

FEDERATION IS NOT ONLY ABOUT FUNCTION: WHERE A NEO-FEDERALIST PLAN FOR GLOBAL CONSTITUTIONALISM FALLS SHORT

GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM BY JEAN L COHEN (CAMBRIDGE UNIVERSITY PRESS, 2012) 453 PAGES. PRICE US\$37.99 (PAPERBACK). ISBN 9780521148450.

This essay engages with Jean Cohen's magnum opus Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism by focusing on her global neo-federalist plan. It is suggested that Cohen stands out in the debate surrounding global constitutionalism with her post-statist, function-oriented notion of federation as the political form for the globalising world order. Yet, when it comes to legality, Cohen returns to the theme of liberal legalism. I make a twofold criticism of Cohen's constitutional prognosis. First, I argue that echoing past reform movements in international law, Cohen focuses on a rule-oriented, judge-centred conception of legality. As a result, she gives short shrift to the political nature of the existing United Nations-centred international legal order in which a state of exception (or emergency) still sits alongside a seemingly permanent state of legal normalcy. Second, Cohen fails to reckon that a federal union of security and peace is not only about function. While her neo-federalist plan may well apply to other governance issues, it fails to do justice to the role of the UN Security Council ('UNSC') in global peace and security, thereby undermining her plan to rein in the UNSC as the stepping stone to a constitutionalised world order.

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I INTRODUCTION

Globalisation has made a revolutionary impact on the way we think about the world order. The centre stage that the state and sovereignty occupied in the post-1648 international legal order has been shaken to its foundations.¹ On the one hand, the domination of states in international law has been challenged from

¹ See, eg, Oscar Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1998) 36 *Columbia Journal of Transnational Law* 7.

above and below at once: international organisations have mushroomed and grown into the parallel players of states on the international stage;² a concern with individuals has come to the fore in the development of international law, to which international human rights law evidently testifies.³ On the other hand, the concept of sovereignty, which has long been regarded as the cornerstone of the international legal order, is blamed for hampering the emergence of a new world order. In other words, the new world order that would suit the needs of the globalising world has to be liberated from the yoke of sovereignty, resting on a reshaped concept of legitimacy and legality.⁴ Yet, the road ahead after sovereignty is unclear.⁵

As the question of the post-Cold War world order is being sharpened in the face of the ongoing Syria crisis and Kenya's initial action to withdraw from the International Criminal Court ('ICC'),⁶ Jean Cohen's *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* ('*Globalization and Sovereignty*')⁷ is a welcome intervention. As is suggested in the title of the book, Cohen ambitiously intends to offer a comprehensive prognosis of the constitutional question in global governance by engaging with the current debate surrounding global constitutionalism.⁸ On the one hand, she forcefully defends the role of sovereignty in the changing world order but reshapes it to fit into a constitutionalised international legal system. On the other, she reworks the conceptual framework of federalism, proposing a non-statist federation as the political form of global constitutionalism. With this double constructivist innovation, Cohen claims to roll out a political and legal blueprint for a pluralist, non-hegemonic globalising world order underpinned by constitutionalism with a post-statist conception of sovereignty.⁹ To do justice to the current discourse on global constitutionalism and thus to better position ourselves towards the ongoing development of the new world order, we must take *Globalization and Sovereignty* seriously.

Equipped with her interdisciplinary expertise, Cohen addresses virtually all the important questions of the emerging world order in her magnum opus on

² James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 116–17, 166–99.

³ *Ibid* 634–70.

⁴ See Michael J Kelly, 'Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver" — Revolutionary International Legal Theory or Return to Rule by the Great Powers?' (2005) 10 *UCLA Journal of International Law and Foreign Affairs* 361.

⁵ See, eg, Neil Walker (ed), *Sovereignty in Transition* (Hart, 2003).

⁶ While the Syrian crisis continues, Kenya's Parliament voted to withdraw from the ICC on 5 September 2013: see Nicholas Kulish, 'Kenyan Lawmakers Vote to Leave International Court', *New York Times* (online), 5 September 2013 <http://www.nytimes.com/2013/09/06/world/africa/kenyan-lawmakers-vote-to-leave-international-court.html?_r=0>.

⁷ Jean L Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, 2012) ('*Globalization and Sovereignty*').

⁸ See, eg, Ming-Sung Kuo, 'On the Constitutional Question in Global Governance: Global Administrative Law and the Conflicts-Law Approach in Comparison' (2013) 2 *Global Constitutionalism* 437.

⁹ A terminological clarification is due here. 'Statist' refers to the Westphalian model of states underpinned by an absolutist conception of sovereignty (the absolutist conception of sovereignty will be further discussed later). Notably, in Cohen's post-statist or non-statist federalist model, the state remains one of the main players in the international system, although it rests on a reformed conception of sovereignty, which I call 'post-statist'.

global constitutionalism. Instead of engaging with her on all the contentious issues, in this essay I shall focus on her neo-federalist plan for the world order and its constitutional implications. I shall show that Cohen's constitutional prognosis evokes liberal legalism, which has been the main theme in the past reform movements in international law.¹⁰ As will be pointed out, echoing her liberal predecessors, Cohen's focus on a rule-oriented, judge-centred conception of legality keeps her from doing justice to the political nature of the existing international legal order, in which a state of exception (or emergency) still sits alongside a seemingly permanent state of legal normalcy. Without tackling this inconvenient political world order head-on, Cohen's constitutional prognosis boils down to another passionate call for a constitutional utopia. Adding to her falling short in legal imagination, Cohen fails to reckon that a federal union of security and peace, which centres on the United Nations Security Council ('UNSC') and lies at the heart of her global neo-federalist plan, is not only about function. Resting federation as a political form entirely on function precludes her from escaping the predicament facing her liberal predecessors in international law reform. To see how Cohen's global neo-federalism displaces 'the political',¹¹ let us start with a close inspection of how she comes up with the political form in her advocacy for a constitutionalised global legal order.

II COHEN'S GLOBAL NEO-FEDERALISM: RECRAFTING CONSTITUTIONS IN A DUALISTIC WORLD ORDER

Cohen situates the constitutional question in global governance in what she calls the 'dualistic world order'.¹² As the importance of international organisations continues to increase, Cohen notes that they are no longer derivatives of states, the classical authors of international law and the primary players in the international system. Rather, they assume more and diverse functions and circumvent states step-by-step in global governance, growing into what she calls 'global governance institutions' ('GGIs').¹³ As GGIs become more equal players in the international system, Cohen argues that the world order turns into a dualistic one in which the interrelationships among distinct GGIs and states lie at the core of the constitutional question in global governance.¹⁴ This is the underlying theme of *Globalization and Sovereignty*.

