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Making a World of Difference? Habermas,
Cosmopolitanism and the Constitutionalization of
International Law

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Abstract

This paper examines the explicit linkage in the recent work of Habermas between cosmopolitanism and the constitutionalization of international law. Whereas previous thinking on the constitutionalization of international law has tended either towards the utopianism of world government or the modest ambition of attaching the constitutional label to certain material developments in transnational regulation – in particular the human rights regimes and the institutional structure of the UN as developed through state agreement – Habermas looks for an intermediate solution. This would involve a modest range of institutions and functions at the global level, in particular around peace and human rights, but founded on a broader and more popular basis than state agreement. The potential and urgency of the Habermas proposal lies in its opposition less to the other constitutional visions and more to the alternative and increasingly tangible prospect of a lop-sided international regime dominated by American perspectives.

Keywords

Constitution building/ legitimacy/ international agreements/. Human rights/ multi-level governance. law

Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law

Neil Walker

1. Introduction

To try to situate Jurgen Habermas in the debate over the development of a new cosmopolitan project for the international order is already to court a significant ambiguity. On the one hand, on the basis of his corpus of academic work Habermas is, quite simply, probably *the* most influential social theorist (broadly understood) of his generation. There are few if any significant streams of thought in transnational sociology, international political theory, international relations and international legal theory which do not today invoke his work as a reference point, whether affirmatively or critically, and, of course, the same has long been true of the domestic state- or society-bound domains of these disciplines. On the other, hand, Jurgen Habermas is also a prominent global public intellectual of our times. His formidable intellectual reputation has given him a platform from which he may pronounce on a wide variety of matters of political moment and moral concern; where, to put it crudely, he is listened to and is capable of making a difference as much for whom he is as for the quality of his ideas and insights.

No-one, of course, is more aware of this than Habermas himself, not least because a central concern of his academic work has been with the contribution of various roles – including that of the intellectual – and of the modes of communication associated with these roles, in the development of public opinion and of a public sphere more generally, and thus of modern forms of democracy.¹ With that awareness has come an acute sense of the responsibilities - the opportunities and privileges, the dangers and potential abuses - associated with the role of the public intellectual. Even his most quotidian interventions are never less than conscious of that responsibility – crafted to influence opinion in a particular direction but always mindful of the overall integrity of his thought.

Yet patently, this double role, and which is more significant in any particular context, has a bearing upon how we read Habermas. To draw another crude generalization, his growing interest in the global political order of international law and international institutions, culminating in a body of work² of which his essay in the present volume is a concise statement,³ falls more on the public intellectual side of the divide. We do not have to look hard to see certain connections and continuities with his deeper intellectual concerns. Yet the main trigger of these interventions has been a series of palpable crises in the international order, culminating in the split amongst the Western powers and within the international institutions over which they have long held sway, over the war in Iraq, and their main purpose has been to offer ways of rebuilding a morally defensible and institutionally efficacious structure of transnational norms in the here and now along cosmopolitan lines. Accordingly,

¹ See in particular, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (trans. by Thomas Burger) (Cambridge, MA: MIT Press, 1991).

² *Der gespaltene Westen* (Frankfurt am Main, Suhrkamp Verlag 2004). To be published in English as *The Divided West*.

³ “The Kantian Project of the Constitutionalization of International Law. Does It Still Have a Chance?”

when assessing his contribution to this debate, I am not so concerned with the detailed roots of that contribution in his intellectual world-view, or what it might say about shifts and tensions within that world-view - although as we shall see these are by no means irrelevant to the task at hand. Rather, I am concerned with the cosmopolitan position itself, and how the manner in which he has adopted and defended it as a particular and - not least for his endorsement - increasingly influential way of understanding and responding to the present difficulties of the international order highlights both its strengths and weaknesses.

2. What Cosmopolitanism is not

To understand the widespread attraction of the cosmopolitan position, and also to begin to appreciate its weaknesses, we must appreciate that first and foremost it is typically defined in negative terms – through the forms of diagnoses and treatment it rejects rather than those it endorses. Here Habermas’s own approach is instructive of a broader tendency. One of the rejected alternatives to cosmopolitanism, and the one with which Habermas is primarily concerned in his contribution to this volume, is a kind of hegemonic liberalism based upon a unipolar American-dominated world order. “Pax America”,⁴ as viewed by Habermas, is committed to the pursuit of the liberal goals of equal freedom under the rule of law in all the states of the world, but rejects faithful conformity to the procedures and substance of international law as the best way of delivering that disaggregated liberal world order. As Habermas is aware,⁵ beyond the Pax America option – the “moralization of international politics”⁶ in the name of liberalism and at the behest of the world’s most powerful state in military, economic and technological terms - there lie markedly more unpalatable alternatives. One would be a neo-liberal global market society where states, and indeed international law other than those negative market-making rules necessary to ensure the global economy, would be marginalized. Another would be a Negri-esque dystopia of scattered imperial rule, with a shifting ‘coalition of the willing’ (and able) asserting their power and interests over the majority of the world states and peoples, and law used strategically to serve particular interests rather than as a universal and universally accountable code. A final alternative would be a global Hobbesian order, in which unipolar might is right and the capacity of unipolar might to produce a negative peace is the first purpose and stabilizing force of law, all other considerations and objectives being subordinated to what is required, or professed to be required, to meet that primary objective.

