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# Human Rights Require 'Cosmopolitan Constitutionalism' and Cosmopolitan Law for Democratic Governance of Public Goods

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## Abstract

The more ‘globalization’ transforms *‘national public goods’* demanded by citizens into *transnational ‘aggregate public goods’*, the stronger becomes the need for reviewing ‘Westphalian governance failures’ and related ‘legal methodologies’ (Section I). Resolving the ‘constitutional problems’ and ‘collective action problems’ of multilevel governance (e.g. in terms of constituting, limiting, regulating and justifying multilevel governance powers, participation and representation of citizens in governance and dispute settlement, rule of law protecting cosmopolitan rights) requires supplementing national Constitutions by ‘multilevel cosmopolitan constitutionalism’ empowering citizens and multilevel governance institutions to realize their collective responsibility for protecting human rights, rule of law and other interdependent public goods across frontiers (Section II). The prevailing ‘political realism’ and ‘constitutional nationalism’ neglect the customary law requirements of interpreting international treaties and settling disputes ‘in conformity with the principles of justice and international law’, including ‘human rights and fundamental freedoms for all’, in order to limit democratic accountability of governments (Section III). Human rights and multilevel protection of ‘principles of justice’ require cosmopolitan law based on constitutional, ‘public choice’- and economic regulatory strategies limiting multilevel ‘governance failures’ as well as ‘market failures’ (Section IV). The human rights obligations of all UN member states limit governmental ‘margins of appreciation’ in dealing with economic crises and related austerity programmes (Section V). Governments and courts of justice must reconcile and ‘balance’ civil, political, economic, social and cultural rights depending on their diverse ‘contexts of justice’ and protect transnational rule of law not only in terms of rights and obligations of governments, but also as cosmopolitan rights of citizens as ‘agents of justice’ and ‘democratic owners’ of all governance institutions (Section VI).

## Keywords

Constitutional Pluralism; Cosmopolitan Constitutionalism; European Court of Human Rights; European Free Trade Area Court; EU Court of Justice; European law; Human Rights; International Economic Law; Judicial Governance; Legal Methodologies; Multilevel Constitutionalism; Social Rights

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# HUMAN RIGHTS REQUIRE 'COSMOPOLITAN CONSTITUTIONALISM' AND COSMOPOLITAN LAW FOR DEMOCRATIC GOVERNANCE OF PUBLIC GOODS

*Prof. Dr. Ernst-Ulrich Petersmann*[*]

## I. Governance Failures, Justice and Legal Methodology

Law and governance need justification in order to be accepted and supported by citizens as legitimate. In contrast to Greek, Roman and Renaissance republicanism justifying governance by the collective supply of the common good (*res publica*) for the benefit of a limited number of free citizens, the human rights revolutions since the 18th century aim at institutionalizing human rights, rule of law and democratic 'public reason' for constitutional self-government respecting and protecting the human rights of all human beings. Even though national 'big C Constitutionalism' prioritizes self-government of 'We the People' and the constitutional rights of national citizens, globalization and the universal recognition of human rights have led to explicit recognition in ever more national Constitutions of the increasing importance of international law and human rights for democratic governance of international public goods, including 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 of the 1948 Universal Declaration of Human Rights = UDHR). The continuing 'human rights revolutions' at national levels (e.g. in African and Asian countries) and regional levels (e.g. in regional human rights and economic law regimes) challenge state-centred 'Westphalian traditions' of power politics justifying treaties and international organizations by mere state consent. The more globalization transforms *national* into *transnational public goods* demanded by citizens, the more does legitimate authority at national and international levels of governance depend on 'multilevel constitutionalism' protecting human rights and rule of law for the benefit of free and equal citizens across national frontiers. Yet, even though cosmopolitan regional economic and human rights regimes (eg in European law) have succeeded in protecting cosmopolitan rights and transnational rule of law more effectively than 'Westphalian conceptions' of 'international law among sovereign states' prioritizing rights of governments over rights of citizens[1], many constitutional and international lawyers, diplomats and also 'courts of justice' continue to resist – for instance, on grounds of power-oriented 'state interests' - 'cosmopolitan constitutionalism' and related judicial remedies against arbitrary violations of international law.

The fact that more than 2 billion people live without effective access to protection of human rights, rule of law, food, water, health care, education, personal and democratic freedom illustrates that worldwide UN and WTO law and governments fail to protect many international public goods demanded by citizens. The worldwide financial and environmental crises, and the failure of the 158 WTO members to conclude their Doha Round negotiations since 2001, also illustrate the failures of international economic law (IEL) to effectively regulate 'market failures' as well as 'governance failures' (like private and public debt defaults destroying jobs, savings and investments worth billions

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[1] Cf. E.U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (Oxford: Hart, 2012), chapter II.

of dollars). Arguably, these multilevel governance failures are closely linked to the following three 'constitutional failures':

1. Apart from European Union (EU) law, there is hardly any other international law regime that effectively 'institutionalizes' human rights and other 'principles of justice' through multilevel constitutional, legislative, administrative and judicial governance of international public goods demanded by citizens. For instance, the Bretton Woods Agreements and WTO law do not even mention human rights and democratic governance.
2. The transformation of ever more national public goods into transnational 'aggregate public goods' (like universal human rights, transnational rule of law, financial stability, efficient global markets coordinating the global division of labour) reveals national Constitutions as 'partial constitutions' that can no longer protect many public goods demanded by citizens without providing for more effective, multilevel legal protection of international public goods.
3. Legal methodologies in most international legal regimes as well as in many national legal systems of UN member states remain dominated by power politics prioritizing rights of states and governments (eg veto powers in the UN Security Council) over rights of citizens. Legal, economic and 'public goods theories' fail to provide coherent theories for more effective and more legitimate governance of international public goods. Can these multilevel 'constitutional failures' be overcome?

Almost all UN member states have adopted national constitutions constituting, limiting, regulating and justifying governments and acknowledging human rights. Foreign policies, however, continue to be dominated by power-oriented 'intergovernmentalism' (e.g. in UN institutions, the WTO) and foreign policy discretion to violate international law. Only the 27 EU member states have delegated comprehensive legislative, executive and judicial powers to supranational institutions and acknowledge the legal primacy, direct effect and 'direct applicability' of precise and unconditional EU rules inside their national legal systems for the benefit of citizens. The necessary adjustment of 'constitutional nationalism' to the requirements of multilevel governance for the collective supply of international public goods necessitates reviewing the obvious 'governance failures' based on state-centred legal methodologies.[2] UN law does not limit the 'sources' and 'rules of recognition' of international law to 'international conventions … recognized by states' (Article 38,a Statute of the ICJ); the additional sources – like '(b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) …judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law' (Article 38 ICJ Statute) – require subjecting state consent to recognition by citizens, civil society, parliaments and courts of justice; the universal recognition of human rights refutes claims by diplomats that they control the *'opinio juris sive necessitatis'* as traditional gate-keepers of 'Westphalian international law among states'. The customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties provide for interpretation based on text, context, objective and purpose (cf. Articles 31-33) 'in conformity with the principles of justice and international law', including 'human rights and fundamental freedoms for all' (Preamble VCLT). In contrast to the interpretation methods practiced in many national jurisdictions and in view of the lack of parliamentary law-making in most international organizations, the preparatory drafting history is recognized only as a 'supplementary means of interpretation' (cf. Article 32). Hence, as illustrated by the jurisprudence of the European Court of Justice (CJEU), judicial interpretation of 'rules of recognition' in conformity with human rights and clarification of 'constitutional principles' common to the member states of international organizations (e.g. underlying their common human

[2] Legal methodology is defined here in terms of the conceptions of the sources and 'rules of recognition' of law, the methods of interpretation, the functions and systemic nature of legal systems, and of the relationships between rules, principles, political and legal institutions and related practices; cf. E.U.Petersmann, Methodological Pluralism and its Critics in International Economic Law Research, in: *JIEL* 15 (2012), 921-970.

