

# **Jürgen Habermas and the Constitutionalisation of International Law: a Critical Analysis of the United Nations**

## **Overview**

The overarching purpose of my thesis is to critically assess the extent to which the post-Cold War period can be considered to represent a transition towards a more cosmopolitan form of humanitarian intervention, through an analysis of both the Responsibility to Protect (R2P) and the European Rapid Reaction Force (ERRF). The extent of this evolution will be deliberated by situating the cosmopolitan principles analogous to both R2P and the ERRF within Habermas' model of global constitutionalism, a paradigm predicated on the incremental expansion of international law and international regimes with the 'purpose' of establishing a cosmopolitan legal order. As will be discussed in this paper, the UN represents a significant development in the constitutionalisation of international law and subsequently can be understood to offer a potential 'blueprint' for the realisation of a *cosmopolitan condition*. R2P can be encompassed within the UN, reinforcing the collective obligation to secure international peace and protect human rights beyond the boundaries of states and, through embodying a constitutional innovation at the international level - however contentiously - has in principle perpetuated the appearance of a concept of *global* human rights and thus the recognition of individuals as subjects of international law. In the process - and despite substantial evidence to the contrary - R2P can be seen as continuing the evolution towards a cosmopolitan condition, strengthening the sense in which the UN embodies aspects of a global constitutional order resembling a politically-constituted world community of states and citizens. In this way, and as will be argued throughout the course of the project, one can be enthusiastic over the transition towards a more cosmopolitan form of humanitarian intervention in the post-Cold War era.

## **Habermas and the Constitutionalisation of International Law**

Habermas' theory of constitutionalisation with a cosmopolitan purpose draws upon two central tenets of Kant's *cosmopolitan condition*. Broadly speaking, these are the requisite for a collective community of states in order to promote international peace and security and the creation of an additional level of public, cosmopolitan right beyond the boundaries of sovereign states. Habermas is quick to acknowledge the legacy and prevalence of Kant's vision of a 'peaceful federation' of like-minded states which, broadly speaking, found credence at the end of the First World War through the creation of *the League of Nations*. As Habermas explains, the formation of the League in 1919 prepared the way for the first steps towards a constitutionalisation of international law and, significantly, placed the Kantian project on the political agenda for the first time.<sup>1</sup> However, Habermas is keen to stress the caveats attached to the League of Nations and, in the process, the limited nature of Kant's theory of constitutional international law. Indeed, the experience of the League of Nations and the subsequent outbreak of World War II in 1939 lead Habermas to postulate that

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<sup>1</sup> Habermas, J. (2006) "*The Divided West*", (Cambridge: Polity), p.156.

something further is required for the continuation of the Kantian project and thus the realisation of a cosmopolitan condition.

Habermas promulgates the attainment of some minimal conditions of cosmopolitan right,<sup>2</sup> which need to be furthered if the ‘possibility’ of a future cosmopolitan constitution is to be realised. This notion of cosmopolitan right in essence equates to the establishment of a system of cosmopolitan citizenship embedded within a broader legally-constituted world community. Integral to the establishment of this community - and an ensuing cosmopolitan legal order - is the process of constitutionalisation. Constitutionalisation, put simply, pertains to the growth of international law, the enlargement of global legal regimes and expansion of international organisations.<sup>3</sup> Constitutionalisation in this sense comes to represent a growing body of international law and norms which, over time, begin to resemble something like a global constitution, in that this legal order begins to have ‘compliance pull’ and a general recognition of being part of a growing rule of law. Habermas incorporates these core tenets of constitutionalisation within his paradigm of global constitutionalism, predicated on the extension of principles, norms and rules of modern constitutionalism<sup>4</sup> beyond the state with the goal of constructing an eventual cosmopolitan legal order.<sup>5</sup> For Habermas, it is through the establishment of supranational institutions concerned with the maintenance of international security and protection of human rights that the incremental process of constitutionalisation - and thus the expansion of international law and institutional regimes - can provide the stimulus for the establishment of a global ‘constitutional’ order, in turn laying the foundations for a legally-constituted world community.