The list of alternatives provided by Habermas is strategically astute in at least two senses. First, it is noteworthy that in placing most emphasis on the liberal version of Pax America, he foregrounds the most charitable interpretation of American intentions. What is at issue here is “empire lite”⁷ rather than a new realism adapted to the conditions of unipolarity, in which, as suggested above, a Hobbesian world order dominated by the most powerful state replaces the traditional anarchy – or precarious balance - of competing sovereign states and coalitions. In many ways, this is a laudable approach. Take the alternative which most closely challenges your own position in terms of practicability and desirability, and to the extent that you can provide persuasive arguments against that ‘second-best’ alternative and demonstrate how your own position fares better, you reinforce the foundations of your own position. Yet there is also a danger lurking at the margins. To assume that America may be a

⁴ *Ibid.* 1.

⁵ Above n2 at 178 *et seq.* See also the discussion in B. Fassbender, “The Meaning of International Constitutional Law” in R St. J. Macdonald and D.M. Johnston (eds) *Towards World Constitutionalism: issues in the Legal Ordering of the World Community* (The Hague: Nijhoff, 2005).

⁶ Above n3, at 1.

⁷ M. Ignatieff, *Empire Lite* (London:Vintage, 2003).

“well-intentioned”⁸ hegemon committed to global liberal ends as opposed to a self-interested hegemon committed to its own ends, even if Habermas is at pains to insist that this *is* only an assumption – a “best-case scenario”⁹ – is already to concede a lot to happy circumstance and the highly contingent prospects of a convergence favourable to cosmopolitan universalism, and so perhaps to lower somewhat the practical bar to making one’s own case.¹⁰

Secondly, in using such broad brush strokes to dramatize the various alternatives, Habermas carves out a very loosely-defined space for his own cosmopolitan preference. While there are clear advantages in this approach, in particular in its contemplation of a generously inclusive consensus in favour of the cosmopolitan position, or at least against all the others, it also begs two major questions. In the first place, there is a practical question. In concentrating on the undesirable alternatives to cosmopolitanism, Habermas tends to draw attention away from the historical difficulties of cosmopolitanism itself. This may seem unfair, since at various points in his article, and even in its title, Habermas makes it clear that in endorsing the cosmopolitan position and the complementary project of the constitutionalization of international law, he is talking about the defence and development of an existing approach to international law and the global order rather than a new beginning. What is more, Habermas is at pains to point out that whatever prominence the cosmopolitan approach gained in response to the three major ruptures of the twentieth century – the two World Wars and the end of Cold War bipolarity – was always fragile and reversible.¹¹ Yet beyond the stark invocation of a new American hegemony and its apotheosis in the second Gulf War, very little attention is given to the *explanation*, as opposed to the *description* of cosmopolitanism instability, and thus to the ways in which such an explanation may cast doubt on the renewal or sustainability of the cosmopolitan project. Here again, as with the emphasis upon the similarity between cosmopolitanism and its most plausible (or least unpalatable) rival – hegemonic liberalism, and on the possibility of their reconciliation or convergence, Habermas subtly downplays the practical obstacles to the renewal and development of the cosmopolitan tradition.

The second question which is begged by an approach which starts from a negative definition is of a more fundamental conceptual nature. What, then, *is* cosmopolitanism, even broadly defined, and how might it provide a coherent answer to the problems of the global order? As we shall see, the pursuit of these questions also deepens our understanding of the relationship between cosmopolitanism and the other candidate global visions, and in so doing places the practical problems in the way of cosmopolitan renewal in a more challenging light.

3. The Tensions of Cosmopolitanism

Histories of cosmopolitan thought have often stressed that the study of cosmopolitanism comes in different guises, asking different questions and providing different answers. For example, in one influential essay, Pauline Kleingeld has focused on a particularly rich developmental phase in cosmopolitan thinking, namely 18th century Germany and the age of Kant and Fichte, in order to identify six different streams of

⁸ Above n3, at 18.