Globalization and Sovereignty comprises five chapters besides its introduction and conclusion.¹⁵ In the first two chapters, Cohen lays out her theoretical position. In Chapter One, she critically examines the differing positions in the current debate on global constitutionalism along the divide of

¹⁰ For a discussion on legal liberalism and past reform movements in international law, see Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 1–3.

¹¹ My use of 'the political' here refers to Carl Schmitt's work: Carl Schmitt, *The Concept of the Political* (George Schwab trans, University of Chicago Press, 1996) [trans of: *Der Begriff des Politischen* (first published 1927, 1932 ed)].

¹² Cohen, above n 7, 5.

¹³ *Ibid* 4–5.

¹⁴ *Ibid* 5, 66.

¹⁵ Notably, Cohen meticulously lays out her position and main arguments in *Globalization and Sovereignty's* introduction.

constitutionalism and radical legal pluralism.¹⁶ Echoing her predecessors in the pluralist camp of global constitutionalism, what Cohen envisages in the age of globalisation is a world of sovereign equality and value pluralism instead of an overarching constitutional order, as some global constitutionalists have suggested.¹⁷ Unlike radical pluralists,¹⁸ however, Cohen embeds her envisaged pluralist world order in constitutional values and principles as a solution to legal conflicts looming from a radical pluralist world. To follow up on her theoretical justification for a sovereignty-based conception of constitutional pluralism, she takes steps further to flesh out the political form for her global constitutional project, suggesting that global constitutionalism is not only an ideal but also a working plan for a better world order. In Chapter Two, she proposes a reformed conception of federalism (or federation), which I call global neo-federalism, for the dualistic world order. In the rest of the book, she tests her theoretical framework against international practices by presenting three case studies: the development of international human rights law (Chapter Three), the controversies surrounding the United Nations-administered humanitarian occupation in the post-Cold War era (Chapter Four), and the expansive role of the UNSC in the global legislative responses to terrorism (Chapter Five). In this section, I shall first uncover the real intent behind Cohen's idea of federation as a partial function sector:¹⁹ to disable 'the political' by reworking political unions along the line of functionalism. After revealing the goal of Cohen's global neo-federalism, I will show how she conceives the legitimacy of her constitutionalised world order.

A *Disabling 'the Political': Federation as a Partial Function Sector*

Cohen presents her own version of constitutional pluralism with a clear awareness that a constitutionalised world order takes a political form. Without tackling the political question, the project of global constitutionalism is 'legalistic' and will not get off the ground.²⁰ Yet, the relationship between constitutional ordering and political form is overshadowed by the statist tradition of constitutionalism. That constitutional ordering cannot do without statehood haunts those who wish to project constitutionalism beyond the state.²¹ This is the underlying suspicion about global constitutionalism for its connotation of a global super-state.²² To resolve the dilemma between a non-constitutionalised

¹⁶ Cohen, above n 7, 45–65.

¹⁷ The foremost advocate for an overarching view of global constitutionalism is Bardo Fassbender, see Bardo Fassbender, 'The *United Nations Charter* as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529. Cohen notes the shared assumption of the existence of 'an institutionalized international community' among many global constitutionalists, including Fassbender, Christian Tomuschat and Bruno Simma: Cohen, above n 7, 47, 338 n 141.

¹⁸ Cohen names Nico Krisch, Paul Schiff Berman and David Kennedy as exemplars of the advocates for radical legal pluralism: *ibid* 342 n 207.

¹⁹ For Cohen's idea of federation as partial function, see Part II(A) of this review essay accompanied by nn 47–50.

²⁰ Cohen, above n 7, 137.

²¹ See, eg, Ulrich K Preuß, 'Equality of States — Its Meaning in a Constitutionalized Global Order' (2008) 9 *Chicago Journal of International Law* 17.

²² *Ibid* 29.

world order trapped in the Westphalian system and a hegemonic world state, Cohen pins her hopes on federalism.

It is no secret that federalism has long been the rallying call for those who dare to envisage a new world order that would not be mired in the global state of nature amidst sovereign states as Hobbes notoriously suggested.²³ Kant's federalist prescription for 'perpetual peace' is one of the most noted examples.²⁴ Yet, as Cohen incisively points out, the debate over a worldwide federalism has been absorbed into a related but separate debate: is a federated world governance structure a state or not? If it suggests a state, turning to federalism will not point the way out in that it will remain liable to the same old criticisms of tyranny or dictatorship that have been launched on a perceived world state. In contrast, if a federated global governance lies on the opposite side, world federalism seems to be less innovative than expected as the envisaged world order will amount to a global confederation, or a more institutionalised international organisation consisting of sovereign states, if you like. Viewed in this way, federalism itself is stranded in the state-centric understanding of political orders.²⁵

Specifically, the state-centric understanding of political orders is tied to what Cohen calls a 'positive' conception of sovereignty. Tracing roots back to Bodin's classical doctrines, a positive concept of sovereignty underlay the Westphalian paradigm of statehood in resisting the universal claims made by the Holy See or the Holy Roman Empire.²⁶ On this view, a sovereign state is considered unlimited in competence as sovereignty refers to 'a property of state power', the content of which cannot be definitively registered.²⁷ Moreover, sovereignty is hardened into an absolutist concept, associated with domination and hegemony,²⁸ while a state internally organised in accordance with federalism remains a sovereign state.²⁹ A world order of sovereign states seems doomed to a permanent state of war only to be curbed by the balance of power.³⁰

Yet, the concept of sovereignty is not entirely valueless as it was constructed with an eye to shielding the nascent self-governing national dominions from the intrusion of the Pope and the Emperor in the 17th century. The underlying principles of nonintervention and domestic jurisdiction in modern international law indicate the bright side, as opposed to the dark images of domination and

²³ Ibid 29–30. For a discussion on international relations as a Hobbesian state of nature, see Charles R Beitz, *Political Theory and International Relations* (Princeton University Press, 1979, 1999 ed) 15–49.