rights obligations) enable 'judicial constitutionalization' of international treaty law for the benefit of citizens and their constitutional rights. Judicial clarification of incomplete legal rules and principles is recognized as integral part of judicial dispute settlement at national, regional and worldwide levels (e.g. in WTO jurisprudence) and in multilevel cooperation among national and international courts (e.g. national courts implementing international judgments, preliminary rulings or arbitral awards). Both in US antitrust law as well as in European economic law, courts have likened individual plaintiffs enforcing common market and competition rules to 'attorney generals' promoting also 'community interests' rather than only individual self-interests.[3] Following the post-war recognition of human rights and other 'principles of justice' as integral parts of national and international legal systems, ever more national and international courts throughout Europe interpret international guarantees of freedom, non-discrimination and rule of law for the benefit of citizens even if the international rules were addressed to states without explicitly providing for cosmopolitan rights:

> 'the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down (see Case 43/75 *Defrenne v Sabena* [1976] ECR 455, par. 31). Such consideration must, *a fortiori*, be applicable to Article 48 of the Treaty, which … is designed to ensure that there is no discrimination on the labour market'.[4]

Arguably, the increasing legal and judicial guarantees of 'access to justice'[5] and of cosmopolitan rights offer individuals similar instruments to enforce precise and unconditional rules in citizen-driven areas of international law (like IEL) in decentralized and de-politicized ways against illegal government restrictions. In view of the need for legal and judicial 'balancing' of civil, political, economic, social and cultural human rights, 'constitutional justice' (e.g. multilevel constitutional protection of equal freedoms and human rights) and impartial judicial protection of transnational rule of law on the basis of 'legal balancing' can be seen as the 'ultimate rule of law'.[6] The worldwide economic, environmental and poverty crises suggest that, in order to meet their democratic responsibility for protecting international public goods more effectively, citizens, civil society, parliaments and courts of justice must challenge abuses of 'intergovernmental power politics' and the ubiquity of 'governance failures' and 'market failures' in international relations.

## II. Human Rights Law (HRL) Requires Cosmopolitan Law Protecting Public Goods Beyond State Borders

The human rights obligations of all UN member states protect the 'moral powers' of individuals to pursue diverse conceptions for a 'good life' and for legal and social justice necessary for collective supply of public goods; respect for such legitimate individual and democratic diversity entails 'constitutional pluralism' protecting the fact of 'reasonable disagreement' among free and equal citizens.[7] The common responsibility of citizens and UN member states for protecting international public goods further requires constituting, limiting, regulating and justifying governance powers beyond states with due regard for citizens as legal subjects and sources of justification also of

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[3] This conception was emphasized by the CJEU in its *Van Gend en Loos* judgment (Case 26/62, ECR 1963, 1): 'the vigilance of the individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by (ex) Articles 169 and 170 to the diligence of the Commission and the Member States'.

[4] Cf. Case C-281/98, *Angonese* [2000] ECR I-4139.

[5] Examples include Article 8 UDHR, Article 13 ECHR, Art.47 EU Charter of Fundamental Rights, Arts. 3 and 7 African Charter of Human and People's Rights, Arts. 8 and 25 Inter-American Charter of Human Rights; cf. F.Francioni (ed), *Access to Justice as a Human Right* (Oxford: OUP, 2007).

[6] Cf. D.M.Beatty, *The Ultimate Rule of Law* (Oxford: OUP, 2004).

[7] On the 'two moral powers' and the need for recognizing that 'justice is prior to the good in the sense that it limits the admissible conceptions of the good', see: J.Rawls, *Collected Papers*, (Cambridge: Harvard University Press, 1999), at 386, 312.

international law. This constitutional foundation and limitation of modern national and international legal systems through 'inalienable rights of all members of the human family (as) the foundation of freedom, justice and peace in the world', based on 'a common understanding of these rights' as specified in the 1948 UDHR and progressively developed through national, regional and worldwide HRL, transforms 'constitutional nationalism' into multilevel 'cosmopolitan constitutionalism'. The EU sets a worldwide example, as recognized by the conferral to the EU of the 2012 Nobel Peace Prize, for the practical possibility of realizing the 'Kantian moral imperative' of transforming intergovernmental power politics into 'democratic peace' based on legislative, administrative and judicial institutionalization of HRL based on the EU Charter of Fundamental Rights (CFR), the European Convention on Human Rights (ECHR) and on multilevel judicial protection of human rights as common constitutional principles of EU member states. The universal human rights obligations of all UN member states require democratic governance[8] recognizing citizens as 'democratic principals' of representative lawmaking by governance institutions with limited powers. As illustrated by the jurisprudence of the CJEU, the European Free Trade Area (EFTA) Court and the European Court of Human Rights (ECtHR), the citizen-driven and rights-based nature of international economic cooperation justify 'constitutional interpretations' of IEL and HRL protecting cosmopolitan rights of citizens and non-governmental organizations (e.g. fundamental rights of companies protected by all European courts) rather than only rights of governments. Just as rights-based national democracies evolve in response to democratic 'struggles for rights', so does collective supply of international public goods depend on empowering citizens through cosmopolitan rights and judicial remedies to participate in, control and benefit from multilevel governance so as to limit the ubiquity of abuses of public and private powers in 'Westphalian governance' of international public goods.

The human rights obligations of all UN member states under the UN Charter, UN human rights conventions and under general international law continue to evolve and confirm that '(a)ll human rights are universal, indivisible and interdependent and interrelated'; 'it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'[9] The references - in human rights treaties and national bills of rights - to the UDHR support the view that most rights enumerated in the UDHR have become part of general international law and 'inalienable rights' of human beings that constitutionally limit all national and international governance powers.[10] Just as the EU is constitutionally founded on and limited by respect for human rights and rule of law (Article 2 TEU), HRL requires interpreting the powers of all international institutions (like the UN) as being constitutionally limited by human rights and related rule of law principles. Neither national governments nor international governance institutions have legitimate powers to unduly restrict 'inalienable' and 'indivisible' civil, political, economic, social and cultural rights of citizens, notwithstanding the diverse democratic preferences and scarcity of resources for fulfilling and 'balancing' these rights in national and international jurisdictions. The 'multilevel human rights constitution'[11] remains embedded into national constitutionalism as protected

[8] See, e.g., Article 21(3) UDHR: 'The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures'. The UDHR guarantees of freedom of expression (Article 19), freedom of assembly (Article 20) and democratic participation (Article 21) are confirmed in many UN and regional human rights conventions and national constitutions and render non-democratic governance powers illegitimate.

[9] Vienna Declaration and Programme of Action adopted at the UN World Conference on Human Rights by more than 170 states on 25 June 1993 (A/CONF.157/24, para.5). This 'universal, indivisible, interrelated, interdependent and mutually reinforcing' nature of human rights was reaffirmed by all UN member states in numerous human rights instruments such as UN Resolution 63/116 of 10 December 2008 on the '60th anniversary of the Universal Declaration of Human Rights' (UN Doc A/RES/63/116 of 26 February 2009).

[10] Cf. O. De Schutter, *International Human Rights Law* (Cambridge : CUP, 2010), at 50 ff.

[11] Cf. E.U.Petersmann, Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution, in F.A.Abbott/C.Breining/T.Cottier (eds), *International Trade and Human Rights* (Ann Arbor: University of Michigan Press, 2006), at 29-67.

by national and regional courts. Yet, as human rights have not been effectively institutionalized in UN law and other worldwide institutions (like the WTO), they do not effectively constrain power-oriented 'Westphalian intergovernmentalism' based on 'sovereign equality of states' protecting governments rather than citizens and their human rights. UN member states only rarely use the UN Human Rights Council and the ICJ for enforcing human rights vis-à-vis other governments; the UN human rights treaty bodies lack effective legal powers and judicial remedies. Human rights are neither mentioned nor effectively protected in most worldwide and regional economic agreements outside Europe. Most national legal systems of UN member states focus one-sidedly on protecting civil and political rights (e.g. in US constitutional law and practices) or economic rights (e.g. in communist countries like China) without multilevel, legal and judicial protection of the 'indivisibility' and 'interdependence' of civil, political, economic, social and cultural rights as required by UN HRL. EU law and the law of the European Economic Area (EEA) offer the most developed regional legal systems for multilevel judicial protection of integrated civil, political, economic, social and cultural rights, based on an innovative methodology of 'dignity rights' (Title I EU FRC), liberty rights (Title II), equality rights (Title III), solidarity rights (Title IV), citizen rights (Title V) and access to justice (Title VI) protected by national and European courts (e.g. the CJEU, the EFTA Court, the ECtHR) in addition to the diverse national constitutional rights guaranteed in European states.