⁹ *Ibid*

¹⁰ This is not intended as a cynical dismissal of liberal internationalist opinion in the United States. Rather, it is to suggest that a healthy skepticism about the prospects of that opinion prevailing has to start from a position which looks closely at the actual trends and the social, political and economic forces which would favour one trend over another, rather than simply positing the liberal and non-liberal option as bald (and in the absence of further specification, presumptively equally plausible) alternatives.

¹¹ Above n3, at 9.

cosmopolitan thought.¹² Of course, what such rich diversity demonstrates, first and foremost, is that for many cosmopolitanism has been and remains an attractive concept, and that like any concept that has engaged widespread academic interests and, moreover, has crossed over into practical political discourse, it becomes difficult and necessarily controversial to try to recover or develop some single or coherent dominant meaning from the historical record – a canonical set of questions and answers. Yet such diversity does not imply intellectual bankruptcy or redundancy. It does not follow that cosmopolitanism, when applied in a particular time and place to a particular set of practical problems cannot provide a broadly persuasive framework of understanding and repertoire of solutions, or that any such approach is vitiated by its inconsistency with any particular aspect of the historical record. For example, many cosmopolitan thinkers, including Habermas himself, find both inspiration and authority in Kant, but this does not mean that their approach is or should be assiduously faithful to the Kantian original. Critics in their turn are entitled to point to aspects of Kant’s cosmopolitanism that may prove unattractive to contemporary cosmopolitan tastes, including his embrace of a Western-centric model of civilized development as a mark of full membership of the cosmopolitan order, or the retreat in his later work from the idea that a league of states should have any coercive powers which trump individual state sovereignty.¹³ But the point of such exposure cannot be to charge that all contemporary cosmopolitans are guilty by association of Kant’s original sins, or, conversely, that if they diverge from Kant they can no longer call themselves cosmopolitan. Rather, it is simply to counsel against indiscriminate appropriation of the Kantian tradition, and to shift the burden onto Kant’s discriminating heirs to explain the basis on which a selective appropriation can be defended.¹⁴

The diverse nature of the cosmopolitan tradition, however, does point us indirectly to one important discipline which a cosmopolitan theory for our times cannot escape. Contemporary cosmopolitanism, as exemplified by the recent interventions of Habermas, is a politically engaged approach, and so must deal with all streams or dimensions of cosmopolitan thinking insofar as they are relevant to such engagement. On that basis, we can point to at least four sets of questions, and sets of candidate answers, which a comprehensive cosmopolitan vision must embrace.

First, and axiomatically, there is a moral dimension to cosmopolitanism. A limiting condition of cosmopolitan thought is the belief that at least in some measure and for some purposes all human beings form a single moral community, and that they owe each other certain obligations just in virtue of their being members of that single moral community.¹⁵ It does not necessarily follow that common nationality, language, religion, customs or other identitive traits should not be the basis of special or additional obligations, but at least some obligations must flow from our common humanity.¹⁶ Secondly, and closely related, there is a

¹² Namely, moral, political, legal, cultural, economic and romantic cosmopolitanism. See P. Kleingeld, “Six Varieties of Cosmopolitanism in Late Eighteenth-Century Germany” (1999) 60 *Journal of the History of Ideas* 505-24.

¹³ Above n3, at 6.

¹⁴ See e.g. J. Tully, “The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives” in A. Pagden (ed), *The Idea of Europe: From Antiquity to the European Union* (Cambridge: CUP, 2002).58.rom U

¹⁵ See e.g. Kleingeld, above n12, 506-508

¹⁶ A distinction may be drawn between strict and moderate cosmopolitans, with only the former holding that the community of all human beings is the *exclusive* reference point for moral community. See e.g. P. Kleingeld and E. Brown “Cosmopolitanism”, *The Stanford Encyclopedia of Philosophy* (Fall 2002 Edition), Edward N. Zalta (ed.), (<http://plato.stanford.edu/archives/fall2002/entries/cosmopolitanism/>). Yet many anti-cosmopolitan arguments start from the premise that “true” cosmopolitanism is necessarily and exclusively of the strict variety, so tending to produce excessively stylized accounts of the difference between communitarian and other local-

cultural dimension to cosmopolitanism. Consistent with its belief in a core of moral obligations which are universally valid and binding, cosmopolitanism must deny that more parochial identities and attachments and the beliefs – or culture – which flows from these identities and attachments, should be the sole measure of our morality or should indicate the boundaries of concern beyond which no moral obligations are owed. Yet just because cosmopolitanism contests the comprehensive moral authority of any particular culture, it must also recognize the value of all, and so respect the rich cultural diversity that we find in the world. This recognition cannot of course be so robust that it leads to cultural relativism, since that would deny the very universalism based on common humanity which lies at the moral core of cosmopolitanism, but, equally, it must be sufficiently robust to ensure against cultural imperialism, where minority or subaltern groups or the preferences associated with these groups are denied the respect and consideration necessary to satisfy the universal obligations owed to them as to everyone else. So a *via media* between cultural relativism and cultural imperialism must always be carved out, although this will vary greatly depending upon what is deemed to be embraced within the universal core and what practical measures are judged to provide an optimal accommodation of core values and culturally specific preferences.¹⁷