Importantly, Habermas’ argues that the process of constitutionalisation is contingent upon an already-established ‘proto-constitution’ of international legitimacy<sup>6</sup> which, as he explains, is prevalent in the form of classical international law.<sup>7</sup> As Brown elaborates, it is from these proto-constitutional legal tenets that, for Habermas, duties and obligations to the international legal community become ‘reiterative’ or repeated principles for further supranational organisation.<sup>8</sup> According to Habermas, what is needed in light of the failure of the League of Nations and continued propensity for conflict between states - as well as the requisite to protect the population of a failing state from egregious violations of human rights by its own

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<sup>2</sup> Habermas’ overarching contention is that Kant’s idea of cosmopolitan right is as pertinent to our times as it was to Kant’s own. See Fine, R. & Smith, W (2003) ‘Jürgen Habermas’s Theory of Cosmopolitanism’, *Constellations* (Vol. 10(4)), p.469.

<sup>3</sup> Brown, G. (2012) ‘The Constitutionalisation of What?’, *Global Constitutionalism* (forthcoming), pp.4-6.

<sup>4</sup> According to Weiner *et al*, global constitutionalism has three key characteristics - constitution, constitutionalisation and constitutionalism. The latter element is concerned with addressing the broader connotations of intense globalisation. Indeed, for Habermas globalisation represents an ‘accommodating trend’ in the constitutionalisation of international law, limiting the power and influence of sovereign states and - although they remain the most important actors on the global stage - forcing them to increasingly direct their interests into new channels of ‘soft’ political influence, including international organisations (See Habermas, J. (2006) “*The Divided West*”, (Cambridge: Polity), pp.174-6).

<sup>5</sup> Weiner, A. *et al* (2012) ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’, *Global Constitutionalism* (Vol. 1(1)), p.8.

<sup>6</sup> *Ibid.*, p.7.

<sup>7</sup> Habermas, J. (2006) “*The Divided West*”, (Cambridge: Polity), p.133.

<sup>8</sup> Brown, G. (2012) ‘The Constitutionalisation of What?’, *Global Constitutionalism* (forthcoming), p.7.

government<sup>9</sup> - are supranational organisations or sources of public right that will help to equip the international community with the sanctioning powers required to implement and enforce its decisions.<sup>10</sup> Through the constitutionalisation of international law, the classical function of the state as the guarantor of security, law and freedom would be transferred to supranational organisations specialised in securing peace and implementing human rights worldwide.<sup>11</sup> For Habermas, what are required are legislative and adjudicative bodies that transcend the power of sovereign states and in essence place upon them a collective and legally-binding obligation to respect and apply their international laws and regulations, in the process helping to establish a 'global' community of states capable of taking political initiatives and executing joint decisions.<sup>12</sup>

Crucially, this expansion of international law and institutional regimes embedded within supranational organisations - and culminating in the establishment of a global constitutional order - also represents a socialisation process, with the experience of growing interdependency in an increasingly complex global society gradually altering the self-image of states and their citizens.<sup>13</sup> Through the demand to adapt to the new legal construction of the international community, nation-states and their citizens could potentially come to perceive themselves simultaneously as members of a larger political community.<sup>14</sup> As will become clear in one's analysis of the UN, this 'new legal construction' of the international community has been underpinned by the strengthening of the legal position of the individual legal subject.<sup>15</sup> In this way, it is through the influence and 'positive' impact of increased constitutionalisation on the human condition that states and in particular their citizens will begin to develop a sense of *patriotism* to the principles underpinning a global constitution, in the process acquiring an additional level of identification beyond their sovereign boundaries.<sup>16</sup> It is the change in self-perception of citizens that is particularly relevant to any discussion of *constitutional patriotism*<sup>17</sup> as, for Habermas, it is through forging an identification relationship between individuals and the principles underwriting a global constitutional order that a sense of global legal identity and thus cosmopolitan citizenship will begin to emerge.<sup>18</sup> It is constitutional patriotism, therefore, that provides the key ingredient and motivational element in the eventual establishment of a cosmopolitan legal order.

