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UNIVERSALISM AND PARTICULARISM AS PARADIGMS OF INTERNATIONAL LAW

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Universalism and Particularism as Paradigms of International Law

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Abstract

This contribution seeks to place theories about international law within the framework of their fundamental conceptual preconditions, within their "paradigms". This should provide a better understanding of, and a more critical perspective on, the diverse and contrasting positions within international legal scholarship. We trace the impressive variety of visions of international law back to two competing paradigms: particularism and universalism. Particularism – from antiquity to structural neo-realism and neo-conservative thought – forms the basis of all theories of international law which assert that true public order is only possible within a homogeneous community. Accordingly, international law can at best provide some containment of disorder. In contrast, universalism – formulated in the stoic-rationalistic and Christian tradition and well alive in authors such as Tomuschat and Habermas – underlies all positions which assert that truly public order is in principle possible on a global scale. Granted, some authors, particularly post-modern ones, try to move beyond the two paradigms. They are not part of the focus of this paper, as the two remain to date powerful conceptual tools providing orientation for many international lawyers.

The first chapter is dedicated to the role of theory for international legal scholarship (I.). The second chapter turns to the debate on the legitimacy of today's international law given its deep encroachments on political self-determination; it develops the two paradigms in this specific context (II). The third chapter presents in more detail the paradigm of particularism (III), the forth chapter that of universalism (IV). In conclusion, we suggest how these paradigms inform concrete interpretations, take a position in favor of universalism, but also indicate how legal scholarship can overcome theoretical divisions (V).

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Universalism and Particularism as Paradigms of International Law

I. Objectives of the inquiry and its place in legal scholarship

1. Paradigms of international law

An international lawyer, when publishing, deciding or advising, should be cognizant of the possible theoretical foundations of how his or her position as well as of those of opposing views, not least because such awareness can help in construing legal solutions all parties can live with. Moving from this assumption, our contribution addresses the main objective of putting theories about the nature and the finality of international law – primarily coming from the Western tradition – within the frame of their fundamental conceptual preconditions, namely within what we call as their "paradigms" This should provide a better understanding of, and a more critical eye on, the diverse and contrasting positions within international legal scholarship. The second objective of the inquiry is to support intercultural dialogue on international law: indeed, the dialogue between different cultural traditions about chances and limits of international order might well be easier when the paradigms that underlie predominant thinking in different parts of the world – in the case of our analysis: of the Western world – are clearly set out. International legal scholarship should not be limited to a debate on the best interpretation of a given norm in a given situation. It should rather extend to a discourse on ideas of order developed in distinct cultures.

Parsimony is an essential element of a good scientific inquiry. That is why we trace back the impressive variety of visions of international law that have been formulated during its long history to two competing paradigms: particularism and universalism.[1] A paradigm consists of the fundamental conceptual preconditions on the basis of which theories are developed.[2] By theory we understand a conceptual construction that explains phenomena and provides orientation. In a nutshell, the paradigm of particularism forms the basis of all theories of international law which assert that true public order is only possible within the framework of a state. Following this assertion, the order that international law can provide is substantially different from the order that can be accomplished within a state. In fact, from the particularistic point of view international order should be better described as a containment of disorder. In contrast, the paradigm of universalism underlies all positions which assert that a truly public order on a global scale is possible.

By *truly public order* we understand a situation in which common rules make sure hat the interaction of humans is in principle peaceful. There will always be conflict, but conflicts are channelled by procedures which succeed in suppressing unilateral violence. It is important to stress that the concept of public order does not imply the absence of conflict. Banning conflict, in fact, is hardly attainable and even undesirable because it would stop an important tool for adapting institutions and policies to social change. Rather, order is understood as a situation in

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[1]   Our paradigms echo the old dichotomy of *realism* and *idealism*. However, we consider the terms *realism* and *idealism* and the respective conceptual reconstruction as unfortunate; see in detail III 2.

[2]   This definition of paradigm is closely related to, although not identical with, the definition proposed by T. Kuhn, *The Structure of Scientific Revolutions* (1963).

which a society succeeds in resolving conflicts through peaceful methods. Moreover, in times in which international collective action is necessary in order to maintain peace and improve human well-being, the concept of public order denotes institutions, procedures and instruments for the fulfilment of collective aims also at the international level.

Such order can today only be based on a developed form of international law with features known from domestic public law. In other words, such order requires a *public* international law with an emphasis on the component of *public*. It builds on the Ius Publicum of the continental European tradition.[3] This Ius Publicum implies that there is a legal frame for the exercise of any kind of power. For that reason public law is more than just an administrative law which serves politics as an instrument. At the same time, Ius Publicum is more than a framework for politics. It also provides the instruments for the realization of common interests. This truly public international law has an important administrative dimension. As a frame and an instrument for the realization for public goods and interests such a public international law is more than a law of coexistence, more than a law of coordination, and even more than a law of cooperation. However, such a *public* international order and *public* international law do not necessarily need to encompass international institutions that control instruments for coercive action, such as a police or military personal. The example of the European Union proves that international *public* law and international *public* order are feasible even without granting transnational institutions the competence to use means of coercion. In the global context, the advancement of this project of truly public international order and law hinges currently to a large extent on the fate of international criminal law. If the regulatory project of the Rome Statute of the International Criminal Court[4] succeeds, a most important element of such an order will be in place without creating any institution that resembles a global state.

Universalism and particularism have been the dominant paradigms of international scholarship during centuries and remain to date powerful conceptual tools providing orientation to those working theoretically or practically in the field. Embracing one or the other paradigm gives rise to greatly varying understandings and interpretations of international rules and principles. Current relevant practical issues include the construction of Article 2 para. 4 United Nations Charter (UNC) or Article 51 UNC, the understanding of the UN Security Council as to its competences and responsibilities, the limits put on its actions as well as the instruments of its accountability and the direction of its reform. Moreover, they include the thrust of the interpretation of international human rights instruments and of the competences of international courts and tribunals.

Nevertheless, our reduction of the conceptual premises of international law to only two paradigms has to be qualified in two ways. First, particularism and universalism focus on the possible range of a truly public order. They respond to the question how far truly public order can reach. Is it confined to the borders of the homogeneous political community (particularism) or does it potentially include all societies and human beings (universalism)? The two paradigms can succeed in mapping the theories of international law because at their core they contain a

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[3] M. Stolleis, Nationalität und Internationalität. Rechtsvergleichung im öffentlichen Recht des 19. Jahrhunderts (1998).
[4] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544.

conceptual element, a more or less explicit statement on the feasible extension of public order. However, if we go beyond the question about the range of order and include into the analysis also the issue concerning its structure, the general paradigms of particularism and universalism might need some specifications. These will remain marginal in the present analysis but could become more central in a further inquiry centred on the conceptual foundations of a general theory of public law and order. Second, although we claim that particularistic or universalistic approaches are until now important to explain preferences of international lawyers, both in theory and practice, there have been some indications that this traditionally rigid opposition should rather be overcome. Once we have specified the reasons speaking in favour of our preference for the universalistic paradigm we will suggest that its future lies probably in a version that includes some justified claims of its counterpart.

The analysis develops as follows: The first chapter is dedicated to the role of theory for international legal scholarship. In many countries legal scholarship is overwhelmingly understood as being practical, sometimes not even as being a science; accordingly theory has no obvious role to play. In order to justify the approach of our inquiry, the first chapter will give an account in the tradition of German legal thinking (I.2). The second chapter turns to the debate on the legitimacy of today's international law given its deep encroachments on political self-determination; it develops the two paradigms in this specific context (II). The idea is that scholars as well as students will find the study of the two paradigms more interesting if they see their relevance for an important current debate. The third chapter will then present in more detail the paradigm of particularism (III), the forth chapter the paradigm of universalism (IV). In conclusion, we will suggest how these paradigms inform concrete interpretations, we will take a position in favour of universalism, but also indicate how legal scholarship as a practical science can overcome theoretical cleavages (V).

2. International legal scholarship: tasks, methods, and the role of theory.

The role of theory in legal scholarship is disputed. Some scholars question the usefulness of theories for legal scholarship and portray theories as abstract, little connected with the positive law and of little use, if not detrimental, to the tasks of the legal scholar. In order to show the place of theories in legal scholarship and to demonstrate their usefulness, first an understanding of legal scholarship in the German tradition shall be presented.[5]

a. Practical legal scholarship and conceptual thought

A first dimension of legal scholarship is the description and teaching of international law. This practical dimension has played a crucial role since the inception of legal scholarship in the High Middle Ages as a core element of the European university. A university was usually composed of four faculties: theology, law, medicine and philosophy, the latter including all sciences from astronomy, to philosophy, to physics. Legal scholarship was institutionalized in the process of the formation of the territorial organisations, which later became the European states. From the High Middle Ages law holds a high place in Europe as an ever more important „infrastructure" on which the social life increasingly rests while other normative orders of general application

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[5] For a US-American approach see A.M. Slaughter, "International law and international relations" (2000) 285 *Recueil des Cours* 13-249.

loose in strength. A society ordered by law is a high ideal, it is said that here lies a difference with some Asian cultures.

What is then the role of scholarship? A first task is to describe and to tell the law, to write it down and teach it. In perhaps no other academic activity research and education are so closely connected as they are in legal science. In this respect, the establishment of public law as a separate discipline in 17th century Germany is telling: it consisted of the identification of a scientific object within the set of positive norms, the identification of a specific scientific purpose in the formulation of structures and leading principles, and, on this basis, the orientation toward academic instruction, institutionally anchored in the universities.[6] These have been and remain the standard bases on which the scientific nature of the discipline rests. Thanks to this orientation, the development of adequate material for instruction and documentation constitutes one of the central tasks of research in legal science: across Europe, practice-oriented genres of scientific literature—the leading treatises and textbooks, both the academic and the practitioner's handbooks or encyclopaedias, or the commentaries tailored to practice—receive significantly more scholarly attention than in most of the other sciences. International public law is integral part of this, in particular within the Holy Roman Empire: its public law was a body of law assembled from diverse components, in particular the law of the German Empire, the rights of the Territories, and a set of norms that would now be conceived of as international.[7]

Such documentary activity remains an important element of international legal scholarship, not least because it provides for the memory of the social system in general and the legal system in particular. Accordingly, a good description of an international treaty is and remains a worthwhile and difficult scholarly aim. One cannot simply list the provisions; the scholar needs to give them a different order, to provide some context, to explain what was controversial in the negotiations and why certain solutions have been adopted. A similar scholarly exercise might be to bring all relevant statements on the legality of an international incident, such as the Kosovo war or the Iraq war, into a meaningful whole in order to describe the pertinent *opinio iuris*. Another object of reporting is the decisions of important courts and tribunals. To present a decision by the International Court of Justice (ICJ) as a meaningful and coherent text is a challenging task, not least because of its internal procedure which calls every judge to write an opinion without knowing the position of the other judges, but also because they often hold differing ideas about the nature of international order. Already in this type of research, theories can play a role: opinions and ideas are easier to grasp if they are linked to theories, in our case general conceptual constructions about the proper role of international law.

Certainly, the role of the legal scholar in most academic systems goes today beyond documentation. A further important activity is to make suggestions for resolving disputes. For many lawyers, law acquires its full reality only once it is applied to a conflict. Here Western cultures and Asian cultures again might differ. Conflict is not seen as something necessarily bad in this West. Rather, many ascribe progress to conflict, and there are even theories which explain

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[6] W. Pauly, Wissenschaft vom Verfassungsrecht, in: von Bogdandy/Villalón/Huber (eds.), II *Handbuch Ius Publicum Europaeum*, §27 Deutschland, pp. 436-491. Rn 1.

[7] For more detail, see Stolleis, *supra* note 3, at 20 f.

social order through the existence of conflict and its successful resolution.[8] Conflict is not seen as something to avoid, but something to be processed in search of a constructive solution. That is where the role of law comes in, and legal scholarship has its role to play. Lawyers translate the divergent interests into legal positions thereby preparing them to be processed in a legal process. Moreover, the norms which govern a conflict are often not very clear on who is right and who is wrong, what is legal and what is illegal. Vagueness is particularly a problem in international law for many reasons, such as multilingualism, different legal traditions, the lack of a compulsory jurisprudence and the decision-making at diplomatic conferences or governmental bodies in contrast to domestic parliamentary process. Article 2 para. 4 and Article 51 UNC provide excellent examples:[9] to what extend should one interpret the provisions on the use of force in international relations in a way that its unilateral use is constrained? What was legal and illegal in the Kosovo war against Yugoslavia? Here, the role of legal scholarship as a practical science is to submit proposals for interpreting a norm for a specific conflict, or to evaluate a given interpretation, given for example by a government or the ICJ. Yet, if the law is vague, who decides? Certainly, any interpretation has to operate according to the standards laid down in Article 31 and 32 Vienna Convention on the Law of Treaties (VCLT). But they hardly ever provide a clear result. So fundamental ideas about the nature and the finality of the international order often play an important, informing role when it comes to interpreting the law, and theories develop these understandings and show more clearly what are their bases and their implications. Note, however, that in most cases, a theory cannot provide the "right solution" in a case. But it helps to clarify premises and the force of arguments as well as to check their consistency.

Legal scholarship as a practical science has a further role to play with respect to law as a policy instrument. This is an aspect often little developed in legal education. If addressed, it is usually presented as part of the teleological or purposive interpretation. It requires a norm to be interpreted in a way that its objectives be realized. Articles 2 para. 4 and 51 UNC may serve as an example. The objective is international peace. What kind of interpretation best serves this objective? An interpretation within the universalist paradigm will strive to curtail any unilateral form of military action and to strengthen international bodies, of which an interpretation within the particularist paradigm will be rather sceptical. When it comes to teleological interpretation, theories on the conceptual premises of the international order, the role of hegemony, the potential of international courts and tribunals play a role as they flesh out the various possibilities. Consequentialist reasoning, which is an important aspect of teleological or purposive interpretation, is more convincing if it is founded on sound theory. Legal scholarship which proposes or evaluates such interpretation is more convincing if it takes relevant theories into account.

The policy function of legal scholarship is not limited to interpretation. The legal scholar is often called upon to give advice within the legislative process. In many international treaty negotiations legal scholars play an important role and the UN's International Law Commission,

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[8]   R. Dahrendorf, *Der moderne soziale Konflikt* (1992) 50 ff., 282 ff.; G. Frankenberg, Tocquevilles Frage. Zur Rolle der Verfassung im Prozeß der Integration, in: Schuppert/Bumke (eds.), *Bundesverfassungsgericht und gesellschaftlicher Grundkonsens* (2000) 31, 44 ff.
[9]   See, e.g., Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, June 27, 1986, ICJ Reports 11, §§191-5; Oil Platforms (Iran v. U.S.), Nov. 6, 2003, ICJ Reports 161, §§46-64.

which helps the General Assembly in the progressive development of international law under Article 13 UNC, counts many academics among its members. The policy advice function is important for legal scholarship's public role and recognition. In our complex world, good legal advice within the political process should be able to explain itself in more conceptual, i.e. theoretical terms. Any legal scholar who advises on important issues of international law should be able to situate his or her advice in an overall account on what international order is about.

So far, the legal scholar deals with the issue of legality, i.e. the question whether certain behaviour or an act conforms to the law - whether they are legal or illegal. Next to the question of legality, and in an uneasy relationship with it, sits the question of legitimacy, which discusses whether there are "good grounds" or "good reasons" for certain behaviour or an act - whether they are "acceptable". Certainly, the thrust of modern European development is to achieve a situation where the legality of certain behaviour or an act also settles the issue of legitimacy; this is one of the main points of liberal and democratic constitutions. Yet, the issue of legitimacy continues to have a life of its own, in particular with respect to international law. The war against Yugoslavia, for example, with the purpose of counteracting the human rights violations might have been illegal but legitimate. With respect to the war of the U.S. against Iraq, all conceivable positions have been held: that it has been legal and legitimate, illegal but legitimate, legal but illegitimate and that it has been illegal and illegitimate. Today many legal scholars see the issue of legitimacy as much in their field as that of legality,[10] and the public institutions usually expect legal scholars to have an informed standpoint in this respect. Yet, any convincing argument on the "acceptability" requires some conceptual premises which lie outside the law and when it comes to international issues it is likely that such conceptual premises coincide either with the fundamental notions of the universalistic paradigm or with those of particularism.

b. Theoretical legal scholarship

So far, it has been argued that theoretical, conceptual thought is important for legal scholarship as a practical science. In that respect, legal scholarship is not so much a producer of theory but rather a consumer. However, conceptual construction is an important part of legal scholarship. The relevant production can be divided into two fields: doctrinal constructions which are conceived to be "inherent" in the law, providing arguments to be immediately used in legal discourse, and other conceptual constructions which are "external", being of a sociological, politological or philosophical nature.

In continental Europe, conceptual thinking in legal scholarship is mostly of a doctrinal form which is conceived to be "internal" to the legal order; this understanding also informs Article 38 para. 1 lit. c ICJ Statute.[11] This stream of scholarship is often termed as "positivist", but a better denomination is "doctrinal constructivism". Conceptual thinking in the form of doctrinal constructivism goes beyond the production of oversight of the body of positive law and guidance for interpreting a norm in case of conflict. Its agenda aims primarily at a structuring of the law using autonomous concepts, concepts developed by legal scholars, following the legal-conceptual (*begriffsjuristisch*) stream of the historical school of law. In order to accomplish such

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[10] See Wolfrum/Röben (eds.), *Legitimacy in International Law* (2008).
[11] A. Pellet, Art. 38, in: Zimmermann/Tomuschat/Oellers-Frahm (eds.), *The Statue of the International Court of Justice. A Commentary* (2006), pp. 677-792, paras 245-264.

a structuring, law is detached from social reality and tied to legal instruments that flow from sources of law. From this foundation, the positive material is transcended, not by way of political, historical, or philosophical reflection, but through structure-giving concepts such as *state*, *sovereignty*, *treaty, peremptory norms,* or *monism* and *dualism*. Even though many of these concepts, in retrospect, clearly have connotations in *natural law*[12] they are conceived of as *specifically legal* and, thus, autonomous. As a consequence they fall under the exclusive competence of legal science. The highest scientific goal is to present, or rather: to reconstruct and represent law as complexes of systematically coordinated concepts. The key scientific competencies thus become abstraction, the development of concepts, and the corresponding arrangement of the legal material.[13] In crafting such concepts, legal scholarship creates for itself an autonomous area of discourse and argumentation, a sort of middle level between natural law, which is primarily within the competence of philosophy and theology, and the concrete provisions of positive law, which are in the direct grasp of politics and the courts. The functional legitimisation of the discipline flows from its specific competence over these concepts and the consequent structuring of the legal material. Such activity might provide legitimisation under the premise that only a conceptually permeated body of law represents a rationalized and thereby rational body of law.[14] Without doubt, the way a "legal system" is understood has changed over the last century. At its beginning, a system tended to be crypto-idealistically understood as inherent in the law, whereas today systems are more often seen as a conceptual instrument for the ordering and managing of the law. Similarly, the understanding of what a system can accomplish in the law has changed; scholars are usually more sceptical today than they were one hundred years ago. Yet, this does not diminish the system-orientation of scholarship as such, at least on the European continent.[15] The autonomy of such doctrinal constructions is, however, not total. In particular the founding concepts and thereby the differing constructions can be better grasped if they are fitted within our leading paradigms. A doctrinal construction centred on "sovereignty" or "non-intervention" sits squarely on the particularist paradigm, whereas one centred on "universal human rights" and an "emergent international constitutional order enshrined in the UN Charter" on the universalist one.

While doctrinal constructivism is an important element of theoretical legal scholarship it does not exhaust its theoretical aspirations. Of particular importance is the scholarly attempt to "integrate reality" and to reflect on its foundations. This brings legal scholarship into exchange and competition with other disciplines which also strive to analyze and interpret social reality. In contrast to the success of the agenda of the "positivist legal method," the "integration of reality" and theoretical reflection fail to conjoin into a common disciplinary platform: here, as opposed to the doctrinal sphere, the relevant insights are often incommensurate. The discipline encompasses

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[12] On the philosophical background of this scholarly agenda, see J. Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (1984), 232 ff.

[13] Not every scholarly contribution presents a great doctrinal design. Much more common is a type of scholarship that—as a sort of "upkeep" and "tending" of international law—systematizes new legal developments within the established scholarly schemes, that is, doctrine, and, in doing so, contributes to the preservation of the systemic nature of the law and the legal relevance of the great "teachings."

[14] For a classic on this topic, see M. Weber, *Wirtschaft und Gesellschaft*, 5th ed, (1972), 825 ff.

[15] *Cf.*: D. Kennedy, "The Disciplines of International Law and Policy" 12 *Leiden Journal of International Law*, 9-133 (1999); A.M. Slaughter, *supra* note 5; M. Koskenniemi, *The Gentle Civilizer of Nations* (2001).

contributions that can only be understood as essayistic speculation but also contributions that draw on established theories from the humanities or social sciences and adapt their thought to usages within the legal discourse, as well as articles employing quantitative methods of empirical social sciences. Legal scholarship shares many interests with other sciences: for instance, how to understand sovereignty, or how to conceive the legitimacy of international order. Other such questions include: is international law a system based an universal values shared by everyone or an instrument of American or Western hegemony, a common law of mankind or of a global civil society, a managerial instrument for functional elites or an instrument for the co-ordination of state interests, and, above all, is a lasting international order of peace feasible and how can it be achieved?

Often, it is this sort of scholarly output that is best received in the other sciences and even in the wider public. The fact that such works are well received shows the resilience and persistence of the Western tradition in comprehending both the political and social spheres in legal categories; notwithstanding powerful competition especially from the economic, social, and historical sciences. Some theories, which form part of these expansions to legal scholarship and its interpretive arsenal, have experienced broad resonance in the process of societal self-comprehension; we will discuss some of them later. Our claim is that our two paradigms lead to better grasp on this theoretical landscape.

Summing up, we have seen that legal scholarship comes in different variants with distinct theoretical baggage. Each mode has its function and specific rationality; the importance of the various modes varies considerably between the different scientific communities. For all modes, so our claim goes, it is useful to search for theoretical foundations, not in order to find the solution for a practical problem, but rather to proceed in a reflective, i.e. scientific mode.