## III. Interpretation and Adjudication of IEL 'in conformity with Principles of Justice' and Human Rights?

The customary methods of international treaty interpretation and dispute settlement, as codified in the VCLT and UN law (e.g. Article 1 UN Charter), require interpreting treaties and settling disputes 'in conformity with the principles of justice and international law', including 'human rights and fundamental freedoms for all' (Preamble VCLT). As states have accepted diverse human and constitutional rights obligations at national, regional and worldwide levels and implement them in diverse legal systems, judicial interpretations of the human rights dimensions of IEL may legitimately differ among jurisdictions. Arguably, the unwillingness of many UN and WTO member states to recognize cosmopolitan rights of citizens to compliance by governments with their UN and WTO legal obligations remains the main obstacle to protecting human rights and transnational public goods more effectively.

### *Which Human Rights?*

Every UN member state has ratified one or more of the 9 core UN human rights treaties[12], and more than 80% of all UN member states have ratified the ICCPR and/or the ICESCR; hence, whatever the intent of the governments which voted for the UDHR, most rights stipulated in the UDHR have acquired the status of 'general principles of law recognized by civilized nations'.[13] As specified in the UDHR and confirmed also in many national constitutions, all human beings have rights to non-discrimination (Article 2), to life, liberty and security (Article 3), prohibitions of slavery, servitude (Article 4) and of torture (Article 5), rights to recognition as a person before the law (Article 6) and to equality before the law (Article 7), rights to judicial remedies (Article 8) and to a fair trial (Article 10), freedom from arbitrary arrest (Article 9), presumption of innocence (Article 11), rights of privacy and

[12] These include the 1965 Convention on the Elimination of all Forms of Racial Discrimination, the 1966 Covenants on Civil and Political Rights (ICCPR) and Economic, Social and Cultural Rights (ICESCR), the 1979 Convention on the Elimination of all Forms of Discrimination against Women, the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the 1989 Convention on the Rights of the Child, the 1990 Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, the 2006 Convention on the Rights of Persons with Disabilities and the 2006 Convention for the Protection of all Persons from Enforced Disappearance.

[13] De Schutter (note 10), at 16.

of honour (Article 12), rights to freedom of movement and residence (Article 13), rights to asylum (Article 14), to a nationality (Article 15), to marry and to protection of the family (Article 16), rights to own property (Article 17), freedom of thought, conscience and religion (Article 18), freedom of opinion, expression and information (Article 19), freedom of assembly and association (Article 20), rights to democratic self-governance (Article 21) and social security (Article 22), labour rights (Article 23), rights to rest and leisure (Article 24), to an adequate standard of living (Article 25) and education (Article 26), rights to participate in cultural life and author's rights (Article 27) and rights 'to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 UDHR). It remains contested to what extent the treaty obligations of the 160 parties of the ICESCR to 'take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of (their) available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant' (cf. Article 2) go beyond their general international law obligations as codified in the UDHR, notably as regards the right to work (Article 6), the right to just and favourable conditions of work (Article 7), trade union rights (Article 8), rights to social security (Article 9), family rights (Article 10), rights to an adequate standard of living (Article 11) and of health (Article 12), rights to education (Articles 13, 14) and cultural rights (Article 15 ICESCR). The ICESCR recognizes the interdependence of human rights by requiring, for instance, that the right to work must be realized 'under conditions safeguarding fundamental political and economic freedoms to the individual' (Article 6); 'the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights' (Preamble ICESCR). These conditions depend ever more on IEL protecting a mutually beneficial global division of labour enabling all countries and citizens to increase their access to scarce goods, services and other resources.

### *How to Construe IEL and its Human Rights Dimensions?*

'Justice', human rights, democracy and rule of law – like many provisions of IEL - are 'interpretive legal concepts' which people share even though they often disagree about the criteria for interpreting and applying the legal terms. Hence, as explained by Dworkin[14],

- at the 'semantic stage', a 'useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures';[15]
- at the 'jurisprudential stage', the legal interpreter must search for the values that supply the best interpretation of the aspirational values of legal concepts like rule of law, including the 'ideal of political integrity' as a requirement of governing 'through a coherent set of political principles whose benefits extend to all citizens' and legitimize coercive power of states;[16]
- at the 'doctrinal stage', the 'truth conditions of propositions of law' must be constructed 'in the light of the values identified at the jurisprudential stage' so that legal justifications fit the practice as well as the values that the practice serves (e.g. the constitutional and procedural practices in which legal claims are embedded);[17]
- at the 'adjudicative stage', courts of justice deploying the monopoly of coercive power must impartially and independently review whether the enforcement of the law in particular cases by

[14] Cf. R.Dworkin, *Justice in Robes* (Cambridge: Harvard University Press, 2006), chapter 1.

[15] *Id*., at 12.

[16] *Id*., at 13.

[17] On the two tests of 'fit' and 'value' as 'different aspects of a single overall judgment of political morality' and 'best justification' of legal practices see *id*., 15-17.

political officials is legally justified by 'the best interpretation of legal practice overall';[18] according to Dworkin's 'adjudicative principle of integrity', judges should interpret law - in conformity with its objectives of legality, rule-of-law and its underlying constitutional principles of justice - 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.'[19]

There is increasing agreement on *taxonomic* and *sociological conceptions of IEL*. Legal systems are perceived as a union of 'primary rules of conduct' and 'secondary rules' of recognition, change and adjudication[20] that dynamically interact with changing *legal practices* by private and public actors, who often justify legal claims and interpretations of rules by invoking *legal principles*. There is also agreement on the need for proving positive law as social facts that must be distinguished from normative proposals for changing the existing rules. Yet, governments, national and international courts and private actors disagree on which *doctrinal conceptions* and *ideal conceptions* should guide the interpretation and development of IEL. For instance:

- Most governments perceive **IEL as a part of public international law** regulating the international economy on the basis of 'sovereign equality of states', related 'Westphalian value premises' (e.g. protecting rulers and their financial dealings regardless of their democratic legitimacy), UN law (e.g. IMF and World Bank law) and the WTO.
- **Global administrative law (GAL)** conceptions aim at limiting abuses of power by emphasizing multilevel administrative law principles underlying the law of international organizations (e.g. the Bretton Woods institutions, WTO) such as principles of transparency, legal accountability, limited delegation of powers, due process of law and judicial remedies.
- **Multilevel regional IEL** is often limited to constitutional democracies (e.g. in NAFTA) prioritizing *national* constitutional, competition and environmental regulations and judicial remedies subject to limited international legal restraints.
- EU law – and to a lesser extent also EEA law – have adopted **multilevel constitutional IEL** for the regulation of their common markets and related fundamental rights of citizens.
- Transnational commercial and investment law and arbitration emphasize the reality of **'legal pluralism'** and the advantages of coordinating competing jurisdictions through 'conflict of law' principles and approaches.

The five competing conceptions of IEL prioritize different value premises (such as state sovereignty, multilevel administrative or constitutional law principles, constitutional nationalism, international private law principles). Their different narratives are due to different legal doctrines, policy approaches and justifications of IEL (e.g. in utilitarian or 'deontological' terms). Yet, 'doctrinal eclecticism' and related interest group politics undermine the legitimacy, legal coherence and political effectiveness of multilevel IEL regulation. Limiting the existing 'fragmentation' (e.g. in legal conceptions and regulation of IEL) and the ubiquity of abuses of public and private power in transnational financial, trade and environmental regulation requires stronger compliance with the customary law requirements of justifying IEL in terms of inclusive 'principles of justice' and human rights rather than only in terms of alleged 'state interests', administrative law principles, domestic

[18] *Id*., at 18, 25.

[19] R.Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) 225, 243. Even though Dworkin developed this legal methodology for national legal systems, the methodology is legally applicable also for the international requirement of international treaty interpretation 'in conformity with principles of justice' and the human rights obligations of states (cf. Preamble and Article 31 VCLT).

