The Constitutional Dimension of the UN Charter Revisited: Almost One Quarter of a Century Later

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Abstract

The question of whether the Charter of the United Nations can be considered as the constitution of the international legal order was first examined by the present author here 25 years ago. At that time, it was noted that this issue raises a number of conceptual and theoretical problems that need to be briefly recalled in this paper. 25 years later, however, the question is whether the practical behaviour of States and the actual impact of their references to the Charter as a “constitution” confirm the validity of this thesis, which, it should be noted, originated in doctrine and was first put forward by scholars from federal States, including, in the first instance, Germany and the United States.

In accordance with the wishes of the editors of this yearbook, the present article was written before the outbreak of Russia’s aggression against Ukraine on 24 February 2022. As a consequence, the examination of State practice both in terms of the authority conferred on the UN Security Council (organic test) and the norms it was able to adopt during that period as well as the way in which the International Court of Justice itself dealt with the Charter (normative test) led to a very nuanced conclusion as to the relevance of the constitutionalist theory in positive law. They also raise the issue of the criteria for appreciating what is a « good theory » one of them being for sure that is should not lead to any kind of dogmatism.

Whatever the case, the very broad condemnation of the Russian aggression in Ukraine from the outset, notably by the United Nations General Assembly meeting in special session, together with the reactions of several other international bodies as well as heads of State or Governments, make it possible to note that the United Nations Charter is indeed still considered, at least by more than three thirds of the members of the United Nations, as the cornerstone of the international legal order. Does this necessarily mean that this instrument should be qualified as a “constitution” in the technical sense that some domestic public laws and political traditions mean it? The question still deserves to be asked. Here again, it very much remains an issue of definition; but the term is probably less important than the actual reality.
Keywords


1 Introduction

1997. That was the year in which the first issue of the Max Planck Yearbook for United Nations Law was published. The title of the yearbook already implicitly raised the question of how to situate this ‘United Nations (UN) Law’ in relation to international law in general. In many respects, this was a very different time from the present one.¹ Four more years were to pass before the twin towers in Manhattan collapsed live before the astonished eyes of a section of the world’s population, who had flocked to their television screens to witness the unbelievable. At that time, the world still wanted to believe that the brief but almost euphoric years of the international community which had started in 1991, with the Gulf War, could be extended. Many, especially in the United States, wanted to embrace Francis Fukuyama’s naive interpretation of Hegel’s thought about the ‘end of history’.²

Shortly after the United Nations celebrated its fiftieth anniversary, many people wanted to take the risk of trusting that the United Nations could better structure the efforts of the ‘international community of states as a whole’, which Article 53 of the Vienna Convention on the Law of Treaties³ had taught us designates as binding on all. A part of the doctrine thus wanted to consolidate these achievements, and rightly so, since a number of scholars already perceived their precariousness. To do this, it seemed necessary to undertake a sort of sacralisation of the United Nations Charter,⁴ raised to the rank of the constitution of the international community. There is no doubt that this doctrinal proposal was particularly stimulating. It produced a large number of comments and almost generated a true school of thought.⁵

At the time, I had the privilege of providing for this Yearbook a critical but balanced analysis of this thesis, highlighting in particular the risks of misunderstandings as well as the political and technical difficulties involved in transforming a fertile metaphor into a genuine legal reality.\(^6\) Considered with the benefit of almost 25 years' hindsight, the thesis of the Charter as a universal constitution prompts us to ask the question again in terms that are in some respects renewed: What is the extent of the influence of a doctrinal initiative of this importance, this time confronted with the test of facts over more than two decades? And what is also its actuality?

In order to answer this question, we shall first briefly recall the questions raised by the constitutionalist thesis as formulated 25 years ago. The evolution of international legal practice as it developed since then will then be considered, by submitting the constitutionalist theory to two successive tests: One, organic or institutional, concerns the way in which, in practice, States have behaved in particular with regard to the authority of the United Nations Security Council (\textit{UNSC}) in the context of peacekeeping; the other test, a normative one, relates, beyond the behaviour of States, to the jurisprudence of the International Court of Justice: has it referred, in one way or another, to the notion of 'constitution' as applied to the United Nations Charter?

In the light of the results of these two tests, an assessment will then be made. Although the results are mixed, the conclusion to be drawn should nevertheless be nuanced, as the objectives set by the theory are more relevant than ever.

2 \textbf{The Questions Raised}

In the article published in the first issue of this Yearbook, I started from the observation made by Professor Christian Tomuschat on the occasion of the 50th anniversary of the Charter, according to whom:

\begin{quote}
It has become obvious in recent years that the Charter is nothing else than the constitution of the international community […]. Now that universality has almost been reached, it stands out as the paramount instrument of the international community, not to be compared to any other international agreement.\(^7\)
\end{quote}


\(^7\) C. Tomuschat, \textit{The United Nations at Age Fifty: a Legal Perspective} (Kluwer 1995).
Professor Tomuschat’s statement was explicitly aimed at the conventional nature of the Charter, which is thus seen as the text in force whose legal authority is superior to that of any other treaty. The formal analogy established between the text of the Charter in the international order and that of the supreme law in the domestic order can be seen here. But then, three questions immediately arise. What is meant by the term ‘constitution’; what are the norms concerned; what is their legal regime?

2.1 What Is Meant by Constitution?

In this respect, the distinction between the normative and organic dimensions of this concept immediately comes to mind. Normatively, the notion of constitution refers to a body of substantial principles and rules intended to define the ethical and rational conditions of a stable and coordinated collective life. These norms are or must be considered fundamental by the members of the social body to which they are addressed, and this social body must be able to benefit from sufficient cohesion for all to feel that they share a minimum degree of convergence from both a political and cultural point of view, particularly with regard to the legitimacy of the rule of law.