Thirdly, then, given that it requires a committed and detailed programme of intervention, there is always an institutional dimension to cosmopolitanism. What political and legal arrangements are necessary to deliver cosmopolitan virtue? In turn, this implies a fourth dimension of cosmopolitanism, which we might call the social dimension. Given the fact of widespread cultural parochialism, how do we de encourage or maintain the kinds of attachments necessary for people to recognize and meet their wider cosmopolitan obligations? How, in other words, might the legal and political arrangements necessary to deliver cosmopolitan difference be generated and effectively implemented in the face of anti-cosmopolitan tendencies?

In addressing these four dimensions in the round, the cosmopolitan must be aware of both the dependencies and the tensions at work in their mutual relations. Clearly, the possibility of developing effective institutional measures depends on the existence of the appropriate social and political attitudes, and reciprocally, such attitudes might be stabilized or reinforced by the right institutional measures. And the value of both depends on the articulation of the appropriate moral and cultural foundations, and in particular on the vexed question of the optimal balance between universal values and standards and the recognition of legitimate diversity. On the one hand, the more ambitious the universal cosmopolitan core, the more difficult to generate the social preconditions, and the attendant institutional structure necessary to deliver that core. On the other hand, the more restrictive the core, the greater the danger that no meaningful cosmopolitan programme may be generated and implemented.

centred theories on the one hand and the cosmopolitan alternative on the other. On this view, a moderate cosmopolitanism in which different categories or strengths of moral obligation are demarcated to different levels of community, is either a contradiction in terms, or merely a short term holding position on the way to full or strict model – an expedient demanded by the temporary persistence of special local cultures or political ties. What is not seriously countenanced here is a position held by many, including Habermas himself (see text below) – namely a principled moderate cosmopolitanism in which our associative obligations are properly layered according to the thickness or proximity of the association in question. For a recent example of the tendency to squeeze moderate cosmopolitanism, see T. Nagel, “The Problem of Global Justice” (2005) 33 *Philosophy and Public Affairs* 113-147, esp. 119-120.

¹⁷ On the difficult choices thus faced, and the extent to which such reconciliation depends upon imaginative institutional design, see J. Waldron, “Status versus Equality: The Accommodation of Difference” in the present volume. See also, “Struggles for Recognition in the Democratic Constitutional State,” Habermas’s perhaps surprisingly strong response to Charles Taylor’s “The Politics Of Recognition,” both in *Multiculturalism: Examining the Politics of Recognition* rev. ed. (A. Gutmann (ed) (Princeton N.J.: Princeton University Press, 1994).

In these various dangers, moreover, we can see the roots of the various flawed and failed alternative visions of the international order. An ambitious cosmopolitan programme always courts controversy and failure – both at the deep level of reconciling moral universalism with cultural recognition and at the practical level of generating the requisite global commitment - as is indicated the highly uneven progress of a system of international law, which, at least since the establishment of the United Nations and the development of its various rights jurisdictions, has sought to treat individuals and not just states as the direct ‘cosmopolitan’ subjects of international law. The prospect or reality of failure may in turn encourage an *ersatz* universalism, an orthodoxy which in the name of the general interest privileges a dominant set of interests and values and is insufficiently sensitive towards or tolerant of other interests and values, as in the liberal hegemony of Pax America. Alternatively, any broad-ranging cosmopolitan vision may simply be erased from the agenda. Too much may give way to too little – to a new one-world Hobbesian realism, or a narrow and incoherent instrumentalism of the (shifting) coalition of the powerful, or to a permissive neo-liberal minimalism.

The most basic conceptual analysis of cosmopolitanism, therefore, reveals an uncomfortable truth. Much of the *prima facie* attraction of the cosmopolitan perspective rests upon the unacceptability of the alternatives. Yet certain tensions within cosmopolitanism itself, both in its basic moral structure which seeks to reconcile universalism with a defence of cultural diversity and in the relationship between this set of concerns and its practical (i.e., institutional and social) dimensions, suggest that cosmopolitanism has an inherent tendency to collapse into one or other of these various unacceptable alternatives. On this view, moreover, the particular proximity of cosmopolitanism to the claimed moral universalism of a liberal Pax America seems as much a threat as an opportunity, the former as likely to dissolve into the latter as to prevail over it.