[20] Cf. H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 1994), chapter V.

interest group politics and 'conflicts of law' principles. Arguably, the customary rules of treaty interpretation and the 'rules of recognition' require reconciling the five IEL conceptions in mutually coherent ways based on 'principles of justice' and human rights limiting abuses of powers. Courts of justice should impartially and independently interpret, justify and develop IEL reconciling the doctrinal perspectives in order to protect transnational rule of law for the benefit of citizens cooperating in the global division of labour. Cooperation among national and international courts and the 'consistent interpretation' requirements of national and international legal systems (cf. Article 31 VCLT) are essential for complying with the customary law requirements of interpreting treaties and settling disputes 'in conformity with principles of justice' and the human rights obligations of all UN member states to protect 'rule of law'. Multilevel judicial remedies can strengthen the human rights obligations of all UN member states and their related 'sovereign responsibilities' and 'duties to protect' basic needs and fundamental rights of citizens; yet, courts must respect legitimate 'constitutional pluralism' and the only limited 'overlapping consensus' on 'principles of justice' among governments and citizens with reasonably diverse conceptions of a 'good life' and 'political justice'.

## IV. Constitutional and Economic Approaches to IEL and their Limits

UN HRL does not protect the economic liberties (like freedom of profession), common market freedoms and property rights protected in European law in conformity with the constitutional traditions of European states. Nor does it indicate *how* private and public economic activities should be regulated in order to maximize consumer welfare and protect the basic needs of all human beings. Hence, the 'human rights approaches' advocated by the UN High Commissioner for Human Rights for interpreting and developing IEL[21] must be complemented by constitutional, legislative, administrative and judicial regulation of the economy at national and international levels. For instance,

- in international organizations without parliamentary control (like the Bretton Woods institutions, the ILO, the WTO), the regulation of the legal 'checks and balances' among political and judicial institutions may depend more on diverse conceptions of 'constitutional democracy' and participatory 'cosmopolitan democracy' than on specific human rights;
- the regulation of 'market failures' through competition, environmental, social and consumer protection laws and policies may be guided more by economic theories (e.g. on 'internalizing external effects') than by human rights considerations;
- the limitation of 'governance failures', for instance by the legal ranking of trade policy instruments in GATT/WTO law, is more influenced by economic theories than by HRL which is nowhere mentioned in WTO law;
- the regulation of other 'collective action problems' in supplying international public goods may be guided by 'public choice'- and 'public goods'-theories emphasizing the diversity of 'production strategies' for 'single best effort public goods' (like an invention), 'weakest link public goods' (like nuclear non-proliferation) and 'aggregate public goods' (like 'rule of law').[22]

### *Need for Comparative Legal and Institutional Research*

Comparative, legal, economic and institutional analyses are needed for evaluating which regulatory alternatives have proven to be more efficient and more legitimate.[23] Cosmopolitan conceptions of IEL

[21] For an overview see: J. Harrison, *The Human Rights Impact of the WTO* (Oxford: Hart Publishing, 2007).

[22] Cf. Petersmann (note 1), at 25 f, 56 f, 94 ff.

[23] Cf. M.Hilf/E.U.Petersmann (eds), *National Constitutions and International Economic Law* (London: Kluwer, 1993).

and multilevel judicial protection of cosmopolitan rights by the CJEU inside the EU, the EFTA Court inside the EEA, the ECtHR in the context of the ECHR, by investor-state arbitral tribunals and national courts in international investment law, as well as by commercial arbitration and national courts in international commercial law have proven to protect transnational rule of law for the benefit of citizens more effectively and more efficiently than state-centred 'Westphalian conceptions' of IEL prioritizing rights of governments and excluding effective judicial remedies of citizens (e.g. for enforcing WTO law in domestic courts).[24] The multilevel 'judicial governance' by the CJEU, the EFTA Court, the ECtHR and national courts suggests that their common focus on *teleological* and *'systemic'* (e.g. comparative) rather than merely *textual interpretations* of European treaties is more in line with the customary methods of international treaty interpretation[25] than with the judicial methods applied by national courts (such as judicial deference towards parliamentary majority decisions, focus on preparatory work of statutes in order to respect the intentions of legislators). In contrast to most worldwide jurisdictions, all three European tribunals emphasize their 'constitutional embeddedness' and commitment to protect human rights and other constitutional principles common to their member states. Such constitutional restraints have not prevented the active use of judicial powers for limiting abuses of power, protecting 'new' fundamental rights of EU citizens, and promoting new forms of 'integration through law' and incremental (small 'c') 'constitutionalization' of multilevel governance, with due respect for national constitutional diversity as a positive value protected by HRL.

### *Dialectic Evolution of IEL through Legal and Judicial Practices*

Constitutions committed to 'establish justice' (as stated in the Preamble of the US Constitution) through democratic legislation and judicial protection of human rights, including rights 'retained by the people' (as stated in the Ninth Amendment), offer dynamic legal frameworks for 'participatory' and 'deliberative democracy' claiming, recognizing, legalizing and enforcing economic and social rights, such as rights to food, water, health protection, education and housing that are increasingly protected in state constitutions, legislation, administrative regulations, judicial remedies and international agreements in developed as well as less-developed democracies. Similar to judicial protection of innovative constitutional and human rights in many national jurisdictions in Africa, the Americas, Europe and Asia[26], also regional economic and human rights courts – in Europe and, increasingly, also in Africa and Latin America - are interpreting regional economic and human rights conventions in mutually coherent ways as requiring judicial review of economic restrictions with due regard also to HRL.[27] For example,

- a 2012 judgment by the Court of Justice of the Economic Community of West African States found the Nigerian government responsible for environmental and human rights abuses by oil companies and other perpetrators, notably violating Articles 21 (on the right to natural wealth and resources) and 24 (on the right to a general satisfactory environment) of the African Charter on Human and Peoples' Rights;[28]

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[24] Cf. Petersmann (note 1), chapter II.

[25] The CILFIT formula – according to which 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of the Community as a whole, regard being had to the objectives thereof' (Case 283/81, *CILFIT*, ECR 1982, 3415, para. 20) – is fully consistent with the interpretation methods codified in Article 31 VCLT.

[26] Cf. the jurisprudence in South Africa, Colombia, Ghana, India, European and North American countries discussed by K.G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012); V.Gauri/D.M.Brinks (eds), *Courting Social Rights. Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008); B.G.Ramcharan (ed), *Judicial Protection of Economic, Social and Cultural Rights* (Leiden: M.Nijhoff Publishers, 2005).

[27] For examples see: E.U.Petersmann, Human Rights, International Economic Law and 'Constitutional Justice', in: *EJIL* 19 (2008), 769-798.

[28] Cf. Amnesty International Press Release PRE01/619/2012.

- the 'judicial balancing' of economic and human rights in the MERCOSUR arbitral award of 6 September 2006 concerning the 'Bridges case' between Argentina and Uruguay explicitly referred to the 'balancing methodology' applied by the CJEU with regard to economic rights and human rights in European economic law.[29]

Yet, even though Article 1 of the founding Treaty of Asuncion commits MERCOSUR to establishing a common market, MERCOSUR remains an imperfect customs union without multilevel legal and judicial protection of common market freedoms and other fundamental rights as in EU law.[30] Multilevel judicial remedies have a long tradition in the Andean Common Market as well as in the Caribbean Free Trade Area; the judicial review system in MERCOSUR was strengthened by the establishment of a Permanent Review Court for appeals against *ad hoc* arbitral awards and for consultative opinions at the request of national supreme courts.[31] In Africa, by contrast, the jurisprudence of regional economic and human rights courts is less established. For instance, Zimbabwe's refusal to comply with the 2008 judgment of the Southern African Development (SADC) Tribunal against Zimbabwe's illegal expropriations of white farmers entailed the subsequent dissolution of the SADC Tribunal by SADC governments.[32] It remains doubtful whether the African Court on Human Rights and People's Rights will declare in an advisory opinion – as requested, in November 2012, by some African non-governmental organizations - that this dissolution of the SADC Tribunal deprived African citizens of their human rights to effective judicial remedies.