²⁴ Immanuel Kant, *To Perpetual Peace: A Philosophical Sketch* (Ted Humphrey trans, Hackett, 1983) [trans of: *Zum ewigen Frieden* (first published 1795)].

²⁵ Cohen, above n 7, 82.

²⁶ Ibid 27–8.

²⁷ See Ming-Sung Kuo, 'Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape?' (2013) 26 *Canadian Journal of Law and Jurisprudence* 341, 369.

²⁸ Cohen, above n 7, 27–8.

²⁹ Ibid 82.

³⁰ Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G L Ulman trans, Telos Press, 2003) 188–90 [trans of: *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (2nd ed, 1974)]. See also Preuß, 'Equality of States', above n 21, 28–9.

hegemony, of the classical conception of sovereignty.³¹ To keep up the brightness of sovereignty without being tainted with its dark side, Cohen proposes a reformed concept of sovereignty by reconstructing it through a negative understanding. Departing from the ‘positive’ conception of sovereignty, Cohen argues that the core of sovereignty does not lie in the contents or ‘marks’ of sovereignty, but in precluding external domination.³² Seen in this light, sovereignty underpins self-determination and political autonomy:³³ a world of sovereign states is not one of domination and conflict but one of political freedom and equal respect instead. Cohen argues that the principle of sovereign equality — a cardinal principle of contemporary international law — is rooted in this reformed conception of sovereignty.³⁴

Through the lens of negative sovereignty, Cohen is able to overcome the predicament resulting from an absolutist conception of sovereignty by suggesting a version of global constitutionalism in which state sovereignty can be reformed and the principle of sovereign equality will remain intact.³⁵ Moreover, this reformed conception of sovereignty paves the way for a new conceptual framework in which, freed of the state-centric understanding of political orders, federalism is reconstructed as a political solution to the dualistic world order. Specifically, as a sovereign state is not underpinned by the positive (or absolutist) conception of sovereignty, it is no longer regarded as the exclusive holder of powers and competences of a sovereign nature.³⁶ States and GGIs are thus not set apart as two distinct categories of the exercisers of political powers. Rather, they refer to political orders involved in global governance with varying degrees of integration.³⁷ In this way, Cohen breaks federalism free from the established typology in which it is defined against the federal state vis-a-vis confederation schema.³⁸ Thus, she paves the way for a political form between domination, which the Westphalian paradigm of sovereign states epitomises, and disorder, with which some scholars associate international relations.³⁹

According to Cohen, the ‘constitutive principles’ of federalism, which have been overshadowed in the standard federal state vis-a-vis confederation schema,⁴⁰ are ‘non-hierarchy (normative), associative polycentricity (structural), shared rule and self-rule (normative and structural)’.⁴¹ Constituted in this way, the relationship between the federal body of governance and its component units in a federalist political arrangement is based on mutual agreement, while neither the federal body nor any component unit holds the ultimate ‘property of state power’ that lies at the heart of a positive conception of sovereignty. Rather, they

³¹ Cohen, above n 7, 29.

³² Ibid 66. For the marks of sovereignty and its relationship between sovereign powers, see Kuo, ‘Discovering Sovereignty in Dialogue’, above n 27, 369.

³³ Cohen, above n 7, 67–8.

³⁴ Ibid 67.

³⁵ Ibid 69–70.

³⁶ Ibid 66.

³⁷ See *ibid* 143–4.

³⁸ Ibid 102–4, 150–3.

³⁹ See, eg, Kenneth N Waltz, *Realism and International Politics* (Routledge, 1st ed, 2008).

⁴⁰ See Cohen, above n 7, 103.

⁴¹ Cohen, above n 7, 112.

are engaged in a continuing negotiation over the demarcation of their competences. Moreover, the autonomy and identity of component units are safeguarded from being turned into the federal body's subordinate parts. Thus, the political form that brings the federal body and component units together in a genuine style of federalism — which Cohen calls 'federation' or 'federal union' — stands apart from a federal state in which the federal body claims a higher status than its component units. Projected onto the globalising world, a federation comprising GGIs and sovereign states seems to indicate the future of the dualistic world order.

Thus far, Cohen's advocacy for federalism as the way forward corresponds to Carl Schmitt's perceptive distinction between federation and federal states as the latter are regarded as embedded in a statist conception of sovereignty.⁴² Yet, Cohen parts company with Schmitt with respect to the durability of federation. Schmitt was sceptical about whether federation could hold up as a distinctive political form with the question of sovereignty permanently undecided: in view of the experience of the United States, Schmitt observed her transformation into a federal state from a federal union following the end of the Civil War as a testimony that the question of sovereignty could not be forever deferred without a final decision.⁴³ Thus, federation is unstable and even transitional in nature, despite being a distinct political form.⁴⁴ In response, Cohen observes that Schmitt's scepticism stems from his 'switch ... from an analytical to a participant perspective',⁴⁵ thereby blunting the sharpness of his theorisation of federation as a distinctive political form. As Schmitt stepped into contemporary politics, he slipped back to the statist understanding of sovereignty in his (mis)diagnosis of the stability of federation, substituting homogeneity for the constitutive principles of federalism.⁴⁶

In contrast, from what she calls the 'observer's' 'external perspective', Cohen defends federation as a durable political form.⁴⁷ Following on from her post-statist conception of sovereignty,⁴⁸ Cohen defines federation in a functionalist manner. In a federation, neither the federal body nor its components are all-purpose political orders. Unlike the Westphalian state, a global federal union — which Cohen calls the 'global ensemble'⁴⁹ — and its constituent federal body are created for certain purposes. Thus, their competence is not unlimited but rather defined by the purpose for which they are created.⁵⁰ Moreover, as

⁴² Ibid, 121–4, 140.

⁴³ Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer trans and ed, Duke University Press, 2008) 390–2 [trans of: *Verfassungslehre* (first published 1928)]. For the changing character of the United States after the Civil War, see generally George P Fletcher, *Our Secret Constitution: How Lincoln Redefined American Democracy* (Oxford University Press, 2001).

⁴⁴ Schmitt, *Constitutional Theory*, above n 43, 392–5.

⁴⁵ Cohen, above n 7, 131.

⁴⁶ Ibid 132–3.

⁴⁷ Ibid 131.