II. Universalism, particularism and the legitimacy of public international law

The two main strands of occidental thinking about international law and their opposing outlooks become apparent in the current debate on the legitimacy of international law within the process of globalisation. From a non-Western perspective, the most serious deficit of legitimacy of international law might be its Western origin and perhaps its Western bias.[16] This, however, is not the main legitimacy issue discussed among Western scholars. Here, the main challenge comes from those who argue, mainly under the particularist paradigm, that the growth of international law in the era of globalisation threatens one of the main achievements of Western civilisation, i.e. liberal democracy. They are opposed by those who claim, mostly under the universalist paradigm, that international law leads to new and promising achievements. Before exploring the two paradigms of universalism and particularism in more detail in Parts III and IV, this Part will present them in the context of this debate.

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[16]   *Cf.*: B. S. Chimni, "The past, present and future of international law. A critical third world approach" 8 *Melbourne journal of international law* 499-515 (2007); M. Mutua, *Human Rights: A Political and Cultural Critique* (2002).

This lecture will accordingly present a stocktaking of influential scholarly positions according to categorised diagnoses and proposals with a view to their conceptions of the further development of international law. This agenda is carried out in three steps. The first step will better define the problem and the core concepts, such as globalisation, legitimacy and democracy (1.). The second step presents important conceptions relating to the impact of globalisation on the reality of democracy in a world organised around statehood (2.). The third step submits conceptions for the protection and development of democracy in the process of globalisation and relates them to conceptions on the future development of international law (3.).

1. Defining the problem

a. The growing "publicness" of public international law and its non parliamentary nature

The legitimacy problem of international law is – in the Western perspective – firstly closely linked to its growing "publicness". The term *public* carries many meanings. In this context, the most important one is that international law consists of increasingly more norms which bind a state irrespective of its consent. Important examples include Security Council resolutions under Chapter VII UNC except for the permanent members of the Council, the development of international treaties through independent international bodies such as the dispute settlement institutions of the WTO or the human rights bodies, other activities of international institutions which often succeed in framing important policy fields, such as the OECD Pisa policy with respect to primary and secondary education, or the development of international customary law irrespective of the concrete consent of a concerned state.

One can even understand the ever denser layer of international treaties as a danger for the democratic principle. With respect to the democratic principle, legislation through international treaties is problematic from a static perspective, and even more so in a dynamic one. From the static perspective, the drawback can be found in the fact that, although national (and consequently often democratic[17]) sovereignty is formally respected, the content of the rules is determined in intergovernmental negotiations according to traditional diplomatic procedures. An open public discourse that can influence the rules, an essential element for democratic legitimacy according to most theories, is severely limited. The autonomy of the bureaucratic-governmental élites is far greater than in the national political process. While this is a general feature of international relations it is particularly so in international trade relations: the GATT 1947 and WTO have so far been one of the most secretive in the world. And this secrecy is considered as an instrument to strengthen national negotiators who are in favour of trade liberalisation.[18] Furthermore, with the possible exception of the US-Congress, national parliaments show a far greater deference to governmental proposals if they concern international treaties rather than autonomous domestic legislation. As the discussion on the role of national parliaments in the EU

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[17] The argument applies to the extent that states' internal structures can be considered democratic. The problem with respect to citizens living under autocratic rule needs a separate investigation.

[18] J. Goldstein and L. Martin, "Legalization, Trade Liberalization, and Domestic Politics", 54 *International Organizations* 603 (2000), 612.

legislative process has clearly revealed, there is also little hope of improving the input of national parliaments into transnational rule-making during negotiations.[19]

The democratic problem grows even worse in a dynamic perspective. In modern times, *law* means *positive law*.[20] The main feature of the positivity of law is the legislature's grasp of and responsibility for the law:[21] the law is posited by a legislature or is at least – in case of the common law or other judge made law - under its responsibility due to the legislature's competence to intervene at any given moment, amending or derogating a rule which an autonomous adjudicative process has developed.[22] This positivity of the law is an important aspect of the democratic sovereignty of a polity: in democratic societies, the majority, usually conceived as a unitary subject organized through the elected government, can at any moment intervene in the body of law and change it.[23] Under all constitutional systems, most social issues are subject to rules that can be enacted by a simple majority or through delegated legislation: the possibility of fast intervention is a leading principle in framing the respective rule-making competence.[24]

International law undermines the positivity of law in this sense. Once a treaty is set up, the political grasp on its rules is severely restricted - not normatively, but in all practical terms. Although international legislation respects the democratic principle insofar as treaties are negotiated and concluded by mostly democratically elected governments, usually even with parliamentary assent, it totally modifies the relationship between law and politics. By ratifying an international treaty a current majority in a polity puts its decision largely outside the reach of any new majority.[25] This restriction is particularly important in the cases such as the WTO or bilateral investment treaties since there „corrective" political influence, i.e. noncompliance, becomes difficult because of the obligatory WTO or ICSID adjudication. Certainly, the democratic autonomy of the new majority is preserved to some extent through the right of withdrawal, for example Article XV WTO. However, this right supports the democratic

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[19]   P. Norton, National Parliaments and the European Union: where to from here, in: Craig/Harlow (eds.), *Lawmaking in the European Union* (1998), 209; D. Judge, "The Failure of National Parliaments?" 18 *West European Politics* (1995), 79.

[20]   G. W. F. Hegel, *Grundlinien der Philosophie des Rechts* (1970 [1821]), § 3.

[21]   E. W. Böckenförde, Demokratie als Verfassungsprinzip, in: idem (ed.), *Staat, Verfassung, Demokratie* – (1991), 289, 322.

[22]   For the specific situation in Common Law countries see P. Atiyah and R. Summers, *Form and Substance in Anglo-American Law* (1991), 141 ff.

[23]   A. v. Bogdandy, *Gubernative Rechtsetzung* (2000), 35 ff. The guarantee of an efficient legislature is a *leitmotiv* of many constitutional developments in the last fifty years.

[24]   In detail M. Hilf und M. Reuß, "Verfassungsfragen lebensmittelrechtlicher Normierung", *Zeitschrift für das gesamte Lebensmittelrecht* 289 (1997), 290 ff.; R. Schmidt, Staatliche Verantwortung für die Wirtschaft, in: Isensee/Kirchhof (eds.), III *Handbuch des Staatsrechts des Bundesrepublik Deutschland* (1988), § 83; on the economic constitution in Germany and the European Union see D. Gerber, *Law and Competition in Twentieth Century Europe* (1998), 232 ff.

[25]   K. Abbott and D. Snidal, "Hard and Soft Law in International Governance", 54 *International Organization* 421 (2000), 439; J. Goldstein et al. "Introduction: Legalization and World Politics", 54 *International Organization* 385 (2000), consider this a common political strategy.

legitimacy of the WTO as much as the individual's right to emigrate does the democratic legitimacy of a State.[26] It can hardly be considered as sufficient as it is not a realistic option.

One might say that this limitation of democratic self-governance inevitably comes with the need for treaty-based international cooperation. This argument can also take the form that this kind of limitation has been generally accepted as intrinsic to international law. Yet, necessity and inevitability are bad normative grounds since they collide with the principle of freedom. Moreover, it has to be borne in mind that much of the contemporary international law does not only govern international relations, but rather might set up a "comprehensive blueprint for social life"[27] and therefore has an impact on democratic self-government far beyond traditional international rules.

For a long time, this impact of international law has been little studied. Since the 18th century International law, including international customary law, has been built on private law concepts, in particular the will of an individual and the contract, i.e. the treaty. As the PCIJ puts famously in its Lotus decision: "International law governs the relations between independent States. The rules binding upon States emanate from their own free will as expressed in conventions or by usages (…) in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."[28] Since states are conceived by classical international law as individuals, the will of a government was equated with the will of all citizens. In this light there is no legitimacy problem in international law, according to the Roman dictum: Volenti non fit iniuria. But today these premises crumble; therefore, the issue of legitimacy comes to the forefront.

Summing up, many international norms severely inflict the freedom of a political community to organize itself. Why should such limitations be accepted? Formerly, this issue has been debated as the morality of international law.[29] Then the debate turned more sociological, and *legitimacy* became the core notion. Legitimacy refers to all good grounds why to accept the curtailment of freedom in a specific historic setting. Our contemporary setting is defined for many by *globalisation*.

b. Globalisation

The term *globalisation* comprises – similarly to the related termini „international integration" or "de-bordering"[30] – a number of highly disparate observations whose regular common

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[26] See Article 13 para. 2 Universal Declaration of Human Rights (1948), Article 12 para. 2 International Covenant on Civil and Political Rights (1966), Article 2 para. 2 Protocol No. 4 of the European Convention on Human Rights; see P. Weis and A. Zimmermann, Emigration, in: Bernhardt (ed.), II *Encyclopedia of Public International Law* (1995), 74.

[27] C. Tomuschat, "International law: Ensuring the survival of mankind on the eve of a new century", 281 *Recueil des Cours* 13-438 (2001), 63.

[28] *The S.S. "Lotus"* (Fr. v. Tur.), 1927 P.C.I.J., (ser. A) No. 10, 18.

[29] As used, for example, in E.H. Carr, The Twenty Years' Crisis. An Introduction to the Study of International Relations (1940).

[30] M. Albert, "On boundaries, territory and postmodernity", 3 *Geopolitics* 53 (1998); K.D. Wolf, Die Grenzen der Entgrenzung, in: Kohler-Koch (ed.), *Regieren in entgrenzten Räumen* (1998), 77, at 81 ff; T. Cottier, A theory of direct effect in global law?, in: von Bogdandy et al (eds), *Liber Amicorum Claus-Dieter Ehlermann* (2002), 99; E. Stein, International Integration and Democracy: No Love at First Sight, 95 *A.J.I.L.* 489 (2001).

denominator is to acknowledge a profound transformation of the traditional nation State, at least in its European variant. This transformation affects the legitimacy of the law because the nation State has so far formed the only framework for democracy's successful realisation.

The traditional European understanding of the nation State is mostly based on the particularist paradigm, in particular on the assumption of a fundamental congruence between a people integrated by strong economic, cultural and historic bonds and *its* State whose main task is to organise and develop this nation. The nation State, visualised through borders, coloured areas on maps, symbols, buildings and persons, provides the all-encompassing unity in which human life finds its place and sense.[31] In the traditional understanding the nation State is seen as the highest form of realisation of a people bound in solidarity. It is the source of all law and the foundation and framework of the national economy. Only through the nation State can the national language, the national literature, the national system of science and arts, the national culture in general realise their full potential. The space in which most human activity occurs is thought to be defined by a nation State's borders. A further constitutive element is the supremacy of State politics over all other societal spheres. All of these spheres are subject to political intervention.

This understanding of the nation State finds its legal basis in the traditional concept of sovereignty. Under international law sovereignty protects the State against foreign interference.[32] Under municipal law sovereignty expresses the State's supreme power and therefore its supremacy over all other societal spheres.[33] Under a democratic constitution, *popular* sovereignty is nothing but the realisation of democracy on which the legitimacy of all public power rests.[34] On this basis the symbiosis of the nation State and democracy was formed; it determines most theories of democracy until this day.[35]

The term *globalisation* indicates developments which might undermine this symbiosis.[36] The common ground between the different understandings of globalisation is the observation of a massive global increase of interaction between the same spheres of different nations, especially since the beginning of the 1990's. Globalisation goes beyond the phenomenon of the interdependence of States because it is said to lead to a partial fusion of once separate national realms, in particular the fusion of national economies into a single world economy. However, hardly anyone argues that globalisation in its present form entails a development towards a fully

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[31]   F. Meinecke, *Weltbürgertum und Nationalstaat*, 2nd ed., (1911), 7.

[32]   Most visible in the PCIJ's Lotus decision, *supra* note 28.

[33]   A. Randelzhofer, Staatsgewalt und Souveränität, in: Isensee/Kirchhof (eds.), 1 *Handbuch des Staatsrechts* (1995), § 15, para. 25 ff., 35 ff.; C. Möllers, *Staat als Argument* (2001) 291 ff.

[34]   H. Heller, Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts, 1927, in: Heller, 2 *Gesammelte Schriften* (1971) 31 ff.

[35]   U. Volkmann, Setzt Demokratie den Staat voraus?, 127 *Archiv für öffentliches Recht* 575 (2002), 577, 582; M.G. Schmidt, *Demokratietheorien* (1995) 13.

[36]   For more detail see the report of the German federal parliament's (Bundestag) committee on „Globalisation of the World Economy – challenges and strategies", *Enquete Commission, Globalisierung der Weltwirtschaft – Herausforderungen und Antworten*, Final Report, BT-Drucks. 14/9200, 49 ff.; see id. Summary of the Final Report (Jun. 24 2002), at http://www.bundestag.de/gremien/welt/sb_glob_kurz.pdf. M. Ferrarese, *Le istituzioni della globalizzazione* (2000) 11 ff.; S. Hobe, "Die Zukunft des Völkerrechts im Zeitalter der Globalisierung", 37 *Archiv für Völkerrecht* 253 (2000); K. Dicke, "Erscheinungsformen und Wirkungen von Globalisierung in Struktur und Recht des internationalen Systems", 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* 13 (2000); most influential are numerous books published in U. Beck's series "Edition Zweite Moderne" from 1997, in particular U. Beck, *Was ist Globalisierung?*, 3rd ed. (1999), 48 ff.

borderless world.[37] If state borders become less important or easier to overcome in some respects and for some individuals, there is little evidence to suggest that they will ultimately become obsolete for everybody, as billion dollar profits in migrant smuggling show.

The term globalisation was first used mostly by authors who critically observed the enhanced possibilities for economic actors and the emergence of global markets. However, the term made its way into the parlance of free-traders and gained favour in business circles for describing diverse forms of global contraction and the phenomenon of "de-bordering".

Global contraction and the decrease of the importance of borders are often be ascribed to the revolution in communications and transport technologies; a development already identified by *Karl Marx* and *Friedrich Engels*.[38] The multi-faceted developments brought together under the term *globalisation* are not, however, simply the result of a quasi natural evolution of technical inventions and applications alone. They are also the fruit of conscious political decisions which have contributed to the dismantling of various borders. The recent opening of China is an excellent example for a political decision to embrace globalisation.

Strengthened transnational bonds and partial fusions have led to a "de-nationalisation", which is manifest in multiple phenomena.[39] An increasing number of persons have daily contact to individuals outside their nation; numerous persons even migrate outside of their original cultural spheres in search of a better life; national economies are increasingly becoming bound to a global economy; national cultures are placed in a context of a globally operating entertainment industry; and in numerous academic fields a career depends on being published in a handful of international journals. Even the Xiamen Academy of International Law can be understood as a fruit of globalisation. At the same time the term *globalisation* indicates new dangers which are not confined to a distinct territory. Such dangers extend from climate-change to financial crises to globally operating criminal and terrorist groups.

Last but not least, the term *globalisation* stands for the proliferation of international organisations and the expansion of international law, which, depending on the conception, promote globalisation, simply institutionalise it or rather try to shape a globalised world for the benefit of public welfare. The increasing autonomy of international law and international organisations from the political preferences of individual States is viewed by some as a prerequisite of a system of international law that meets the challenges of globalisation.[40] National law, once considered the expression of the will of a people, accordingly implements ever more international rules resulting from an international process that is necessarily different from processes under domestic constitutions.[41] National law is hereby de-nationalised. Summing

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[37] C. Möllers, "Globalisierte Jurisprudenz", 79 *Archiv für Rechts- und Sozialphilosophie Beiheft [A.R.S.P.]* 41 (2001), 46 ff.

[38] K. Marx and F. Engels, Das Kommunistische Manifest (1848), in: Marx/Engels, *Das Manifest der kommunistischen Partei* 40, 2nd ed. (1980), at 47.

[39] M. Zürn, *Regieren jenseits des Nationalstaats* (1998), 65 ff: "De-nationalisation".

[40] *Cf*.: C. Tietje, "Die Staatsrechtslehre und die Veränderung ihres Gegenstandes", 118 *Deutsches Verwaltungsblatt* 17 (2003), at 1081, 1087.

[41] D. Thürer, "Völkerrecht und Landesrecht – Thesen zu einer theoretischen Problemumschreibung", 9 *Schweizerische Zeitschrift für Int. und Europäisches Recht* 217 (1999); Tietje *supra* note 40, 1093, sees "domestic and international law as a functional unity".

up, national politics are now found to be bound by a multiplicity of legal and factual constraints originating from outside the nation State. To the extent that national politics reflect democratic processes, globalisation and democracy clash.

c. Legitimacy, in particular democratic legitimacy

Legitimacy refers to the grounds why to accept the law, in our case why international law may merit acceptance and obedience.[42] Many different grounds can be adduced. Many base the legitimacy of international law on the effective protection of common goods and interests. In the international sphere, the maintenance of peace or the protection of the environment is of particular importance in this respect.[43] When public law provides for order, for individual security, for economic growth, for individual well-being, it builds up a form of legitimacy which today is often termed as out-put legitimacy. A second category is that public law respects and protects fundamental interests of the individual, in particular those expressed in human rights and due process of law. The third category is democratic legitimacy, also called in-put-legitimacy; this is the most complex issue because of deep theoretical divisions.

That may come as a surprise. Upon first glance it appears as if the fall of the Berlin Wall and the dissolution of the Soviet bloc settled all fundamental issues over the core contents of the principle of democracy with respect to the organisation of public power.[44] Western scholars assume that there is an almost universal and increasingly legally based consensus regarding the *necessary* requirements of a State to qualify as democratic. International law,[45] comparative law[46] as well as political and constitutional theory[47] all agree upon the elements deemed necessary: governmental personnel must ultimately derive their power from citizen-based elections that are general, equal, free and periodic. Moreover, all public power has to be

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[42]   Regarding this general discussion see Wolfrum/Röben, *supra* note 10; D. Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law", 93 *A.J.I.L.* 596 (1999); P.-T. Stoll, *Globalisierung und Legitimation* (Göttinger inaugural lecture), at http://www.cege.wiso.uni-goettingen.de/Veranstaltungen/antrittsvorlstoll.pdf; *cf.* also S. Kadelbach, *Zwingendes Völkerrecht* (1992) 130 ff..

[43]   S. Cassese, "Lo spazio giuridico globale", 52 *Rivista trimestrale di diritto pubblico* 323 (2002), 331 ff.; in detail M. Kumm, "The Legitimacy of International Law", *Eur. J. Int'l L.* 15 (2004), 907; The issue of the legitimacy of international law addresses the rational grounds why international law may merit obedience, D. Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law", 93 *A.J.I.L.* 3 (1999), 596 ff.

[44]   The most visible expression of this belief is F. Fukuyama, *The End of History and the Last Man* (1992), 133 ff.

[45]   Groundbreaking T. Franck, „The Emerging Right to Democratic Governance", 86 *A.J.I.L.* 46 (1992); G. Dahm, J. Delbrück and R. Wolfrum, *Völkerrecht* (2002), 14 ff.; J.A. Frowein, "Konstitutionalisierung des Völkerrechts", 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* 427 (2000), 431 ff.; see also M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (1993) 435 ff.; for a critique see M. Koskenniemi, Whose intolerance, which democracy?, and B. Roth, Evaluating democratic progress, both in: Fox/Roth (eds.), *Democratic Governance and International Law*, 436, 493 (2000).

[46]   N. Dorsen et al., *Comparative Constitutionalism* (2003), 1267 ff.; C. Grewe and H. Ruiz Fabri, *Droits constitutionnels européens* (1995), 223 ff.

[47]   Schmidt, *supra* note 24, 17; G. Sartori, *Demokratietheorie* (1992), 33, 40.

exercised in accordance with the rule of law and has to be restricted through a guaranteed possibility of a change in power.[48]

This consensus with respect to the requirements of democracy has not, however, lead to a consensus on theory and premises. One still has to distinguish an understanding of democracy which takes as its starting point the people as a macro-subject (the holistic concept of democracy, often linked to particularism) from one which designates affected individuals as its point of reference (the individual, civil or fundamental rights concept of democracy, including the deliberative theory of democracy, often linked to universalism). It is likewise not decided whether democracy is concerned with the self-determination of a people or of affected individuals (the emphatic or emancipatory conception of democracy) or whether it simply requires effective control over those who govern (the sceptical understanding of democracy).[49] Democracy remains an essentially contested concept.

The different conceptions of democracy still lead to different results on some issues in the municipal realm, such as granting electoral rights to resident foreigners, allowing citizen participation in administrative procedures or employee involvement in public or private organisations' decision-making. These divergences do not, however, affect or endanger the solid consensus on the institutions and procedures required for the realisation of democracy within a State.

Such a consensus does not extend to the issue of how globalisation affects the realisation of democracy and how it can be maintained in the process of globalisation. In both regards the differing conceptions of democracy result in conflicting diagnoses or proposals, none of which command any larger support. Thus the theoretical discussion of democracy acquires its greatest relevance on the transnational level.[50]

2. *Effects of globalisation on states and their resources of legitimacy*

a. Globalisation as a threat to national self-determination

Most academic treatments of the relationship between globalisation and democracy have a diagnostic character. More often than not they come to the conclusion that globalisation endangers democracy in its current form. That endangerment is usually considered to arise "behind the scenes"; unlike the danger to democracy by an authoritarian government,

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[48] "Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has at its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.

Democracy, with its representative pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law." Charter of Paris for a New Europe, 30 I.L.M. 190, 194 (1991).

[49] For a convincing reconstruction from the perspective of the German constitutional scholarship see Volkmann, *supra* note 35, 582 ff.; other reconstructions by P. Mastronardi, "Demokratietheoretische Modelle – praktisch genutzt", 7 *Aktuelle Juristische Praxis* 4 (1998), 383; SCHMIDT, *supra* note 35, 115 ff.