'Judicial balancing' of economic freedoms with non-economic rights and public interests subject to requirements of transparency, non-discrimination, 'suitability', necessity, 'proportionality *stricto sensu*' and legal accountability is increasingly recognized by national and international courts as 'best standard' for reconciling competing civil, political, economic, social and cultural rights. Yet, cooperation among national and international courts in protecting transnational rule of law for the benefit of citizens remains neglected in many regional economic law systems outside Europe. Inside the EU, national courts rightly insist on sovereign rights of member states to scrutinize whether EU acts are '*ultra vires*', violate the 'national constitutional identity' (cf. Article 5 TEU) or fail to protect constitutional safeguards equivalent to national fundamental rights.[33] Judicial reasoning and 'judicial dialogues' are important for promoting 'judicial comity', national compliance with IEL and HRL as interpreted by international courts, and the search for 'the best fit' of judicial interpretations. For instance, the *Mangold* judgement by the CJEU on age discrimination in employment - which was widely criticized for exceeding the borderline separating law from policy - was reluctantly accepted by the German Constitutional Court as a 'methodologically justifiable development of the law'[34]; such conditional cooperation among supreme courts illustrates that the validity and legitimacy of legal rules may depend no less on respect for diverse legal methodologies than on the outcome of judicial decisions. By connecting novel interpretations to the aims of regional treaty systems and of national constitutional systems, national authorities may find it easier to accept the reasonableness of international judgments as judicial 'clarification' of their existing legal obligations.[35] Legal and

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[29] See L Lixinski, Human Rights in MERCOSUR, in: M.Filho/L.Lixinski/M.Giupponi (eds), *The Law of MERCOSUR* (Oxford: Hart Publishing, 2010), 351 ff.

[30] Cf. F.Fuders, Economic Freedoms in MERCOSUR, in: Filho/Lixinski/Giupponi (note 29), 87-130.

[31] Cf. N.Susani, Dispute Settlement, in: Filho/Lixinski/Giupponi (note 29), 73-85.

[32] Cf. O.C.Ruppel, The Case of Mike Cambell and the Dissolution of the SADC Tribunal, in: N.Madolo (ed), *International Economic Law. The Voices of Africa*, Cape Town : Silber Ink, 2012, 141-159.

[33] Cf. the Lisbon judgment of the German Bundesverfassungsgericht of 30 June 2009, BVerfGE 123, 267.

[34] Case C-144/04 *Mangold* ECR 2005 I-9981; BVerfGE 2 BvR 2661/06 of 6 July 2010 ('Dem Gerichtshof ist auch die Rechtsfortbildung im Wege methodisch gebundener Rechtsfortbildung nicht verwehrt').

[35] An example is the justification by the CJEU of the need for European 'uniform interpretations': 'According to settled case law, the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining

judicial protection of cosmopolitan rights promotes not only more inclusive 'public reason' and more democratic conceptions of the relevant 'rules of recognition' as 'tests' for legitimate interpretations of IEL and justifications of its principled coherence with human rights and other 'principles of justice'. Human rights also justify reviewing the 'Westphalian methodologies' of WTO dispute settlement bodies and 'investor biases' in investment arbitration in order to protect reasonable citizen interests more effectively. Even though national parliaments have not transferred any powers to the EU for arbitrary violations of international law, the CJEU fails to protect EU citizens against welfare-reducing violations of the EU's WTO obligations; it disregards legally binding WTO dispute settlement rulings on the ground that EU politicians prefer 'freedom of manoeuvre'[36] to violate international law even if no evidence has been submitted how illegal trade restrictions could serve legitimate 'Community interests'.

## V. 'Margins of Appreciation' in Legal and Judicial Protection of Social Rights during Economic Crises

The financial and economic crises since 2008 have forced many governments to reduce levels of public borrowing, to cut public spending on social protection in order to prevent an unsustainable build-up of public debt, and to adopt austerity programs so as to avoid a debt default.

### *Human Rights and the European Economic Crises*

The EU Agency for Fundamental Rights (FRA) has monitored social problems of the economic crisis (e.g. of vulnerable groups like children, women and unemployed people, xenophobia against foreign migrants). It emphasized that governmental restrictions must be publicly justified, remain non-discriminatory and protect fundamental rights and the welfare especially of the poorest and most vulnerable.[37] As regards rights to social protection guaranteed by the EU CFR (Article 34), the 1961 European Social Charter (Articles 12-13) as well as by Article 9 ICESCR, the Agency found 'that the level of protection provided remained adequate in terms of guaranteeing a "decent existence", despite the reductions in overall expenditure'.[38] The EU responses to the crises included, *inter alia*, increased financing of 'economic, social and territorial cohesion' measures (e.g. based on the 1958 European Social Fund, the 1974 European Regional Development Fund, the 1994 Cohesion Fund, the 2006 European Globalisation Adjustment Fund) and of other investments (e.g. financed by the European Investment Bank), 'bailouts' for over-indebted Eurozone member states (Greece, Portugal, Ireland, Spain, Cyprus), balance-of-payments assistance to other EU member states (like Latvia, Hungary, Romania) that do not use the Euro as their currency, and additional fiscal disciplines under Article 126 TFEU and the related 'Stability and Growth Pact' aimed at preventing unsustainable build-ups of public debt and debt defaults with severe adverse consequences for economic, social and other human rights. According to the FRA, the 'EU institutions reacted promptly and comprehensively to the economic crisis taking steps that have supported the protection of fundamental rights in many ways'.[39] In response to the 2012 'Lijkanen report' on reforms of the EU banking sector in order to shield

*(Contd.)*

its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question', Case C-373/00, *Truly*, ECR 2003 I-1932, para. 35.

[36] This term continues to be used by both the political EU institutions and the CJEU (e.g. in Joined cases C-120 and C-121/06 P, FIAMM [2008] ECR I-6513, para. 119) as the main justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings.

[37] *Protecting Fundamental Rights during the Economic Crisis*, EU Agency for Fundamental Rights, Working Paper December 2010.

[38] Note 37, at 27.

[39] Note 37, at 45.

taxpayers from future bailouts and avoid shocks to the financial system, a group of independent UN human rights experts emphasized in October 2012 that the unforeseen spending by European countries of 4.5 trillion Euros (2008-2011) for rescuing their financial institutions risked undermining public budgetary resources for fulfilling the human rights of poor persons.

### *The UN Guiding Principles on Foreign Debt*

The potentially detrimental effects of foreign debts and associated austerity programs on the realisation of human rights are also emphasized in the 'Guiding Principles on foreign debt' adopted by the UN Human Rights Council in July 2012, whose Principles 8 and 9 read:

> '(8) Any foreign debt strategy must be designed not to hamper the improvement of conditions guaranteeing the enjoyment of human rights and must be directed, inter alia, to ensuring that debtor States achieve an adequate level of growth to meet their social and economic needs and their development requirements, as well as fulfilment of their human rights obligations.'
>
> '(9) International financial organizations and private corporations have an obligation to respect human rights. This implies a duty to refrain from formulating, adopting, funding and implementing policies and programmes which directly or indirectly contravene the enjoyment of human rights'.[40]

Similar concerns were voiced by the UN Committee overseeing the implementation of the ICESCR in its 'concluding observations on Spain' adopted in June 2012:

> 'The Committee expresses concern that the levels of effective protection for the rights enshrined in the Covenant have been reduced as a result of the austerity measures adopted by the State party, which disproportionately curtail the enjoyment of their rights by disadvantaged and marginalized individuals and groups, especially the poor, women, children, persons with disabilities, unemployed adults and young persons, older persons, gypsies, migrants and asylum seekers (Art.2, para.1). The Committee recommends that the State party ensure that all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances, especially for disadvantaged and marginalized individuals and groups'…[41]

In its 'general comments', the UN Committee on Economic, Social and Cultural Rights emphasizes that – even if Article 2 ICESCR allows states to realize economic and social rights 'progressively' with due regard to their 'available resources' – there are minimum core obligations which every state must fulfil.[42] Even though international organizations are usually not parties to state-centred UN human rights conventions, UN resolutions recognize that 'inalienable' human rights are limiting the powers not only of states, but also abuses of power by non-state actors and international organizations exercising delegated powers.[43] The 'conditionality' of financial assistance granted by the IMF, the EU and creditor countries to over-indebted borrowing countries tends to be determined primarily from economic and policy perspectives aimed at correcting the root causes of unsustainable debts and related governance failures in debtor countries (like corruption, a dysfunctional tax system and uncompetitive labour markets in Greece, inadequate banking regulation and supervision in Ireland and Cyprus). As states may subject economic, social and cultural rights only 'to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society' (Article 4 ICESCR), democratic discourse and decisions on reducing unsustainable public debts by adjusting the social

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[40] Resolution 20/10 of 18 July 2012, A/HRC/RES/20/10, para. 2. The Guidelines had been proposed in the 'Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights', A/HRC/20/23 of 10 April 2012.