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<sup>9</sup> See Habermas, J. (2008) "*Between Naturalism and Religion*", (Cambridge: Polity), p.320

<sup>10</sup> Habermas, J. (2006) "*The Divided West*", (Cambridge: Polity), p.132.

<sup>11</sup> Habermas, J. (2008) "*Between Naturalism and Religion*", (Cambridge: Polity), p.332.

<sup>12</sup> Habermas, J. (2006) "*The Divided West*", (Cambridge: Polity), p.133.

<sup>13</sup> Habermas, J. (2006) "*The Divided West*", (Cambridge: Polity), p.177.

<sup>14</sup> Habermas, J. (2006) "*The Divided West*", (Cambridge: Polity), p.177.

<sup>15</sup> Habermas, J. (2008) "*Between Naturalism and Religion*", (Cambridge: Polity), p.334.

<sup>16</sup> For a precise definition of constitutional patriotism, see Brown, G. (2009) "Grounding Cosmopolitanism: from Kant to the Idea of a Cosmopolitan Constitution", (Edinburgh: Edinburgh University Press), p.171.

<sup>17</sup> See as above.

<sup>18</sup> See Brown, G. (2012) 'The Constitutionalisation of What?', *Global Constitutionalism* (forthcoming), pp.18-19 and similarly Brown, G. (2009) "Grounding Cosmopolitanism: from Kant to the Idea of a Cosmopolitan Constitution", (Edinburgh: Edinburgh University Press), p.171.

## **The UN as a Potential ‘Stepping Stone’ to the Establishment of a Cosmopolitan Order**

For Habermas, the UN represents a significant development in the constitutionalisation of international law and, importantly, is paradigmatic of the evolution from proto-constitutional legal tenets to the supranational organisations of a cosmopolitan order.<sup>19</sup> Importantly, the UN in principle places a collective obligation on states to maintain international peace and security that has been both complemented by and extended to the protection of human rights beyond the borders of sovereign states, propagating a concept of *global* human rights and thus the recognition of individuals as subjects of international law. Although further progress is required at the supranational level before the world organisation can be deemed to be moving positively in a cosmopolitan direction - as will become clear - for Habermas the UN can already be considered ‘a community of states and citizens’,<sup>20</sup> with both nation-states and their citizens subsequently perceived to represent the constitutional pillars of a legally-constituted world society.<sup>21</sup> In this way, one can discern that the UN can, in principle, be seen to reflect the foundations of a global constitutional order composed of something close to a legally-constituted community of nation-states. As a consequence, the constitutionalisation of international law at the level of the world organisation has the potential to alter the self-image of states and their citizens, in the process providing a blueprint or ‘stepping stone’ to the realisation of a cosmopolitan condition.

The postulation that the UN offers a plausible blueprint for the establishment of a cosmopolitan order is underpinned by Habermas’ assertion that the UN Charter can be interpreted as a global ‘constitution’, exemplified by its three defining characteristics:

- The explicit connection the Charter makes between securing peace and promoting human rights.<sup>22</sup> The UN Charter confers on the UN Security Council (UNSC) - and more specifically its permanent member states - the primary and ‘collective’ responsibility for maintaining international peace and security.<sup>23</sup> As Dan Sarooshi elaborates, it is in this way that the Charter can be understood to constitute a collective security system.<sup>24</sup> Therefore, the UN can be seen to be composed of a community of states obligated to maintain and secure international peace beyond their sovereign boundaries. Importantly, this requisite to safeguard international peace has been both informed and perpetuated by the protection of human rights within politically fragile states, underpinned by the Chapter VII mandates sanctioned in Rwanda, Somalia and Bosnia-Herzegovina as discussed in Chapter 2, as well as more recently military intervention in Libya.<sup>25</sup> Thus, through extending the collective obligation placed on states to secure peace to the protection of human rights, the UN has helped to

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<sup>19</sup> Habermas, J. (2006) *“The Divided West”*, (Cambridge: Polity), p.133.

<sup>20</sup> *Ibid.*, p.135.