[50] The debate in the European Union shows that such a discussion can lead to convincing results. Following an intensive and sharp, and sometimes apparently uncompromising debate, the model of dual legitimation has become a widely agreed-upon solution. The main focal point is a dual form of representation, through representatives of the peoples as macro-subjects (Council, European Council) on the one hand, and through representatives of the individual Union citizens (European Parliament) on the other.

globalisation does not intervene directly in the democratic decision-making process. More specifically, three theoretical positions appear to be of particular importance.[51]

The first position considers the developments subsumed under the term *globalisation* as an expansion of US-American interests and lifestyles. Accordingly, globalisation is little more than a byword for American hegemony.[52] In this version, globalisation means the economic triumph of *American* neoliberalism, which primarily benefits *American* enterprises, the cultural dominance of the *American* entertainment industry, which transforms social patterns in other nations, or the leading academic role of *American* universities. All of this is seen to occur in a framework of historically unprecedented *American* political and military supremacy. Central international institutions, especially the International Monetary Fund, the World Bank and the WTO – to a lesser extent the United Nations – are considered agents of this development.[53]

This threatening scenario is based mainly on understandings of democracy that view self-determination as the be-all and end-all of democracy, whether they rest on a holistic tradition concerned with the self-determination of a people, or on a fundamental rights tradition concerned with the self-determination and self-realisation of individuals. Accordingly, globalisation endangers democracy because it builds up pressure to assimilate and leads to heteronomy, as a result of which the national democratic process is no longer free to shape the nation's life. This criticism of globalisation is found in various – otherwise contrasting – theoretical and ideological camps. It is present within both the conservative criticism of mass culture (*Kulturkritik*) and the emancipatory conceptions of democracy. It is important to stress that according to this understanding globalisation does not necessarily lead to a weakening of State institutions. Few proponents of this position doubt that globalisation is driven by the political power of the US.

A second critical position views globalisation as capitalism's attempt to increase profits, to conquer markets, and – in particular in the Western welfare States – to reduce profit-restricting social achievements.[54] The danger for democracy lies, with regard to the Western democracies, above all in the undermining of the democratic balance attained between the opposing class interests. This position is mainly based on an emancipatory understanding of democracy, which is most prominent in European social democratic parties,[55] but it can also be of a Marxist-Leninist provenance. Representatives from developing nations often consider globalisation as an extension of colonial economic dependency for the benefit of Western businesses and States.[56]

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[51] For an overview see E. Altvater and B. Mahnkopf, Grenzen der Globalisierung. Ökonomie, Ökologie und Politik in der Weltgesellschaft, 4th ed. (1999), 542 ff.

[52] U. Mattei, "A Theory of Imperial Law", 10 *Indiana Journal of Global Legal Studies* 1 (2003), 383; S. Sur, The State between Fragmentation and Globalisation, 8 *E.J.I.L.* 421 (1997), 433.

[53] N. Krisch, Weak as a Constraint, Strong as a Tool? The Place of International Law in U.S. Foreign Policy, in: Malone/Khong (eds.), *Unilateralism and U.S. Foreign Policy* (2003), at 41; R. Rilling, "'American Empire' als Wille und Vorstellung. Die neue große Strategie der Regierung Bush", 5 *R.L.S.-Standpunkte* 1 (2003).

[54] Altvater & Mahnkopf, *supra* note 51, 562 ff.; Beck, *supra* note 36, 14; H.-P. Martin and H. Schumann, *Die Globalisierungsfalle. Der Angriff auf Demokratie und Wohlstand* (1996), 193 ff.

[55] In more detail Schmidt, *supra* note 24, 159 ff.

[56] A. Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World", 32 *N.Y.U. Journal of International Law and Politics* 243 (1999-2000), particularly 246 ff., 275 ff.; a helpful overview of the multi-layered discussion is provided by B. S. Chimni, "Towards a Radical Third World Approach to Contemporary International Law", 5 *International Center for Comparative Law & Politics Review* 16 (2002), 21 ff.

This version by no means proclaims the decline of the State, which it considers instead as the most important agent for the implementation of particular interests.

The third position lacks the immediate critical impetus of the former two. It focuses rather on the fundamental weakening of national institutions' power to shape a nation's life resulting from the increased strength of transnationally operating groups of individuals and organisations, in particular economic actors, but also criminal organisations. These groups are seen to have moved from the national into the international realm and as having emancipated themselves – at least partially – from the political supremacy of State institutions.[57] This position views globalisation much more as a spontaneous evolutionary development than do the first two.[58]

Political attempts by state institutions to counter the negative aspects of globalisation are judged ambivalently in this understanding. Accordingly, as opposed to the first two versions, international law and in particular international economic law are not construed as the driving forces of globalisation; rather they are seen as capable of promoting global welfare. Nevertheless, the international mechanisms which aim to legally order the spontaneous process of globalisation, including those of global governance,[59] are critically assessed under this position due to their detrimental effect on democracy. It criticises the frailty of their democratic control, their lack of transparency and responsiveness, their technocratic character, and the difficulty of changing their once-established rules.[60]

This understanding is further developed by various theoretical schools.[61] The system theory, as elaborated by *Niklas Luhmann*, is particularly influential in Germany; it acuminates the understanding dramatically. According to this theory the most important sectors of national societies have already been fully globalised and a global society with a global political system (the "*international community*") has been formed. However, neither the global nor the national political systems, which subsist as partial systems, are considered to enjoy supremacy over other societal spheres.[62] The demise of the supremacy of politics is a key assertion of this theoretical camp with profound consequences for democracy.

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[57]   J. T. Mathews, "Power Shift", 76 *Foreign Affairs* 1 (1997), 50 ff.; N. Luhmann*, Der Staat des politischen Systems*, in: Beck (ed.), *Perspektiven der Weltgesellschaft* (1998), at 375; Zumbansen, "Die vergangene Zukunft des Völkerrechts", 34 *Kritische Justiz* 46 (2001), 59 ff.

[58]   Enquête Commission, supra note 36, 56.

[59]   On Global Governance *Commission on Global Governance*, OUR GLOBAL NEIGHBOURHOOD. THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE 253 ff. (1995); D. Messner and F. Nuscheler, "Global Governance. Organisationselemente und Säulen einer Weltordnungspolitik", in: Messner/Nuscheler (eds.), *Weltkonferenzen und Weltberichte. Ein Wegweiser durch die internationale Diskussion* (1996), 12, at 21.

[60]   Considerations of this kind focus on the WTO, S. Charnovitz, *WTO Cosmopolitics*, 34 N.Y.U. Journal of International Law & Politics 299 ff. (2002); M. Krajewski, Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation, 217 ff. (2001); M. Hilf and B. Eggers, *Der WTO-Panelbericht im EG/USA-Hormonstreit*, 8 Europäische Zeitschrift für Wirtschaftsrecht 559 (1997); generally J. Crawford, *Democracy and International Law*, 64 B.Y.I.L. 113 ff. (1994).

[61]   Powerful and influential C. Schmitt, *Der Begriff des Politischen*, 2nd ed. (1963), at 10 of the foreword: „Die Epoche der Staatlichkeit geht nun zu Ende" ("The era of statehood is coming to an end").

[62]   N. Luhmann, *Die Weltgesellschaft*, 57 A.R.S.P. 1, 27 ff. (1971); *id*., *Die Gesellschaft der Gesellschaft* 145 ff. (1997); *id.,* Der Staat des politischen Systems, in: Beck (ed.), *Perspektiven der Weltgesellschaft* 376 ff (1998); G. Teubner*,* Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus, 15 *Rechtshistorisches Journal* 255 ff. (1996).

Such a dramatic diagnosis of the fundamental weakening of traditional democratic institutions is by no means limited to this theory. Also some theoreticians of International Relations assert the existence of an integrated (or "de-bordered") world in which the nation state becomes increasingly irrelevant.[63] On the basis of a number of sociological studies, the majority opinion of the German Parliament's Enquete Commission on globalisation similarly concludes that globalisation causes a substantial erosion of democratic decision-making in national institutions.[64]

b. Globalisation as an instrument of democratisation

These bleak visions contrast with optimistic accounts. There is by no means a consensus that globalisation weakens the realisation of the democratic principle. Rather, some see a close interaction between globalisation and democratisation, thereby increasing the resources of legitimacy of states. In this respect, it is helpful to distinguish between a school of thought focused on economic development and one based on the further development of international law.

The first school of thought, to which the periodical *The Economist* and the minority of the German Parliament's Enquete Commission belong, emphasises the positive democratic effects of free-trade and communicative freedoms.[65] It focuses on the link between global free-trade and prosperity on the one hand and the ensuing link between prosperity and democracy on the other.[66] Clearly, this conception is less concerned with political self-determination; in the liberal tradition of the democratic theory, democracy is predominantly seen as a set of institutions for ensuring the control and responsiveness of politicians and bureaucrats.

Against this background, a limitation on the reach of national political activity due to the pressures of globalisation is not considered as fundamentally negative or hostile to democracy. Rather, these pressures are seen as tending to limit the scope for unreasonable decisions of the political classes which damage the interests of the majority of consumers.[67] Moreover, democracy and fundamental rights are found to be stabilised through global publicity and global media, which loosen the grasp of authoritarian regimes on individuals.

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[63] Forschungsgruppe Weltgesellschaft, *Weltgesellschaft: Identifizierung eines „Phantoms",* 37 Politische Vierteljahresschrift 5 (1996), 12.

[64] Enquete Commission, *supra* note 36, 56.

[65] ENQUETE COMMISSION, *supra* note 36, 461 ff. (minority vote).

[66] Regarding the correlation between trade and wealth see: P. Chow, *Causality between Export Growth and Industrial Development*, 26 JOURNAL OF DEVELOPMENT ECONOMICS 55 et seq. (1987); A. Harrison, *Openness and Growth: A Time-Series, Cross Country Analysis for Developing Countries*, 48 JOURNAL OF DEVELOPMENT ECONOMICS 419 et seq. (1996); A.J. Frankel & D. Romer, *Does Trade cause Growth?,* 89 AMERICAN ECONOMIC REVIEW 379 et seq. (1999); A.D. Irwin & M. Tervio, *Does Trade Raise Income? Evidence from the Twentieth Century*, JOURNAL OF INTERNATIONAL ECONOMICS 1 et seq. (2002); Regarding the correlation between wealth and democracy J. Helliwell, *Empirical Linkages between Democracy and Economic Growth*, 24 BRITISH JOURNAL OF POLITICAL SCIENCE 225 et seq. (1994); R.J. Barro, *Determinants of Democracy*, 107 THE JOURNAL OF POLITICAL ECONOMY 158 et seq. (1999); D. Acemoglu & J.A. Robinson, *Why did the West extend the Franchise? Democracy, Inequality and Growth in Historical Perspective*, 115 QUARTERLY JOURNAL OF ECONOMICS 1167 et seq. (2000).

[67] W. Meng, *Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG*, *in* FESTSCHRIFT FÜR RUDOLF BERNHARDT 1063, 1080 et seq. (U. Beyerlin et al. eds., 1995).

Similar conclusions are attained by a school of thought that asserts the advent of a "constitutionalisation of international law"; this school is deeply embedded within the universalist paradigm. It focuses on an increasingly stringent and dense set of international rules which bind national governments.[68] Three observations form the core of this school: the deepening of the ethical dimension of international law, its expansion and more effective enforcement, and its partial emancipation from the will of the individual State.[69] All these developments are considered, in principle, as adequate responses to the challenges of a globalised world. The core institutions of international law are seen as increasingly effective instruments vis-à-vis dictatorial regimes and even promoters for democratic forms of government.[70] Globalisation is, in principle, considered as a chance for a stronger international law to further democratic domestic institutions.[71]

3. Strategies to respond to the challenge

There are various strategies to strengthen the legitimacy of international law. A first strategy aims at improving the problem solving capacity of international law in general and international institutions in particular: more efficiency and effectiveness shall improve out-put legitimacy. A second strategy is centred on human rights: by imposing such rights against states, but also rights endangering institutions such as the Security Council with its listings or the World Bank through its funding of certain projects international law gains legitimacy by protecting fundamental human interests and universal values. Conceptually the most difficult issue remains the issue how to uphold democratic legitimacy in this context: in this respect, the difference between particularists and universalists map most positions.[72]

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[68]   This school of thought is particularly strong in the German speaking scholarship, Frowein, *supra* note 17, 440 et seq.; C. Tomuschat, *International Law as the Constitution of Mankind*, *in* INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY 37 et seq. (U.N. ed. 1997); R. Uerpmann, *Internationales Verfassungsrecht*, 56 JURISTENZEITUNG 565, 566 et seq. (2001); T. Cottier & M. Hertig, *The Prospects of 21st Century Constitutionalism*, 7 MAX PLANCK U.N.Y.B. 261 (2003); see also P.-M. Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 MAX PLANCK U.N.Y.B. 1 et seq. (1997).

[69]   H. Mosler, *The International Society as a Legal Community*, 140 Rd.C. 1, 31 et seq. (1974); Tomuschat *supra* note 27, 72 ff.; B. Fassbender, *Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls*, 30 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 1, 2 ff. (2003).

[70]   Franck, 'The Emerging Right to Democratic Governance', 86 AJIL (1992), 46, 47 et seq.; Stein, *supra* note 2, 533 et seq.; M. Beutz, *Functional Democracy: Responding to failures of accountability*, 44 HARV. J.I.L. 387, 391 et seq. (2003).

[71]   Culminating in the right to intervention: early on O. Schachter, *The Legality of Pro-Democratic Invasion*, 78 A.J.I.L. 645, 649 et seq. (1984); M. Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. J.I.L. 163, 175 (1993); F. Tesón, A PHILOSOPHY OF INTERNATIONAL LAW 55, 57 (1998); critical M. Koskenniemi, *Die Polizei im Tempel*, *in* EINMISCHUNG ERWÜNSCHT? MENSCHENRECHTE UND BEWAFFNETE INTERVENTION 63, 64 et seq. (H. Brunkhorst ed., 1998). For the position that international law is strengthened through the process of globalisation see M. List, B. Zangl, *Verrechtlichung internationaler Politik*, *in* DIE NEUEN INTERNATIONALEN BEZIEHUNGEN 387 et seq. (G. Hellmann, K. Wolf, M. Zürn eds., 2003).

[72]   Most academic contributions regarding the protection and development of democracy in the process of globalisation have not yet been developed into detailed models. Rather, they exist in a preliminary stage involving the testing of ideas on a new and by no means fully understood phenomenon. In particular, international legal scholarship in continental Europe does not yet focus on the democratic legitimacy of international law and international organisations. The close connection between US international legal scholarship and the discipline of international relations leads to a more intensive perception, for a useful compilation see G. Fox/B. Roth (eds.), Democratic Governance and International Law (2000); the contributions in the 10 INDIANA JOURNAL OF GLOBAL LEGAL ISSUES 1 (2003). Yet, the subject is also considered by American scholars to be in an embryonic phase,

The principle of democracy is, generally speaking, mostly dealt with in two respects: first, as an international legal requirement regarding a national system of government and, second, in connection with parliamentary control of foreign policy.[73] Further debate, on which this article focuses, is not yet concerned with the design of appropriate practical institutional arrangements, but rather with their conceptual foundations; in these foundations, the paradigm of particularism and that of universalism play a leading role.

a. The particularist response: State sovereignty as the leading principle

One approach for safeguarding democracy within the process of globalisation is mostly based on the particularist paradigm claiming that democracy can only be successfully realised within a nation State.[74] The primary concern is the protection of and the return to the political supremacy of national democratic institutions, i.e. the protection of State sovereignty in its traditional meaning. As a result, this approach resists the transnationalisation of societal spheres and the autonomisation of international political decision-making and international law-making.[75]

To protect the State as an institution of political self-determination, this conception can lead to the demand to slow down or even reject developments which contribute to a globalisation that endangers democracy. As *Ernst-Wolfgang Böckenförde*, perhaps the most eminent living German *Staatsrechtslehrer*, puts it: "If statehood [and therefore democracy] is to be preserved, then a counter-thrust against the globalisation process appears necessary in the form of a struggle for the re-establishment of the supremacy of politics in a governable space".[76] In order to counter transnational interdependence detrimental to democracy, the development of international law must, in this view, also be slowed down or even rejected. This is especially so in so far as it

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C. Ku & H. Jacobson, *Broaching the issues*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 3, 8 (C. Ku & H. Jacobson eds., 2003). In continental European journals there have been relatively few contributions in the past six years (?? Why six?)) that have focused on this subject. The United Kingdom is situated, like most, halfway between the European and American positions. The European Journal of International Law does not differ in this respect, with contributions from S. Wheatley, *Democracy in International Law: A European Perspective*, 51 INTERNATIONAL COMPARATIVE LAW QUARTERLY 225, 227 et seq. (2002); *id.*, *Deliberative Democracy and Minorities*, 14 E.J.I.L. 507 (2003); Sur, 'The State between Fragmentation and Globalisation', 8 EJIL (1997), 421; S. Marks, *The End of History? Reflections on some International Legal Theses*, 8 E.J.I.L. 449 (1997).

[73] A. Randelzhofer, *Zum behaupteten Demokratiedefizit der Europäischen Gemeinschaft*, in DER STAATENVERBUND DER EUROPÄISCHEN UNION 39, 40 et seq. (P. Hommelhoff & P. Kirchhof eds., 1994); it is difficult to find more detailed discussions in general textbooks, cf. K. DOEHRING, VÖLKERRECHT para. 117, 239 and 990 (1999); K. IPSEN, VÖLKERRECHT 374 et seq. (4th ed. 1999); P. Kunig, *Völkerrecht und staatliches Recht*, in VÖLKERRECHT 87, 93 et seq. (W. Graf Vitzthum ed., 2nd ed. 2001); M. SHAW, INTERNATIONAL LAW 177 et seq. (4th ed. 1997); P. DAILLIER & A. PELLET, DROIT INTERNATIONAL PUBLIC 427 et seq. (6th ed. 1999); B. CONFORTI, DIRITTO INTERNAZIONALE 191 et seq. (5th ed. 1997); J. GONZÁLEZ CAMPOS ET AL., CURSO DE DERECHO INTERNACIONAL PÚBLICO 432 et seq. (2002).

[74] J. Isensee, *Abschied der Demokratie vom Demos*, FESTSCHRIFT FÜR PAUL MIKAT 705 (D. Schwab et al. eds., 1989).

[75] E.-W. Böckenförde, *Die Zukunft politischer Autonomie*, in E.-W. BÖCKENFÖRDE, STAAT, NATION, EUROPA 103, 124 et seq (1999); similar to Hillgruber, 'Souveränität – Verteidigung eines Rechtsbegriffs', 57 Juristenzeitung (2002), 1072; J. Isensee, *Die alte Frage nach der Rechtfertigung des Staates*, 54 JURISTENZEITUNG 6, at 265 et seq. (1999); P. Kahn, *American Hegemony and International Law*, 1 CHICAGO J.I.L. 1, 3 et seq. (2000); J. Rubenfeld, *The Two World Orders*, in AMERICAN AND EUROPEAN CONSTITUTIONALISM (G. Nolte ed., 2005), 280-296: .

[76] Böckenförde, *supra* note 52, 123; also D. Schindler, *Völkerrecht und Demokratie, in* LIBER AMICORUM PROFESSOR SEIDL-HOHENVELDERN, 611, 618 (G. Hafner et al. eds., 1998), asserts a tension impossible to overcome.

supports such interdependence or affects spheres where law-making and political decision-making require maximum legitimation, particularly with regard to the redistribution of resources, security or national identity. In light of growing transnational interdependence, parliamentary control of foreign policy is not considered sufficient to uphold democracy. Due to the lack of a global *demos*, this understanding rejects an increase in the autonomy of international decision-making. Rather, it questions globalisation as a path for increasing societal wealth and individual freedom, and accords the principle of democracy fundamental primacy.

Translated into the categories of international law, this understanding corresponds to a position that considers mere co-ordination[77] – rather than co-operation or even integration – as the appropriate task and *Gestalt* for international law.[78] Accordingly, the concept of sovereignty, in the sense of a State's autonomy, forms the guiding paradigm for the development of international law. The international system should therefore aim at sovereign equality and not at its democratisation. In other words: the principle of democracy translates in the international realm into the principle of sovereign equality.

Another approach that allows for State co-operation beyond mere co-ordination on the basis of the above-mentioned premises advocates informality. This position is not opposed to co-operation as such, but considers processes of international legalisation and autonomous international legislation as problematic under the democratic principle.[79] It prefers that co-operation, which more substantially affects democratic self-determination than co-ordination, operate outside the legal framework. By staying outside the legal framework, co-operating national politicians retain a firm grasp on all issues even after a decision has been taken. No international norm will thus obstruct national democratic processes. This understanding puts technocratic elites operating outside the legal framework at the centre of the international political processes.[80] G8, OECD and similar institutions operating without legally binding instruments but also informal cooperation between national administrations, usually eyed with suspicion under the democratic principle, appear under this thought as prime avenues for international democracy, i.e. international co-operation responsive to the democratic principle.[81]

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[77] Similarly W. Friedmann, The Changing Structure of International Law 60 et seq. (1964).

[78] P. Weil, *Vers une normativité relative en droit international ?* 86 Revue generale de droit international public 5, 44 et seq. (1980); this sceptical position can be confined to individual areas, as my proposal of model of "co-ordinated interdependence" for the interpretation and development of WTO law, A. von Bogdandy, *Law and Politics in the WTO. Strategies to Cope With A Deficient Relationship*, Max Planck U.N.Y.B. 609, 612 und 653 et seq. (2002).

[79] J. Goldstein et al., *Introduction: Legalization and World Politics*, 54 International Organisation 385 et seq. (2000).

[80] G. Junne, *Theorien über Konflikte und Kooperation zwischen kapitalistischen Industrieländern*, in Theorien der internationalen Beziehungen 353, 364 et seq. (V. Rittberger ed., Supp. 21 1990); A.-M. Slaughter, *The Real New World Order*, 76 Foreign Affairs 183, 184 et seq. (1997); also published as *Government networks: the heart of the liberal democratic order* in: Fox/Roth, *supra* note 45, 199; R. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U.L.Rev. 437, 455 et seq. (2003).

[81] See the contributions in the collected volumes New Directions in Global Economic Governance (J. Kirton & G. von Furstenberg eds., 2001) and Guiding Global Order (J. Kirton et al. eds., 2001); P. Hajnal, The G7/G8 System – Evolution, Role and Documentation (1999).