⁴⁸ To dissociate herself from Schmitt's statist view of sovereignty, Cohen characterises her approach to federalism as anti-sovereignty, although she defends a reformed conception of sovereignty in a federated dualistic world order: *ibid* 136–50.

⁴⁹ Ibid 141.

⁵⁰ Ibid.

component units, sovereign states in a federation also deviate from the Westphalian paradigm, according to which some competences of states are considered too important to be pooled together under a federation. From Cohen's global neo-federalist perspective, states are no longer all-purpose either, as their sovereign claim extends no further than the radius of political autonomy, while the demarcation of competence between states and the federal body is decided in terms of the purpose of a global federation.⁵¹ Neither the federal body nor component units nor their composite federation are all-purpose. In this way, the sovereignty question is not so much deferred as dissolved, rescuing federation from the instability as Schmitt suggested.

Through this non-statist lens, GGIs and states function as the federal body and component units of a global federation. Take the UNSC, Cohen's prime example.⁵² The UNSC as a GGI is not all-purpose but an arrangement among sovereign states for the sake of global security and world peace. Only for that purpose can the UNSC — as the federal body of the global federation of security and peace — claim a higher status than sovereign states, which remains subject to the principles of constitutionalism. The UNSC has no otherwise legitimate or legal right to intervene and thus to encroach on the autonomy of sovereign states. In other words, the UNSC and the UN member states jointly constitute a federation of security and peace.⁵³ Thus, a global federation based on 'a constitutive "principle of incompleteness"',⁵⁴ as opposed to a Westphalian sovereign state underpinned by a comprehensive constitution,⁵⁵ seems to provide the political form in which the dualistic world order can be constitutionalised.⁵⁶

Notably, while a function-defined federation is able to accommodate the dualistic order without turning into a global super-state at the expense of equal sovereignty among its component states, all political units in such an arrangement — the federal body, component units and the composite federation — are dispossessed of the property of state power that underlies the absolutist conception of sovereignty and thus become partial.⁵⁷ Unlike Westphalian sovereign states of full competence, a global federation as a partial function sector is incapable of styling itself on political decisionism, which features in Schmitt's (in)famous friend/enemy distinction.⁵⁸ Put differently, by virtue of a function-oriented reconstruction of federalism, Cohen not only suggests a political form for a constitutionalised world order but also displaces 'the political' from the post-statist federation. As the existential conception of 'the political' lies at the heart of traditional international relations and renders

⁵¹ Ibid 143–5.

⁵² Ibid 18, 45.

⁵³ Ibid 270, 281.

⁵⁴ Ibid 140. See also Olivier Beaud, *Théorie de la Fédération [Theory of Federation]* (Presses Universitaires de France, 2007) 65.

⁵⁵ For the idea of comprehensive constitution in sovereign states, see Dieter Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, 2010) 3, 7–11.

⁵⁶ Cohen, above n 7, 139–40. For the relationship between a sovereign state and the idea of comprehensive constitution, see Grimm, above n 55.

⁵⁷ Cohen, above n 7, 142.

⁵⁸ Schmitt, *The Concept of the Political*, above n 11, 26.

international law impotent,⁵⁹ Cohen's global neo-federalist project seems to tame the conflict-prone international relations by the founding of a 'post-political' world order.

B *Rethinking Constitutional Legitimacy: Constitutional Pluralism and the World of Non-Statist Federal Unions*

Federation is more than a political form. According to Cohen, federation also suggests a mode of legitimacy for a constitutionalised world order.⁶⁰ As has been noted above, a global federation comprises three parts: the composite federation, the federal body and the federated component states. To see how this tripartite political form of federation plays out in constitutional terms, let us take a closer look at the distinction between a federal state and federation again.

Echoing Schmitt's characterisation of the US constitutional arrangement before the Civil War, Cohen observes that the antebellum *US Constitution* conceived a federal union, not a federal state. Reading the constitutional provisions closely, she argues that the constitution played a double role. First, it functioned as the constitution of the federal government: arts I, II and III defined the competence of the three branches of the federal government. In addition, the *US Constitution* doubled as the constitution of the US federal union, steering the relationship between states and that between the federal government and states. At the centre of this second role of the *US Constitution* was the entrenched status of state representation in the Senate as stipulated in art V.⁶¹ As states functioned in relation to, but were not absorbed into, the US federal union, to gain a full picture of how the federal union worked in constitutional terms requires taking into account state constitutions. Taken together, the constitutional framework governing the US federal union was a tripartite constitutional compound comprising the federal constitution in its double role and state constitutions.⁶²

This tripartite understanding of the US constitutional arrangement stands in stark contrast with the standard account of the federal structure of the *US Constitution*. On this view, the end of the Civil War, followed by the ratification of the *Reconstruction Amendments (XIII–XV)* and other nation-building measures, has led to the transformation of the US as a federation into a federal state.⁶³ The *US Constitution* is regarded as the federal constitution, while state constitutions are subjected to its scrutiny.⁶⁴ Granted, it requires further reading of

⁵⁹ See Paul W Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia University Press, 2011) 43–6, 54–7.

⁶⁰ Cohen, above n 7, 138.

⁶¹ *Ibid* 127.

⁶² Cf *ibid* 124–5, 141–2.

⁶³ *Ibid* 128–9. For the postbellum state-building in the US, see generally Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (Cambridge University Press, 1982).

⁶⁴ The federal pre-emption of state constitutions is stipulated in the so-called supremacy clause:

This *Constitution*, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the *Constitution* or Laws of any State to the Contrary notwithstanding.