While, as suggested, Habermas may not present these questions of basic orientation in as harsh a light as they merit, he is by no means unaware of the precariousness of the cosmopolitan project. How, then might cosmopolitanism address its weaknesses, and develop a more robust answer to the opposing visions of global order? The strategy suggested by Habermas himself begins by attempting a more precise specification of cosmopolitanism’s contemporary challenges and opportunity and ends by placing centre-stage the constitutionalization of international law.

4. The Turn to International Constitutional Law

(a) *Fleshing out Cosmopolitanism*

In order to understand the allure of the constitutionalization approach, we need to focus more closely on what is required for cosmopolitanism to prevail over the competing visions of global order. Cosmopolitans must simultaneously solve a practical problem and a moral problem. They must explain how the presumptively “thin” social commitments associated with a set of common obligations at the global level will withstand the competing imperatives of “thicker” local obligations, and also how these common global commitments may emerge from a process in which diverse interests and perspectives are taken into account and embody norms which are seen as fair from that diversity of perspectives.

Habermas’s initial response to these questions is twofold.¹⁸ First, like the majority of contemporary cosmopolitans, his view of what should be attempted at the global level is modest. He envisages neither a federal world government in which the states are the subordinate units, nor a configuration short of a world state in which those norms which operate transnationally are nonetheless primarily located at the widest global level. Rather, he

¹⁸ Above, n3, at 6-8.

opts for a “multilevel system”¹⁹ in which the main site of transnational norm generation and application is the continental regime. These continental regimes, of which the most developed model is the European Union, would address “the difficult problems of a global domestic politics.” That is to say, in a world in which it is increasingly beyond the capacity of states acting individually (with the partial exception of the United States) to achieve effective normative control over the forces of globalization, these continental regimes would avoid the dangers of international (de)regulatory competition by resolving to act in supranational concert - undertaking the business of re-regulating the global economy by balancing the demands of mobile capital to minimize product and production costs against the need to retain reasonable levels of social and environmental regulation. The properly global level, organized around a reformed United Nation, would in contrast have a far more restricted mandate; namely to “fulfill the vital but strictly circumscribed functions of securing peace and implementing human rights at the supranational level.”

Secondly, however modestly circumscribed, it is vital to Habermas that the global mandate operates within a faithfully legal register. In the final analysis, his objection to an ethically grounded unilateralism is grounded in the “logic of practical discourse.”²⁰ Even with the best intentions, the United States will encounter “insuperable cognitive obstacles” in seeking to separate “its own national interests from the universalizable interests that could be shared by all the other nations.” Its proposals and preferences must instead be tested in a process of prior argumentation in which all affected parties can participate and in which the requirement of consensual decision-making require each to assume and consider the perspective of all the others. Only a legal process and discourse, one in which both the legitimacy of norm generation and the authority of norm application depends upon – indeed implies – universalizability, can guarantee an appropriately inclusive structure of ongoing argumentation and a suitable general scheme of implementation.

In both of these moves – the specification of a modest role for global regulation and the emphasis that this should take place within the universalizable register of law, we see a strong connection with longstanding Habermasian themes. The modesty of the global role reflects Habermas’s conviction that justly vested and effective political capacity depends upon conscious and reflexive choice by particular political associations or communities of attachment. Habermas has long been an opponent not only of national or any other form of particularism as an exclusive moral basis for political community – the denial of which, as we have seen, is a basic article of cosmopolitan faith – but also of national or other local particularisms as the exclusive practical basis for polity-making.²¹ In particular, his work on the constitutional progress of the European Union,²² and on the possibility of adapting the ideas of constitutional patriotism – of the commitment to universal ideas in the context of a particular bounded political community – to the regional level, speaks to his faith in this possibility, and of course that stress remains in the present work in the importance he attributes to the intermediate tier of the multi-tiered architecture for global justice. Nevertheless, even at the intermediate level some emphasis on the active appropriation of universal themes by a particular community already equipped with the rudiments of a

¹⁹ *Ibid* 7.

²⁰ *Ibid* 18

²¹ See, in particular, his two collections, *The Postnational Constellation* (trans. by M. Pensky) (Cambridge: Polity, 2001) and *The Inclusion of the Other* (trans. by C. Cronin) (Cambridge MA: MIT Press, 1998).

²² See e.g. *The Inclusion of the Other*, above n21, Part III; see also , J. Habermas, "Why Europe Needs A Constitution" (2001) *New Left Review* Sep-Oct (11).

particular self-understanding remains,²³ and the difficulties of imagining this at the global level are reflected in the limited jurisdiction he envisages there. Yet he does not shy away from what is entailed at the global level, however modestly circumscribed - hence the explicit connection with his famous theory of communicative rationality,²⁴ with law as the carrier of that rationality and the means by which the requirement of universal validity is redeemed.