A third option upholding the primacy of national sovereignty, which also allows for enjoyment of the benefits of globalisation, is unilateralism.[82] It is mostly held by US-American authors, but also appears in European thinking.[83] A democratic justification of unilateral policy can easily be given. According to a widespread – though not uncontested – understanding, the principle of democracy under a given constitution applies *only* to the relationship between those to whom the constitution grants power and the citizenry of that State. The effects of domestic law and policy on foreigners or other peoples consequently lie outside of the ambit of this principle.[84]

In this understanding, if globalisation is considered desirable or inevitable, it should be shaped, where possible, according to preferences and decisions found in the national democratic process. The implementation of national interests *vis-à-vis* the interests of other States and foreigners can accordingly be construed as the realisation of the democratic principle of the legally relevant constitution, i.e. the constitution that grants power to the national government in question. Seen in this light and constitutionally speaking, *only* George W. Bush's responsibility towards the American people is legally relevant and enforcing national security against Afghanistan or Iraq contains a democratic dimension.[85]

To be sure, not all scholars who construe democracy on this theoretical basis advocate unilateralism. There is room for different approaches if further considerations and principles are given more weight, such as peace,[86] international cooperation or the respect for international law.[87] It is, however, important to see that international obligations almost by necessity lead to a constriction of democracy under this understanding.

b. The universalist responses: Cosmopolitan law versus state centred integration

The starkest contrast to the above-mentioned approach is formulated by those who advocate cosmopolitan law that they consider to be the ultimate normative objective of modernity. Such law, they argue, should be the foundation and expression of a democratic global federation or cosmopolitan democracy. Accordingly, the nation State is viewed as a mere intermediate stage in the institutional evolution of public power. This understanding rests on a long tradition which has left its marks on international law scholarship,[88] as well as political thinking in general.[89] Its

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[82]   For the basis of a singular American status in international law M. Reisman, *Assessing Claims to Revise the Laws of War*, 97 A.J.I.L. 82 et seq., 90 (2003); as an expression of democratic constitutionality Kahn, *supra* note 52, 10 et seq., 18; Rubenfeld, *supra* note 75; an extensive account of the conceptional background by E. Afsah, *Creed, Cabal or Conspiracy – The Origins of the Current Neo-Conservative Revolution in US Strategic Thinking*, 4 GERMAN LAW JOURNAL 901 et seq. (2003).

[83] R. Cooper, The Breaking of Nations. Order and Chaos in the Twenty-first Century, 83 et seq. (2003).

[84]   Kahn, *supra* note 75, 8.

[85]   See the National Security Strategy of the USA: "In the war against global terrorism, we will never forget that we are ultimately fighting for our democratic values and way of life." The National Security Strategy of the United States of America, White House, September 2002, III., at http://usinfo.state.gov/topical/pol/terror/secstrat.htm#nss1. In this sense one can also point to the Reform Treaty amending the Treaty of the European Union Article 2 to read in para 5: "In its relations with the wider world the Union shall uphold and promote its values and interests".

[86]   L. Chieffi, Il valore costituzionale della pace (1990).

[87]   For example, the German Federal Constitutional Court (BVerfG), BVerfGE 89, 155, 185 et seq.

[88]   G. SCELLE, LE PACTE DES NATIONS ET SA LIAISON AVEC LE TRAITE DE PAIX 101 et seq., 105 et seq. (1919); *id.*, 1 PRÉCIS DE DROIT DES GENS 188 et seq. (1st ed. 1932); W. Schücking, *Die Organisation der Welt*, *in* FESTSCHRIFT FÜR PAUL LABAND 533 et seq. (W. van Calker ed., 1st ed. 1908); whereas Kelsen, the most significant

main premise is that only a democratic world federation can lay down law which shapes globalisation according to the needs of humanity. The international political level must itself operate democratically in order to satisfy the democratic principle.[90] This proposition usually stems from a fundamental rights understanding of democracy,[91] which focuses mostly on self-determination. Only such an emphatic understanding of democracy is capable of demanding a world federation, something that many consider to be utopian.[92]

Yet, the demand for a democratic world federation can legally be construed from the principle of democracy set out in national constitutions. If the principle is understood as requiring individual self-determination, a structural democratic deficit in the age of globalisation arises. Many State measures impact individuals in other States. However, these persons, as non-citizens, have almost no possibility for asserting their interests and preferences within the democratic process of the regulating State. Against this background, participation in and the opening up to global democratic institutions may overcome democratic deficits in national decision-making processes. Thus, the principle of democracy in the constitutions of many States can be construed as aiming towards an almost Hegelian superseding (*Aufhebung*) of traditional statehood.

Most recent publications on international law which envisage a world federation devote little space to the democratic principle.[93] Research in other disciplines has been much more prolific in this regard.[94] The key for democratisation of the international realm is often considered to be a global institution of a parliamentarian nature. Such an institution would catalyze global democratic processes and the formation of a global public.[95] It is not uncommon for the European Union to be viewed as an example.[96] The constitutions of the established democratic nation States are sometimes also conceived as guiding lights of a global order, albeit not as

representative of monism in international law, remains cautious, to some extent even sceptical, see H. KELSEN, PEACE THROUGH LAW 9 et seq. (1944).

[89]   See, e. g., E. Jünger, Der Weltstaat. Organismus und Organisation (1960).

[90]   D. Archibugi, *Principi di democrazia cosmopolita*, *in* DIRITTI UMANI E DEMOCRAZIA COSMOPOLITA 66, 90 et seq. (D. Archibugi & D. Bettham eds., 1998). Some scholars consider national elections as hardly capable of legitimising important governmental decisions on the international plane, cf. H. BRUNKHORST, SOLIDARITÄT. VON DER BÜRGERFREUNDSCHAFT ZUR GLOBALEN RECHTSGENOSSENSCHAFT 20 (2002).

[91]   F. MÜLLER, DEMOKRATIE ZWISCHEN STAATSRECHT UND WELTRECHT, 11 et seq. (2003); J. HABERMAS, FAKTIZITÄT UND GELTUNG 532 et seq. (1992) and passim; C. Offe & U. K. Preuß, *Democratic Institutions and Moral Resources*, *in* POLITICAL THEORY TODAY 143 et seq. (D. Held ed., 1991).

[92]   Presented as an outright ethical obligation by O. HÖFFE, DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG 267 (2nd ed, 2002).

[93]   Cf. B. Fassbender, *The U.N. Charter as a Constitution*, 36 COLUM. J.T.L. 574 et seq. (1998); *id.*, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO. A CONSTITUTIONAL PERSPECTIVE 301 et seq. (1998); S. Hobe, *supra* note 36, 281; J. Delbrück, *Wirksameres Völkerrecht oder neues „Weltinnenrecht"*, *in* J. DELBRÜCK, DIE KONSTITUTION DES FRIEDENS ALS RECHTSORDNUNG 318 et seq. (1996); but see also his more recent piece *Exercising Public Authority Beyond the State*, 10 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 1, 29, 37 et seq. (2003).

[94]   The theoretical breadth of approaches is evident when comparing O. Höffe's Kantian book DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG, *supra* note 92, with the Hegelian approach taken by H. BRUNKHORST, SOLIDARITÄT, *supra* note 71, 110 and 184.

[95]   With concrete proposals Archibugi, *supra* note xx, 98 et seq., 109; also D. HELD, DEMOCRACY AND THE GLOBAL ORDER 278 et seq. (1995); *id.*, *Kosmopolitische Demokratie und Weltordnung. Eine neue Tagesordnung*, *in* FRIEDEN DURCH RECHT 220 et seq., 232 (M. Lutz-Bachmann & J. Bohman eds., 1996).

[96]   Early on J. Monnet, MEMOIRES 617 (1976); also E.U. Petersmann, The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization, 6 E.J.I.L. 161, 221 (1995).

blueprints. Some authors, however, advocate new but little-defined sets of institutions in order to anchor democracy on the world plane.[97] Within the latter models, representative organs are only accorded a subordinate role.

Be that as it may, law-making under contemporary international law is considered unsatisfactory and in need of a far more solid democratic basis. Many scholars place much emphasis on transnationally operating non-governmental organisations, which they construe as the nucleus of a future democratic global public capable of animating global democratic institutions.[98]

The other strand of thinking under the universalist paradigm advocates intense co-operation among democratic nation States and focuses accordingly on the international law of co-operation. The key belief is that the democratic nation State is and remains the essential framework for the realisation of the democratic principle as well as the pivotal point of the international system. The nation State is considered capable of thoroughly mastering the challenge of globalisation in close co-operation (including partial integration) with other States and with the aid of international organisations.[99] In the course of globalisation, the nation State has been weakened and fragmented. Nevertheless, the two core premises of a well-functioning democracy within a nation State are considered to remain intact:[100] national elections and parliamentary institutions continue to convey a sufficient amount of democratic legitimacy and the State retains the capacity to enforce its will throughout the national society.

Under German constitutional law, the "openness" of Germany towards international legal regimes of a co-operative nature is constitutionally required.[101] The same is true for the European Union.[102] Such openness can be deduced from the constitutional principle of democracy. The argument runs similar to the one already presented with respect to cosmopolitan democracy. The deduction is based on a fundamental rights understanding of democracy which not only includes citizens, but requires – in order to minimize heteronomy – that the preferences and interests of affected foreigners be taken into account.[103] Thus, international law acquires its own and specific democratic significance, unavailable to domestic law, since international law is the standard instrument for giving foreigners a voice in national law-making.[104]

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[97]   MÜLLER, *supra* note 91, 143.

[98]   BRUNKHORST, *supra* note 71, 209 et seq.; MÜLLER, *supra* note 91, 139.

[99]   As a form of "global governance", cf. ENQUETE COMMISSION – SUMMARY, *supra* note 36, 76 et seq.; K. König, *Governance als Steuerungskonzept*, *in* K. KÖNIG et al., GOVERNANCE ALS ENTWICKLUNGS- UND TRANSFORMATIONSPOLITISCHES KONZEPT 9 et seq. (2002)

[100]   C. Walter, *Constitutionalizing (Inter)national Governance*, 44 G.Y.I.L. 170 et seq. (2001).

[101]   According to the preamble, the Basic Law is: „.... moved by the purpose to serve world peace as an equal part of a unified Europe"; in detail H. Mosler, *Die Übertragung von Hoheitsgewalt*, *in* 7 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND § 175, para. 14 (J. Isensee & P. Kirchhof eds. 1992); Tietje, *supra* note 40, 1087.

[102]   Article 11 EU Treaty; even more forcefully, the Lisbon Reform Treaty inserting the new Article 10a on the Union's external action.

[103]   S. Langer, GRUNDLAGEN EINER INTERNATIONALEN WIRTSCHAFTSVERFASSUNG 23 et seq., 51 (1995); for an appropriate understanding of the concept of sovereignty DAHM, DELBRÜCK & WOLFRUM, *supra* note 45, 218 et seq.; R. WAHL, VERFASSUNGSSTAAT, EUROPÄISIERUNG, INTERNATIONALISIERUG 17 (2003). This notion is also expressed in BVerfGE 83, 37, 52.

[104]   Some reports of the WTO's Appellate Body seem to be inspired by this understanding, WTO Appellate Body Report, *Standards for Reformulated and Conventional Gasoline*, AB-1996-1, WT/DS2/AB/R (Apr. 29, 1996);

This school of thought distinguishes itself from that focussed on State sovereignty because it does not understand openness towards international law and international policy as a disadvantage for democracy. On the contrary, according to this vision, such openness realises a democratic potential that the closed or hegemonic State cannot attain. Loss of national self-determination is compensated through greater transnational participation.

The fundamental differentiation to the cosmopolitan school of thought lies in the fact that global democratic institutions are considered in practice futile and – as legal and political projects – normatively problematic. Following a certain interpretation of Kant's essay "Perpetual Peace", a world federation is understood as potentially despotic.[105] This school of thought attracts the support of most international legal scholars. Within it, two positions for determining the appropriate forum for co-operation can be distinguished: the unitarian model of legitimation and the pluralist model of legitimation.

Under the first position, the democratic principle is institutionally realised *only* through the choices of the electorate. All public acts achieve a democratic quality only when they are either enacted (exceptionally) by the citizenry as such (through referenda) or can be traced back to the decisions of elected bodies ("chain of democratic legitimation").[106] According to this understanding, the democratic legitimacy of international law can be improved by better parliamentary control of the executive,[107] the establishment of international institutions of a parliamentary nature[108] or referenda.

The involvement of those affected or other civil actors in decision-making processes is not attributed any positive relevance for democracy by the unitarian model. Rather, it sees the democratic principle as shedding negative light on such participatory procedures, because they represent a potential threat to the democratic "chain of legitimation". It is this point which distinguishes this position from the pluralist one described below: civil participation, in particular that of non-governmental organisations, cannot strengthen the democratic credentials

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United States – Import Prohibition of certain Shrimp and Shrimp Products, *Recourse to Article 21.5 of the DSU by Malaysia* AB-2001-4, WT/DS58/AB/R (Nov. 21, 2001).

[105] I. Kant, *Zum ewigen Frieden*, *in* I. KANT, KLEINERE SCHRIFTEN ZUR GESCHICHTSPHILOSOPHIE, ETHIK UND POLITIK 115, 147 (K. Vorländer ed., 1964).

[106] The "chain of legitimation" is a core concept of German constitutional law; see E.-W. Böckenförde, *Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie*, *in* FESTSCHRIFT FÜR KURT EICHENBERGER 301 et seq., 315 (G. Müller ed., 1982); this has been important in numerous decisions of the Federal Constitutional Court, see most recently BVerfG, Az.: 2 BvL 5/98 5. Dec. 2002, at http://www.bundesverfassungsgericht.de/cgi- bin/link.pl?entscheidungen, at n. 156 with further references concerning earlier decisions.

[107] *Cf.* R. Wolfrum, *Kontrolle der auswärtigen Gewalt*, 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 38 et seq., 45 et seq., 61 et seq. (1997); furthermore K. Hailbronner, *Kontrolle der auswärtigen Gewalt*, 56 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7 et seq. (1997).

[108] S. Kadelbach, *Die parlamentarische Kontrolle des Regierungshandelns bei der Beschlußfassung in internationalen Organisationen*, *in* NEUE PROBLEME DER PARLAMENTARISCHEN LEGITIMATION IM BEREICH DER AUSWÄRTIGEN GEWALT 41, 53, 56 et seq. (R. Geiger ed., 2003); for an overview of the relevant international practice H. SCHERMERS & N. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW § 558 et seq (3rd. ed. 1995); H. Lindemann, *Parliamentary Assemblies, International*, *in* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 892 – 898 (R. Bernhardt ed. 1997); C. WALTER, *Parliamentary Assemblies, International, Addendum*, *id*., 898 – 904 (1996).

of international law or international politics. No procedures are seen as having been developed so far whereby civil participation complies with core requirements of the democratic principle, above all the requirement of democratic equality.[109]

Consequently, the democratic openness to the interests of citizens of other States is carried out procedurally via governmental co-operation as well as via international bodies that are essentially controlled by national governments. Thus, the executive and technocratic character of international political processes is not viewed within this framework as problematic under the democratic principle. Moreover, further international legalisation and a cautious development of international organisations towards more autonomy ("constitutionalisation of international law"[110]) do not raise concerns. The basic premise of this position is that additional international legalisation and more autonomous international law-making are required in order to cope with the challenge of globalisation. Accordingly, limitations on national democracy do not constitute the main legitimatory problem of international law. This understanding can be summarized as follows: there cannot be a democratic world federation, but there can be a world of closely and successfully co-operating democracies; it is the task of contemporary scholarship to contribute to realising this objective.[111]

By contrast, the second, the pluralist position holds that the international law of co-operation can substantially increase the democratic legitimacy of international law if new forms of civic participation are adopted. Such forms, going beyond elections and referenda, are possible avenues for the realisation of the democratic principle and adequate responses to the detachment of international processes from national parliamentary control.[112] The underlying premise is that enabling the participation of non-governmental organisations (NGOs), as exponents of the international civil society, represents a prime strategy to further the democratic principle on the international plane.[113] At its heart usually lies a fundamental rights understanding of democracy focussed on the opportunity for participation of the individual, but sometimes also neo-corporative theories of democracy.[114]

The central institutional issue for the pluralist approach concerns the development of decision-making systems in such a way that civil actors can participate in international procedures and

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[109] Stoll, *supra* note 42, V A 4 b, VII.

[110] Uerpmann, *supra* note 68, 565 et seq.

[111] This also appears as the vision of J. Habermas, Hat die Konstitutionalisierung des Völkerrechts noch eine Chance, in: J. Habermas, Der gespaltene Westen 113, 134 et seq., 137 et seq. (2004); J. Habermas, *The Divided West*, (2006), at 115 ff.

[112] Of particular interest in recent years has been civil actors' access to the WTO Dispute Settlement mechanism, P. Mavroidis, *Amicus Curiae Briefs before the WTO: Much Ado about Nothing*, *in* LIBER AMICORUM CLAUS-DIETER EHLERMANN, *supra* note 30, 317 et seq., and D. Steger, *Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience, id.*, 419 et seq.; H. Ascensio, *L'amicus curiae devant les juridictions internationales*, 105 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 897 et seq. (2001).

[113] ENQUETE COMMISSION, *supra* note 36, 439 et seq.; B.-O. Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 42 DER STAAT 1, 8 et seq. (2003); R. Khan, *The Anti-Globalization Protests: Side-show of Global Governance, or Law-making on the Streets?*, 61 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (HEIDELBERG JOURNAL OF INTERNATIONAL LAW) 323 (2001); Charnovitz, *supra* note 60, 299; I. B. Boutros-Ghali, An Agenda for Democratization, United Nations, New York 1997, Sales No. E.97.1.3, 29, 34 ff.

[114] This latter understanding informs the EU Commission's White Paper on European Governance, see COM (2001) 428 final, *at* http://europa.eu.int/eur- lex/en/com/cnc/2001/com2001_0428en01.pdf.

ultimately in international law-making, conveying social interests, preferences and values. This position emphasises the need for transparency of international politics, seeing it as indispensable for effective democratic involvement of the nascent transnational civil society.

4. New Approaches

Particularism and universalism remain the most important paradigms in Western international scholarship. The preceding understandings rest on the premise of the supremacy of politics over other societal spheres. However, numerous scholars diagnose a loss of this supremacy, finding instead new disorder because of overwhelming differentiation and fragmentation. Some even go so far as claiming that the world is relapsing into a situation akin to the Middle Ages.[115] The supremacy of the nation State over other societal spheres is said to have become substantially eroded, leading to the inability of the State to organise society effectively. Any conception which envisages the realisation of democracy through the supremacy of politics is, consequently, futile and hopeless in the era of globalisation.

With reference to the future of democracy, most representatives of this vision agree that democracy organised through state procedures has lost much of its meaning. Accordingly, the political apathy of many citizens appears intuitively comprehensible. Some even diagnose – by no means joyously – the end of democracy.[116] Public law scholarship cannot shrug off such a diagnosis. Should it prove convincing, a fundamental reorientation of constitutional scholarship and practice would be advisable, requiring for example the horizontal application of fundamental rights as an instrument for protecting individuals from infringements by other private actors.[117] Furthermore, in order for constitutional law to realise its basic principles throughout the entire society,[118] new legal institutions would have to be conceived and established.

Notwithstanding the diagnosed demise of the supremacy of politics, there are also proposals for maintaining democracy in this new setting. They can best be described as aiming at the control of any powerful actor. Gunther Teubner asserts the formation of a new system of the separation of powers provided by separate and competing social systems. These systems in turn are seen as responding to the democratic principle through the formation of "dualistic social constitutions". Any such system is divided into a spontaneous sphere which allows for participation of individuals and an organisational sphere which checks the other systems.[119] It is also argued that democracy might be maintained through another radically innovative avenue, i.e. by basing new law less on decisions of public bodies, but rather have it emerge spontaneously within the

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[115] Cf. above, III. 1.

[116] J.-M. GUÉHENNO, DAS ENDE DER DEMOKRATIE 13 et seq., 162 (1994) and passim; similarly BÖCKENFÖRDE, supra note 75, 116; R. Dahl, *Can International Organizations be Democratic?*, in DEMOCRACY'S EDGES 19 et seq. (I. Shapiro & C. Hacker-Cordón eds. 1999).

[117] D. Thürer, Modernes Völkerrecht: Ein System im Wandel und Wachstum – Gerechtigkeitsgedanke als Kraft der Veränderung?, 60 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 557, 587 et seq. (2000); G. Teubner, Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 4 et seq. (2003); GUÉHENNO, supra note 116, 14.

[118] This is a core concern of European public law scholarship.

[119] G. Teubner, *Privatregimes: Neo-spontanes Recht und duale Sozialverfassung in der Weltgesellschaft*, in FESTSCHRIFT FÜR SPIROS SIMITIS 437, 447 et seq. (D. Simon ed., 2000); *id*., *Globale Zivilverfassungen*, supra note 117, 25 et seq.

international society. The prime example is the alleged emergence of legal norms as a result of the outrage of the international society in response to specific situations.[120]

Positions in the "governance" debate arrive at similar conclusions to the extent that consensual forms for the development and implementation of policy are considered to be appropriate responses to the challenges of globalisation. Given the largely fragmented international system, the consensus of large businesses, NGOs and further important actors is deemed necessary and adequate.[121] Such approaches are mostly based on models of associative democracy,[122] whereby democracy is realised through consultation between the representatives of collective interests.

Interesting as many of these new approaches are, they have not yet succeeded in forming new paradigms able to inform Western international scholarship as a collective exercise.[123] Particularism and universalism still build the main conceptual framework of international lawyers. They will now be presented in more detail.