Organically, the constitution is seen not only as the instrument that brings together a body of substantive principles, but as the text that determines the organs of public authority to ensure the application of these principles. The application of the ‘separation of powers’ presides, in the majority of existing States, over the distribution of competences between institutions whose respective functions are generally defined with precision. This is where the danger of misunderstandings arises when we talk about the Charter as a constitution, depending on whether we emphasise the normative or the organic aspect of the concept of a constitution, depending on our political culture. As a Franco-German colloquium on the same subject showed, the French conception is traditionally more attached to the organic dimension and the German conception to its normative one, although neither of them rejects one or the other meaning. But what about the universal level, characterised

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by the dispersion of sovereignties and the cultural diversity of the countries making up the international community? It is difficult to cut a toga out of a harlequin suit!

2.2 Which Norms?

How can other rules established under customary international law, which are now clearly recognised as having a peremptory character, since they belong to *jus cogens*, be placed in relation to the Charter, the supreme treaty instrument? How, in other words, can we resolve a potential problem of conflict of hierarchy between peremptory norms derived from customary law and conventional norms contained in the Charter, at least when the former are not explicitly named in the latter?

Even if one tries to accept that all the norms in question can be linked to the Charter, whether explicitly or not, they are not all explicitly named in it. Yes indeed, the prohibition of the use of force is certainly set out in Article 2(4) of the Charter and the International Court of Justice has admitted that it is, on a customary basis, one of the ‘cardinal principles’ of contemporary international law. However, the Charter itself says nothing explicitly about the principle of non-intervention in the internal affairs of another State or the principle of respect for its international borders, a rule which the ICJ judgment between the United States and Nicaragua States, constitutes ‘an essential foundation of international relations’. A similar point could be made with regard to respect for diplomatic immunities, with reference to the case that gave rise to the 1980 judgment between the United States and Iran. To provide another illustration of the same kind of difficulty while the Charter refers by name to the ‘right of peoples to self-determination’, it refers only generically to the ‘fundamental freedoms’ attached to the human person in Article 2. For example, the Charter does not specifically refer to any of them, such as the prohibition of torture, as being peremptory in nature, although the Court subsequently had occasion to do so in the 2012 case between Belgium and Senegal on the ‘obligation to prosecute or extradite’.

If one accepts that the Charter is the constitution of the international legal order, then it must be admitted either that it constitutes only the ‘hard core’ of it or that, even in a substantive sense, the entirety of *jus cogens* is not necessarily part of the substance of international constitutional law, which would be an

11 Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senega) (Judgment) [2012] ICJ Rep 422, at para. 99.
embarrassing conclusion. The Court’s explicit recognition of the existence of *jus cogens* in 2006,12 reinforced by its repetition, a year later,13 that the prohibition of genocide belongs in this category, shows that the Charter does not have a monopoly on the formulation of rules that can be considered to be at the top of the normative hierarchy. But then, how to manage this normative disparity?

2.3 Which Legal Regime?
The Charter contains a provision which, according to the preparatory work, was directly inspired by the example of federal law. This is, of course, Article 103, which states that ‘in the event of a conflict between the obligations of the Member States of the United Nations under the present Charter and their obligations under any other international agreement, the former shall prevail’. This provision has been commented on many times. In particular, it has been noted that it is deliberately placed in a constitutional context.14 However, Article 103 says nothing about a possible extension of the application of the priority it establishes in favour of the obligations arising from the Charter to any of those deriving from a customary norm, even one of *jus cogens*, at least when the said norm is not included in the text of the Charter itself. The primacy of some ‘institutional’ norms is not the same as that of other ‘customary’ norms.

Moreover, the normative effects of the respective play of the aforementioned Articles 103 and 53 of the Vienna Convention on the Law of Treaties are not the same. The former sets out a normative prevalence but its implementation does not in any way entail the nullity of the treaty norm that is incompatible with a provision of the Charter. Article 53, on the other hand, invalidates a norm that is incompatible with a rule of *jus cogens*.

Last but not least, the consequences of breaches of the two types of rules are also different. The disregard of a principle of the Charter by a Member State may lead to a series of measures decided by the Security Council; but this does not prevent the same State from also being held responsible according to the now codified principles of the law of international responsibility of

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States (ARSIWA).\textsuperscript{15} Strictly speaking, the action of the Security Council is not
an action in responsibility; it is only the implementation of measures intended
for the maintenance of peace and international security.

As for the violation of ‘cardinal’ norms of international law, this time in terms
of responsibility, whether or not these norms belong to the Charter by name,
ARSIWA did not establish precisely what regime of responsibility it entails.\textsuperscript{16}
It has merely specified in other ways what the member States of the interna-
tional community must or must not do with regard to the consequences of
this violation, just as it has regulated the use of countermeasures; furthermore,
this codification text has not been able to define, even if only in general terms,
the legal regime of what would be an ‘aggravated’ responsibility for breach of
a norm of \textit{jus cogens}, whether or not it is included and stated in the Charter.\textsuperscript{17}

But let us now step back. Almost 25 years after these questions were raised,
it now seems possible to examine the extent to which practice, including that
of the International Court of Justice, has provided at least some answers to the
above questions. However, it can already be stated that, since that time, the
authority of the Charter has been called into question on several occasions.

It is now appropriate to apply the two tests previously mentioned to the the-
ory in order to appreciate not necessarily its intellectual relevance but at least
its actual impact and efficiency. We will start with the organic test. In practice,
it is indeed, in the context of peacekeeping, the way in which States respect or
do not respect the authority of the Security Council that most directly reveals
their legal conviction.

3 The Organic Test

What has been the actual conduct of states with regard to the Organisation for
the last 25 years in the field of international peace and security?