If we push a little harder, however, we can see that the tensions that Habermas sets out to resolve, as any cosmopolitan must, remain stubbornly present. The reservations he clearly has over the development of a sufficiently 'thick' social commitment at the global level are not easily answered by limiting the scope of global jurisdiction or by a strong requirement of juridification. As regards the former, even if we could plausibly limit the global regime to conflict resolution and human rights - and this neglects the fact that the global (as opposed to regional) normative regime is in truth much broader than this - these norms are themselves very wide-ranging (in the case of human rights) and deeply controversial (in the case of both human rights and conflict resolution).

To focus only on conflict resolution, as Habermas clearly acknowledges,²⁵ the breakdown of the collective security system over Iraq is no one-off failing, but symptomatic of a broader difficulty which has been highlighted, ironically enough, by the very fact that the end of the Cold War stalemate, in which the invocation of the veto by one or other superpower was a common occurrence, held out the prospect of a more effective framework. Over the last 15 years, the Security Council has indeed been more active, in particular in response to many of the "new wars"²⁶ of internal conflict or oppression in weak states and, latterly, in relation to new transnational terrorists threats within and across but not coterminous with such weak states. But it has also been bitterly criticized *both* for its acts and for its omissions - its endorsement of questionable intervention in Kosovo and Afghanistan as much as its failure to intervene, or at least to intervene timeously, in places such as Iraq, Kurdistan, Angola, Nigeria and Sri Lanka.²⁷ According to these critiques, deficiencies of procedure and substance feed off each other. On the one hand, selective membership of the Security Council and the existence of the veto power make it too easy both to endorse and to prevent intervention. On the other hand, both of the major grounds for intervention - the right to individual or collective self-defence under Art.51 of the UN Charter and the collective intervention system under Ch. VII where the existence of a threat to international peace or act of aggression is unanimously determined - are highly contested - witness the attempt by the United States to stretch the former to encompass a right to pre-emptive or anticipatory self-defence in Iraq, or various attempts to supplement the latter with a new doctrine of humanitarian intervention. In a vicious spiral of declining trust and confidence, these doctrinal disputes and indeterminacies both reflect and serve to reinforce lack of confidence in the procedural underpinnings of the system.²⁸

²³ See e.g. J. Habermas, "On Law and Disagreement: Some Comments on "Interpretative Pluralism" " (2003) 16 *Ratio Juris* 187. On the tensions and possible inconsistencies within Habermas's work on this point, see R. Fine and W. Smith, "Jurgen Habermas's Theory of Cosmopolitanism" (2003) 10 *Constellations* 469-87.

²⁴ See in particular, *The Theory of Communicative Action* (2 vols) (trans. T McCarthy) (Cambridge MA: MIT Press, 1984). For his developed theory of law, see *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. W. Rehg) (Cambridge MA: MIT Press, 1996).

²⁵ Above n3, 13-15.

²⁶ M. Kaldor, *New and Old Wars: Organized Violence in a Global Era* (Cambridge: Polity, 1999).

²⁷ Above n3, at 14.

²⁸ See e.g. N. Walker, "Sovereignty, International Security and the Regulation of Armed Conflict: The Possibilities of Political Agency" in J. Huysman (ed) *The Politics of Protection* (London: Routledge, forthcoming); C. Gray, "The Use of Force and the International Legal Order" in M. D. Evans (ed) *International Law* (Oxford: OUP, 2003) 589-622.

In the face of these difficulties, the invocation of a communicatively rational model of juridification of global norms may seem to restate the problem rather than answer it. If the legitimate authority of cosmopolitan law depends upon a virtuous connection between the inclusiveness of the generative procedures and the universal applicability and reciprocal defensibility of the outcomes, then it is the absence of procedures and outcomes thus characterizable which stands out, as well as the underlying difficulty of locating the social forces in the ‘thin’ air of global culture necessary to motivate the common effort required to put such a structure in place.

(b) *The Constitutional Gambit*

How, if at all, does the invocation of a constitutional basis to international law help to overcome this impasse? In his self-confessedly selective treatment of the constitutional features of the UN system, Habermas picks out three features; namely the explicit connection between the purpose of securing peace and that of advancing human rights, the linking of the prohibition on the use of violence with a credible system of prosecution and sanction, and the inclusive character of the world organization and the universal validity claims it makes for the law it generates.²⁹ So, to abstract from these features, the constitutionality or constitutionalism of international law seems to inhere partly in the substantive quality of the norms generated, partly in their institutional efficacy, and partly in their universalizability – as a matter of both process and outcomes.