United States Constitution, art VI, cl 2.

state constitutions to get a sense of how the US federal state works as an integrated political form. Nevertheless, state constitutions are secondary to the federal one. In other words, the federal constitution and state constitutions exist in a hierarchical relationship in which state constitutions are even inferior to federal statutes. As a federal state, the US derives her constitutional legitimacy from the constituent power of ‘We the People of the United States’.⁶⁵

In contrast, in the tripartite understanding of the antebellum US constitutional arrangement, the status of state constitutions was not subordinate to the federal one. Instead, both were equal and indispensable to the functioning of the constitutional compound of the US federation. Underpinning this constitutional compound is the contestation, dialogue and compromise between different constitutional components.⁶⁶ Cohen observes that contestation within the perimeters of the constitutional compound is a way to strike equilibrium among distinct constitutional units without ending up with the federal constitution or state constitutions standing out as the dominant one. From this perspective, the legitimacy of the constitutional compound of federation pivots on the heterarchical relationship between state constitutions and the federal constitution in its double function instead of a composite *demos*.⁶⁷ This is regarded as emblematic of constitutional pluralism.⁶⁸

Correspondingly, through the lens of the tripartite constitutional compound, the constitutional arrangement of a global federation consists of the constitution of the federal body in its double function and those of the component states. Take the UNSC-centred global federation of security and peace again. In this tripartite constitutional compound, the *Charter of the United Nations* (‘*UN Charter*’)⁶⁹ is not only the constitution of the UNSC but also doubles as the constitutional framework governing the relationship between the member states and the UNSC, functioning as the constitution of the global federation. Continuing to be the only source of any UNSC-sponsored international security forces, UN member states are central to the functioning of the global federation of security and peace and thus must act in accordance with their constitution. Absent a global *demos*, the legitimacy of the constitutional compound of the UNSC-centred global federation is constructed on the model of constitutional pluralism underpinned by the contestation and negotiation between state constitutions and the *UN Charter* in its double function.⁷⁰

⁶⁵ ‘We the People of the United States ... do ordain and establish this *Constitution* for the United States of America’: *US Constitution* Preamble. See also Ming-Sung Kuo, ‘Cutting the Gordian Knot of Legitimacy Theory? An Anatomy of Frank Michelman’s Presentist Critique of Constitutional Authorship’ (2009) 7 *International Journal of Constitutional Law* 683.

⁶⁶ Cohen, above n 7, 140–5.

⁶⁷ *Ibid* 145–9.

⁶⁸ See Daniel Halberstam, ‘Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 326, 331–6.

⁶⁹ *Charter of the Nations* (‘*UN Charter*’).

⁷⁰ Cohen, above n 7, 291–301. Cf Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2010) 55–6, 85–103.

At the core of this constitutional characterisation of the world order of non-statist federal unions, is the substitution of the internal/external distinction for the international/municipal distinction in the classical legal thinking. Framed by the international/municipal distinction, the effect of international law is stuck in the monism vis-a-vis dualism debate. On this view, either domestic law is absorbed as part of the international legal system, or international law rests efficacy on the goodwill of each sovereign.⁷¹ Instead, in the federated world order, the relationship between states and the federal body is regarded as 'internal'. Accordingly, the federal constitution guarantees that the constitutional identity and political autonomy of each component state be protected from the intrusion of the federal body without undermining the functioning of the global federation.⁷² In the constitutional compound of a global federation, states and GGIs coexist and interact with each other according to constitutional principles rather than interest and power. Yet, when it comes to the 'external' relations, the objective of the federal constitution shifts to make sure that the purpose of the federation and the identity of the constitutional compound be preserved vis-a-vis other federations.⁷³ As a whole, in this federated world order, constitutional legitimacy pivots on the interaction between distinct constitutional units according to the varying degrees of integration. A world of global federations is a constitutionalised order without a global *demos* but with *demoi*.⁷⁴

III LIBERAL LEGALISM REDUX: WHEN LEGAL IMAGINATION RUNS OUT

As indicated in the title of the book, Cohen aims to tackle both the legal and political challenges facing global constitutionalism. If *Globalization and Sovereignty* points to the way forward for the political form of global constitutionalism, it falls short on the legal dimension. As will be discussed below, the conception of legality Cohen embraces for a federated world order evokes the features of liberal legalism. First, Cohen's portrayal of the content of global constitutionalism turns out to be rule-oriented. Secondly, the functioning of constitutional pluralism as a way of delivering constitutional legitimacy in the pluralist legal landscape centres on judges. Thirdly, conceived in this liberal mindset, legality is rendered incapacitated as the underlying political nature of the contemporary international legal order is left unaccounted for and thus legally untamed. Let us start with Cohen's rule-oriented constitutional reform.

⁷¹ Cohen, above n 7, 33–7.

⁷² Ibid 141–2.

⁷³ Ibid 144. See also Miguel Poiars Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 356, 375–6.

⁷⁴ Cohen, above n 7, 145–7. See also Samantha Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 381, 396–9.

A *Taming Global Governance with Constitutionalism: A Rule-Oriented Reform Agenda?*

In contemplating the globalising world order, Cohen holds that international relations must be taken out of the hands of realist politicians and be conducted within the bounds of international law. Moreover, as the role of GGIs continues to grow, a legalistic view of the world order does not suffice to hold them in check. Rather, a substantive understanding of the rule of law with the underpinnings of constitutionalism is crucial to the development of the new world order.⁷⁵ This underlies Cohen's passionate call for global constitutionalism. As has been noted above, however, she breaks new ground in the debate on global constitutionalism by presenting innovative conceptions of political form and constitutional legitimacy. All in all, *Globalization and Sovereignty* seems to suggest a completely new reference framework for the world order.

Yet, such high hopes are dimmed when Cohen moves from theoretical argumentation to case study. Notably, the UN (and the UNSC in particular) features in her meticulous discussion on the 'responsibility to protect' ('R2P') in international human rights law, the UN-administered humanitarian occupations, and the role of the UNSC in the global 'war on terrorism'. What she manages to achieve in these three case studies is to tame the UNSC without reverting to the Westphalian tradition. Specifically, the *UN Charter* is reconceived in her proposed constitutional framework. The *UN Charter* is treated as the core part of the constitutional framework that governs the global federation of security and peace. The prohibition of threat or use of force in international relations (the principle of non-aggression, art 2(4)), the non-intervention doctrine (art 2(7)) and the principle of sovereign equality (art 2(1)) safeguarded in the *UN Charter* constitute the cornerstone of the global constitution of security and peace in which neither the UN nor sovereign states are allowed to legally intervene in other sovereign states even under the pretence of R2P.⁷⁶ Moreover, these principles are fundamental to constraining the UNSC from turning into a global hegemon, whether it acts in the name of humanitarian intervention or the war on terrorism.⁷⁷ Correspondingly, the doctrines of customary international law concerning belligerent occupation, which have developed out of long practices and some of which have been codified in treaties and conventions, are becoming more and more important to the functioning of the UNSC-centred global federation as the UN plays an increasing role in the administration of post-conflict countries.⁷⁸ Thus, limiting the power of the UNSC lies at the heart of Cohen's constitutional vision of the world order.