The Security Council is the principal organ of the maintenance of peace
by virtue of the Charter (Article 24). Without necessarily giving a caricature

\textsuperscript{15} UN ILC ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts

\textsuperscript{16} Yearbook of the International Law Commission [2001] Vol II Part II.

\textsuperscript{17} See P.-M. Dupuy, ‘The Deficiencies of the Law of State Responsibility Relating to Breaches
of Obligations Owed to the International Community as a Whole: Suggestions for Avoiding
the Obsolescence of Aggravated Responsibility’ in A. Cassese (ed.), \textit{Realising Utopia, The
Future of International Law} (OUP 2012), at 213; G. Gaja, ‘The Protection of General
Interests in The International Community, General Course on Public International Law’
of the constitutionalist theory, it seems then necessary, in order to verify the existence of the organic dimension of the constitution, for the Member States to have, at least in the majority of cases, adopted a behaviour that reflects their consideration of the Security Council, if not as the ‘executive power’ of the international community of States, then at least as the organ whose competences most closely resemble it. Thus, in the 1990s, even though it was quickly accused of having served the interests of the permanent members too often,\(^{18}\) starting with the United States, doctrine often raised the question of whether the Council was now naturally inclined to take charge of the defence of the interests of the international community as a whole, in an otherwise broadened conception of peacekeeping.\(^{19}\)

In this respect, we can only draw a very mixed picture. It is true that the Security Council continues to be perceived as the body to be consulted as a matter of priority when international peace seems to be jeopardised by a crisis of sufficient magnitude to go beyond a local or very narrowly regional dimension. Moreover, far from acting solely as an executive power, this body has taken certain initiatives to impose, by means of resolutions adopted on the basis of Chapter 7 of the Charter, a kind of international legislation, particularly to combat terrorism. However, as soon as the interests of a Member State, especially a permanent member, of the Security Council are at stake, the Council is, as was most often the case before the 1990s, sidelined in favour of unilateral actions that remain largely uncontrolled by the United Nations. The Council is then reduced, in these cases, to the rank of consecutive intervener, to manage as best as possible a situation often resulting from the ill-considered use of the old argument of individual or collective self-defence. The following are some examples of the phenomena just described.

### 3.1 Cases of Compliance with the Charter

The maintenance of the Security Council as the principal organ of peacekeeping in compliance with the Charter is still attested to by numerous examples, some of which are recalled here. In Afghanistan, in the aftermath of the defeat of the Taliban, this organ endorsed the use of armed force so that the Afghan Interim Authority and UN personnel could work in a secure environment (UNSC Resolution 1386 of 20 December 2001). The military operations

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\(^{18}\) See, in particular, M. Bedjaoui, *Nouvel ordre mondial et contrôle de la légalité des actes du Conseil de sécurité* (Bruylant 1994).

carried out in Ivory Coast from 2005 onwards in order to guarantee peace and respect for democracy there; the allied intervention against Libya in 2011 (even if one might have wondered whether some States, including France, were not interpreting Resolution 1973 too broadly); Operation Serval, conducted by the French army in Mali under Resolution 2085 in 2012, are among the cases in which Member States, including permanent Member States, have drawn the legitimacy of their intervention from resolutions emanating from the Council, a body thus recognised and used in conformity with the Charter. This seemed to be in line with the words of the 2005 Summit Final Document adopted by the heads of State and governments. Affirming that all States need an effective and active collective security system, in accordance with the purposes and principles enshrined in the Charter, the heads of State and governments declared: ‘We reaffirm our faith in the United Nations and our commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterate our determination to foster strict respect for them.’

The value of such a solemn declaration of principles should of course not be underestimated. However, it must be placed in its context, which, as will be seen below, was featured by the new link established between peace and the enthusiastic but short-lived affirmation of the so called ‘responsibility to protect’ (RtoP).

With regard to the Council’s normative or quasi-legislative action, which could be seen as a clear indication of its assumption of responsibility for the interests of the international community as a whole, particular mention may be made of its Resolution 1368 and, even more so, Resolution 1373 of 28 September 2001. Taken in the aftermath of the collapse of the Manhattan Towers, these resolutions, particularly the second of the two, constitute a genuine programme of action against terrorism, insisting in particular on the obligations of diligence incumbent on Member States in the fight against terrorism, designated as a global scourge. Resolution 1373, taken under Chapter 7 of the Charter, was immediately binding on all Member States, a result which could never have been achieved and so quickly by the adoption of a multilateral convention on the same subject.

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3.2 **Cases of Breach of the Charter**

Whatever the case may be, it would be a great mistake to find in these precedents sufficient material to support the idea that the Security Council is now endowed with sufficient authority to reinforce the constitutionalist thesis. On the contrary, practice has shown in many cases of breaches of peace and collective security over the past 20 years that this authority is still conditional, in particular, on the agreement of the five permanent members. Indeed, there has been an increased tendency to invoke self-defence, which the International Court of Justice has recalled on several occasions during the same period as being lawful only under very restrictive conditions, and cannot justify in its so-called ‘preventive’ dimension the initiative to use force without the Council’s authorisation. However, this is what happened on several occasions, the most obvious of which will be recalled here.

3.2.1 **Afghanistan**

If we look back at the intervention in Afghanistan after 9/11, which has already been mentioned as an occasion during which the Council played a prominent role, it must also be admitted that none of the aforementioned resolutions (neither 1368 nor 1373) included any provision for the authorisation of the use of force (contrary to Resolution 1973 concerning Libya, ten years later). The United States, wishing to retain complete freedom in the use of force, did not want to subordinate its initial intervention in Afghanistan to UN control, unlike what had happened during the 1991 ‘Gulf War’. Instead, they placed their action under the aegis of invoking self-defence against an armed non-state group, Al-Quaida. One may explain but not necessarily justify this non-invocation of Chapter 7 in relation with the fact that the Member States did not want to directly confront the question of the qualification of the attack (was it or was it not an aggression) and that of its attribution (could it be attributed to the *de facto* state of the Taliban or only to Al-Quaida). In any case, the same reasons cannot be found in the case of the American-British action in Iraq in 2003.