III. Particularism: the impossibility of global order

1. The core of the paradigm

The paradigm of particularism is the most ancient, the most embedded in common sense, the most vociferous at the outset of the 21st century. It embraces a stream of theories reaching from the Greek roots of occidental political thinking to today's US-American *Neocons*. The qualification as *particularism* rests on two basic assumptions shared by all theories within this paradigm. The first sees order as possible only within the *particular* polity; it cannot extend to humankind as a whole. The second assumption asserts that a polity is only viable if *particular*: its internal cohesion depends upon something that is exclusively shared by all members. Consequently, the polities are conceived as competing, even conflicting, and the denial of the possibility of common comprehensive public order entails that external conflicts can easily escalate. The competition for scarce resources in a world without any universally shared public order has, as a general consequence, the strengthening of the polity's internal ties. This second dimension of *particularism* leads many particularistic theories to be also *holistic*. The qualification as *holistic* depends on the assumption that the theory's basic unit is a whole of humans, be it a demos, a nation or a state, but not the individual as such. The theories which elaborate this paradigm tend towards the firm defence of the polity's interests. This is seen as an ontological datum on which any responsible understanding of international order and international law needs to be built.

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[120] Teubner, *Globale Bukowina*, *supra* note 62, 255; A. Fischer-Lescano, *Globalverfassung: Verfassung der Weltgesellschaft*, 88 A.R.S.P. 349, 356 et seq. (2002); see also M. Reisman, *A Critique of International Treaty Making*, *in* THE DEVELOPMENT OF INTERNATIONAL LAW IN TREATY MAKING (R. Wolfrum ed., 2004).

[121] ISSUES IN GLOBAL GOVERNANCE/OUR GLOBAL NEIGHBORHOOD 253 et seq. (Commission on Global Governance ed., 1995).

[122] P. Schmitter, Interest, Association, and Intermediation in a Reformed Post-Liberal Democracy, in STAAT UND VERBÄNDE 161 (W. Streeck ed., 1994); A. Martinelli, Governance globale e responsabilità democratica, in L'ITALIA E LA POLITICA INTERNAZIONALE 47, 51 et seq. (F. Bruni & N. Ronzitti eds., 2001).

[123] In detail D. Kennedy, *supra* note 15.

Accordingly, international law is best understood as an instrument of coexistence or perhaps of hegemonic power. As a consequence, Articles 2 para. 4 and 51 UNC should be interpreted in a way accommodating the interests of those states who are capable of projecting their power globally. Any other interpretation would miss the very point of international law and would probably damage it by overstretching its normativity. Also human rights should be interpreted and applied cautiously.

2. Three variants of the paradigm

The paradigm of holistic particularism has found expression in widely differing theories in the last two-and-a-half thousand years by which it responded to the evolving theoretical discourse and the social evolution. Just imagine how different the intellectual, social, technological world of Thukydides' Peloponnesian War is from that of the *Neocons'* Iraq war. In particular, three variants have emerged, mostly as a reaction to deep transformations which undermined the paradigms' persuasiveness: realism, nationalism, and hegemonism.

Usually many of the positions that we subsume under the term *particularism* are conceived of as *realist*. We see this term as unfortunate. Firstly, realism indicates two different issues. One is simply that any scholar and any theory need to take reality into account. This, however, is a truism, and there is no serious theory that purports what it conceives as unrealistic positions. Therefore, this broad understanding is of no use for mapping the theoretical landscape. The second understanding of *realism* is far more narrow and only relates to a subgroup of the particularist theories. Its basic tenet is that all politics is a struggle. In that guise *Realism* is the oldest variant of the paradigm *holistic particularism*, as its core assumptions were developed in ancient Greece. Reduced to a simple formula, its main assertion is that all politics is nothing but struggle for power. After having been elaborated with laconic mastery by the Greek historian Thucydides (460 – 400 b. Chr.) in his report on the Peloponnesian War,[124] the "realistic" view of politics was re-proposed, substantially unchanged, by Machiavelli (1469-1527) in the early modern era.[125]

However, as convincing as it may appear at first sight, a severe flaw afflicts this paradigm from the outset. Neither Thucydides and Machiavelli, nor their numerous successors or *epigones*, manage to overcome a serious deficit of realist thought, namely, its inability to explain the evident difference between internal and external policies. Whereas there is some evidence that the rule of law is not always a top priority in foreign policy, a general claim of lawlessness cannot convince if applied to the political struggle within a polity. The latter is manifestly ruled by laws which mostly succeed in establishing a certain degree of responsibility of the rulers towards the fellow-members of the polity. The failure to explain in a convincing way the *whole* (inside the polity and outside) realm of politics as a quest for power might be one reason, if not the most significant of all (at least on the conceptual level), why classic realism made way, roughly half a century ago, to the so-called "structural realism" or "neo-realism" of the new

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[124] Thucydides, The Peloponnesian War (1959), at V, 86.
[125] Niccolò Machiavelli, Il Principe (1513); Discorsi sopra la prima deca di Tito Livio (1513-1519).

discipline of international relations; only through this limitation to the international sphere its basic assumption can gather sufficient evidence for being a meaningful proposition.[126]

This problem becomes most evident in Hans J. Morgenthau, one of the founders of the new discipline of International Relations in the U.S.[127] He maintains the pretence of explaining all politics as a struggle in defence of self-interests. But, he concedes the fundamental difference between domestic and international politics in this respect,[128] focusing his "realistic" analysis exclusively on the latter. The scholarship that grew under the umbrella of his new interpretation of realism eventually gave up the closer examination of the foundations of domestic policies. Founding the "neo-realistic" approach to international relations, it came to focus exclusively on the way states, as the sole (or at least as the main) actors on the international arena, organize their mostly hostile interactions.[129]

Trying to explain why there is rule of law in domestic politics, Morgenthau resorted to the concept of the *nation* as the consolidating factor within the polity.[130] He thereby turned - while abandoning the variant of "classic" realism - to the central theoretical tool of the second variant of the particularistic-holistic paradigm, namely to the idea of the *nation* as a *community* of a *particular* history, *particular* destiny, *particular* culture or *particular* ethnos.

Nationalism as a theory asserts that the individual's belonging to a nation founded on a *particular* history, *particular* destiny, *particular* culture or *particular* ethnos allows for the polity's internal cohesion. This idea also justifies the quest for solidarity and inclusion inside as well as collision and exclusion outside. Although less ancient than realism, nationalism has as well a quite long history, dating from the time of political Romanticism, when conservative political writers, especially in Germany, borrowed the nation-concept from the progressive lexicon of the French Revolution and adapted it to the needs of a re-founded social and political conservatism.[131] Founding the cohesion of the polity on the nation, a powerful idea was created.

For the next century and a half, this paradigm inspired the vision of the nation and boosted the internal cohesion in a way that far exceeded the antiquated Aristotelian vision of the society as an enlarged family.[132] It allowed broader social classes to be involved in the polity that no longer could be excluded from political process. This development corresponded historically with and is perhaps connected to aggressive foreign policy, colonialism and imperialism. However, it also coincided with the creation of a body of treaties and doctrines today often referred to as "classical international law". This body provides a legal framework for the expansion of the nation state, but also for peaceful coexistence and even constructive co-ordination. Being constitutively *without a spine* it worked as a "gentle civilizer of nations."[133]

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[126] Slaughter, *supra* note 5, at 30.

[127] Hans J. Morgenthau, Politics Among Nations. The Struggle for Power and Peace (1948).

[128] *Id.*, at 31, 35.

[129] Within the very voluminous literature see, as the historically maybe most eminent exponent, KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

[130] MORGENTHAU, *supra* note 127, at 118, 244, 471.

[131] Adam H. Müller, Die Elemente der Staatskunst (1809).

[132] Aristotle, The Politics (1988), at I, 2, 1252a and following; Jean Bodin, Six livres de la république (1576), at I, I, 1; Robert Filmer, Patriarcha, Or the Natural Power of Kings (1680).

[133] Koskenniemi, *supra* note 15.

The national variant of the holistic particularism has found a contender within the paradigm due to its difficulties to respond to the challenges of the ongoing transition to an ever-more-closely interlinked world. An idea mainly concentrated on the flowering and protection of a self-sufficient nation does not provide the best conceptual precondition for developing responses to world where states are ever more intertwined and ever less self-sufficient. Since a universal perspective with a truly public international order is beyond the particularistic-holistic paradigm, the quest for order beyond the borders of the nation found its answer in the turn to *hegemonism* as the third variant.

Through the hegemonic variant the particularistic-holistic paradigm incorporates a global perspective without going universal, that is, confirming the premise of the non-universality of order. An early elaboration was given by the Carl Schmitt with his theory of "large-range-order" (*Großraumordnung*).[134] Moving from the diagnosis that the traditional concept of the European nation state would be inadequate to manage the challenges of a new era,[135] he proposed a *Großraumordnung* as an idea of global (yet not universal) order based on few great powers. Under this new vision, those powers would be allowed to enlarge both the range and meaning of order as well as the resources needed to achieve it.

The hegemons should guarantee the order within their respective spheres of influence, which would be in the hand of an ethnically and ideologically homogeneous group organized within a nation state as the heart of the *Großraum*. Between the spheres of influence the principle of non-intervention should rule, and the international law between these powers should maintain its "classical" form. In Schmitt's conception, the particular community assumes continental proportions due to a more comprehensive definition of the possible reasons of the cohesion. No universal law or order is recognized by Schmitt to be more than a mere deceit. For some decades Schmitt's theory of *Großraumordnung* had enjoyed little interest and even less appreciation.

However, the influence of his thought remains quite strong, so that the features of his hegemonic reinterpretation of the particularistic-holistic paradigm, in general, and of its idea of the international relations in particular, outlining the comprehensive definition of the political communities as the actors of international relations as well as the existentialistic dimension of conflicts, reappeared recently in Huntington's influential idea of the "clash of civilisations."[136]

3. The American Neocons

Among the variants of the particularistic-holistic paradigm, hegemonism appears to be most in tune with the challenges of globalisation: it seeks to extend the reach of the polity beyond the nation for pursuing globally its interests or even values without ending in the impasse of colonialism or in a web of international governance. Recently, a new and politically powerful version of hegemonism has been developed by the US-American neoconservative movement. Since this stream of thinking still lacks its defining work, the following discussion combines

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[134]   Carl Schmitt, Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte (1939). The concept has been later redefined, the theory being yet substantially restated, in Carl Schmitt, Der Nomos der Erde im Völkerrecht des Jus Publicum Europeum (1950).

[135]   Carl Schmitt, *Das Zeitalter der Neutralisierung und Entpolitisierung* (1929), in: CARL SCHMITT, DER BEGRIFF DES POLITISCHEN. TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN (1963), at 87.

[136]   Samuel P. Huntington, The Clash of Civilizations (1996).

various authors in order to work out what can be considered as the most recent *Gestalt* of the paradigm.

Sketching tradition and innovation in a nutshell, one can state that as always under this paradigm – the assumption reigns that social, political and juridical order based on public law can only be realized within the single polities, whereas beyond them, in the realm of the relations between the polities, a truly public order is impossible; institutions which claim to be a step in that direction are to be regarded with deep suspicion. Innovation can be found in two aspects shared by most neocons. First, the *realists'* prudential restraint on using power gets lost in the neoconservative vision. Second, the democratic principle assumes a founding role within the paradigm: it is used as justification for the aggressive pursuit of the national interest, for the intervention into non-democratic states and for the scepticism of international law.

a. The critique of international order through public international law

The scepticism of a public international order based on public international law is a shibboleth of the *Neocons*. A telling example is provided by Jeremy A. Rabkin. In Rabkin's view, international law is an instrument for restraining the well-motivated and legitimate national interests of the United States, as the paladin of the free world, and of all other liberal and democratic nation-states. As it was still called "law of nations" – Rabkin argues – international law was largely about war and commerce, and therefore limited in reach and range.[137] Moreover, it was fundamentally bilateral, and pre-existed international institutions. There was no room for a nebulous international community. He criticises what he sees as international law's development into a much more ambitious and invasive enterprise pretending to give effect to the alleged will of nothing less than humankind itself.

The consequence, according to Rabkin, has been not only a loss of efficiency but also a shift in the political meaning of international law. By building institutions, which pretend to be binding on sovereign nation-states, contemporary international law is becoming "a sheer monument to collectivist ideology."[138] That change, Rabkin claims, should pose in itself a problem for liberalism. Yet, an even more serious challenge arises from it: in a world which is characterized by a large number of non-democratic states, binding international institutions can represent a handicap for liberal states and for their actions taken in defence of liberty. In this light, international law is often an ideological weapon of indecent positions.

Not every thinker in this movement is totally set against international law and institutions, not least because of their possible usefulness. As such it is presented by Robert Kagan. He shares Rabkin's position so far as he considers the idea of a legalisation of international relations as based on "legitimacy myths."[139] The United Nations is far from being "the place where international rules and legitimacy are founded."[140]. However, the United Nations and the Security Council as its main organ are useful instruments serving the interests of the nation-states. Kagan points out that this judgment holds for the foreign policy of the super-power. This

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[137] Jeremy A. Rabkin, Why Sovereignty Matters (1998), at 24.
[138] *Id.*, at 95.
[139] Robert Kagan, *America's Crisis of Legitimacy*, 83 FOREIGN AFFAIRS 65, 73 (2004).
[140] *Id.*, at 73.

is shown in cases like the intervention in Haiti in 1994 or the Iraq bombing in 1998.[141] At the same time, international law is not able to constrain powerful states. As evidence Kagan refers to the Kosovo war in 1999, which, although waged while circumscribing or even flouting the will of the United Nations, had been considered as legitimate by France and Germany. This serves as evidence for the limits of a legalisation of the international order.

This scepticism is elaborated in Jack L. Goldsmith's and Eric A. Posner's book on the "Limits of International Law". It sets out to show that international law is constitutively incapable of providing for a truly public international order.[142] Using rational choice theory, they claim to prove that international law has little normative influence on the behaviour of states because states, irrespective of the law, always follow their peculiar interests, of which the international rule of law is none.

The limits to international law are not just factual, they are also normative, due to democracy. Here, they upset the Kantian theory which asserts that representative democracies are far more prone to subscribe to international law and a peaceful public international law.[143] Posner and Goldsmith claim that one of the most important reasons why democratic states do not submit themselves to international rules and international institutions consists in their specific form of domestic legitimacy, namely the power of the people. Insofar as governments are accountable to the citizens in democracies, and the citizens are not prone to prefer altruistic policies, liberal democracies would be precluded from pursuing cosmopolitan projects.[144] Moreover, international law is scorned as it limits the possibility of democratic self-government.

In Goldsmith and Posner's view, the more liberal and democratic the polity, the less willing it will be to submit itself to international rules not immediately supporting their interests. Yet, the respective discrepancy with Western European states needs to be explained. Goldsmith and Posner join Kagan in ascribing this difference to the difference in power: "Powerful states do not join institutions that do not serve their interests."[145] Following the interpretation of democracy and compliance with international rules as inversely related, therefore, a democratic state will always prefer to rely on its own resources and interests, unless it is not strong enough to take full responsibility for its actions.

An extensive analysis of the epistemological deficits of Goldsmith and Posner's theory would go far beyond the purposes of the present contribution,[146] but some points need to be discussed in

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[141] *Id.*, at 74.

[142] Jack L. Goldsmith, Eric A. Posner, The Limits of International Law (2005).

[143] Kant, *supra* note 105; *cf.*: A. Moravcsik, "Taking preferences seriously a liberal theory of international politics" (1997) 51 International Organization 513 - 53.

[144] GOLDSMITH/POSNER, *supra* note 142, at 212.

[145] *Id.*, at 223. This is precisely one of the most important arguments articulated by Kagan in his successful book ON PARADISE AND POWER (2003) in order to explain the differences in the foreign policy between the United States and Europe. For an analysis of content and background of Kagan's bestseller as well as for a critique of his approach see the special issue of the "German Law Journal" (September, 2003), available at http://www.germanlawjournal.com/past_issues_archive.php? show=9 &volume=4.

[146] *See, e.g.*, Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006); Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533 (2006); Oona A. Hathaway and Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006); Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defense*, 15 EUR. J. INT'L. L.

light of the objective of our inquiry. As a presupposition of their research, Goldsmith and Posner assume some far-reaching axioms,[147] like the definition of the state as the unique significant actor in the arena of international relations, as well as the assumption of a merely instrumental concept of rationality according to which the only rational behaviour would consist in pursuing short-termed and particular payoffs. However, these assumptions are far from self-evident. In fact, some questions arise from Goldsmith and Posner's axioms: is it correct, first, to treat collective actors (states) in the same way as single actors (individuals)? And, second, does not a purely instrumental understanding of rationality lead to an unconvincing view of human praxis? In fact, game theory was conceived to explain the actions of concrete individuals, not of complex social, political and administrative structures, which are difficult to conceptualize as single players. Goldsmith and Posner assert that the assumption is nonetheless justified by the particular shape of the international arena, where states are normally perceived as acting as a unitary whole, and because the "billiard ball" approach, considering every single state as a unity, albeit "far from perfect", would be simply "parsimonious,"[148] in the sense that it would allow to usefully reduce number and complexity of the analyzed phenomena in order to concentrate on the most significant among them. This argument, however, has little content in the face of one of the most relevant trends of our times: the de-structuring of state unity and the progressive development of private and public networks.[149] Ignoring these new developments would not provide for a healthy reductionism in scientific analysis, but rather for a misunderstanding of the present reality. Furthermore, either rationality should be understood in a more than purely instrumental sense[150] or, even if it is conceived as a mere instrument for the achievement of particular goals, it does not necessarily find its highest self-fulfilment in the *immediate* maximisation of short-sighted payoffs. From a more far-reaching point of view, it also might be argued that the creation of norms, rules and solid international institutions to secure their compliance is, already in itself, a better achievement of instrumental reason insofar as it guarantees higher benefits in the long term.[151]

b. Hegemonic order

Public order is always *particular* according to Neoconservative thinking and it is always *holistic*. Neoconservative thought shares with all variants of the paradigm its two main characteristics, namely the idea that social, political and legal order can only be possible within a well integrated

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1031 (2004); Anne van Aaken, *To Do Away with International Law? Some Limits to the "Limits of International Law"*, 17 EUR. J. INT'L L. 289 (2006).

[147] Goldsmith/Posner, *supra* note 142, at 4.

[148] *Id.*, at 6.

[149] Anne-Marie Slaughter, A New World Order (2004).

[150] Jürgen Habermas, Theorie des kommunikativen Handelns (1981); Andrew Linklater, The Transformation of Political Community (1998); Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 International Organization 1 (2000); Harald Müller, *Arguing, Bargaining and All That: Communicative Action, Rationalist Theory and the Logic of Appropriateness in International Relations*, 10 European Journal of International Relations 395 (2004).

[151] The most famous example of a non-short-sighted use of strategic rationality has been delivered, at the very beginning of modern times, by Thomas Hobbes in his motivation of the transition from the state of nature to civil society. See THOMAS HOBBES, LEVIATHAN (1651), Chapt. XIII and following. For a different – and more recent – proposal in order to enlarge the horizon of instrumental rationality, see ROBERT O. KEOHANE, AFTER HEGEMONY (1984), at 65.

polity as well as the notion that this compactness relies largely on a fact (*factum brutum*) upon which to build public order. This holds true even for those who use the individualistic methodology of rational choice, such as Goldsmith and Posner, because they choose the state as their basic unit and follow a communitarian theory of democracy. To understand the state as an individual is rather a typical feature of holistic theory.

Rejecting the idea of a public international order based on public international law, *Neocons* need to propose a substitute if they want to provide an answer for the challenges of the 21st century. At this point, two further important aspects of their conception have to be pointed out, the first collocating them within the hegemonic variant of the paradigm; the second showing which novelty they represent even compared to the hegemonic tradition. Indeed, Neocons have an outstanding characteristic in common with the post-nationalistic hegemonic thought of the 20th century, which distinguishes them from both the other variants of historical particularism. Albeit thoroughly sceptical about the possibility of world order, realists and nationalists were willing to admit the necessity of a certain constraint as regards the goals pursued by the single political community in its international actions as well as the means deployed to achieve them. On the one hand, realists like Thucydides, Machiavelli and, more recently, Morgenthau[152] admonish restraint in international relations, in order not to overstretch the particular community's capacities. This attitude can be traced back directly to the power-based idea of politics peculiar to the "realist" school, in which the claim for self-limitation is not a question of normative principles but only of prudential behaviour grounded on a strategic understanding of practical reason. By contrast, for the exponents of hegemonism as well as for the Neocons politics is the conveyer of aspirations held by communities kept together not eminently by common interests, but rather by shared principles in order to mobilize all available material and spiritual resources. On the other hand, nation-states have been able, just in the golden age of the *Weltanschauung* on which they were based, to develop an important body of international law. Certainly, the agreements signed in that "foundational" time did not result in enduring supranational institutions that could prevent the drive to war. They were proven impotent in the face of the aggressive tendencies deeply rooted in nationalistic thought and politics. This notwithstanding, the presence of a certain openness to international agreements testifies to how nation-states could be able, under favourable circumstances, to recognize the fundamental importance of the normative element of law, though only in a transitional way. This element as well is absent both in the hegemonic variant of the paradigm and in neoconservative thought. In front of a vital fight for survival or decline, of a worldwide battle for life or death, no normative or prudential constraint can be accepted anymore: the community's security requires the imposition of the rules of the community on a scale as large as possible.

While Neocons share with hegemonic thought the rejection of a prudential vision of international politics aiming at the pursuit of strategic interests as well as of the normativity of international law, they go nevertheless even beyond the main features of the variant of the particularistic paradigm to which, at a first glance, they belong. The "classic" hegemonic approach from Schmitt to Huntington never bore really global aspirations: rather it extended the range of the homogeneous community, aiming to create a hegemonic system in distinct spheres of influence

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152   MORGENTHAU, *supra* note 127, at 10.

in order to gather more assets for global competition. It did not aspire to impose everywhere in the world a coherent set of values. Therefore, hegemony as conceived for example by Carl Schmitt was limited to a large but not worldwide scale, and thus there was no global order per se, but only the competition among the enlarged hegemonic communities. Not surprisingly, we find both in Schmitt[153] and in Huntington[154] warnings against the tendency to overestimate the community's values and the ambition to impose them universally. In this perspective values are fundamental in order to compact the society and make it fit for competition; yet they are always something relative, not universal. To the contrary, the neoconservatives acknowledge no limitation on hegemonic expansion. The values they claim are supposed to be globally valid.