Tellingly, one or more of these general ‘constitutionalizing’ features figure in the growing tide of attempts by international lawyers themselves to attribute a constitutional quality or foundation to international law.³⁰ Without going into the details of such attempts, their common theme, as Fassbender notes, is to view international law as a “progressive movement,”³¹ simultaneously looking backwards and forwards in an attempt to find and argue for the consolidation or reinforcement of some characteristic which deepens international co-operation. Sometimes, that argument is explicitly about substantive norms, as in the invocation of international law’s progressive grounding in human rights.³² Sometimes, the argument is primarily institutional, whether in the abstract sense of international law developing a systemic autonomy and integrity – an internal scheme of hierarchy and differentiation in the Kelsenian mode³³ or in the more concrete sense of the development of a particular institutional capacity for norm generation and enforcement, as with the advent of the United Nations in the second half of the twentieth century.³⁴ Sometimes, and often related to the argument about institutional efficacy, the emphasis is upon universal applicability, as in the invocation of the preemptory or non-consensual quality of the growing body of rules of *jus cogens*, or the comprehensive reach of obligations *erga omnes*,³⁵ although tellingly, international lawyers have tended to be less vocal or convincing in arguing for the inclusiveness of the process or the commitment to universalizability of the argumentative logic of norm *generation*.

²⁹ Above n3, at 13

³⁰ Like Habermas, I draw upon the work of Bardo Fassbender in discussing these trends. See above n5. See also his seminal essay, “The United Nations Charter as Constitution of the International Community” (1998) 36 *Columbia Journal of Transnational Law* 529.

³¹ Above n5.

³² See e.g. E-U. Petersmann, “Constitutionalism, International Law and “We the Peoples of the United Nations,”” in H J. Cremer *et al* (eds) *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger* (Berlin, Springer, 2002) 291-315.

³³ See e.g., A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Berlin: Springer, 1926).

³⁴ See e.g. Fassbender, above ns 5 and 30.

³⁵ See e.g. C. Tomuschat, “Obligations Arising for States Without or Against Their Will,” (1993) 241 *Recueil des cours de l’Académie de droit international* 195.

But what is the added value of the invocation of the term ‘constitutional’ to endorse the favoured narrative of progress? The common rhetorical purpose seems to be to lend additional gravitas to the particular trend or trends in question. In a circular or boot-strapping logic, it is the documentation of the supposedly progressive trend or trends which justifies a ‘constitutional’ attribution, and it is the constitutional attribution which then both dignifies the existing state of affairs and authorizes further progress. Such a discursive move carries with it both dangers and opportunities, and it is on how these dangers are approached and opportunities negotiated that the prospects of a cosmopolitan-inspired constitutionalization of international law depends.

On the one hand, the dangers are obvious. These are that the community of international lawyers, and whoever may exploit the community of international lawyers to their ends, become the self-appointed judges, guardians or beneficiaries of ‘progress.’ Just because international law displays, or may be interpreted as displaying, an increasing doctrinal concern with certain substantive values, or an increasing institutional depth and efficacy, or an increasing universality of norm application, is of course in and of itself no authority for the continuation of these trends. If, as we have seen, false universalism is a charge which can be laid against those who invoke a universal morality *beyond* law, it can also be laid against those who attribute such a morality, or some other special basis of authority *to* law.³⁶ In the final analysis, whatever arguments can be made for any or all of the candidate ‘constitutionalizing’ trends have to be premised upon some distinctive feature of the trends themselves, and cannot be reduced to the tautology that they contribute to or are interpreted as contributing to the formal intensification or advancement of something called international law. Arguably, if all the constitutional label can provide is an unjustified patina of authority, it is either useless, or, to the extent that it deflects attention from the task of independent justification of the structure and content of international law and lends false comfort or confidence, worse than useless.

Yet, on further inquiry, the constitutionalization of international law may signify something additional to these ‘progressive’ trends, which in turn may transform how we view these trends themselves - and here Habermas has one final card to play. Alongside his specific references to the United Nations Charter, Habermas does also mention constitutionalism at a more general level at a number of points in his text. The oft-repeated phrase is that of a “political constitution of world society.” Although he does not develop this oblique reference to the social dimension of the cosmopolitan project, here Habermas is broaching, however tentatively and despite his misgivings, the possibility of the generation of a particular community of attachment and political association at the global level to complement that known at the state level, and, more provisionally, at the regional level. Let us at least speculate, he seems to imply, that we might develop something that looked like a community mobilizing constitutional process at the global level to match those we are familiar with at other levels. Let us at least be alive to the possibility that the ‘constitutional’ in international constitutional law be conceived of not just as an objective record interpreted and dignified as such by the expert witnesses of international law, but also as an inter-subjective process of constitutive imagining by all those affected or potentially affected by it - a “world society” in the making.