Yet, what is of particular pertinence to my present discussion is how Cohen comes to the conclusion that the *UN Charter* occupies the core of the global constitution of security and peace. Instead of conceiving of the prototype of a global federation of security and peace fitting the post-Cold War international

⁷⁵ See Cohen, above n 7, 4, 63–4, 83, 317.

⁷⁶ Ibid 159–65, 196–215, 254–8.

⁷⁷ Ibid 172–8, 275–6.

⁷⁸ Ibid 223–65.

system, she takes the post-World War II, UN-centred world order as given. The *UN Charter* together with other international legal rules, whether they are codified or not, are treated as components of this constitutional compound of global security and peace.

As far as security and peace is concerned, global constitutionalism turns on the rules of international law instead of serving as source of inspiration for how the rules of international law should be reformed. What is most revealing of Cohen's rule-oriented view of global constitutionalism is her justification for the higher status the *UN Charter* occupies in the international legal system. As has been suggested, Cohen centres her global constitution of security and peace on the *UN Charter*. Yet, if the *UN Charter* is deemed as one of the numerous international conventions, the constitutional significance she attaches to the *UN Charter* and its institutions will fail to hold up as it will have to yield to any subsequent contradicting treaty under the principle of *lex posterior derogat priori*. Paralleling her approach to identifying the content of the constitution of global security and peace, Cohen turns to the provisions of the *UN Charter* in justifying the *UN Charter's* superior status. Relying on art 103, she claims to make the case that the *UN Charter* stands apart from ordinary treaties as it prevails over any other international agreement in the event of a conflict of obligation between them.⁷⁹

With the *UN Charter* set apart from other international agreements, a distinction is made between higher law and ordinary law in Cohen's vision of the world order. By virtue of the introduction of this normative duality,⁸⁰ Cohen distinguishes herself from past liberal reformists who were focused on constraining sovereign states with international law, indicating a constitutional version of the international legal order.⁸¹ Nevertheless, when it comes to the content of her global constitutional order of security and peace and to the justification of this normative duality, she implicitly allies herself with her liberal predecessors. In the event, legal rules and doctrines of international law hold the key to their respective reform agendas.⁸² In Cohen's case, global constitutionalism amounts to a new version of liberal legalism.

B *Legality Conceived in the Judicial Mind*

If Cohen's version of global constitutionalism echoes past liberals' call for taming international relations with legal rules and doctrines, the way that she conceives of the legitimacy of the constitutionalised global federation is further evidence that she reverts to liberal legalism in her neo-federalist plan. As has been noted above, with no global *demos* serving as the source of legitimation, Cohen pivots the legitimacy and functioning of constitutional compounds on the contentious negotiation between the numerous component constitutional units.

⁷⁹ Ibid 49.

⁸⁰ See Kuo, 'Cutting the Gordian Knot of Legitimacy Theory?', above n 65, 687.

⁸¹ For the evolution of reform movements in international law, see David Kennedy, 'The Mystery of Global Governance' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 37, 44–54.

⁸² Cohen, above n 7, 213, 226. For a critical discussion on the tradition of liberal legalism, see Gavin W Anderson, *Constitutional Rights after Globalization* (Hart, 2005) 40–4.

Yet, the question is: how can constitutional units within a constitutional compound engage with each other in legitimacy-bestowing negotiations?

Obviously, the interaction between constitutional components requires the participation of institutional players. Facing the reality of plural constitutional components, all the institutional players engaged in constitutional interactions should refrain from asserting their own constitutional identity at the expense of others and the composite constitutional compound. Rather, they are supposed to be committed to the maintenance of the distinct global federations concerned. In other words, all the institutional players should work under the ethos of 'constitutional tolerance' with an eye to preserving diversity in unity.⁸³ Drawing on the experiences of European integration, however, Cohen suggests that courts and the functional equivalents take the lead in steering the interactions between the component units of global constitutional compounds.⁸⁴ In terms of the state of the global legal space, she further notes that a fundamental flaw in the current constitutional setup of the UN-centred global federation of security and peace is the lack of a functional judicial body that can efficaciously review the UNSC decisions.⁸⁵ As the International Court of Justice, the judicial arm of the UN system, is only responsible for deciding on controversies between states and for providing advisory opinions, it fails to assume the role of a dialogue partner on the UN's behalf when a constitutional conflict occurs between the UN system and other constitutional unit in the global constitutional compound of security and peace.⁸⁶ The installation of effective judicial review with the UN system holds the key to the success of her neo-federalist plan for global constitutionalism. Through judicial dialogues guided by constitutional tolerance, Cohen argues that potential constitutional conflicts can be resolved and the balance of constitutional compounds can be preserved.⁸⁷

Like many other advocates for constitutional pluralism as the cornerstone of the global constitutional architecture, Cohen's focus on the judicial role in the functioning of global constitutional compounds seems to align with the view of others who suggest that the success of global constitutionalism does not so much lie in constitutional tolerance as in the judge-centred institutional dialogue.⁸⁸ This shift of emphasis from ethos to the identity of institutional players is worthy of special note for it betrays deep scepticism about the capacity of non-judicial players in acting in accordance with constitutional tolerance. It is true that traditionally judges are often criticised for being too legalistic and narrow-minded to take full account of the policy implications from their

⁸³ Cohen, above n 7, 73–4, 140–2.

⁸⁴ Ibid 70–3, 296–301. For the idea of constitutional tolerance and its centrality to constitutional pluralism, see J H H Weiler, 'Prologue: Global and Pluralist Constitutionalism — Some Doubts' in Gráinne de Búrca and J H H Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012) 8, 11–14.

⁸⁵ Cohen, above n 7, 209, 299–300.

⁸⁶ See Kuo, 'Discovering Sovereignty in Dialogue', above n 27, 365–6.

⁸⁷ Cohen, above n 7, 299.