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3.2.2 Iraq

The extension of the use of self-defence marked the period opened by the US and UK intervention in Iraq in March 2003. These two states realised that they would not be able to convince the others of the need to intervene under the Charter on account of Iraq's alleged possession of weapons of mass destruction; instead, they were invited, in particular by the other permanent members of the Security Council, to comply with the conditions laid down in a Council's previous Resolution 1441 of 8 November 2002. This resolution, as the British and Americans themselves had initially recognised, did not include any implicit authorisation to use force; it merely subjected Iraq's compliance with its disarmament obligation to international control, under the aegis of the United Nations and the International Atomic Energy Agency (IAEA). On the eve of the start of armed operations, the international inspectors had even noted some progress in Iraq's attitude in this respect, which justified even less the use of force. It is therefore understandable that the Secretary-General of the Organisation drew the necessary conclusions when the American-British action took place, outside of any authorisation respecting the most elementary principles of collective security, when he declared on 19 March 2003: 'this is a sad day for the United Nations and the international community'.

In the same theatre of operations, the Security Council was certainly called upon again, the day after the fall of Saddam Hussein, to authorise the deployment of a multilateral force on the basis of Chapter 7 (Resolution 1511). But it was then to help the initial interveners to face the danger of getting bogged down, the extent of which they had not anticipated. Far from being perceived by the government of President George W. Bush as the essential architect of collective security, the Security Council was at best viewed as a tactical support, while its involvement could be seen as an afterthought, legalising a military action that was nevertheless incompatible with the Charter, given the conditions under which it had been undertaken. This is a far cry from the warring parties' recognition of the Security Council's undisturbed 'constitutive' authority in the context of peacekeeping.

Subsequently, the Council organised the country's political transition through Resolution 1546 until the first democratic elections in January 2005 and the withdrawal of the last American soldiers from Iraq in October 2011. The fact remains that such an action could not erase the flagrant violation of

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the principles of the Charter that led to the action decided by the United States and the United Kingdom.

3.2.3 From Libya to Syria: Grandeur and Misery of RtoP

Eight years later, as has already been noted, the armed military operation against Libya may have appeared to be a return to the prior submission of such action to Security Council authorisation, which was explicitly granted in Resolution 1973. This operation deserves nevertheless to be considered with more care. Indeed, this allied action has been the subject of various commentaries, including that of Catherine Powell, senior advisor to the US State Department. In 2012, she published an in-depth study in the American Journal of International Law entitled ‘Libya, a Multilateral Constitutional Moment’?.

The author relied, among other things, on Resolutions 1970 and 1973, which explicitly invoke the ‘responsibility to protect’ local or national populations from any severe damage by their own government (RtoP). In the case of the Resolution 1973, an authorisation was given by the Security Council to its Member States to use force against Colonel Gaddafi’s regime if it did not cease to endanger the security of its own people.

Catherine Powell argues that the ‘Libyan moment’ marked the beginning of a new phase in international relations and law. According to her views, reinterpreting the terms of the UN Charter itself, Member States adopted a renewed conception of sovereignty, characterised more by the duties it entails than by the traditional rights it confers.

Without seeing any particular obstacle to this rereading of the Charter in the terms of its Article 2(7), the obligations of each Member State towards its own population would have thus broadened and reinterpreted the entire field of collective security. This interpretation had, moreover, often been accredited, and not only by the North American doctrine, a few years earlier since the Secretary-General of the Organisation himself, following the adoption of the High-Level Panel Report (on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility), had declared in 2004: ‘in signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities’.


In fact, on the basis of the above-mentioned report, the main objective of the final document adopted by the heads of State and government\textsuperscript{26} meeting at the 2005 General Assembly session was, if not to revise the text of the Charter itself, at least to strengthen its meaning while updating it, in particular around this broadened and revised vision of sovereignty. It is therefore revealing that this State Department advisor wanted to see the Libyan episode as a moment that she described as ‘constitutional’\textsuperscript{27}.

However, the complex and mixed political and strategic aftermath of the allied military operation in Libya has clearly undermined this notion. In any case, Russia and China had already expressed the greatest reluctance to refer to RtoP while finally accepting the adoption of Resolutions 1970 and 1973. Whatever the case may be, realistically speaking, it is very unlikely that RtoP will be used again in conjunction with collective security mechanisms, and that for a long time. It is worth noting that less than two years after the allied initiative in Libya, on 30 August 2013, President Obama abandoned his earlier statements on the ‘red line’ not to be crossed in Syria. He gave up ordering the strikes, even though they had already been prepared and directed towards the territory run by Bashar Al-Assad; and he did so even though the latter’s government had just effectively used chemical weapons against its own people.\textsuperscript{28} Moreover, if he had taken another decision, a military action of this type could not have taken place under the aegis of the Security Council, which would have been immediately paralysed by the Russian veto. After such a renunciation, the attempt initiated several years earlier to strengthen the collective security system by promoting the ‘responsibility to protect’ ended in a clear failure. It should be remembered that President Bashar Al-Assad’s behaviour towards his own people has caused half a million deaths among the Syrian population and the flight of 6.6 million refugees from Syrian territory. It therefore seems decent not anymore to assert that RtoP still is part of positive international law.