<sup>21</sup> *Ibid.*, p.161.

<sup>22</sup> *Ibid.*, p.160.

<sup>23</sup> See Sarooshi, D. (1999) *“The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers”*, (Oxford: OUP), p.2.

<sup>24</sup> *Ibid.*, p.5.

<sup>25</sup> A discussion of the Libyan conflict - and more specifically its implications for R2P - will be provided in chapter 5.

propagate a concept of *global* human rights and thus the recognition of individuals as subjects of international law. In this way, the world organisation can also be understood to be composed of a community of citizens.

- The nexus between the prohibition on the use of violence and the realistic threat of prosecution and sanctions, underlined by Articles 42 and 43 of the Charter.<sup>26</sup> This relationship has been illustrated most recently by the conflict in Libya, where the UNSC imposed travel bans and asset freezes on numerous organisations and individuals based within the country in light of Gaddafi's large-scale violations of human rights.<sup>27</sup> The UN Charter makes provisions for sanctions in cases where this prohibition has been violated - once again predicated more broadly on the collective responsibility to maintain international peace and security - and, as the example of Libya highlights, will even use force in order to conduct police operations.<sup>28</sup> In this way, the various measures that the UN has at its disposal in order to address gratuitous acts of violence once again underline the collective obligations placed on states as members of a supranational organisation to maintain international peace and security, with the case of Libya reinforcing the nexus between securing peace and promoting human rights beyond the boundaries of sovereign states. Consequently, the UN can again be seen, in principle, to embody aspects of a global constitutional order composed of a legally-constituted community of states and their citizens.
- The inclusive and universal character of the Charter, paradigmatic of the world organisation more generally.<sup>29</sup> As Habermas argues, if conflicts are to be resolved peacefully then all states must be treated as concerned members of the international community, in the process transforming international conflicts into domestic ones.<sup>30</sup> This assertion is underlined by the 193 wide-ranging members that constitute the world organisation and thus are not only subject to but also protected by its international laws and regulations.<sup>31</sup> In this way, therefore, the UN Charter can again be interpreted as a global constitution that has laid the foundations of a legally-constituted world community, not only through the collective obligations placed on its permanent members to secure international peace but also by ensuring - at least in principle - that all member states and their citizens are safeguarded by its legally-binding covenants, further enhancing the recognition of individuals as subjects of international law.

As mentioned earlier, further progress is required at the supranational level before the world organisation can be deemed to be moving positively in a cosmopolitan direction, capable in practice of securing peace and promoting human rights in an effective and non-selective fashion.<sup>32</sup> In *Between Naturalism and Religion*, Habermas touches upon some of the reforms

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<sup>26</sup> *Ibid.*, p.163.

<sup>27</sup> UN Website (2012) "Security Council Approves 'No-Fly Zone' over Libya", <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm>, retrieved 6<sup>th</sup> February 2012.

<sup>28</sup> Habermas, J. (2006) *"The Divided West"*, (Cambridge: Polity), p.163.

<sup>29</sup> *Ibid.*, p.165.

<sup>30</sup> *Ibid.*, p.165.

<sup>31</sup> *Ibid.*, p.165.

<sup>32</sup> Habermas, J. (2006) *"The Divided West"*, (Cambridge: Polity), p.136.

already underway within the UN which, since 2004, have directed the political will towards a continuation of the Kantian project.<sup>33</sup> These reforms have been underpinned by the new collective human security agenda.<sup>34</sup> Habermas considers in particular the appearance of the High Level Panel on Threats, Challenges and Change put in place in 2003, which expedited the endorsement of the norm of the Responsibility to Protect (R2P). Significantly, R2P lends greater credence to Habermas' theory of constitutionalisation with a cosmopolitan purpose, placing a collective responsibility on the UN's permanent member states to protect in the event of egregious violations of human rights and international humanitarian law that sovereign governments have proved powerless or unwilling to prevent.<sup>35</sup> To put simply, R2P further illustrates how, at the level of the world organisation, the maintenance of international peace and security has been complemented by and extended to the protection of human rights beyond the boundaries of states. Through representing a further development in the constitutionalisation of international law - encapsulated by its incorporation within international humanitarian law<sup>36</sup> - R2P could be seen as continuing the evolution towards a cosmopolitan condition, strengthening the sense in which the UN embodies aspects of a global constitutional order encompassing a legally-constituted world community of states and citizens. Importantly, it is from this basis that one can be enthusiastic about the shift towards a more cosmopolitan form of humanitarian intervention in the post-Cold War period.