⁸⁸ See, eg, Maduro, above n 73, 365–79.

decisions.⁸⁹ Moreover, the adversarial process at the centre of judicial adjudications is even blamed for making the lead-up to decision confrontational.⁹⁰ Thus, not all reformists in the liberal school have subscribed to the judicial mode of decision-making process as the way forward for international law reform. Rather, judicial adjudications are considered too simplistic to tackle the complexity of international relations.⁹¹

However, a distinction should be made between court proceedings and judicial reasoning. It should be noted that what has repelled the process school in international law is not the role of judges in international relations but instead the confrontational aspects of institutional design in judicial procedures.⁹² When we shift focus from institution to personnel, the image of lawyer-statesman or philosopher-judge emerges, which has long been a source of inspiration for liberal jurists in the debate on the role of law in steering politics.⁹³ Moreover, the practice of judicial (or constitutional) review, especially in the post-WWII era, has proven that judicial procedures can be reconfigured to rein in politics with constitutional principles. Further, the exercise of judicial balancing can accommodate policy needs,⁹⁴ laying the grounds for judicial supremacy prevalent in the advocacy for international rule of law.⁹⁵ As a consequence, the idea of judge-statesmen with the constitutional mindset rooted in the post-WWII experience of judicial review is not only regarded as central to the success of rebuilding liberal democracies in Europe and beyond,⁹⁶ but also underlies the interaction model of plural constitutional units which is dubbed ‘constitutional pluralism’.⁹⁷

⁸⁹ See Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, 2006) 154–81. See also Ulrich K Preuss, ‘The Concept of Rights and the Welfare State’ in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1986) 151, 166–9.

⁹⁰ See Mirjan R Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, 1986) 78–80. See also Robert A Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2001) 74–81, 118–25.

⁹¹ See Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995) 206.

⁹² *Ibid* 205–7.

⁹³ See Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1995) 11–52; David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press, 2010) 354–62. For a sceptical view, see Richard A Posner, *Overcoming Law* (Harvard University Press, 1995) 444–67.

⁹⁴ See Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 72. See also Ming-Sung Kuo, ‘Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law’ (2012) 10 *International Journal of Constitutional Law* 1050, 1068–72.

⁹⁵ See Kuo, ‘Discovering Sovereignty in Dialogue’, above n 27, 360–8. Cf Krisch, above n 70, 285–96; Maduro, above n 73, 371–9.

⁹⁶ See Kuo, ‘Discovering Sovereignty in Dialogue’, above n 27, 371–4. For a discussion of American judicial statesmanship, see Neil S Siegel, ‘The Virtue of Judicial Statesmanship’ (2008) 86 *Texas Law Review* 959.

⁹⁷ Maduro, above n 73, 356, 372–5. See also Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart, 2013).

Before concluding this section, I should make it clear that my objective here is not to offer a comprehensive explanation of what has prompted this shift to judicial dialogue in the move towards constitutionalisation in international law.⁹⁸ Rather, the point is to underscore the association of the idea of constitutionalisation with the development of judicialisation in international law scholarship.⁹⁹ In conceiving of how legality can work to structure international relations in a constitutionalised world order, Cohen signs up to the liberal reform agenda, placing judges front and centre in steering the relationship between constitutional units in a global constitutional compound.

C *Discovering Normalcy and Exception in a Federated World: The Limits of Reform in a Dualistic Global Constitutional Ordering*

Even though Cohen inherits the legacy of liberal legalism in conceiving of legality in a constitutionalised world order, it does not mean that she would face the same fate of failure as her liberal predecessors. Rather, her notion of legality is tied to her idea of global federation, which is partial, functional, and post-political. Rid of 'the political', the unfulfilled dream of liberal legalism appears to be fully realised in Cohen's neo-federalist plan for global constitutionalism.

Yet, when it comes to execution, Cohen's plan looks bleak. She is fully aware of the gap between here and there, but still falls short on how to move from here to there. She emphasises the importance of the political will to depart the current statist model for her federated order.¹⁰⁰ Political will is no doubt essential for the success of any reform. Cohen, however, pins her hopes only on political will without tackling what it is that political will needs to overcome. This brings her closer to her liberal predecessors thereby reducing her constitutional manifesto to a passionate call for utopian reform. Then, what is it that we have to confront but which we may fail to overcome even with the political will Cohen calls for?

As is noted above, Cohen's plan for global constitutionalism consists of two components. Politically, she presents the neo-federalist model, substituting functional federations for all-purpose states. Legally, she turns to the rules and doctrines of international law and counts on the virtue of judicial statesmanship as the solution to constitutional conflicts. Notably, there exists a difference in orientation between the two components. In the former, it is aimed to overcome the political reality; whereas in the latter it is embedded in the legal status quo. Even if she claims that her plan is normative and thus the political imagination should not be bound by reality, the fundamental question remains yet to be answered: can political imagination be totally detached from where we stand? If not, should we not take a closer look at the legal status quo in imagining our better political future as Cohen suggests when she spells out the contents of global constitutionalism? Following Cohen's approach to legality, however, we

⁹⁸ For further discussion, see Kuo, 'Discovering Sovereignty in Dialogue', above n 27, 368–74.

⁹⁹ See Anne Peters, 'The Constitutionalisation of International Organisations' in Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart, 2011) 253, 269–71.

¹⁰⁰ Cohen, above n 7, 152–3, 319.

shall encounter the inconvenient truth: ‘the political’ is written into the existing international legal order, which simply cannot be imagined away. Let us take Cohen’s prime example, the *UN Charter*, again.

As has been argued, the contents of the *UN Charter* include all the characteristic features of the ideal type of a constitution. The *UN Charter* provides for a system of governance, defines the membership of its object of regulation, ie, the UN (arts 3–6), elevates its legal status above from other norms in the international legal order (art 103), and applies equally to all the UN members (art 2(1)). Also, the amendment procedures stipulated in the *UN Charter* depart from traditional treaties in that its amendment does not require the unanimous agreement of all the UN member states (art 108). In addition, taking account of the origin of the *UN Charter* and its subsequent development together with the deliberate self-naming as a ‘Charter’, the *Charter of the United Nations* evokes the symbolic significance of state constitutions. Corresponding to its national counterparts, the *UN Charter* emerged from an exceptional humanity crisis, aiming to rebuild the world order and to unite its members with its own adoption.¹⁰¹

Yet, if we take a closer look at the provisions of the *UN Charter*, in particular those regarding the power of the UNSC, it will look gloomier than Cohen’s reading has suggested. On the one hand, the *UN Charter*’s primary concern is international peace and security (art 1(1)). Unlike its national counterparts, however, the *UN Charter* provides that only the UN decisions in this regard, which are within the UNSC’s competence, be binding on the member states.¹⁰² From this perspective, the *UN Charter* is more a security constitution of the world order than a comprehensive constitution for the international community as state constitutions would otherwise suggest. Or, only when the *UN Charter* addresses the subject matters that reside outside the UNSC’s remit does it epitomise Cohen’s neo-federalist plan. If so, however, Cohen’s plan will be undermined in its entirety for in her view, reining in the UNSC with her global federation of peace and security is the stepping stone to a constitutionalised world order.