3.2.4 From Crimea to South China Sea
Other examples during the twenty five years under review have also shown how the Council’s action remains dependent on the goodwill of the permanent members. There is no need here to repeat the detailed description of the conditions under which Crimea was annexed by Russia to its territory in

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\textsuperscript{26} See UNGA Res 60/1 ‘2005 World Summit Outcome’ (16 September 2005).
\textsuperscript{27} In both Resolutions 1970 and 1973, the Security Council recalled the responsibility of the Libyan authorities to protect the country’s population; Resolution 1973 authorized UN Member States collectively to protect Libyan civilians insofar as Libya was failing to do so.
\textsuperscript{28} See ‘The Obama Administration on Syria 2009–2017’, BallotPedia.
March 2014.\textsuperscript{29} Suffice it to recall that this action, even if Russia tried to justify it by the positive results of a referendum on self-determination organised in the wake of the takeover of the Crimean territory, would in any event appear hardly reconcilable with the principle of the non-use of force for the acquisition of territory belonging to another State; this, even if Russia had initially taken the very formal precaution of not directly engaging troops in Russian uniform in the military operation itself. In any case, it is clear that in such a situation, the Security Council was prevented from taking any decision on the basis of Chapter 7; indeed, it could only be paralysed by the veto of the permanent member behind the action. And in this case, it was not only the organic dimension of the Charter as a possible constitution that was affected by the paralysis of the Security Council. It was also, if not even more so, its substantive dimension, since the fundamental principle of the prohibition of force laid down in Article 2(4) of the Charter was directly called into question.

As for China’s repeated initiatives in the South China Sea to establish its hold by means of military occupation over areas that do not fall within its competence under the applicable rules of the law of the sea,\textsuperscript{30} they also illustrate the impossibility for the Security Council to intervene against the initiative of a permanent member clearly uninterested in recognising it as an international constitutional body in any sense of the term.

Thus, if one attempts a provisional assessment of State practice in the last 20 years, it must be said that the constitutional theory seems to have had virtually no lasting impact on State practice. The effectiveness of the United Nations, the respect shown by States for the fundamental principles of the Charter, and the recognition of the authority of the Security Council have had indeed varying fortunes. However, the general direction of the evolution is towards a progressive weakening of the authority of the UN in comparison with the period, remaining exceptional, which had taken place in the first years of the 1990s, precisely the period during which the constitutionalist theory was formulated by some scholars.\textsuperscript{31}


\textsuperscript{31} See, in particular, C. Tomuschat, ‘Obligations Arising for States Without or Against their Will’ (1993) Collected Courses of the Hague Academy of International Law Vol. 241, at 199ff; J. Frowein, ‘Reactions by Not Directly Affected States to breaches of Public
As was inherent in an organisation entrusting the functioning of the collective security system to a body subordinated to the political agreement of its five permanent members plus some others, it is always in the evolution of the political situation that the conditions necessary for the effective work of the Organisation must be sought. The same applies to respect for the substantive rules and principles set out in the Charter. The Charter is always at the disposal of States, ready for use, and this is already sufficient justification for the eminent place it can be given in law. But the organisation it governs remains in a state of flux as international political relations evolve. Let us therefore remain on the legal front, and now look at the jurisprudence of another permanent organ of the Charter, namely its principal judicial organ, the International Court of Justice.

4 The Normative Test

The question is whether the Court, which Article 38 of the Statute specifically states may draw on ‘the teachings of the most highly qualified publicists of the various nations’ as an auxiliary means of determining the rule of law, has wished to draw on the constitutionalist doctrine of the Charter to argue in favour of the particular authority of certain rules, and in the first place those set out in the Charter.

4.1 Vicinities

Indeed, in some of its decisions since the beginning of this century, the Court has suggested that fundamental principles, such as respect for territorial integrity or the peaceful settlement of disputes, derive their normative force directly from the Charter. In other decisions, the Court notes that there are fundamental principles of the international legal order that are also expressed in the Charter, even if the Charter did not originate them. This is for instance the case with ‘the principle of the sovereign equality of States, one of the fundamental principles of the international legal order, which finds expression in Article 2,


Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

paragraph 1, of the Charter of the United Nations'.

Similarly, the Court states that ‘the rule of State immunity plays an important role in international law and international relations. It derives from the principle of sovereign equality which, as is clear from Article 2, paragraph 1, of the Charter of the United Nations, is one of the fundamental principles of the international legal order’; the same applies to the principle of territorial integrity, which the Court tells us ‘constitutes an important element of the international legal order and is enshrined in the Charter of the United Nations’. What is noteworthy in the above quotations is the direct link established by the Court between the rules concerned and the Charter itself, in spite of the fact that the Charter was not as such the source of the rules.

In any event, two observations are in order, to place this type of judicial declaration more precisely in relation to the constitutional theory.

The first is that the Court, long before the expression of this constitutionalist doctrine, has already always issued obiter dicta or laid down statements of principle emphasising the importance of certain rules which, moreover, have been identified as belonging to a higher normative category in which we can now see norms of international public order. This was already the case, for example, with ‘peremptory obligations’, as the Court itself put it, concerning respect for diplomatic and consular immunities in its Order of 15 December 1979 in the Hostage Case.

The second observation is that, even in cases where it establishes a link, as already mentioned, between the fundamental nature of a principle and its mention in the Charter, the Court is careful not to use the term ‘constitution’ or ‘constitutional’, precisely because of its specific connotations in some domestic laws and not in others, and because its meaning, significance, perception and actual scope may thus vary according to the legal culture in question, from one State to another. The Court, for its part, is aware of the misunderstandings that may result from these cultural disparities, precisely because of its composition, which indeed effectively reflects the diversity of existing legal traditions.

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34 See Question relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v Australia) (Order) [2014] ICJ Rep 147, at para. 27.