[41] Committee on Economic, Social and Cultural Rights, Concluding observations regarding Spain, E/C.12/ESP/CO/5 of 6 June 2012, para. 7.

[42] Cf. M.Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Oxford: OUP, 2009), at 66 ff.

[43] Cf. note 40 and Petersmann (note 1), chapter IV.

spending of debtor states to their financial resources must take into account the social impact of austerity measures on human rights, for instance in the examination of alternative policy measures (such as tax increases and prevention of tax evasion rather than cuts in public spending, reduction of military budgets rather than social budgets, introduction of user fees for essential public services rather than privatization entailing price increases excluding the poor).[44] The 'human rights consistency' of 'debt brakes' introduced into national constitutional or legislative provisions (e.g. as required by the 'Fiscal Compact' concluded by 25 EU member states and in force since 1 January 2013) can be justified by their policy objective of promoting savings, investments and economic welfare through financial stability and legal security. The legal consistency of 'bailout provisions' imposing losses on private creditors (e.g. owners of Greek government bonds) with the property rights of adversely affected investors depend on the particular circumstances (e.g. the market value of government bonds, the consent of private bond holders, the shared responsibilities of creditors and debtors).

***Extraterritorial Human Rights Obligations***

UN law distinguishes between obligations of states to protect human rights beyond the national territory and obligations of international assistance and cooperation.[45] In the jurisprudence of the ECtHR, extra-territorial obligations to protect human rights are recognized (1) if a state exercises 'effective overall control' over another territory; (2) if state authorities act abroad or their actions produce foreseeable extraterritorial effects; (3) if extradition or expulsion involves risks for the individual's rights once he leaves the territory; and (4) diplomatic, consular and flag jurisdiction cases.[46] The Human Rights Committee, in its 2012 Concluding Observations on Germany's periodic report on its implementation of the ICCPR, recognized extraterritorial obligations to prevent German companies acting abroad from contributing to human rights violations (forced evictions from an African village in order to make way for a new coffee plantation by a foreign investor). Similarly, the EU CFR, including its comprehensive guarantees of economic and social rights, may be applicable also in the external relations of EU institutions and EU member states (cf. Article 21 TEU) in order to justify EU measures aimed at preventing EU companies from negatively affecting the enjoyment of human rights abroad (e.g. the right of access to water in foreign jurisdictions, as recognized by various UN resolutions). The 'human rights clauses' included into EU agreements with more than 130 third states pursue both 'domestic policy functions' (e.g. for justifying EU sanctions against human rights violators abroad) as well as 'foreign policy functions', for example in order 'to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant' (Article 2 ICESCR). As the EU has so far acceded to only one UN human rights convention, the EU's human rights clauses focus on general UN HRL as specified in the UDHR unless all contracting states are members of the same human rights convention (e.g. the ECHR).

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[44] The UN 'Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights' (A/67/304 of 13 August 2012) claims, for instance, 'that women are disproportionately affected by debt and related conditionalities, and that debt and related economic reform policies have, in many contexts, contributed significantly to the impoverishment and marginalization of women' (p.2) and to violations of human rights to education, health, adequate housing, work, food, water and sanitation (p.4).

[45] Cf. De Schutter (note 10), at 162 ff, 172 ff.

[46] Cf. S.Miller, Revisiting Extraterritorial Jurisdiction : A Territorial Justification for Extraterritorial Jurisdiction under the European Convention, in : *EJIL* 20 (2009), 1223-1246.

### *HRL Requires Cosmopolitan Rights*

As UN human rights conventions offer no effective judicial remedies, some human rights advocates argue that economic agreements offering material benefits for compliance with human rights, changing the 'cost-benefit calculations' of human rights violators, and setting incentives for 'participatory democracy' may be more important for promoting human rights and satisfying basic needs than pushing more countries to ratify UN human rights conventions.[47] The 2011 'Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', elaborated and adopted by a group of independent human rights experts, can serve as 'subsidiary means for the determination of rules of law' in terms of Article 38, para. 1 (d) ICJ Statute (referring to 'the teachings of the most highly qualified publicists of the various nations') in legal and judicial clarifications of the human rights dimensions of IEL (e.g. obligations of states to contribute to the global realization of the human rights of access to food, healthcare and adequate standards of living).[48] The jurisprudence of European courts suggests that the necessary 'balancing' of civil, political, economic, social and cultural rights in interpreting IEL cannot rely on a simplistic 'human rights primacy' over constitutional guarantees of economic rights that are unduly neglected in UN HRL (like freedom of profession, common market freedoms, author rights and other property rights guaranteed in European constitutional and HRL).[49] For instance, the distortion of international agricultural trade by EU and US subsidies (amounting to ca US$ 350 billion p.a.) may be justifiable on constitutional and human rights grounds (e.g. in terms of promoting food security in Europe, the US as well as in net-food-importing countries) as well as on grounds of 'commutative justice' (as defined in WTO law) notwithstanding trade-distorting effects on farmers in third countries, which remain free to prevent 'harmful externalities' by means of countervailing duties and other safeguard measures. Similarly, EU bailout agreements supporting austerity measures (e.g. in Greece) may be justifiable on constitutional and human rights grounds (e.g. in terms of providing additional resources for protecting human rights, preventing more severe alternative policies, justifying 'human rights conditionality' in parliamentary 'austerity legislation') as well as on grounds of 'commutative justice' (as defined in EU law and bailout agreements) even if they cannot prevent inevitable reductions of unsustainable debt and financial policies threatening the human rights of younger and future generations in the debtor country.[50] Articles 2 and 4 ICESCR confirm that human rights must shape democratic and international decision-making on reconciling economic and social rights in economic crises notwithstanding the legitimacy also of other economic, political and legal considerations in democratic 'human rights impact assessments'. For example, the lifting of millions of Chinese citizens out of poverty due to the welfare gains enabled by the WTO membership of China, Hong Kong, Macao and Taiwan confirms that – had China complied with GATT rules since its 1948 GATT membership rather than withdrawing from GATT in 1949 – the impoverishment of hundreds of millions of Chinese citizens could have been avoided.

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[47] Cfg. E.M.Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights*, Cornell University Press, 2009.

[48] The principles are reproduced and commented upon in: M.Langford/W.Vandenhole/ M.Scheinin/W.Genugten (eds), *Global Justice, State Duties: The Extra-Territorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge : CUP, 2013),

[49] Cf. the case-law discussed by Petersmann (note 1), chapters IV and VIII.

[50] Paragraphs 19 and 20 of the UN 'Guiding Principles for foreign debt and human rights' (note 40) confirm that 'retrogressive measures' due to lack of budgetary resources may be justifiable in terms of 'progressive implementation of economic and social rights' (Article 2 ICESCR) also in case of legal obligations to repay external debts.

## VI. Human Rights Require Cosmopolitan Law and Transnational 'Rule of Law' for the Benefit of Citizens

Sections I and II explained why the transformation of ever more *national* into *transnational 'aggregate public goods'* requires 'constitutionalizing' and 'civilizing' the power-oriented conceptions of 'Westphalian governance' (e.g. in UN and WTO institutions) on the basis of 'cosmopolitan constitutionalism' empowering citizens and multilevel governance institutions to collectively supply international public goods demanded by citizens. Section III argued that the 'governance failures' of state-centred 'Westphalian regimes' to protect international public goods in democratic and more effective ways are due to their 'Westphalian neglect' of the customary law requirement of interpreting and developing IEL 'in conformity with the principles of justice' and the human rights obligations of all UN member states. Section IV discussed why 'human rights approaches' to collective supply of international public goods must be supplemented by constitutional and economic regulation and limitation of 'governance failures' as well as of 'market failures'. Section V discussed European and UN responses to the worldwide financial and social crises since 2008, including the emphasis by European and UN human rights bodies on protecting human rights from being adversely affected by economic austerity programs and international debt and bailout arrangements. This Section VI concludes by summarizing the European and UN initiatives for strengthening 'access to justice' and transnational rule of law for the benefit of citizens as legal preconditions for the collective protection of many international public goods like human rights, democratic self-government, an efficient global division of labour protecting the basic needs of all human beings, and 'sustainable development' promoting the 'human capabilities' of all. The current economic, social and legal crises reflect democratic failures of citizens to protect their human rights and democratic self-governance – beyond parliamentary and constitutional democracies in national jurisdictions – on the basis of 'cosmopolitan constitutionalism' and 'cosmopolitan law' expanding the limited human rights guarantees of access to justice to all intergovernmental restrictions of fundamental rights, as provided for in Article 47 of the EU CFR:

> 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.'