### **The UN: A World Community of States and Citizens?**

Habermas perceives the UN as part of the on-going evolution from classical international law to the supranational entities of a cosmopolitan legal order, with further reform still requisite if the world organisation is to effectively address breaches of international peace and gross violations of human rights at the global level. So, although at first glance the UN appears suggestive of a global constitutional order resembling something close to a legally-constituted community of nation-states, in practice the institution still has some way to go before it can be considered paradigmatic of Habermas' theory of constitutionalisation with a cosmopolitan purpose.

- States continue to preserve a monopoly over the use of military force at the international level. In practice, the UNSC has to delegate its Chapter VII powers to entities - principally its permanent member states - as it possesses no enforcement capacity.<sup>37</sup> As Sarooshi elaborates, the UNSC has no military force at its disposal that it can call upon directly to carry out enforcement action.<sup>38</sup> As a consequence, and although legally obligated to safeguard international peace and security, the permanent members of the UNSC could in practice abrogate the use of force as

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<sup>33</sup> Habermas, J. (2008) *"Between Naturalism and Religion"*, (Cambridge: Polity), p.313.

<sup>34</sup> See Woodhouse, T. & Ramsbotham, O. (2005) 'Cosmopolitan Peacekeeping and the Globalisation of Security', *International Peacekeeping* (Vol. 12(2), p.148.

<sup>35</sup> *Ibid.*, pp.26-7.

<sup>36</sup> See both Bellamy, A. (2011) *"Global Politics and the Responsibility to Protect: from Words to Deeds"*, (New York: Routledge), p.34 & Zifcak, S. (2010) 'The Responsibility to Protect' in Evans, M (ed.), *"International Law"* (Oxford: OUP). p.524.

<sup>37</sup> Sarooshi, D. (1999) *"The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers"*, (Oxford: OUP), p.4.

<sup>38</sup> *Ibid.*, p.4

authorised under Chapter VII of the UN Charter. Crucially, this has been the case in such instances as Rwanda and Kosovo and more recently in Syria, where both China and Russia rejected a Security Council Resolution condemning the violence committed by Syrian forces against the civilian population. These examples illustrate the negative connotations attached not only to the UN's collective responsibility to maintain international peace and security but also to its concern with enforcing and applying human rights beyond the boundaries of sovereign states. In the process, the case of Syria - coupled with widespread incredulity over the extent to which the norm represents a constitutional innovation at the international level<sup>39</sup> - also bring into question the sense in which R2P has perpetuated Habermas' claim that the UN offers an embryonic blueprint for the establishment of a cosmopolitan condition, thus assuaging enthusiasm over the extent to which the post-Cold War era can be seen to have witnessed a transition towards a more cosmopolitan form of humanitarian intervention.

- The UN's dependency on the general *will* of the UNSC's permanent member states. In an earlier chapter, this project examined how the various interests of the permanent members of the UNSC both individually and collectively contributed to the UN's failure to secure international peace and, more importantly, address large-scale violations of human rights, in Rwanda, Somalia, Bosnia-Herzegovina and Kosovo. Significantly, this trend has extended into the 21<sup>st</sup> Century, with the logic of independent state interests continuing to trump the logic of humanity.<sup>40</sup> Furthermore, and as will again be elaborated upon in one's discussion of R2P in chapter 5, the pervasiveness of state self-interest in undermining the collective responsibility amongst the UN's members to address egregious violations of human rights has been perpetuated by the conflict in Syria, where Russia has so far refused to sanction military intervention ostensibly in view of its long-running ties with the Assad regime.<sup>41</sup> As will become clear, the conflict has further weakened the norm of R2P and, more precisely, its reiteration of the collective commitment to protect and promote human rights beyond the demarcations of sovereign states.
- The power of veto possessed by the UN's permanent members. Sarooshi explains that this power is perceived to be an important institutional limitation on the use of Chapter VII enforcement powers by the UNSC.<sup>42</sup> As such, the power of veto acts as the primary restraint and check against excessive interventionism by the Security Council.<sup>43</sup> Any decision to sanction the use of Chapter VII powers - employed to address large-scale human rights violations in Rwanda, Somalia, Bosnia-Herzegovina and, most recently, in Libya - is wholly contingent upon the acquiescence of all