4.2 The ICJ, the Charter and Jus Cogens

Another aspect of the ICJ’s jurisprudence in the last 20 years is worth noting, in relation to the question of the audience of the constitutionalist theory. This is the end result of an evolution, and one that has indeed taken a long time to emerge, at least as far as the key concept of peremptory rules of international law is concerned.\textsuperscript{38} On four occasions, in 2006, 2007, 2011 and 2012,\textsuperscript{39} the Court has – finally – explicitly recognised that certain rules belong to *jus cogens*. It is necessary to examine whether these recognitions provide at least some answers to the question of how two normative hierarchies should be articulated, one of which derives from a convention, the Charter itself, and the other, more simply, from general international law, which is now known to contain peremptory norms. As mentioned above, this type of problem only deals with those rules that do not derive directly from the Charter. However, the Court’s acknowledgements of the existence of *jus cogens* concern precisely this type of norm, since what was at stake was the prohibition of genocide and the prohibition of torture.

However, it must be noted that the Court’s case law in the cases concerned does not provide any precise answer to the problem just mentioned above. With regard to genocide, the Court states in these two cases that its prohibition constitutes ‘a peremptory norm of international law’ but it does not draw any substantive conclusions from this statement, in particular as regards the regime of responsibility applicable to its violation. The same is true of the 2012 judgment between Belgium and Chad concerning the peremptory nature of the prohibition of torture. The Court did not refer to the Charter in either case, which is hardly surprising.

But there is more to this failure to act, which can again be explained. In the case the *Jurisdictional Immunities of the State*, the Court endorsed the proposal


made by Germany in its pleadings;\textsuperscript{40} it drew a distinction between substantive rules that may have a \textit{jus cogens} character and procedural rules, among which it placed the principle of immunity of the State from jurisdiction (which is in itself debatable), insisting on the fact that these are two different normative registers that have nothing to do with each other. The author of this article was counsel for Italy in this case and he had, on the contrary, challenged this strict separation between substantive and procedural rules, explaining that the latter cannot be a barrier to the exercise of the first and that it is the essence of a secondary rule to remain at the service of the application of a primary rule, not to obstruct it.\textsuperscript{41} If the obligation to compensate victims of war crimes and crimes against humanity is \textit{jus cogens}, the rule of State immunity from jurisdiction should not be an obstacle to its application, at least when the victims in question have reached a phase where there remains absolutely no other recourse than to sue the foreign State itself before their national courts for failure to fulfil its obligation to compensate for the crimes committed. This argument was based in particular on the Naples Resolution of the Institute of International Law (\textit{ID1}) adopted just three years earlier, in 2009. This resolution stated contrary to what the Court will affirm afterwards that ‘in accordance with conventional and customary international law, States have the obligation to prevent and punish international crimes’. And the text of the resolution further added: ‘Immunities should not be an obstacle to the adequate reparation to which victims of the crimes referred to in this resolution are entitled’.\textsuperscript{42}

Without repeating the detailed analysis that I have made elsewhere of the Judgment and the reasons why the Court’s position appears to be highly questionable from both a theoretical and technical point of view,\textsuperscript{43} I shall limit myself here to indicating that the thesis shared in this case by the Court and the Applicant, by reducing the assertion of \textit{jus cogens} to a mere normative virtuality, does not in any case provide any element of an answer in this case than

\begin{thebibliography}{99}
\bibitem{40} Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Judgment) [2012] ICJ Rep 99, at para. 94.
\bibitem{41} Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) (Verbatim Record) (Public Sitting) [2011] ICJ Rep 1, at 40–51.
\end{thebibliography}
it did in those of 2006, 2007, but also in 2012, to the question of whether there is a substantive constitution of international public order and, if the answer is in favour, how the conventional hierarchy of substantive principles set out in the Charter fits in with principles that belong to the same category of customary international law (even if they originate in one or more other international conventions or are well established in customary international law).

However, it is definitely difficult to identify a direct influence of the constitutionalist doctrine, if only on the language used by the Court in its decisions, but perhaps also in the very conception it has of these principles. Although they are described as ‘fundamental’, they are not considered to be ‘constitutional’. This latter qualification seems in any case to be awkward, because it raises a number of problems already mentioned in the first part of this article, but also because it would pose questions of interpretation made all the more difficult by the diversity of the legal traditions present within the Court itself.44

At the end of the review of the international practice of the last twenty years, including judicial practice, the balance sheet thus seems particularly negative as regards the international impact of the theory considered. However, this is not a reason for considering that the launching of this theory was necessarily a mistake, and we shall see why.

5 A Mixed Picture until the War in Ukraine

5.1 What is a Good Theory?
There is no single answer to this question. In the so-called hard sciences, a theory will only be considered valid if its conclusions are corroborated by experiments and observation. To take the most important of them, this is what happened with the theory of general relativity.45 Constantly confirmed since 1915, from the observation of the deviation of light to the actual and recent perception of gravitational waves, via the verification of the expansion of the universe or the discovery of black holes, it remains the theory whose validity is, par excellence, universal, in the most literal sense of the term.

In the social sciences, on the other hand, the criteria for judging the quality, if not the relevance, of a theory are often not the same. Hans Kelsen’s pure theory of law continues to be a construction that lawyers, especially internationalists, must get to know, even if they are not convinced either by the axioms on

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44 Even within Europe, this diversity should not be underestimated as demonstrated, in particular, in P. Hilpold (ed.), European International Law Traditions (Springer 2021).
45 See C. Rovelli, Sette brevi lezioni di fisica (Adelfi 2014).
which it is based or by the aims it has set for itself. Nevertheless, Kelsen's theoretical proposition remains indispensable, especially when an author seeks to define the way in which he or she understands the legal phenomenon.

However, the theory of the Charter as a constitution is obviously not comparable to Einstein's or even Kelsen's theory, particularly because the latter is ultimately only theoretical. Constitutional theory does, however, aim to give the legal order coherence, a formal structure and an eminent purpose, which is not a negligible ambition either. It should be noted in passing that it is not irrelevant whether the constitutional dimension of the Charter is assigned to the international community (a legal-sociopolitical concept) or to the international legal order (a purely formal notion).