### *Need for Cosmopolitan Law Beyond HRL*

In worldwide institutions governing transnational cooperation among citizens without effective parliamentary control (such as UN and WTO institutions), the power-oriented 'intergovernmentalism' focusing on rights of the rulers must be limited by cosmopolitan law protecting 'cosmopolitan justice' as defined by human rights - rather than only 'Hobbesian justice' as defined by power-oriented conceptions of 'sovereign equality of states' (e.g. in UN law) and utilitarian 'commutative justice as reciprocal trade among customs territories' (e.g. in WTO law). Cosmopolitanism recognizes democracies as communitarian values and 'collective responsibilities' that must be reconciled with the human rights imperative of 'cosmopolitan justice'. The systemic neglect of the right to 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized' (Article 28 UDHR) by all UN member states is the central 'constitutional problem' of the 21st century. The reality of 'reasonable disagreement' on conceptions of HRL must be respected, for example the potential justification of 'social contracts' by utilitarian self-interests and basic needs (e.g. 'Hobbesian social contracts' focusing on peaceful order) rather than by constitutional rights (e.g. as claimed by peoples in human rights revolutions), Kantian 'moral imperatives', Aristotelian virtue

ethics or contractarian constitutionalism (e.g. in terms of Rawlsian 'justice as fairness'). The necessary reconciliation of national constitutionalism (e.g. our duties to national compatriots) with transnational 'cosmopolitan constitutionalism' (e.g. our duties vis-à-vis foreigners so as to protect everyone's human rights and human capabilities) can be based on diverse moral, political and legal principles and procedures. Hence, diplomats, economists and 'realist politicians' unfamiliar with HRL prefer analysing the regulatory problems of international public goods from political and economic perspectives such as public goods theories, realist pursuit of 'national interests', protection of basic human needs and 'human capabilities'.[51] Even if one accepts the Rawlsian argument that social welfare and human 'capabilities' depend primarily on *national* democratic institutions and political virtues, a mutually beneficial *global* division of labour can enhance individual and national welfare in all states and contribute to promoting satisfaction of basic needs and human rights of all human beings. Cosmopolitan rights entail 'duties to protect' and to 'struggle for justice' so as to avoid contributing to injustices, for instance in terms of the widespread abuses by non-democratic rulers of their 'borrowing privilege' and 'resource privilege' at the cost of domestic citizens.[52]

Cosmopolitan law aims at strengthening cosmopolitan rights beyond HRL, for instance by protecting citizens against the ubiquity of abuses of public and private power in IEL. The 2012 'UN Guiding Principles' on foreign debt and human rights draw attention to the adverse impact of excessive debt burdens on human rights and development; they highlight the need for striking an appropriate balance between the obligations of states arising from their external debt arrangements and HRL. The human rights to individual and democratic self-determination suggest that – just as individuals and families have to assume responsibility for their self-development – democratic societies have 'primary responsibility' for organizing a social division of labour protecting the human rights and fulfilling the basic needs of all citizens. If, as explained by Rawls in conformity with economic theory, each people can agree on social and constitutional arrangements that provide its citizens with the natural and social goods essential for satisfying basic needs, then 'responsible sovereignty' of peoples and self-responsibility of individuals have legal priority over subsidiary, transnational human rights duties to assist foreign people and foreigners in protecting their human rights and basic needs.[53] As debt financing can contribute to countries' development, reconciling IEL with HRL depends on context-specific 'balancing' of human rights and related economic regulation, for instance regarding the terms, conditions and prudent use of loan funds and effective debt management. HRL and equity may require 'rebalancing' a debtor and creditor state's contractual obligations arising from external debt arrangements in order to avoid adverse effects of external debt servicing on the enjoyment of human rights in conformity with the shared responsibility of creditors and debtors, notably in case of 'odious' and 'illegitimate' external debt consented by non-democratic rulers without benefits for the debtor state's population.[54] Also international organizations and private corporations have legal obligations to

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[51] For an overview see: G.Brock, *Global Justice. A Cosmopolitan Account* (Oxford: OUP, 2009), chapter 3; M.C.Nussbaum, *Creating Capabilities. The Human Development Approach* (Cambridge: Harvard University Press, 2011).

[52] Cf. T. Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002).

[53] On the Rawlsian theory of justice, and the justified cosmopolitan criticism of Rawls' theory of international justice, see: Petersmann (note 1), e.g. at 342 ff; Brock (note 51), chapter 2. On the moral significance of national borders see also: J.Mandle, *Global Justice* (Cambridge: Polity Press, 2006).

[54] On the contribution of human rights to the formulation of the concept of 'illegitimate debt', and the 'Monterrey Consensus' that creditor and debtor countries are both equally responsible for preventing and resolving unsustainable debt situations, see the 2009 Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights (A/64/289 of 12 August 2009). Resolution 20/10 by the UN Human Rights Council (see note 40) 'reaffirms the fact that the exercise of the basic rights of the people of the debtor countries to food, housing, clothing, employment, education, health services and a healthy environment cannot be subordinated to the implementation of structural adjustment policies, growth programs and economic reforms arising from the debt' (para. 24). The need for policy coherence in the areas of trade and finance is emphasized in the 2010 'Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights' (A/65/260 of 9 August 2010). The 2009 Report of the independent expert

respect human rights as 'constitutional status rights' protecting individuals against abuses of public and private powers. The scope of these human rights obligations remains contested, for instance regarding 'corporate social responsibilities' of multinational enterprises and 'vulture funds' that purchase defaulted foreign debt at significant discounts and subsequently litigate for full repayments.[55]

### *Access to Justice: Lessons from European Law for UN/WTO law and IEL*

From a human rights perspective, justice is a human right – rather than only a service provided by governments to citizens - to effective protection of human rights, equal access to all governance institutions and to judicial and non-judicial remedies against violations of human rights, democratic governance and rule of law. The empirical fact that cosmopolitan legal and economic regimes (like EU and EEA common market law, the ECHR, investment and commercial law and arbitration) protect general consumer welfare, basic needs and human rights of citizens more effectively than Westphalian regimes prioritizing rights of governments confirms that the effectiveness of law and institutions depends on their democratic legitimacy and support by citizens.[56] The fact that – in contrast to EU law – most regional and worldwide economic agreements do not even mention human rights and offer citizens no effective legal, democratic and judicial remedies against injuries suffered from intergovernmental power politics undermines human rights, especially the rights of poor and vulnerable people in times of economic crises resulting from systemic violations of rule of law (e.g. in corrupt debtor countries like Greece and many less-developed countries). The legal and social studies by the EU Fundamental Rights Agency on 'access to justice' during the European economic crises revealed that – even in some EU member countries (like Bulgaria, Greece, Italy, Romania) - up to three quarters of the population lost trust in the national judicial system, whose 'justice budgets' were cut by austerity measures.[57] In regional and worldwide governance systems for protecting public goods, democracy and rule of law depend on participatory rights of citizens to act as 'agents of justice' at national and transnational levels of multilevel governance (e.g. by challenging in national courts welfare-reducing violations of WTO obligations ratified by national parliaments). The right to an effective judicial remedy enshrined in Article 47 CFR remains the most quoted Charter right in the jurisprudence of the CJEU enabling citizens, companies and other non-governmental organizations to defend their rights under EU law and their reasonable self-interests in 'the rule of law' (Article 2 TEU) and the effectiveness of EU rules, e.g. on non-discriminatory conditions of competition, subsidiarity and proportionality of EU regulations (cf. Article 5 TEU), participatory and 'deliberative democracy' (cf. Articles 9-12 TEU). Extending 'cosmopolitan constitutionalism' to multilevel governance in UN and WTO institutions requires following the example of Article 47 by empowering citizens to challenge welfare-reducing violations of precise and unconditional UN and WTO guarantees of freedom, non-discrimination and rule of law in domestic courts. Without such 'countervailing rights' of self-interested citizens and democratic institutions to challenge intergovernmental power politics, the frequent violations of UN HRL and of WTO guarantees of non-discriminatory access to foreign markets will continue being abused to the detriment of citizens and their cosmopolitan rights. Democratic participation and, if necessary, litigation in courts of justice remain the most effective 'countervailing powers' of citizens against the widespread abuses of human rights in so many UN member states. As court proceedings are complex, costly and time-consuming, legal aid, non-judicial