But, it may be objected, is this not simply to beg the question yet again? If no such sense of world society - or community of single attachment dedicated to the pursuit and protection of global common goods along cosmopolitan lines, however narrow, already exists, then are we not fated to an infinitely regressive search if we try to discover or institutionalize

³⁶ See e.g. M. Koskeniemi, “International Law in Europe: Between Tradition and Renewal” (2005) 16 *European Journal of International Law* 113-124.

the motivation behind the motivation to put things thus in common? On that view “the *constitution* of world society” becomes just one more empty play on words, one more hollow exhortation lacking either a mobilizing force and medium or a practical context of action.

Yet the charge of absence of mobilizing potential may be to underestimate the generative power of symbols. If we look at the current extended debate over a European Constitution and its ratification, whatever may finally transpire the supranational constitutional register has in the course of a few short years been profoundly transformed from its dusty origins as a technical discussion about the consolidation and merger of texts into a reflexive political process concerning the optimal governance of a common European society. This has been in some small part at least because of the loaded signification of “c” word itself. Once introduced into the debate the wider, historically resonant “performative meaning”³⁷ of a constitutional project as a people founding a voluntary association of free and equal citizens committed to self-government could be mobilized by those seeking a much more inclusive construction of the European polity, and could not easily be gainsaid by those with different intentions.³⁸ Why, then, might the promotion of a constitutional discourse not, over time and in a series of incremental stages, generate something similar, if more modestly circumscribed, on a broader global level?

If, however, we stay for a moment with the European analogy, this might prompt the further objection that even if the requisite political imagination could be sparked by the “c” word, the global level, unlike the European level, lacks a suitably focused context of action - that there is nothing similar to the mature and reasonably democratically responsive institutional structure and *acquis communautaire* which had already built up in the EU over a period of 50 years. But, as we have seen, the global level does not entirely lack institutionalization, and here it is instructive to remind ourselves that the United Nations is sometimes invoked as a point of reference for the work of reform and re-imagining of international constitutionalism.³⁹ Of course, the UN system, and the large body of international law which has been generated since the Second World War directly or indirectly under its auspices, clearly lacks the democratic credentials of the EU. Yet, as we have seen, it does possess other ‘progressive’ tendencies, in particular the increasing emphasis on fundamental human rights, and the commitment to universality of norm application and enforcement. A political constitutionalism at the level of norm generation could arguably supply the missing democratic link which would allow the cosmopolitan virtue of these other elements to be properly exploited, and which would provide a model more adjacent to Habermas’s ideal of a communicatively rational juridification of global relations.

5. Conclusion

All of this, however, raises one final, and perhaps fatal objection. The strategy of political constitutionalism, as we have seen, is to take what is already there as materials towards the self-constitution of a particular political society and through a work of imagination and reform transform it into a more inclusive system of self-government. What is already there, then, is by no means the measure of what can be achieved, but it is both a necessary precondition and an unavoidable legacy. As the new constitutionalists of international law have shown us, there are features of that legacy which both provide a platform for a process of political constitutionalism and which may themselves be positively transformed by that process. Yet international law is also a project which grew out of the

³⁷ Habermas, above n23 at 193

³⁸ See e.g. N. Walker, “Europe’s Constitutional Momentum and the Search for Polity Legitimacy” (2005) 5 *International Journal of Constitutional Law*.

³⁹ Fassbender, above n5.

West and which enacted and reflected various phases of Western domination both in its contents and in its operating procedures.⁴⁰ Or to put it another way, the false universalism of particular interests masquerading as general and the genuine universalism of cosmopolitan striving exist side by side and in complex intersections in the evolution of international law,⁴¹ and this creates both an objective problem concerning the skewed content of its normative structure and a perceptual problem concerning the preparedness of historically disadvantaged or disempowered group to trust and engage in any process of political reconstitution.

Whether these problems can be overcome is a question which only politics can answer, which brings us, finally, full circle to the original ‘negative’ articulation of the global cosmopolitan project as the only escape from a series of unpalatable alternatives. On the one hand, that negative articulation, as we have seen, is profoundly incomplete, and if relied on too much merely serves to obscure and avoid the difficult questions that cosmopolitans must address. On the other hand, it remains a minimal guarantor of the cosmopolitan project – an emphatic reminder of the unacceptability of what lies in store *unless* these difficult questions are addressed.

⁴⁰ See Tully, above n 13; Koskenniemi, above n36.

⁴¹ Commentators disagree both about the continuing strength of the legacy of false universalism and about whether and to what extent this may corrupt or undermine attempts to develop a more genuinely inclusive form of legal universalism. For more affirmative views, see, in response to Koskenniemi (above n36) P-M. Dupuy, “Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi,” (2005) 16 *European Journal of International Law* 131-137; O. Gerstenberg, “What International Law Should (Not) Become. A Comment on Koskenniemi,” (2005) 16 *European Journal of International Law* 125-30.