In Professor Tomuschat's particularly straightforward formulation, this constitution was said to be that of the international community, and the theoretical proposition it sets out was intended to be both descriptive (‘[I]t has become obvious in recent years that the Charter is nothing else than the constitution of the international community ...’), but also implicitly constructive if not even finalised (‘it stands out as the paramount instrument of the international community, not to be compared to any other international agreement’), which sounds like the consecration of this text as a Grundgesetz or fundamental law.

If one were to adhere to the criteria of the hard sciences, one would have to conclude, 25 years later, that this theory is clearly irrelevant: have we not just seen the extent to which this quasi-sacredness of the Charter has been belied, in fact, in the practice of States, if not even in law, by the International Court of Justice that has been careful never to take it up? However, it would be as inappropriate to confine oneself to this negative observation as to forget it. The constitutionalist theory of the United Nations Charter can, in fact, be understood as a most stimulating doctrinal proposal if one knows how to resituate it in relation to the context that saw its birth, now obsolete, but also with reference to the goals that were assigned to it, which as for them have lost none of their relevance.

5.2 The Context
The theory was born during the Gulf War, when, following the collapse of the communist bloc, the Security Council finally spoke with one voice and established a new ‘Agenda for Peace’, a peace which was thus destined not only to be maintained but also consolidated.

Even in the aftermath of the multiple tensions caused by the break-up of Marshal Tito's former Yugoslavia, the United Nations seemed for a time to have sufficient authority to be given a mandate for territorial management in Kosovo, a function that had until then had no real equivalent. There was
a glimpse that the ‘World Organization’ could finally function as envisaged in the Charter and that the ‘international community’ celebrated in Article 54 of the UN Charter was perhaps finding direct expression in the UN organs, starting with the Security Council. Of course, informed internationalists did not forget the vicissitudes of the Cold War period, even tempered from the aftermath of the Cuban crisis in 1963 by the era of ‘peaceful coexistence’.46

Moreover, particularly at the doctrinal level, since the uncertain reports of Mr. Riphagen to the International Law Commission on ‘self-contained’ regimes,47 some thought it appropriate to emphasize what they called the ‘fragmentation’ of international law, an idea that quickly became all the more fashionable because it remained confused for a long time in many respects.48

It was then that it seemed necessary, and understandably so, that the recent gains of the renewed authority conferred on the Charter be maintained, if not reinforced, by repeatedly affirming that the Charter was henceforth not only the constitution of the United Nations but also that of the international community as a whole. And it is here that one perceives the final purpose of the theory that of affirming the unity, but this time also the unity of the international legal order, that structured body of law charged precisely with normalising the behaviour of the members of the community previously noted. In a way, the constitutionalist theory appeared as a new conjugation of the theme of peace through law,49 itself structured and implemented through the channels of the World Organisation, founded in 1945 but for so long largely paralysed by the persistent disagreement between the permanent members.

It is interesting to note that the most zealous promoters of the constitutionalist idea were to be found first in Federal Germany and the United States,50 two federal states with, for historical reasons, some similarities in their respective national constitutions. In Germany, whose constitutional culture is in any case particularly rich and ancient,51 the idea of ‘constitutional patriotism’

50 See supra fn.5 and fn. 31. It is perhaps worse to recall that, in the legal internal context, in Germany, the constitutional debate had taken a prominent importance during the period which took place just before the reunification of this country on 3 October 1990.
defended among others by Jürgen Habermas, and transposed at the international level albeit on the basis of a questionable reading of Kant undoubtedly provided favourable ground for the expression of such a theory. It was relayed in a somewhat lyrical mode in the United States, as Catherine Powell’s article illustrates, with the obvious danger of falling into wishful thinking, as the tragic aftermath of the merciless repression in Syria and the passivity of the American executive subsequently proved. It had been thought, however, a few years earlier, at the Summit of Heads of State and Governments, that the final document adopted at that time would effectively seal the affirmation of the Charter, re-read, through the kaleidoscope of the ‘responsibility to protect’, as the Constitution of the international community charged with consolidating the unity of its law.

If there ever was a ‘constitutional moment’, to use the terms of the above-mentioned article, it was not 2011 with the Libyan affair but 2005, at the time of the aforementioned summit.

However, the idea did not remain purely German-American. French Foreign Minister Dominique de Villepin’s eloquent and forceful speech to the Security Council on 14 February 2003, during a tragic Security Council meeting, in an attempt to dissuade the United States from using force against Saddham-Hussein, was another way of celebrating respect for the rule of the Charter in accordance with its principal organ for peace, thus bringing the position of one of the permanent members of the Security Council close to the constitutionalist thesis.

Indeed, as we have seen above, it was from the joint Anglo-American attack on Iraq that the heyday of collective security decisively came to a halt, leading to a time marked by the return of nationalism and the rise of populist leaders alien to the noble inspiration celebrated by the proponents of the constitutional theory.

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52 See J.-W. Müller, Verfassungspatriotismus (Surkamp 2010); J. Bühler, Das intragrative der Verfassung. Eine politiktheoretische untersuchung des Grundgesetz (VSA 1996).
54 See C. Powell, ‘Libya: A Multilateral Constitutional Moment?’.
5.3 *The War in Ukraine and the Renewed Affirmation of the Charter as The Cornerstone of the International Legal Order*

From all points of view, the military operation unleashed by President Putin against Ukraine on 24 February 2022 deserves to be called ‘special’; it will go down in history as clearly inspired by a conception of international relations that is perfectly archaic in terms of international law, as if it were inherited from another age, undoubtedly closer to the time of Peter the Great than to the adoption, including by Marshal Staline, of the United Nations Charter. This deliberate aggression\(^\text{56}\) is indeed based on the idea that the abolition or unilateral modification of the borders of another sovereign state can be legitimately and durably achieved by the initiative of the use of force as well as the disregard of the ‘cardinal rules of humanitarian law’\(^\text{57}\) and the neglect of the reactions of an ‘international community’ of which the President of Russia seems to have an approximate perception.\(^\text{58}\)