Consequently the concept of "empire," which seemed to belong to an old-fashioned political vocabulary, has re-emerged in the contemporary debate. The concept is used by the critics of hegemonism to outline the features of a system which pretends to guarantee a global order, while oppressing, in reality, cultural pluralism and the just interests of the weak.[155] However, the idea of "empire" as a globalized political and legal regime is also re-vitalized, here with a positive connotation, by neoconservatives like Deepak Lal. In Lal's view, empires can perform much better than nation-states in realizing the main goals of social life, namely maintaining peace and securing prosperity.[156] Furthermore, empires can achieve these goals on a significantly larger scale. The rehabilitation of the historic function of empires is then enlarged to comprehend also the role played at present time by the United States. Tearing the "million strings" of international law which aim at tying down the super-power, impeding its free movement as the Lilliputians did with the overwhelming Gulliver, the United States should accept its imperial role along with the duties arising from that role. This consists, first, in securing global order, and second in expanding modernisation. While global order guarantees peace on a large scale, modernisation is the condition for prosperity.[157] Extending the regime imposed by the U.S.-superpower throughout the world, Lal's imperial conception globalizes hegemony in a way unknown to the tradition prior to the neoconservative turn.

In Lal, we find no reference to the universality of the values carried forth by the "empire." The sense of the empire's rule has to be found, Lal argues, in the security and wealth it can deliver all over the world, not in the global validity of its principles. To the contrary, precisely such a global validity of Western values, as defended in particular by the United States, is asserted by Robert Kagan, and here lies the radical novelty of neoconservative thought. Far from being analogous to the despotic superpowers of the past, Kagan argues, the United States

> *is* a behemoth with a conscience. It is not Louis XIV's France or George III's England. Americans do not argue, even to themselves, that their actions may be justified by *raison d'état*. The United States is a liberal, progressive society through and through, and to the extent that Americans believe in

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[153]   Carl Schmitt, Positionen und Begriffe (1994), at 151, 309.

[154]   HUNTINGTON, *supra* note 43, at Chapt. V, 12.

[155]   Michael Hardt, Antonio Negri, Empire (2001); Detlev F. Vagts, *Hegemonic International Law*, 95 The American Journal of International Law 843 (2001); Nico Krisch, Imperial International Law (2004) (Global Law Working Papers 01/04).

[156]   Deepak Lal, In Defense of Empires (2004), at 2.

[157]   *Id.*, at 35.

power, they believe it must be a means of advancing the principles of a liberal civilization and a liberal world order.[158]

Liberty being a value shared, in principle, by all humans, the United States can reasonably claim to act globally. Furthermore, its intervention in the name of freedom is not a violation of the principle of equal sovereignty but a defence of a fundamental right. Kagan argues that, faced as we are with an existential threat to liberal values, it is worth thinking of a new kind of legitimacy in international relations. The protection of fundamental human rights all over the world should be recognized as superior to the principle of the equal sovereignty of states, with the consequence that actions have to be considered legitimate if they coerce dictators and autocrats to show greater respect for civil and political rights.[159] From the global validity of liberty Kagan ultimately draws the legitimacy of the worldwide American predominance:

> modern liberalism cherishes the rights and liberties of the individual and defines progress as the greater protection of these rights and liberties across the globe. In the absence of a sudden democratic and liberal transformation, that goal can be achieved only by compelling tyrannical or barbarous regimes to behave more humanely, sometimes through force.[160]

Hence, as a consequence of the neoconservative turn, particularly in its more radical expression, hegemonism has reached worldwide extension and is based on the idea to impose universal principles who find their truest interpretation in the hegemon's constitution. Hereby neoconservatives seek to legitimize the global rule of the superpower and its right to intervention. They insist that "the United States can neither appear to be acting, nor in fact act, as if only its self-interest mattered."[161]

IV. Universalism: the possibility of global order

The second paradigm of international law starts from the assumption that order can in principle be extended all over the world, i.e. to all humans and all polities not only in their internal relations – as contended by supporters of the particularistic paradigm – but also in their interaction beyond the borders of the single polities. In this understanding there are rights and values which are universal because they are shared by all individuals and peoples. They are enshrined in the set of rules which build the core of international public law. Following this understanding, international law is more than a mere law of coexistence and coordination between states.

Universalism has developed two strands: the first founding universal principles on metaphysical assumptions such as religious beliefs or ontological postulations about the "true" nature of human beings and their innate and spontaneous sociability; the second interpreting universal order as the construct of individuals – as the original bearers of rights and values – and as the consequence of their correct use of reason. In the first case universalism is rooted in society,

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[158] Robert Kagan, *Power and Weakness*, 113 POLICY REVIEW 1, (2002).
[159] *Id.*, at 78.
[160] Robert Kagan, *America's Crisis of Legitimacy*, 83 FOREIGN AFFAIRS 65, 78 (2004).
[161] *Id.*, at 85.

although society embraces here the whole world; in the second it is traced back to the faculties of individuals, particularly their reason.

1. Two strands

a. The metaphysical tradition: the legacy of Christianity and the theory of the natural and universal sociability of humans

It took many thousand years before humans, although already living in complex societies expressing a high level of culture, could conceive to be part of a common humanity. At the beginning of Western philosophical thought, in ancient Greece and Rome, the only laws thought to be universal were the laws of nature. To the contrary, the laws of humans – i.e. those laws, called *nomoi* in ancient Greek political philosophy, which humans give to themselves in order to rule their societies – were conceived to be specific for every political community. No *nomos* was assumed to be shared by all societies and all human beings.

The idea of the universal validity of a general law for the human society appeared for the first time at a mature stadium of antiquity. It was the merit of the Stoicism to develop a radically new idea in Western philosophy: in their view the whole world – the physical as well as the social – is ruled by only one fundamental law, the *logos*.[162] Such a perspective, which represented a true "revolution" in the way Western thought conceived social, political and legal order, had two consequences: first, also the social world was now thought to be ruled by a law valid, in its essence, for all humans and applicable, even if not without cautious arrangement, in principle to all communities. This was a kind of "universal *nomos*" directly derived from the everything ruling *logos*. Second, the *nomoi* of the different polities had to be, if they wanted to be valid, in accordance to the "universal *nomos*" which had been placed above them.

Doubtlessly, the Stoics introduced a turn in the question how order can be understood. Nevertheless, their view remained largely speculative, with little impact on politics. In the best case their political philosophy could be seen as a vision for a scholarship moving freely within the Hellenistic society or the Roman Empire, both cultural and political entities firmly convinced to encompass the whole civilized world. In order to become a paradigm of the way how international relations and international law can be understood, universalism had to abandon the conviction of being realized by indefinitely expanding the boundaries of a single political community, and accept the burden of creating universality within the complex context of political diversity. Yet, this has not been the historical task of Stoicism but of Christianity.

Many elements of the Stoic philosophy became part of the Christian doctrine. Among these were the ideas of a universal *logos* and of an all humans encompassing community. However, while Stoicism never attained the status of an "official state philosophy", maintaining herewith the possibility to avoid the prosaic dimension of concrete politics, Christendom achieved in few centuries such a prominent political position that the question how to traduce the commandment of universality into a realistic political and legal program could not be passed over in silence anymore. At the edge between antiquity and the Middle Ages the Western world had become a Christian world: since the principle of universality was enclosed into the doctrine of Christianity,

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[162] Johannes von Arnim, *Stoicorum veterum fragmenta*, Teubneri, Lipsiae 1905.

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a Christian world had to show the signs of universalism also within the realms of law and politics.[163]

At first, the Christian scholars tried to make this vision concrete by suggesting the idea of a universal political system. Like the Christian Gospel was thought to be a message of love for the whole of humanity and the papacy claimed to embody the spiritual leadership of the entire world, so a Christian universal monarchy had the right and the duty to rule over all peoples worldwide. Yet, the principle of the "universal monarchy" was impossible to be realized, and this matter of fact became evident even before its most impressive conceptual formulation.[164] On the one hand, indeed, Christianity could never really spread globally: even in the period of its most powerful expansion and despite the often merciless methods of its triumphal spreading out, its allegedly universal message could never reach more than a minority of humans. And, on the other hand, also within the Christian world the growing differentiation of the territorial – and then national – states after the decline of the Holy Roman Empire undermined the very idea of unity.

The response of the Christian philosophy to increasing political diversity even within the range of the Christian community was the conception of a "jus inter gentes", i.e. of an international law conceived as set of rules governing the interactions between peoples on the basis of shared principles.[165] These principles were still to be derived from the core commandments of Christian religion but the political frame, in which they had to be realized, changed significantly by passing from the unrealistic vision of a universal monarchy to the concrete program of an unprecedented international law. In fact, this is the moment of the foundation, in the Western world, of a modern law of nations. The specific contribution in the works of Francisco Suarez consists in accepting the plurality of polities, each of them governed by specific rules, however, within an all encompassing legal framework as a guarantee of minimal standards of interaction. Therefore, the vision grounding the first formulations of the modern Western international law can be interpreted as a kind of anticipation of a multilevel legal system, going beyond the global state as well as the inter-state lawlessness of particularism. Herein lies its ongoing topicality.

Despite of its significant contribution to the groundbreaking foundation of modern international law the Christian vision of the relations between peoples was affected by a bias. In fact, although the message of love of Christianity claimed to reach potentially every human on earth it has always been linked to the belonging to a specific religion. And belonging to a religious group or faith is such an intimate question that global homogeneity and an all encompassing unity cannot be reached nor demanded. As a consequence of the link to a peculiar religious community, the Christian law of nations showed the deficit of being one-sided. Only Christians were allowed to be full members of the order of peace, security and cooperation based on the commandments of the divine law. Other peoples were treated as enemies or, in the best case, as marginal

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[163] In the early centuries of Christianity, when Christendom was yet largely distant from political power or even persecuted, this necessity to formulate a concrete political program according to the Christian principles was not felt so strongly as it would have been later. This is the time of the distinction between the *civitas dei* and the *civitas diaboli*, whereas the second one – the City of the Devil – corresponds to the real political situation on earth, and the first – the City of God – is projected, along with its universalistic aim, into a purely spiritual dimension. See Augustinus (413–426), *De civitate Dei*, Moretus, Antverpiae 1600.

[164] Dante Alighieri, *De Monarchia* (1310–1314), in: Dante, *Opere minori*, Vol. II, Utet, Torino 1986.

[165] Francisco Suarez, *De legibus, ac Deo legislatore* (1612), in: Suarez, *Selections from three Works*, Clarendon Press, Oxford 1944.

components of the system of international law, curtailed in their rights and dignity.[166] Even an author like Francisco Vitoria, who was sincerely keen to overcome the most outrageous injustices that characterized the treatment of non-Christians at the dawn of the era of colonisation, pleaded for a consideration of the respective claims of European and non-European peoples which, if seen from the point of view of our sensibility, reveals the signs of open discrimination.[167]

The growing ascertainment of the bias embodied from the outset in the system of Western international law led some authors to the conviction that even its core concept would be characterized by structural discrimination.[168] Following this interpretation, since the Western international law is deeply Christian, its universalism would be rather a masquerade than a honest political program. Considering the dark sides of Western history, this criticism has to be taken seriously. The first step to overcome the discriminating bias inside the concept of Western international law would therefore lie in affranchising it from the Christian presuppositions. Curiously, the conditions for undertaking this step were first laid down within a doctrinal dispute concerning the correct Christian interpretation of the relation between the law of humans and the law of God. In the theology of the Middle Ages and then in the Catholic doctrine the universality of the most general law made by humans, i.e. of the international law, is deduced directly from the universality of the divine law of the Christian God. As has been argued, here lies the root of a deep going discrimination. However, the Reformation introduced at the very beginning of the modern era a new understanding of the relation between human and divine law which delivered also the basic elements of a non-religious philosophy of international law. Since the law of God, from the Protestant point of view, is inscrutable and if the international lawyers influenced by the theology of Reformation did not want to forsake the universalist claim of their newborn doctrinal system, they had to search for a new foundation which had to be independent from the direct reference to the Christian God. This has been the task accomplished by the third founder, along with Vitoria and Suarez, of the modern international law, Hugo Grotius.

The new, non-religious foundation of the universalism of international law was located by Grotius in an ontological postulation on human nature, concerning an alleged natural and universal disposition of human beings to sociability.[169] Insofar as humans naturally tend to build a society and this tendency is not – as Aristotle thought –[170] limited to the boundaries of each people and country but is extended globally, international law can be seen as the common law of humankind, containing the general rules defending the universal sociability. This interpretation of Western universalism refrains from any reference to the Christian God and grounds the law of nations on a view of natural reason considered to belong to every human being and to bind him, irrespective of his cultural or religious background. Certainly, the universal sociability is less

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[166] Jörg Fisch, Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart, Steiner, Stuttgart 1984.

[167] Francisco de Vitoria, *Relectio prior de Indis recenter inventis* (1538–1539), in: Vitoria, *De Indis recenter inventis et de jure belli Hispanorum in Barbaros*, hrsg. von Walter Schätzel, Mohr Siebeck, Tübingen 1952.

[168] Ram Prakash Anand, Studies in International Law and History, Nijhoff, Leiden 2004; Antony Anghie, Imperialism, Sovereignty and the Making of International Law, Cambridge University Press 2005.

[169] Hugo Grotius, *De Jure Belli ac Pacis* (1646), William S. Hein & Co., Buffalo (New York) 1995, Prolegomena, 6.

[170] Aristotle, The Politics I, at 2, 1252 et seq.

"thick" than its counterpart within the borders of the single polities; nevertheless, it is strong enough to bear the responsibility of a set of general, "thin" norms as the guarantee of the interaction of peoples and individuals beyond the borders of their countries.

The idea of international law as the common law of a naturally sociable humankind has been extremely powerful in shaping its universalistic understanding. It builds to date the core philosophical concept of one of the most important theories about meaning and scope of international law, namely the theory of the international community, even among catholic scholars. In the narrative of progress developed by the supporters of universalism the international community rests on a set of values shared by all humans. On that basis international law is a legal system protecting the principles of a universal interaction based upon the assumption of a naturally reasonable human sociability.

Notwithstanding its great significance, the ontological variant of the universalistic approach to international law shows at least one unresolved shortfall. The existence of a global community including all individuals and states and sharing fundamental values seems in fact to be more a profession of faith than a proposition that can be proven or an evident axiom on which everyone must agree. To be clear about which little evidence such an argument has we should simply imagine the case that the "realistic" counterpart would introduce. Indeed, historic experience speaks for caution in supposing a worldwide brotherhood and sisterhood of humans. What we can experience is the capacity of all humans to interact with each other; from this matter of fact solidarity can grow, but also deathly competition. Given the open possibilities of human interaction, the case for a worldwide community of humans turns to be founded on a metaphysical principle derived from the old-fashioned argument about the "true" nature of humankind. But a metaphysical assertion on the "natural" goodness of our fellow humans is hardly a solid basement for a system of law binding everyone and everywhere.

b. Contract theory

Moving from this deficit affecting the metaphysically grounded idea of universalism a second strand was developed. The preconditions were created by a real "revolution" in political thinking which occurred at the beginning of Western modernity. Until that time individuals were thought to be part of the society in which they lived. The community as the totality, the "holon", was seen in any sense as superior to its members: the individuals had to serve the community, not vice versa. At the edge between the Middle Ages and modernity the close community ties were broken. The consequence was a demand for a new philosophy of social and political life. This new vision was delivered by Thomas Hobbes, the first political philosopher who overturned the hierarchy between individual and community. In his eyes, the centre stage of political life has to be taken by the individuals: they are the bearers of the fundamental rights and the starting point of any legitimation of authority.[171] Like Copernicus reversed the position between earth and sun, giving for the first time centrality to the second, so turned the "Copernican revolution in political thought"[172] the order of society upside down. In Hobbes' view, in fact, the Commonwealth is not

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[171] Thomas Hobbes, De Cive (1642), Royston, London 1651 ; Hobbes, Leviathan, ot the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil (1651), Crooke, London 1651.

[172] Norberto Bobbio, Michelangelo Bovero, *Società e stato nella filosofia politica moderna*, Il Saggiatore, Milano 1979.

the highest entity in the ethical world anymore but rather a tool that humans give to themselves in order to guarantee a better safeguard of life, security and property.

Following this understanding, political institutions are the product of a contract among individuals. Concerning the consequences for the theory of international law the central question is how far the society built on such institutions can reach. In other words: can this society only be a national one, construed to serve the interests of a limited, albeit large, number of individuals? Or can we imagine that the society based upon the contract expand itself to comprehend all humans? For one and a half centuries after its first formulation contract theory showed little interest in international law and, insofar the question of international order was mentioned, the most important exponents of conctractualism were rather sceptical about the possibility of guaranteeing a peaceful interaction on a global scale.[173] On the other hand, yet, no conceptual reason stood against the possibility of applying contractualism to a system of global peace and security: if the central moment of any society is the single individuals and if it also be granted that all individuals are endowed with essential rights and faculties, in particular with the capacity to reason, then no insurmountable obstacle – if not some of practical nature, albeit significant – stands between our condition and the construction of a world order based on a general agreement among fellow humans.

Such a consequence of contractualism, which was already implicit in the very core of its conception, was drawn first by Immanuel Kant.[174] In his political philosophy, the passage from the state of nature to the civic condition is not only, like in Hobbes, the practical output of a reasoning based on expediency but the fulfilment of a higher moral duty. In fact, in Kant's view only the civilized human is a morally accomplished human, and, insofar as the perfect moral accomplishment can be merely reached if every interaction is civilized, the creation of an international order can be seen as the most difficult, but also as the noblest duty we can pursue.

Summing up, in the contractualistic version of universalism global order depends on:

- the centrality of individuals;

- some essential assumptions about the equality of humans;

- the cognisance of mutual interdependence;

- the awareness that individual long term self interest is in building a common society;

- the conviction that we can pursue self-fulfilment only in peace and in a global interaction based on freedom and justice;

- the principle that the definition of the rules binding all members of any society has to be based on inclusive procedures;

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[173] Hobbes, *Leviathan*, *supra* at note 171, at XXX; Baruch de Spinoza, *Tractatus politicus* (1677), in: Spinoza, *Opera*, Winters, Heidelberg, 1924, Vol. 3, at III; Spinoza, *Tractatus theologico-politicus* (1670), in: Spinoza, *Opera*, Vol. 3, at XVI; John Locke, *Two Treatises of Government* (1690), Awnsham-Churchill, London 1698, at II, 2, 12, 16.
[174] Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (1795), in: Kant, *Werkausgabe*, Suhrkamp, Frankfurt/M., XI, at 191; Kant, *Die Metaphysik der Sitten* (1797), in: Kant, *Werkausgabe*, VIII, at 309.

- the commitment to create institutions and procedures in order to put the previous cognitive tenets into practice.

It was precisely on this last issue – the traditional rupture point between theory and praxis – that Immanuel Kant as the father of contractualistic universalism had to tackle the most tenacious problems, also revealing a significant uncertainty. We find in fact in Kant's work two different solutions for the institution accomplishing world order: on the one hand the "world republic" (*Weltrepublik*) as a kind of global super-state; on the other hand the rather unpretentious idea of a "league of nations" (*Völkerbund*).

Considering the strengths and weaknesses of the philosophical approaches to universalism, we can transitively conclude that a universalist international law should resolve two problems: first its conceptual foundation should not resort to religious or metaphysical assumptions; second it should search for institutional solutions capable to conciliate the need for global values and rules with the respect for the equal sovereignty of peoples. In the following we will analyse some proposals going in this direction.

2. Constitutionalism as the most visible contemporary offspring

Constitutionalism is the latest offspring of the universalist scholarly tradition that strives for a global legal community that frames and directs political power in light of common values and a common good.[175] It is often associated with international scholarship in Germany, but international constitutionalism is most assuredly also taught in other countries.[176] The idea of understanding current international law as a building block of a global legal community has been a constant thread of thinking among many German international law scholars. In 1974, Hermann Mosler held the General Course under the title "The international society as a legal community".[177] Since it was given during the Cold War, it provides a dampened version of constitutionalism. Yet, it echoes the core concept of Walter Hallstein, his former superior in the nascent German Foreign Service and first president of the European Economic Community. Hallstein had devised the term *legal community* in order to conceive and direct the embryonic European integration project.[178] It succeeded in inspiring the "constitutionalisation" jurisprudence of the ECJ,[179] laying the conceptual basis for the enormous power the

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[175] It has deep roots in pre-war projects, *see* Hans Kelsen, *Reine Rechtslehre*, 115 et seq., 328 (Deuticke 1934); Georges Scelle, *Le Pacte des Nations et sa liaison avec Le Traite de Paix*, 101 et seq., 105 et seq. (Sirey 1919); *id*., *1 Précis de droit des gens*, 188 et seq. (Sirey 1932); Walther Schücking, *Die Organisation der Welt*, *in Festschrift für Paul Laband*, 533 (Wilhelm van Calker ed., Mohr 1908); Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926).

[176] *See*, e.g., Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 Max Planck U.N.Y.B. 1 (1997). In the Netherlands even a chair for international constitutional law has been created at Amsterdam University in 2004, whose first and current incumbent is Erika de Wet, *see* Erika de Wet, *The International Constitutional Order*, inaugural speech 2005, on file with the author; see also *id*., *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law,* 15 E.J.I.L. 97 (2004).

[177] Hermann Mosler, The International Society as a Legal Community, 140 Recueil des cours 1 (1974); id., The International Society as Legal Community (Sijthoff/Noordhoff 1980). On this course see Robert Kolb, Les cours généraux de droit international public de l'Académie de La Haye 541 et seq. (Bruylant 2003).

[178] Walter Hallstein, *Der unvollendete Bundesstaat* 39, 252-255 (Econ Verlag 1969).

[179] On this Joseph Weiler, *The transformation of Europe*, in *The Constitution of Europe* 10 (Cambridge U. Press 1999).

Commission's Legal Service wielded for decades as well as generally framing the political discourse.