Notably, the UNSC decisions with binding force have increased substantially with the broadly defined concept of international security and peace. This appears to parallel development in national constitutions where security is frequently invoked to increase government power.¹⁰³ Yet, in contrast to the expansion of state power in the name of national security in national constitutions, the central role of international security and peace in the increase

¹⁰¹ See, eg, Fassbender, ‘The *UN Charter* as Constitution for the International Community’, above n 17, 573.

¹⁰² Article 2(7) of the *UN Charter* provides:

Nothing contained in the present *Charter* shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present *Charter*; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

¹⁰³ See, eg, Eric A Posner and Adrian Vermeule, ‘Accommodating Emergencies’ (2003) 56 *Stanford Law Review* 605.

of the UNSC power is rule, not exception.¹⁰⁴ Viewed in this light, the *UN Charter* appears to have built in an ongoing state of emergency, so to speak. Moreover, considering the historical background of the adoption of the *UN Charter* and the idiosyncratic provisions regarding the special treatment of ‘enemy states’ (arts 53, 57 and 107) and the designation of ‘strategic areas’ as a special trusteeship system (arts 82, 83 and 85) therein, it can be said that the *UN Charter* was drafted and designed in response to another potential world war.¹⁰⁵

Taken together, what is characteristic of the *UN Charter* is not the normative components of a normal constitution so much as its character as a dual constitution, which comprises a global emergency constitution at the UNSC’s command and other neo-federalist global constitutional compounds outside the area of peace and security.¹⁰⁶ As a result, the UN-centred global federation is not just about function but continues to be ‘political’. Due to this exceptional character, the *UN Charter* does not conceive of the UN in accordance with the principle of separation of powers but instead puts the UNSC, a magistrate-like political body, at its helm.¹⁰⁷ Moreover, the special treatment the Permanent Five have received under the *UN Charter*, which is epitomised in their veto power in the UNSC, results from the historical circumstances when they were expected to play the pivotal role in executing the post-WWII emergency constitution.¹⁰⁸ Unfortunately, the veto power as the epitome of the UN’s political nature also blocks all essential reforms to make the UN system better.¹⁰⁹ This is the ultimate challenge to all reform proposals but Cohen fails to address this except for passionately calling for political will.¹¹⁰

If my reading of the *UN Charter* is correct, Cohen’s reliance on it as the prototype for global constitutionalism seems to stem from a partial interpretation of the *UN Charter* in which its constitutional character is identified with a normal account of rule of law.¹¹¹ The limits of liberal reforms also lie in equating the existing international legal order with the state of normalcy. Failing to tackle the exceptional or extralegal part of the *UN Charter* head-on blinds Cohen to the real challenge facing her neo-federalist plan.

¹⁰⁴ See Paul W Kahn, ‘War Powers and the Millennium’ (2000) 34 *Loyola of Los Angeles Law Review* 11, 34–6.

¹⁰⁵ See Wilhelm G Grewe, *The Epochs of International Law* (Michael Byers trans and rev, Walter de Gruyter, 2000) 673–5 [trans of: *Epochen der Völkergeschichte* (first published 1984)]; James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006) 581–2.

¹⁰⁶ Cf Carl Schmitt, *Legality and Legitimacy* (Jeffrey Seitzer trans and ed, Duke University Press, 2004) [trans of: *Legalität und Legitimität* (first published 1932)]. For the extraordinary role of the UNSC in the *UN Charter* system, see Kahn, above n 104, 34–5.

¹⁰⁷ See Kahn, above n 104, 35.

¹⁰⁸ See Bardo Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Kluwer Law International, 1998) 170–2.

¹⁰⁹ Thomas G Weiss, ‘The Illusion of UN Security Council Reform’ (2003) 26(4) *Washington Quarterly* 147, 151.

¹¹⁰ See Cohen, above n 7, 312–9.

¹¹¹ Cohen notes that the war on terrorism brings about a global state of emergency. But she considers this to be extralegal and violative of the *UN Charter* rather than an inbuilt character thereof: *ibid* 272.

IV CONCLUSION

In this essay, I have first suggested that *Globalization and Sovereignty* stands out in the debate surrounding global constitutionalism with its neo-federalist plan for the political form. When it comes to legality, Cohen is not a revolutionary but instead returns to the theme of liberal legalism, which has been prevalent in the past international law reform movements. In spite of this seeming dissonance, I have also noted that Cohen's dream world of partial, functional federations is conducive to a rule-oriented, judge-centred conception of legality. However, a close look at the *UN Charter*, which occupies centre stage in Cohen's global neo-federalism, has revealed that she gives short shrift to the political nature of the contemporary international legal order. As a state of exception (or emergency) is built in the UN system, the global federation of security and peace is not only about function but remains political in nature, overshadowing her perceived permanent state of legal normalcy.

Apparently, the failure to bring the exceptional or extralegal part of the *UN Charter* to the fore compromises Cohen's normative reading of the *UN Charter*. Her exegesis of the *UN Charter* turns out to be partial. Yet, a closer look at Cohen's neo-federalist plan has revealed her reform strategy that underlies her partial exegesis: the functional understanding of global federations is not aimed at giving account of the international relations we are in but rather at conceiving a new world order through idealist construction.

I have no objection to Cohen's strategic goal: a world order recast in constitutional terms. Nor do I intend to dispute her neo-federalist reading of the *UN Charter* in relation to the multifarious matters other than peace and security the UN is expected to administer. Yet, the global constitution of peace and security at the UNSC's command indicates that the *UN Charter* system is not only about function. Viewed from a functionalist angle, the UNSC's inborn political character is left unaccounted for in Cohen's account. As a consequence, her neo-federalist plan may well apply to other governance issues but it fails to do justice to the UNSC-centred ('functional') federation of global peace and security. Without tackling the distinction between normalcy and exception in the existing UN-centred international legal order, the liberal reform Cohen is calling for amounts to no more than another idealist plea.

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