*(Contd.)*

argues 'that a human rights-based approach to foreign debt offers specific value through its emphasis on participation, non-discrimination, transparency, accountability and the universality, interdependence and indivisibility of all human rights, to ensure that the goals of development in general and debt relief measures in particular are consistent with international human rights standards' (A/HRC/11/10 of 3 April 2009, at p.2).

[55] For case studies, see the 2010 Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights (A/HRC/14/21 of 29 April 2010, at p. 7 ff).

[56] Cf. Petersmann (note 1), chapter II.

[57] Cf. *Access to Justice in Europe: An Overview of Challenges and Opportunities* (Vienna, 2011); *Access to Justice in Cases of Discrimination in the EU* (Vienna, 2012).

remedies, advice by non-governmental organizations and reforms of the judiciary may be preconditions for public interest litigation and for effective 'access to justice' by vulnerable groups (such as children, migrants, persons with disabilities, victims of discrimination). The economic costs of 'justice systems' illustrate the 'indivisibility' of human rights as preconditions for both democratic self-governments and social welfare. The more than 13'000 violation judgments rendered by the ECtHR since its inception, including more than 10'000 findings of violations of the right to a fair trial within a reasonable time or of the right to an effective remedy, confirm that - for justice being secured – judicial procedures must be supplemented by multilevel legal cooperation.

### *Multilevel Judicial Protection of Transnational Rule of Law for the Benefit of Citizens*

Human rights and democratic self-government cannot be effective without rule of law. Just as 'constitutional democracy' requires constitutional, legislative, executive and judicial 'institutionalization' of 'public reason', citizens are also collectively responsible for protecting 'constitutional justice' in all multilevel governance institutions and for invoking judicial remedies in courts. The 'rational ignorance' of individuals vis-à-vis most governmental violations of IEL rules requires not only limiting the 'information gaps', 'incentive gaps', 'participation gaps' and 'jurisdiction gaps' impeding the supply of international public goods[58], for instance by limiting abuses of governance powers through individual access to judicial remedies correcting violations of justice. There is also a need for establishing human rights agencies and 'justice systems' protecting transnational rule of law for the benefit of citizens. Similar to the rights-based EU guarantees of an 'area of freedom, security and justice' (cf. Articles 67 ff TFEU) based on multilevel legal and judicial protection of constitutional rights of all 500 million EU citizens across national frontiers, UN HRL requires protecting transnational rule of law for the benefit of citizens rather than only in terms of rights and obligations of the rulers. Justice as defined by human rights must be institutionalized in all areas of international law in order to limit abuses of public and private power more effectively by promoting cooperation, 'mutual recognition' and effective enforcement of multilevel 'justice systems' linking multilevel 'justice chains', rights and remedies for collective supply of international public goods for the benefit of citizens.

The UN is providing 'rule of law assistance programs' for almost 150 member states and fosters rule of law at the international level through codification and development of international rules, international courts, non-judicial dispute resolution and accountability mechanisms and the strengthening of rule of law at regional levels.[59] The UN 'Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels' of 24 September 2012 emphasized the systemic importance of 'an international order based on the rule of law' as 'indispensable foundation for a more peaceful, prosperous and just world': 'human rights, the rule of law and democracy are interlinked and mutually reinforcing and … belong to the universal and indivisible core values and principles of the United Nations.'[60] The annual reports by the UN Secretary-General on 'The Rule of law at the national and international levels' define the 'rule of law'

> 'as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law,

[58] Cf. Petersmann (note 1), at 25 ff, 56 ff, 94 ff.

[59] Cf. *Strengthening and Coordinating UN Rule of Law Activities. Report of the Secretary-General*, A/67/290, 10 August 2012.

[60] A/RES/67/1, paras. 1,5.

> separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'.[61]

The veto-powers of the five permanent members of the UN Security Council, the acceptance of the compulsory ICJ jurisdiction by only 66 member states, the lack of parliamentary UN institutions, of effective democratic and judicial remedies of citizens under UN law and of democratic and independent judicial institutions inside many UN member states illustrate that the UN governance system itself does not meet the rule-of-law standards it proclaims. As 'rule of law reforms' generate winners and losers and – according to the UN Secretary-General himself – 'political will to ensure consistent compliance with existing international obligations remains weak' among many rulers benefitting from the lack of legal and democratic accountability[62], citizens are bound to remain 'losers' under the Westphalian UN governance system unless they succeed in 'constitutionalizing' the intergovernmental abuses of power.

## Conclusion: Multilevel Constitutionalism Depends on 'Struggles for Justice' and 'Cosmopolitan Public Reason'

The IEL crises require a new kind of multilevel 'cosmopolitan law' that must remain constitutionally constrained by multilevel constitutional protection of cosmopolitan rights and transnational rule of law for the benefit of citizens. The prevailing 'constitutional nationalism' and 'Westphalian intergovernmentalism' do not effectively protect international public goods demanded by citizens. Westphalian prioritization of rights of states - without effective legal, democratic and judicial remedies of citizens against harmful violations of international law - undermines international public goods. European history confirms that transforming national into regional democracies requires 'struggles for justice' and judicial protection of cosmopolitan international law and human rights. After more than 10 years of Doha Round negotiations in the WTO, the leading trading nations rightly prioritize *regional* free trade agreements and *functional plurilateral agreements* (like the WTO Government Procurement Agreement, the Information Technology Agreement) as political 'second-best solutions' in order to overcome the protectionist interest group politics preventing worldwide agreement among WTO members on worldwide trade liberalization and regulation. In international financial regulation, democracies prioritize regulating 'market failures' (like under-regulation of financial services and banks) and 'governance failures' (e.g. in the Eurozone) inside national and regional jurisdictions in view of the disagreement on worldwide reforms. The economic crises offer opportunities for reforming ineffective governance structures, for instance of multilevel monetary and financial regulation. In the absence of legal hierarchies among most functionally limited public goods regimes, their mutual coherence requires inclusive 'legal dialogues' and 'judicial balancing' limited by common constitutional principles (eg in HRL) underlying 'multilevel constitutional pluralism'. 'Constitutional reforms' of Westphalian governance in UN institutions remain unlikely without stronger 'struggles for justice' by citizens and democracies. Building more democratic, regional 'cosmopolitan legal regimes' - like the proposed 'Transatlantic Free Trade Agreement' among NAFTA, EU and EEA democracies and stronger, multilevel judicial protection of regional human rights regimes and bilateral investment agreements – remains the most realistic strategy for incremental reforms of Westphalian governance institutions. As long as the US Congress and discretionary EU policies remain dominated by selfish interest groups and multilevel judicial protection of human rights and of transnational rule of law remain underdeveloped outside Europe, incremental 'multilevel constitutionalism' may be a more realistic paradigm for 'transitional justice' in international governance reforms than 'cosmopolitan justice' in view of the opposition by many

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[61] Cf. *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels. Report by the Secretary-General*, A/66/749, 16 March 2012, para. 2.

[62] See the Report (note 59), para.12, and K.Annan, *Interventions. A Life in War and Peace* (London : Penguin Books, 2012), chapters IV and VI.

governments to stronger cosmopolitan rights, democratic accountability and judicial remedies of citizens in multilevel governance of international public goods. -