After the fall of the Iron Curtain, Christian Tomuschat taught in 1999 a much bolder course titled: "Ensuring the Survival of Mankind on the Eve of a New Century".[180] In order to present the constitutionalist thought we shall focus on certain elements of his teleological reconstruction of core concepts of current international law, rather than presenting a "night of the proms" from various authors.[181] This choice is based on The Hague Academy's consideration of Tomuschat as particularly representative and important; perhaps one day the Xiamen Academy's consideration will be just as important. The strengths of this thinking, as well as inherent tensions, will be addressed. Tomuschat's ideas about the roles and the normativity of international law will be presented first. Among the various roles of international law, of particular importance is its constitutional function through legitimating, limiting and guiding politics. As a consequence, Tomuschat turns the dominant understanding of the relationship between international law and municipal constitutional law "upside-down", whereby the state becomes an agent of the international community. The third step looks at the organisation of the international community and discusses Tomuschat's understanding of international institutions. Since he attributes to such institutions a substantial and autonomous role, the issue of international federalism is addressed. Yet, Tomuschat does not use this term for his model. This reticence may be explained by his view that international law possesses merely derivative democratic credentials and by an uncertainty about its "social substratum" in the "international community".

a. International law as a common law of humankind

Tomuschat's construct attributes new prominence to international law, which he sees as having become paramount to all other law in many respects. This importance largely results from the challenge of globalisation: "[T]he concept [of globalisation] captures in a nutshell the current

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[180] Tomuschat, *supra* note 27, at 1999. On this course Kolb, *Les cours généraux de droit international public de l'Académie de La Haye* at 1057 et seq.

[181] There is an enormous variety of ideas, cf.: Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 Recueil des cours 6, 221 (1994); Bardo Fassbender, *The U.N. Charter as a Constitution*, 36 Columbia J.T.L. 574 (1998); Michael Cottier, *Die Anwendbarkeit von völkerrechtlichen Normen im innerstaatlichen Bereich als Ausprägung der Konstitutionalisierung des Völkerrechts*, 9 SZIER 4/5, 403 (1999); Jochen Frowein, *Konstitutionalisierung des Völkerrechts*, 39 Berichte der Deutschen Gesellschaft für Völkerrecht 427, 431 (2000); Giovanni Biaggini, *Die Idee der Verfassung*, 119 ZSR I, 445 (2000); Jost Delbrück, *Structural Changes in the International Legal Order and its Legal Order*, 11 SZIER 1, 1 (2001); Robert Uerpmann, *Internationales Verfassungsrecht*, 56 Juristenzeitung 11, 565 (2001); Christian Walter, *Constitutionalizing (Inter)national Governance*, 44 G.Y.I.L. 170 (2001); Hauke Brunkhorst, *Solidarität: von der Bürgerfreundschaft zur Globalen Rechtsgenossenschaft* 20 (Suhrkamp 2002); Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* (2d ed., Beck 2002); Brun-Otto Byrde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 42 Der Staat (Berlin) 1, 61 (2003); Thomas Cottier & Maya Hertig, *The Prospects of 21st Century Constitutionalism*, 7 Max Planck U.N.Y.B. 261 (2003); Stefan Kadelbach, *Ethik des Völkerrechts unter Bedingungen der Globalisierung*, 64 ZaöRV/HJIL 1 (2004); Matthias Ruffert, *Die Globalisierung als Herausforderung an das Öffentliche Recht* 38 (Boorberg 2004). Much debated has been Ernst-Ulrich Petersmann's constitutional approach to international trade law, among his writing cfr. *Constitutional functions and constitutional problems of international economic law* (Fribourg, Switzerland: Univ. Press [u.a.] 1991); *id*., *The WTO Constitution and human rights*, 3 J.I.E.L. 19-25 (2000); *id*., *Constitutional economics, human rights and the future of the WTO*, 58 Aussenwirtschaft 49 (2003),.

state of increased transnationalism which constitutes the background against which the adequacy and effectiveness of international law and its institutions must be carefully tested. It is part and parcel of the empirical context from which international law receives its major impulses. To the extent that the State forgoes or is compelled to relinquish its role as guarantor of the common interest of its citizens, common institutions should be established at regional levels or the universal level to compensate for the losses incurred".[182]

In his view, some rules of international law fulfil a constitutional function with respect to the international realm *and* the municipal realm, "namely to safeguard international peace, security and justice in relations between States, and human rights as well as the rule of law domestically inside States for the benefit of human beings, who, in substance, are the ultimate addressees of international law".[183] The core principles of international law address and limit all forms of political power: this is the essence of the constitutional argument.

He sees the traditional function of international law—to regulate interstate relations—as not only being supplemented with a constitutional function, but also with a further function similar to that of municipal administrative and private law: the new international law presents a "comprehensive blueprint for social life".[184] International law is seen as a multi-faceted body of law that permeates all fields of life, wherever governments act for promoting a public purpose; accordingly international law now is "a common legal order for mankind as a whole".[185] The traditional understanding of international law and municipal law as respectively dealing mostly with different issues is replaced by one in which fundamentally the same issues are addressed and regulated. Tomuschat's vision is not one of separate spheres, but rather of an integrated, multilayered system. His understanding of an integrated international system is not a defence of the "ancien régime" of international law with the ICJ at its pinnacle. The ICJ actually plays quite a limited role in Tomuschat's construction. Rather, the integration is provided by scholarly effort and practical reason.

Tomuschat's understanding rests on the premise that international law can direct and control social reality and (in particular) political power similarly to municipal constitutional or administrative law—an assumption not generally held. Its rejection by the New Haven School (similar in this respect to the Critical Legal Studies approach) is so important to Tomuschat that he even starts his General Course with its rebuttal. The New Haven School does not consider international law, particularly its fundamental principles, as being able to direct political behaviour similarly to municipal public law. From this perspective, international law is deemed to lack municipal law's determinacy and normativity (contra-facticity); rather, it is understood as usually following the practice of the most powerful states.

Tomuschat's defence of international law does not deny that its norms are often vague and contested. Nor does he ignore the permanence of state sovereignty and the lack of strong global institutions, which do not allow international law and municipal law to be regarded in fully parallel terms. Despite these limits, he advocates a "positivist" legal discourse on international

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[182]   Tomuschat, *supra* note 27, at 42.
[183]   *Id.*, at 23.
[184]   *Id.*, at 63.
[185]   *Id.*, at 28 and passim.

law, and assumes that it can operate similar to municipal public law. This assumption rests above all on a moral imperative:

> [D]iscourse on issues of international law must […] be couched in language that allows everyone affected by its operation to make its voice heard, fully to grasp arguments invoked by others and thus to engage in meaningful dialogue permitting to highlight on a common basis of understanding any controversial issues. […] Discourse on what is right or wrong must be crystal-clear and should not fall into the hands of a few magicians who invariably are able to prove that law and justice are on their side.[186]

Tomuschat is an enlightened positivist. He knows the shortcomings of international law as an instrument of social order as well as the rational limits of established legal reasoning. Nevertheless, he sees this established form of legal reasoning as the best way so far for lawyers to live up to undisputed postulates on how to carry-out their profession. Moreover, social theory and political philosophy, in particular, have never proved able to lead the debate on "right or wrong" better than have the established paths of legal reasoning.[187] The 20th century Kantian pragmatic response to relativism—the philosophy of the "als-ob"[188]—can support this methodological and constructive approach, the foundation of which (not of the law as such!) is an ethical premise. This explains why this position is sometimes termed as idealistic.

b. A revolutionised understanding of the institutional order

One of Tomuschat's conceptual innovations that has become part of common scholarly discourse is the qualification of some important international treaties as "völkerrechtliche Nebenverfassungen", i.e. as international law having a supplementary function for municipal constitutional law.[189] He radicalizes his former concept now in his General Course: here, the core principles of international law assume a foundational, rather than a merely supplementary, function for the state and its constitution.

In the history of international scholarship, one finds several attempts to turn "upside-down" the relationship between municipal law and international law, between the state and the international community.[190] Developments in international law after 1990, a point in time when the law formulated in 1945 appeared to have acquired substantial normativity (mainly, though by no means exclusively, through the Security Council's activities), allowed for a fresh attempt to redefine this relationship. The foundational role of international law is not conceived in formal terms as a relationship of delegated competences (Kelsen) or according to the doctrine of *dédoublement fonctionnel* (Scelle). Tomuschat's construction is based rather on substance, in

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[186] *Id.*

[187] This is confirmed by authors who earlier on paid little importance or even criticized "legal formalism", see Habermas, *supra* note 111, at 182, 187; Koskenniemi, *supra* note 15, at 502 ff.

[188] Hans Vaihinger, *Die Philosophie des Als Ob* (Meiner 1920).

[189] Christian Tomuschat, *Der Verfassungsstaat im Geflecht der internationalen Beziehungen*, 36 Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer 7, 51 et seq. (de Gruyter 1978)*;* Robert Uerpmann-Wittzack, *The Constitutional Role of Multilateral Treaty Systems*, in *Principles of European Constitutional Law* 145 (von Bogdandy & Bast eds., 2006).

[190] In particular Hans Kelsen: *Reine Rechtslehre* 150 (Deuticke 1934); Hans Kelsen, *Die Einheit von Völkerrecht und staatlichem Recht*, 19 ZaöRV/HJIL 234 (1958).

particular on international human rights, a conception only possible after World War II: "The fact that the international community is progressively moving from a sovereignty-centred to a value-oriented or individual-oriented system has left deep marks on its scope and meaning".[191]

Even for Tomuschat, the state remains the most important *actor* on the international plane; this corresponds to the universalist position of state centred integration.[192] However, the state assumes a *role* – and herein lies the innovation – in a *play* written and directed by the international community. "[P]rotection is afforded by the international community to certain basic values even without or against the will of individual States. All of these values are derived from the notion that States are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights".[193] "The international community […] views the State as a unit at the service of the human beings for whom it is responsible. Not only is it expected that no disturbances for other States originate from the territory of the State, it is moreover incumbent upon every State to perform specific services for the benefit of its citizens".[194]

This understanding of statehood as an instrument of the international community to implement its core legal values does not correspond to the general understanding in legal scholarship, political science or the media. Tomuschat himself concedes that "the transformation from international law as a State-centred system to an individual-centred system has not yet found a definitive new equilibrium"[195] and that it is, moreover, by no means clear which one of the two rivalling understanding, sovereign equality or protection of basic values by the international community, prevails in case of conflict. This "weakness" does not necessarily diminish the value and usefulness of Tomuschat's construction. Rather, it may be proof of the potential for normative legal evolution within legal texts through innovative legal scholarship—or as Hegel put it: once the ideas have been revolutionized, reality will not resist.

According to Tomuschat, fundamental rights codified in a municipal constitution form the basis of all municipal public power, and these rights are in turn based on universal values, which are now enshrined via international human rights. Although this vision has to struggle with some of the problems of natural law thinking, it is supported by the fact that most documents (municipal as well as international) referring to fundamental rights do not "enact", but rather "recognize" such rights. This suggests that these rights, although formally elaborated and ratified by states, are considered to exist independently of the municipal legal order.[196] Accordingly, comparative constitutionalism acquires a substantial function for constitutional adjudication within the various municipal legal orders. As Tomuschat demonstrates throughout his course, his construction of the state as an agent of the international community provides a coherent

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[191]   Tomuschat, *supra* note 27, at 237.
[192]   Above II 3 b.
[193]   Tomuschat, *supra* note 27, at 161 f.
[194]   *Id.*, at 95.
[195]   *Id.*, at 162.
[196]   See, e.g., *La Déclaration des droits de l'homme et du citoyen* (adopted 1789): "l'Assemblée nationale reconnaît et déclare, en présence et sous les auspices de l'Être suprême, les droits suivants de l'homme et du citoyen"; in detail Maria Zanichelli, *Il discorso sui diritti* 101 et seq. (CEDAM 2004).

explicative framework for many elements of current international law as well as a helpful indication on which meaning should be attributed to a norm in case of its legal indeterminacy.

International law, as construed in this line of thinking, supports a system of international governance. In current discussions, the institutional features of this system are hazy and disputed. Tomuschat enriches the pertinent debate by linking up the notion of "international governance" with public-law thinking on state government as developed over the last 300 years. This is a thoroughly legal approach: it looks (at least with one eye) to the past in order to meet a new challenge, which is the analogical nature of legal thinking.[197] His argument is based on the premise that the international community – as with any community – needs "a sufficiently broad set of legal norms in order to be able to deal efficiently with the many challenges arising in the course of history":[198] *ubi societas, ibi ius*. Satisfying this need requires institutions with the following traditional governmental functions: a "legislative function" for enacting a "broad set of legal norms" and particularly for making basic political decisions; an "executive function", i.e. a "machinery mandated to translate into concrete facts the law produced"; and a function concerning the "settlement of disputes", i.e. the "application of these rules in disputes". Thus, at least the functions of the global institutions are fixed, something which gives direction for interpretation, further research and political proposals.

For Tomuschat, municipal constitutional law can only inform, it cannot determine future developments. The international system cannot adopt a blueprint provided by comparative (municipal) constitutional law particularly for one specific reason: the continuing significance of state sovereignty. Although state sovereignty undergoes a substantial transformation in Tomuschat's thinking, he nevertheless acknowledges state sovereignty as normative and factual reality which for the foreseeable future will profoundly shape the international sphere: "it may be said that the different elements of the executive function in the international community have never been established *more geometrico* like under a national constitution, which seeks to organize the system of governance in a transparent way, taking as its point of departure the principle of separation of powers. The international system still rests on national sovereignty".[199]

If a convincing form of global governance needs international legislative, executive and judicial institutions, the question arises whether this governance requires the creation of a global federation. Tomuschat uses the terms *federal* and *federation* most carefully. They do not figure prominently in his text. One might assume that he has learned a lesson from the hostile reactions these terms encounter when used with respect to the European Union.

It is possible to qualify his vision as a federal one, for the basic understanding of federalism deems as "federal" any multi-level system of governance.[200] The international system as proposed by Tomuschat is such a multi-level system, in which the state "must accept to live in a

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[197] Ulrich Schroth, Hermeneutik, Norminterpretation und richterliche Normanwendung, in Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart 270, 278 (Arthur Kaufmann et al. eds., 7th ed., C.F. Müller 2004)

[198] Tomuschat, *supra* note 27, at 305.

[199] *Id.*, at 389.

[200] Mauro Cappelletti, Monica Seccombe & Joseph Weiler, *Integration Through Law: Europe and the American Federal Experience. A General Introduction*, in *Id.* vol. 1 (Methods, Tools and Institutions), 3, 7-8, 12 et seq. (*Id.* eds., de Gruyter 1985).

symbiotic relationship with the institutions of the international community at regional and universal levels".[201] Moreover, the overall system features further integrative elements. First of all, it is the constitutional character of the international system which is understood as enshrining and securing (though not always successfully) the fundamental legal values. The principles of Article 2 UNC and the core of international human rights enshrine those values "which humankind must uphold in order to be able to continue to live under peaceful conditions which permit individuals real enjoyment of human rights".[202] Hence, some international obligations are fundamental for municipal legal orders and, may therefore be considered as performing a constitutional function for the entire world. Secondly, Tomuschat proposes an international political system with a considerable degree of autonomy vis-à-vis the constituent states. This is particularly true for the legislative function:

> The international system cannot rely any more solely on treaty-making, where the sovereign State holds an unrestricted power of unilateral determination. In principle, treaties are instruments of self-commitment. No State can be forced to adhere to a given conventional régime, no matter how important that régime may be with a view to furthering community interests. To the extent that in international society other values are recognized, values that deserve protection irrespective of consent given by an individual State, treaties must lose their primary role as instruments for the creation of legal norms.[203]

In addition, he finds that the autonomy of the international executive branch should also be increased: "It stands to reason that it would be much to be preferred to have a centralized agency which would itself take sanctions against a State remiss of its obligations, or which would at least co-ordinate the measures taken by individual States. Such a hierarchically organized superstructure does not yet exist, however, except in certain fields".[204]

Tomuschat's vision of international governance partially resembles the specific form of federalism realised in Germany and the European Union. In both systems, legislation that is enacted by the institutions at the higher level is executed by lower-level bodies. At the same time he holds that "it would be an erroneous assumption […] that the most promising way of facing up to the challenges of the future would be to centralize ever more functions in the hands of a world bureaucracy as the nucleus of a world government. International supervision and monitoring play an essential role […]. But there can be no genuinely sustainable international legal order if national systems of governance disintegrate".[205]

Tomuschat does not conceive or propose the creation of a global federal state in any traditional sense, as can be deduced from the importance he attributes to sovereign states as constituent

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[201] Tomuschat, *supra* note 27, at 436.
[202] *Id.*, at 85; in more detail Christian Tomuschat, *Die internationale Gemeinschaft*, 33 Archiv des Völkerrechts 1, 7 (1995). C. Tomuschat, Human rights: between idealism and realism. 13 Collected courses of the Academy of European Law, (2003).
[203] Tomuschat, *supra* note 27, at 306 f. This understanding is elaborated in Christian Tomuschat, *Obligations Arising for States without or against their Will*, 241 Recueil des cours 4, 199 (1993).
[204] Tomuschat, *supra* note 27, at 377.
[205] *Id.*, at 435.

elements of the envisaged global system. Yet, as Kant[206] and the discussion on the "nature" of the European Union prove, it might be useful to refer to transnational non-state entities as being federal.[207] Whenever an organisation within a multi-level political system is vested with the competence to enact unilaterally binding decisions, the issues of legitimacy and delimitation of competences arise. These are precisely the issues which beset federal states. Thus, conceptualizing transnational entities in multilevel systems as federal entities allows reference to experiences accumulated in the municipal context.

The importance that Tomuschat attributes to international law and the autonomy with which public functions binding upon the states should be exercised at the international level conceivably qualifies his vision as "federal". Yet, (again), he is reticent to use this qualification. The same is true with respect to the question whether the European Union provides an example of how to shape and develop a global system of governance. Some authors believe the EU indicates the direction the international system should take,[208] whereas Tomuschat presents European integration as exemplary for the global level far more cautiously. At the same time, nowhere does he assert that the experience of integration within the EU is limited to its specific regional setting or that such developments cannot be replicated in a broader international context.

Tomuschat's hesitance to draw parallels between his understanding and vision of international law on the one hand and the evolution of European integration on the other is also evident in his narrative on the evolution of international law. Under the heading "The growing complexity of the international legal order", he divides this evolution into the following four successive stages: (1) a law of coexistence; (2) a law of co-operation; (3) international law as a comprehensive blueprint for social life; and (4) international law of the international community.[209] The conceptualisation of stages three and four are peculiar, as one would expect co-operation (second stage) to lead to integration. According to most understandings, it is precisely this feature of law—being directly important to social life (i.e. the "blueprint" in the third stage)—which should mark the law of integration and distinguish it from the law of co-operation.[210] Yet, the term "integration" hardly appears in Tomuschat's text.

Accordingly, one might suspect that Tomuschat is attempting to further international federalism "by stealth". This assumption may, however, miss an important aspect of his thinking. In fact, he poses the last stage of his narrative (on the evolution of international law) as a question: "Is there

[206] Kant, *supra* note 105, at 115, 133.

[207] Eric Stein, Lawyers, Judges and the Making of a Transnational Constitution, 75 A.J.I.L. 1 (1981); Ulrich Everling, Zur föderalen Struktur der Europäischen Gemeinschaft, in FS Doehring 179.(1989); Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 A.J.C.L. 205 (1990); The Federal Vision (Kalypso Nicolaidis & Robert Howse eds., Oxford U. Press 2002).

[208] For a more outspoken view, see Daniel Thürer: "From the point of view of world global order the EU seems to me to represent the most promising way of creating some structure capable of checking the abuse of economic and social power, and of directing social activities towards overriding common ends. The EU seems to be making the most successful effort so far to cope with the problematic effects of globalisation and, perhaps it offers a model for new legal institutions to be created on a world-wide basis", Daniel Thürer, *Discussion* in *Non-State Actors as New Subjects of International Law* 92 (Rainer Hofmann et al. eds., Duncker & Humblot 1999); from a sociological point of view Klaus Friedrich Röhl, *Das Recht im Zeichen der Globalisierung der Medien*, in *Globalisierung des Rechts* 103 (Rüdiger Voigt ed., Nomos 2000).

[209] Tomuschat, *supra* note 27, at 56 f.

[210] Hans Peter Ipsen, *Europäisches Gemeinschaftsrecht* 66 et seq. (Mohr 1972).

an international community?". This question points out the major difficulty in designating the international order as federal.

c. The substratum and legitimacy of international law

A "thick" federal system requires not just an overarching organisation of government, but also a genuine "social substratum", i.e. a people or citizenry which provide that organisation with original (not just derived) legitimacy.[211] Municipal law rests on and refers to a people, a citizenry. Municipal public institutions (parliaments, governments and courts) are institutions of that group; the municipal institutional actors (politicians, lobbyists and officials) are – in one way or another – representatives of interests or values of that people. The concept *people* represents the focal point of reference for all political and legal processes. If international law increasingly assumes functions previously exercised by municipal law, a question arises concerning its point of reference. As long as this issue has not been settled, caution with respect to application of the term *federal* has good reasons.

Under the traditional doctrine of international law, the focal point of reference is "the states". Whereas municipal law originates from the people, international law originates from the states. States are usually understood as unitary actors who animate and control the international political and legal processes. Thus, "China" presents a position in the UN Security Council; "Germany" is concerned about the human rights situation in Congo; "Thailand" ratifies an international agreement. However, in international discourse "the states" are being increasingly replaced by a new term: the international community. In a growing number of discourses, the notion of *international community* plays a role for international law and international politics similar to that played by the concept of the *people* in the municipal realm. The increasing significance of the term *international community* in discourses on international law and politics might indicate a conceptual shift which could result in the basic transformation of these disciplines. Should the view become generally accepted that international law and politics refer to a social group called the *international community*, to which all human beings belong, the realisation of Tomuschat's vision and construction will be much facilitated.