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<sup>39</sup> See Zifcak, S. (2010) 'The Responsibility to Protect' in Evans, M (ed.), "*International Law*" (Oxford: OUP), p.524.

<sup>40</sup> Barnett, M. & Weiss, T. (2011) "Humanitarianism Contested: Where Angels Fear to Tread", (Abingdon: Routledge), p.93.

<sup>41</sup> Kocadal, O. (2011) "R2P and Syria: Why Inaction?". <http://www.thinkir.co.uk/r2p-and-syria-why-inaction/>, retrieved 6<sup>th</sup> February 2012.

<sup>42</sup> Sarooshi, D. (1999) "*The United Nations and the Development of Collective Security: the Delegation by the UN Security Council of its Chapter VII Powers*", (Oxford: OUP), p.39.

<sup>43</sup> *Ibid.*, p.39.

permanent members of the Council, who can choose to veto a proposed sanction or resolution at any time. The decisions by Russia and China to veto potential UN-led humanitarian intervention in Kosovo in 1999, comprehensive sanctions against Zimbabwe in 2008 and proposed resolutions against Syria in 2012 all help to emphasise this assertion. As will again become clear, such a system of conditionality - reinforced by the vetoing of proposed sanctions in Syria by Russia and China - has further attenuated the sense in which R2P can, in practice, be understood to have proliferated the concept of global human rights and thus the recognition of individuals as subjects of international law, in the process failing to strengthen the platform for the development of constitutional patriotism at the international level.

## **Conclusion**

In principle, then, the UN can be understood to embody the foundations of a global constitutional order resembling something analogous to a politically-constituted world community of states and citizens. Through the defining characteristics of its global constitution, the collective and legally-binding commitments placed on nation-states to secure international peace have been reinforced and extended to the protection of human rights beyond their sovereign boundaries, providing a context in which a sense of constitutional patriotism could manifest at the global level and thus offering a prospective blueprint for the establishment of a cosmopolitan legal order. Furthermore, through enhancing the recognition of individuals as subjects of international law R2P can, in principle, be understood to have proliferated Habermas' claim that the UN provides a plausible model for the attainment of a condition of cosmopolitan right. Importantly, it is from this basis that one can be enthusiastic about the shift towards a more cosmopolitan form of humanitarian intervention in the post-Cold War period.

However, in practice the world organisation still has some way to go before it can be considered to provide a sufficient stepping stone to the establishment of a cosmopolitan order. State control over the use of military force, state self-interest and retention of the power of veto by the UN's permanent members all serve to qualify perceptions of the UN as an organisation that imposes a collective obligation on its members to safeguard international peace and security and enforce *global* human rights. All three of these caveats subsequently weaken Habermas' claim that the UN can offer a potential blueprint for the creation of a cosmopolitan legal order. Furthermore, the UN's impotence in the face of egregious violations of human rights in Syria has had a detrimental effect on the principle of R2P which, consequently, has ostensibly failed to reinforce the collective commitment to maintain international peace and protect human rights in endemically weak states. Coupled with ubiquitous contention over its place in international law, one can extrapolate that in practice, R2P has so far proved inadequate in advancing the concept of global human rights and thus providing a further platform for the development of constitutional patriotism at the international level, in the process assuaging optimism over the evolution towards a more cosmopolitan humanitarian order in the post-Cold War era.