Among other serious misjudgements, the Kremlin leader’s initiative reflects his belief that the fundamental principles of the UN Charter have lost most of their authority among UN Member States, in spite of their reiteration in the Friendly Relations Declaration in 1970 which was largely initiated by Soviet diplomacy.\(^\text{59}\)

In any case, it is already clear that this true war has had several effects that its initiator had not counted on. Without dwelling here on the unexpected strengthening of NATO or the increased solidarity of the European Union Member States in favor of Ukraine, it is striking to note that the Russian aggressive initiative was almost immediately condemned, as early as on 24 February 2020 by the North Atlantic Council,\(^\text{60}\) on 1 March 2022 by the European Parliament,\(^\text{61}\) and on 2 March 2022 by the United Nations General Assembly.\(^\text{62}\)

Absolutely all of these texts explicitly mention the UN Charter as having

\(^{56}\) See ‘Declaration of the Institut of International Law on Agression in Ukraine’ (1 March 2022) Institut de Droit International (present author is a member) (adopted without objection).


\(^{59}\) See J. Vinuales (ed.), *The UN Friendly Relations Declaration at 50* (CUP 2020), at 371.

\(^{60}\) ‘Statement by the North Atlantic Council on Russia’s attack on Ukraine’ (24 February 2022) NATO.


\(^{62}\) ‘UN Resolution against Ukraine invasion: Full text’ (3 March 2022) Al Jazeera.
been outrageously breached. The same is true with the G7\(^63\) and the Council of Europe,\(^64\) not only to condemn the Russian aggression but also to adopt repeatedly and with increasing intensity a whole series of sanctions unparalleled in the history of international relations against a State having disregarded the most basic rules of international law.\(^65\)

The reference to the United Nations Charter has, in this context, been constant, not only in the declarations of international organisations but also in the political speeches of many heads of State and government, acting unilaterally or collectively.\(^66\) This convergence can indeed attenuate the reservations or precautions expressed in the present article, which, due to editorial constraints initially imposed on the author, was written for most of it at the end of last year, 2021, i.e. several months before the Russian aggression which, it must be admitted, was at that time only foreseen by the American and British intelligences.

Thus, Mr. Putin has, not without paradox, also succeeded in demonstrating that the Charter, despite the vicissitudes described above, is indeed still perceived as a sort of cornerstone of the international legal order. As the Russian aggression in Ukraine has clearly shown, the Charter is referred to as the hard core of the most fundamental principles that should govern international relations, without forgetting of course those relating to the protection of human rights and humanitarian law.\(^67\)

Of course, another question then comes to mind. That of knowing whether this common tribute has remained heartfelt as well as properly universal, a crucial question to which the present author devotes an article elsewhere.\(^68\) It is true that the UN has 193 Member States and that the aforementioned General

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63 ‘G7 Foreign Ministers’ Statement on Russia’s War of Aggression Against Ukraine’ (7 April 2022) U.S. Department of State.

64 ‘Russian Military Aggression against Ukraine’ (24 March 2022) European Council Conclusions.

65 See, in particular, COE Committee of Ministers ‘Resolution on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe’ (23 March 2022) CM/Res(2022)3. See also ibid.

66 ‘Statement of the heads of state or government, meeting in Versailles, on the Russian military aggression against Ukraine’ (30 March 2022) European Council Statements and Remarks.

67 ‘High Commissioner for Human Rights Calls on the Russian Federation to Immediately Withdraw All Troops from Ukraine as the Human Rights Council Hears an Update on the Situation in Ukraine’ (30 March 2022) ReliefWeb.

Assembly resolution was only adopted by 135 of them. Some, such as China, a permanent member of the Security Council, preferred to abstain, which they will have to politically manage anyway. It is also worth noting that a significant proportion of the abstaining States are developing countries, particularly African ones, and that India, soon to be the most populous State in the world, also thought it could abstain from explicitly condemning the Russian initiative, without nevertheless in principle denying its commitment to the rules set out in the Charter. These are facts whose political and legal analysis will require further reflection.

Whatever the case may be, the conduct of China is by far the most worrying. Making no secret of its intention to regain control of Taiwan by force if need be, China has sealed a de facto strategic alliance with Vladimir Putin’s Russia to counteract the power of the Western countries, of which the United States, beyond Donald Trump’s muddled presidency, remains the main guarantor. However, it is noteworthy that China is careful never to openly assert that it does not respect the principles of the Charter. On the contrary, it never misses an opportunity to proclaim its commitment to the search for peace, sometimes even by referring to the UN’s constitutive instrument.

Here we are clearly confronted with an area in which the legal analysis of State declarations must take due account of the political background in which they are asserted. Paul Valéry used to say that the real treaties are those which are concluded between afterthoughts and the same could in some cases be said of the invocation of the Charter in political discourse. Anyway, what the outbreak of war in Ukraine confirms is that, in times of acute crisis and most serious violations of some of the fundamental principles of international law, which are thus recognised by the international community as belonging to jus cogens, the Member States of the UN point to its Charter as the reference text par excellence. Another matter is to know whether everyone sees it as a ‘constitution’, giving in particular to this very term the same legally technical as well as symbolic meaning.

69 See ‘China’s Position on Russia’s Invasion of Ukraine’ (19 May 2022) US-China Economic and Security Review Commission; see also ‘China Insists it’s “not a Party” to Russia’s War with Ukraine’ (14 March 2022) Politico.

70 See ‘What Chinese Media is saying about Russia’s Ukraine’s War’ (3 April 2022) Vox.