The term *international community* has different functions and carries diverse meanings in Tomuschat's text. Tomuschat uses the term mostly as an underlying premise for his construction and sometimes even as a straight normative argument.[212] At times, he uses the term *international community* as the term *people* would be used in a municipal context—meaning a self-aware and organized group of human beings, i.e. a collective subject. This is indicated by the following passages: "As any other human community, the international community requires a sufficiently broad set of legal norms in order to be able to deal effectively with the many challenges arising in the course of history", "the international community has realized in the last decade of the

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[211] Stefan Oeter, Federalism and Democracy, in Principles of European Constitutional Law 53 (von Bogdandy & Bast 2006, eds.).
[212] See e.g. Tomuschat, *supra* note 27, at 346: the idea that "the international community has an overriding interest" is the decisive argument why a unilateral act is irrevocable.

twentieth century that national efforts of combating crime must be complemented by international machinery".[213]

The international community is presented above all as a community of values, enshrined above all in the international obligations *erga omnes* and of *jus cogens*.[214] The role attributed by Tomuschat to states fits nicely into this understanding of the international community. States have legitimacy only to the extent that they respect and implement those fundamental obligations. The international community is even considered as having some institutions of its own. Thus, according to Tomuschat, "the Secretary-General should always promote the interest of the international community with resolute determination"; he is "an agent of the international community".[215] Even the Security Council is seen as an embryonic "community" institution.[216]

Yet, he recognises that many differences remain between the international community and the national community. International community institutions are far less developed than their national counterparts. Possibly for this reason Tomuschat only asserts the existence of a law-making process *in* the international community" but not *of* the international community. The reification of the international community does not go as far as has occurred with municipal communities. Thus, Tomuschat capitalizes the word "State", but never does so for the term "international community".

Among the various differences between the international community and the national communities, the one which appears fundamental to Tomuschat's thinking concerns the aforementioned concept of *the people*. As stated, *the people* is the fundamental point of reference in municipal law, because it is seen as the source of democratic legitimacy, which in turn serves as the foremost source of governmental legitimacy. In other words, the concept of *the people* gives an ultimate point of reference to the legitimacy discussion. With respect to international law, Tomuschat sees the *international community* as providing a source of legitimacy through (common) values, but it is not a source of democratic in-put. He concedes that international law "as a blueprint for social life" is problematic when examined under the democratic principle since "the quantity and quality of international obligations has reached a level that puts in jeopardy the right of framing independently the internal constitutional order".[217] In Tomuschat's thinking, there is no substitute at the international level for the municipal source of democratic legitimacy that lies with the people.[218] Accordingly, the term *international community* does not appear in his construction as a substitute for *the people*.

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[213]   *Id.*, at 305, 431; a much more outspoken view is presented by the Russian judge Vereshchetin at the ICJ: "Mankind as a whole [...] tries to manifest itself in the international arena as an actor, as an entity", Vladlen Vereshchetin, *Discussion*, in *Non-State Actors as New Subjects of International Law*, (Hofmann et al.), *supra* note 208, at 136.

[214]   Tomuschat, *supra* note 27, at 75 ff.

[215]   *Id.*, at 399.

[216]   *Id.*, at 89; this understanding sits uneasily with the assertion that "international organizations [...] possess no social substratum of their own, but operate essentially as common agencies of their members", *id.*, at 91.

[217]   *Id.* at 184.

[218]   See above, II 3 b.

Some scholars consider non-governmental organisations as the embryo of an international community that provides democratic legitimacy.[219] Tomuschat rejects this approach: "Since they [i.e., the NGOs] are products of societal freedom, they lack the kind of formal legitimacy which a government emerging from free democratic elections may normally boast of. Apart from their membership, there is no one to whom they are institutionally accountable. Therefore, NGOs have never been regarded as the true voices of the peoples they are representing".[220] It is a defining feature of Tomuschat's construction that international law has no source of *democratic* legitimacy on its own: its democratic credentials rest on the democratic processes within the states, and he sees no way to overcome this dependency. Tomuschat's reticence with respect to federalism is due to an understanding that the upper level of a federal system requires its own democratic base. His scepticism in this respect distinguishes his approach from cosmopolitan federalism.[221]

In many instances, Tomuschat presents the international community as a group of human beings which serves as the "social substratum" (though not as a source of democratic legitimacy) of international law and a possible point of reference similar to *the people* in the municipal context. On the other hand, sometimes his usage is far more restricted and only succinctly indicates a number of legal developments without reference outside the law. He even defines the term *international community* "as an ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values".[222] This is far less than asserting the existence of a social group which might form a reference point for international law similar to that held in municipal law by the concept of the "people". This definitional uncertainty may be explained by the novelty of the phenomenon. A global community of values can only be asserted in a world that is fundamentally at peace with itself:

> As long as international society consisted of three different ideological blocs pursuing different and even contradictory objectives, each side could have the suspicion that general principles were the opening gate for attempts to introduce political bias into the international legal order. Controversy has not disappeared altogether from the international stage. On many issues, Western States, Russia, China and developing countries continue to hold different views, with many intermediate shades. But the sharp ideological divide has disappeared. No group of countries is opposed in principle to the recognition of human rights as an important element of the international legal order, almost no group rejects democracy as a guiding principle for the internal systems of governance of States. Given this rapprochement towards the emergence of a true international community, objections to general

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[219] Daniel Thürer, The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and Changing Role of the State, in Non-State Actors as New Subjects of International Law, (Hofmann et al.), *supra* note 208, at 37, 46.

[220] Tomuschat, *supra* note 27, at 155.

[221] For a taxonomy of the various positions see Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 E.J..I..L. 885 (2004). For example, Gráinne de Burca's and Oliver Gerstenberg's contribution in this issue derives/deduces a democratic value (out) of international law from its empowerment function .

[222] Tomuschat, *supra* note 27, at 88.

principles of law are progressively losing the weight which they carried 25 years ago.[223]

Tomuschat shows that current international law contains many features that allow for its evolution into a "common law of humankind" – a law through which humankind might address its pressing problems. Yet, this evolution will only happen if most human beings acquire a global perception of themselves as being part of a common group. There are hints that such a shift in self-perception is under way, but the new perception has not yet established itself to the extent where it substantially informs many decisions on the international plane. However, Tomuschat's construction of international law in his General Course may well contribute in driving forward such a perception for future decision-makers.

3. A more cosmopolitan vision of global order

Tomuschat's understanding of contemporary international law is universalist, but denies the possibility of an international democratic process and puts almost all his faith in national governments reconstructed as agents of the international community. A more cosmopolitan approach in the tradition of Kantian thinking is presented by Jürgen Habermas. The title of Habermas's piece *Is there still a chance for the Contitutionalization of Public International Law?[224]*) demonstrates that there is a broad consonance with Tomuschat's core assumption: international law plays a constitutional role in *any* exercise of public authority. Habermas considers this understanding of international law and international relations to be in competition with three other approaches: first, the traditional approach under the particularist paradigm in its realist or national variant, which sees the plurality of diverse states as the ultimate horizon of international law; second, the approach which advocates a world order based on liberal values, but subject to American hegemony rather than international law and common international institutions - the particularist paradigm in its hegemonic variant; third, the approach that asserts a waning of public power undermining the premises of any constitutional rule.[225] From Habermas' perspective, the universalist telos is conceptually and normatively most convincing.

For him, practical reason mandates that the telos of all law be the assurance of peace and freedom under the rule of law, rather than mere security, as in a Hobbesian perspective, via brute force (or American hegemony).[226] The theoretical centrepiece of the Habermasian text consists of a reconstruction of Kant's thought meant to overcome a conceptual problem which afflicts many "Kantian" approaches. In 1793, Kant indicated that the effective and enduring legal assurance of peace and freedom requires transnational institutions vested with public power over the constituent states.[227] Only two years later, however, he dismissed this idea, proposing only a "free federalism" without common institutions to enforce international law against wrongful state behaviour. Kant's reversal is not due to empirical insights, i.e. a recognition of the unwillingness of the states of his epoch to accept entities with transnational power, rather to a

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[223] *Id.*, 339.

[224] Habermas, *supra* note 111.

[225] See II 4.

[226] Habermas, Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?, *supra* note 111, at 120.

[227] Immanuel Kant, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis, in Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik (id.), in Sämtliche Werke, (Vorländer), *supra* note 105, at 67, 112 et seq.

conceptual inconsistency. In 1795, he considered international institutions vested with power as incompatible with the idea of international law.[228]

Habermas proves that this reversal results from an unnecessary conceptual straightjacket: the understanding of sovereignty as *indivisible*.[229] Under that understanding, developed during the French revolution, there can be only one political centre. As a consequence, global institutions would steer the world as Paris has steered France since the 18th century. Such a centralized political order would probably trample on the plurality of forms of life which many citizens cherish, leading to a "seelenlosen Despotism" (soulless despotism) under which freedom vanishes.[230] However, as the US Constitution has shown since 1787, sovereignty *is* indeed divisible. This allows for conceiving a federal system which consists of different layers of public authority. Thus, international federalism with operative international institutions is not conceptually inconsistent with the organisation of political life in "thick" political communities, i.e. states.

The core issue is not an *either/or* question, but rather how to design a multilevel system in a way that each layer of authority exercises only those powers matching its resources of legitimacy. Like Tomuschat, Habermas is well aware of the limited resources of democratic legitimacy upon which global institutions can rely; and like Tomuschat, he finds that such legitimacy can only be derived from democratic states.[231] Neither the participation of NGOs nor global parliamentarian institutions appear as possible sources of proper legitimacy for global institutions. Thus, true powers of international institutions should be confined to fields which require little *democratic* legitimacy. According to Habermas, this is the case both for the *enforcement* of peace and for the basic requirements of human rights, but not of democratic government in the Western sense. These principles enjoy broad legitimacy since serious infringements meet throughout the world with the same moral indignation. This community of moral indignation could be seen as an agent of Tomuschat's *international community*. As to the question of determinacy, there exists a consistent number of possible and relevant infringements which are clearly covered by these principles.

Habermas advocates two types of global regimes. One is centred in a reformed UN Security Council, which, as a supranational institution, is vested with true powers in order to *enforce* international peace and (the more) basic requirements of human rights. The other regime, which must deal with all legislative issues,[232] is not supranational, but rather transnational in nature:

> In the light of the Kantian idea, one can imagine a political constitution of a decentralized global society, based on currently existing structures, as a multi-level system that for good reasons lacks statal [*staatlichen*] character

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[228] Kant, *supra* note 105, at 131.

[229] Habermas, Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?, *supra* note 111, at 125 et seq.

[230] Kant, *supra* note 195, at 147.

[231] Habermas, Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?, *supra* note 111, at 140 et seq.

[232] Habermas therefore also validates the contested (see D. Fiedler, *Discussion*, in *Non-State Actors as New Subjects of International Law*, *supra* (Hofmann et al.), at 158-60) use of the separation of powers doctrine on the international level, *id.*, at 173.

in general. Under this conception, an appropriately reformed global organization would effectively and non-selectively be able to fulfill vital, yet precisely specified, peacekeeping and human rights functions on the *supranational level* without having to assume the statal form of a global republic. On a middle, *transnational level*, the large globally competent actors would deal with the difficult problems not only of coordinating, but of configurating world domestic policy, particularly problems of the global economy and of ecology, in the framework of standing conferences and negotiating systems [...]. In the various regions of the world, nation-states would have to band together as continental regimes in the form of "foreign-policy-competent" EUs. On this middle level, international relations in a modified form would continue – modified already because under an effective United Nations security system the *global players* as well as others would be barred from resorting to war as a legitimate means of conflict resolution.[233]

A constitutionalized international order is not as utopian as it might appear at first glance. Alongside numerous empirical observations, Habermas places a conceptual reminder. The international realm is not properly understood if conceived as the Hobbesian state of nature. At least some of the main actors are constitutional democracies whose constitutional tenets direct their action on the international plane.[234] Therefore, less evolutionary effort is needed to proceed from a largely horizontal international system to one with global institutions safeguarding core constitutional principles compared to against international law leaving the Hobbesian state of nature between individuals. International constitutionalism, in this sense, is simply a complement to municipal constitutionalism and a further step in a process of civilisation. Thus, unlike the municipal constitutionalism situation with its polarized "state of nature" versus "police state" context, international constitutionalism is not one of the alternatives in an *either/or* situation.

This position's understanding of the democratic legitimacy of international law can be best explained by the critique of the critique it received from Jed Rubenfeld.[235] The thrust of his argument is to present the respective European openness as a democratic deficiency, whereas US-American resistance against international law is praised as living up to the democratic ideal. This is certainly in line with particularist thinking: under this paradigm, any self-respecting polity is normatively required to minimize the influence of international law on itself. However, the issue looks totally different under the universalist paradigm, in particular if the individual is put in the tradition of contract theory at the heart of the construction. Here, democracy is not considered primarily as the auto-determination of a macro-subject, but as a number of procedures which give a voice to those affected. From this angle, a self-respecting democratic polity is one which attempts to provide for the necessary avenues of participation of affected individuals.

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[233] *Id.*, at 134-35 (footnotes omitted) (Steven Less trans.); *see* also reform proposals for the Security Council, *id.*, at 172 et seq.

[234] US Supreme Court Decision, Rasul v. Bush, No. 03-334, Argued April 20th 2004—Decided June 28th 2004.

[235] Rubenfeld, Jed, 2005, *The Two World Orders*; von Bogdandy, *Comment on "The Two Orders" from Jed Rubenfeld*, both in: Nolte (ed.) *European and US Constitutionalism* (2005), 280, 297.

In an interdependent world many decisions of the authorities of one polity substantially affect individuals living abroad. They do not have standing in domestic procedures. This situation is one of the undemocratic features of globalisation: increasingly, purely "domestic" decisions have a transnational impact with ever greater significance. There is almost no remedy in the domestic democratic process. It is the nature of the domestic political process that the interests of the polity's citizens enjoy a priority over those of foreigners. Even when the process does not aim at hurting non-citizens, domestic interests tend to be favoured and foreign interests relegated to the fringe. International law, with all its deficiencies, is thus far the only instrument to provide a voice to foreign persons affected by the adoption of measures of another polity. A state open to international law is therefore not limiting its democratic life, but rather realizing a new dimension of it.

The particularists' argument is tainted by a further problem. Let us call it the "Carl Schmitt fallacy". Some representatives of the American intellectual establishment are late disciples of "old" Europe, in particular of Carl Schmitt as an advocate of a political order that Europe as it is today has – hopefully – overcome. Carl Schmitt ridiculed the Weimar Republic by comparing and delegitimizing the reality of the Weimar political process against an ideal of parliamentarianism. In a similar vein, in Rubenfeld's essay the reality of the international legal process is pitted against an idealized US-American democracy. This idealisation is reminiscent of Carl Schmitt in a further way. Schmitt's basic understanding of democracy is that of the identity of ruled and rulers, amalgamated in a homogeneous "we". "We" is a very important word in particularist thinking and therefore in Rubenfeld's piece in which all internal differences have disappeared. And that "we" is forged above all – as with Schmitt – by enmity: anti-Americanism is a crucial part in Rubenfeld's argument; it is an essential argument in many theories under the particularist paradigm.

V. Summing up, situating this contribution, looking forward

Summing up, we hope that the usefulness of our approach has become visible. The paradigms of universalism and particularism help to map the theoretical landscape and to explain the premises which inform interpretations and understandings of core issues of international law.[236]

Summing up the pros and cons of the two paradigms, we favour universalism. We are convinced that in the era of globalisation the case can be made for all humans to strive for an international public order that efficiently safeguards universal principles and solves global problems.[237] That order would build on proper institutions which are *public* in the emphatic meaning, but remain at the same time *public* international in nature. These are propelled by national governments (preferably democratically elected), which would be, however, no longer in a position to individually block the enactment or enforcement of international law. These international institutions would be in turn conscious of their largely state-mediated (and thus limited)

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[236] It is important to stress that we do not argue that the paradigms ort he corresponding theories determine concrete interpretations in a given case. What we do argue is that the paradigms and the theories inform the interpretation.
[237] For a reconstruction of the relevant philosophical thought Georg Cavallar, *Cosmopolis. Supranationales und kosmopolitisches Denken von Vitoria bis Smith*, 53 Deutsche Zeitschrift für Philosophie 49-68 (2005).

resources of democratic legitimacy and respectful of the diversity of their constituent states. A democratic global federation cannot exist, but there can be a better, more peaceful and more integrated world of closely and successfully co-operating states by way of efficient international institutions. It is incumbent upon the profession of international scholarship to contribute in realising this objective. This vision provides a conceptually coherent conception that builds on the history of American and European constitutionalism. This scholarship has a sufficient basis in current law. Even critics cannot deny that it has scholarly potential as a construction of the law in force and not simply a lofty discourse *de lege ferenda*.

Certainly, the theories under the universalist paradigm face some serious problems. The term "international constitutionalism" for this approach is perhaps not the most fortunate one. The terms "constitutionalism" and "constitutionalisation" (similar to the term "federal") imply a (somewhat unrealistic) progression towards global democratic institutions, something which only a few scholars consider viable in our times. In this way, the arguments which contend against conceiving the international order as "federal" are well founded and do apply accordingly. Sometimes the term "legalisation" is used,[238] but it underrates the political impact. Others address this approach as "institutionalism" or "new institutionalism".[239] However, this approach embodies more than just the assertion that "institutions matter". Perhaps the term "supranationalism" as used by Habermas may be a more convenient denomination, although it is tainted by its technocratic overtones. The terminological difficulty might be indicative of the need for further elaboration and clarification.

The advocates of this approach do not deny that the current law can be read in different lights, nor that the thrust of current developments on the global scale does not precisely follow their vision, given the resistance towards a strong international public order by the governments of countries such as China, India, Russia or the United States. At the same time, there is no reason to abandon a scientific project only because it is politically difficult to realize. Koskenniemi accuses the project of as having a hegemonic nature.[240] It is, however, difficult to see how this could be so – except perhaps that by presenting itself as a meaningful construction for all concerned it asserts itself as being universally acceptable.[241] Perhaps more substantial is the critique that there will remain a fundamental difference in normativity between public law in developed liberal states and public international law as long as there are no strong international institutions with a strong international law ethos. As a *legal* project, international

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[238] Judith Goldstein et al., Legalization and World Politics, 54 International Organization 385 et seq. (2000); Stefan Oeter, Chancen und Defizite internationaler Verrechtlichung: Was das Recht jenseits des Nationalstaats leisten kann, in Verrechtlichung – Bausteine für Global Governance? 46 (Michael Zürn & Bernhard Zangel eds., Dietz-Verlag 2004).

[239] For a detailed analysis of the various approaches Andreas Paulus, *Die internationale Gemeinschaft im Völkerrecht* 97 et seq., 188 et seq. (Beck 2001).

[240] *See* also Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 Cambridge Review of International Affairs 2, 197 (2004).

[241] It must be conceded that the constitutionalist reconstruction needs to take into account more closely the relationship between the principles of current international law and the dramatic situation in the South. However, Koskenniemi's critique that "the global public order […] is fully implicated in what can only be seen as a deeply unjust system of distributing material and spiritual values" also necessitates further proof (*id*. at § 2 of conclusion),

constitutionalism might simply be a step too far and might lead to normative over-extension.[242] As put at the beginning of our analysis, much hinges on the success of international criminal law as outlined in the Rome Statute of the International Criminal Court: it might provider more normativity to the fundamental principles of international law. Also the danger of establishing powerful (yet evasive and irresponsive) bureaucratic regimes needs to be thoroughly addressed.[243]

Although there are some weaknesses, a final evaluation needs to look at the alternatives. According to Koskenniemi, the alternative vision for the development of international law is empowering disenfranchised groups largely outside of international institutions.[244] Objectively seen, it is difficult to understand this as the better alternative given global challenges such as sustainable development, poverty, climate change and international crimes. This is particularly true if one perceives legal scholarship above all as a practical science. In the current world, the practical proposals by "constitutionalist" authors appear in many instances preferable to those by others. Paraphrasing Kant: this vision might be vulnerable in theory, but in the current state of international relations and in view of the alternatives, it provides a convincing orientation for responsible practice for a number of issues.

Whereas pleading the case of the historic paradigm of universalism, we do not deny the scientific value of scholarship under the particularist paradigm, nor do we hold that its claims are altogether untenable. Concerning the future of the tension between universalism and particularism in international law, in general, and of the universalist paradigm in specific, we think therefore that scholars should be open for solutions capable of integrating the idea of a truly universal order with some issues emerging from the tradition of particularism. To be introduced into a renewed conception of universalism is, first, the assertion that democratic legitimation arises eminently from participation within single political communities, and second the rejection of any strictly vertical structure of law and political institutions, i.e. of a global hierarchy within the world order. Fairly distant from advocating any kind of up-to-date version of that "universal monarchy" seen by Kant as the threatening vision of an all-comprehensive tyranny, the challenge of a universalism made fit for the future consists in defending universal rights and values belonging to all humans and a binding system of compelling rules without oppressing horizontal diversity.

In any event scholars should try to find solutions for international problems that are acceptable under both paradigms. It belongs to the pride of the lawyer in general and the international scholar in particular to find solutions that suit opposing interests and advance common interest. A famous example is the Antarctic Treaty. [245] As set out its Article 4, the contrasting positions are unaffected but this did not prevent the development of one of the most successful

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[242]   This argument has been elaborated for international trade law see von Bogdandy, supra note 78, at 615 et seq.; Robert Howse & Kalypso Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far*, http://www.ksg.harvard.edu/cbg/Conferences/trade/howse.htm.

[243]   Joseph Weiler, The Geology of International Law – Governance, Democracy and Legitimacy, 64 ZaöRV/HJIL 547, 561-62 (2004).

[244]   Martti Koskenniemi, *Global Governance and Public International Law*, 37 Kritische Justiz 241, 253 et seq. (2004).

[245]   Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

international treaty regimes. In a similar line it should be possible to conceive the development of the international order on other issues as well. For example, it might serve the legitimacy of international law under most theories of both paradigms if a principle of subsidiarity was introduced into international law,[246] if the domestic parliamentary procedure was rearranged in order to better control the international activities of the government,[247] or if the international representation of weaker countries was improved.

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[246] In detail I. Feichtner, Subsidiarity, in: Wolfrum (ed.), EPIL (forthcoming 2008).
[247] Wolfrum, *supra* note 107.