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## **Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?**

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### **I. Introduction: Universal International Law and Its Critics**

When dealing with the allocation of authority in the international realm, subsidiarity has become one of the key terms of reference. The more local and the more specialized an international norm is, the better its legitimacy, or its ‘compliance pull’<sup>1</sup> for the States called upon to implement it. The very attempt to establish ‘general international law’ as a law binding on all States and other subjects of international law is called into question on two fronts: On the one hand, the age-old resistance to international regulation has found new supporters arguing that, in the absence of an international demos, international law suffers from an incurable ‘democratic deficit’ that severely limits its legitimacy, in particular when confronted with democratically mandated domestic majorities.<sup>2</sup> On the other hand, many

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<sup>1</sup> On the ‘compliance pull’ as expression of legitimacy see T Franck, *The Power of Legitimacy Among Nations* (Oxford, Clarendon Press, 1990) at 43.

<sup>2</sup> See, eg, JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford, Oxford UP, 2005) 205 et seq.; C Hillgruber, ‘Souveränität - Verteidigung eines Rechtsbegriffs’ (2002) 57 *Juristenzeitung* 1072 at 1079.

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international legal scholars maintain that international law has been deposed by new, issue-oriented international regulatory schemes, in particular regarding trade, but also human rights or the environment.<sup>3</sup>

The relationship between the allocation of authority in international law, on the one hand, and democracy, on the other hand, seems to be a pretty simple one: democracy requires that decisions be taken as closely as possible to the citizen. This relationship implies that democracy resides in the city, or the nation, maybe even in private associations such as the club or the parish, but not in the international sphere or with international institutions, whether the European Union or the United Nations. It is not surprising, then, that the German Constitutional Court (Bundesverfassungsgericht, hereinafter "BVerfG"), in its famous *Maastricht* decision, ruled that democracy requires the application of the principle of subsidiarity within the European Union.<sup>4</sup> In a recent interview with the German daily *Frankfurter Allgemeine Zeitung*, the President of the BVerfG emphasized that if the European Court of Justice did not better respect the principle of subsidiarity in the future, the BVerfG may again be called to intervene.<sup>5</sup> The 'democratic deficit' of international institutions, from the European Union to the United Nations and international law in general, is a rallying cry for those advocating national sovereignty as defence against the increasingly intrusive regulatory demands of globalization.<sup>6</sup>

It is the purpose of the present contribution to this collection of essays to put this conventional wisdom on the allocation of authority in international law into question. Ruth Lapidoth (to

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<sup>3</sup> G Teubner and A Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999; P Zumbansen, 'Die vergangene Zukunft des Völkerrechts' (2001) 34 *Kritische Justiz* 46.

<sup>4</sup> 89 Entscheidungen des Bundesverfassungsgericht [Decisions of the (German) Federal Constitutional Court (hereinafter "BVerfGE")] 155, Engl. transl. as *Brunner v European Union Treaty*, [1994] 1 CMLR 57 [accordance of the German Act of Ratification of the Maastricht Treaty on European Union, [1992] 2 German Federal Gazette 1251, with the German Basic Law (Grundgesetz)].

<sup>5</sup> H-J Papier, 'Interview' *Frankfurter Allgemeine Zeitung* (Frankfurt 24 Jul 2007), available at <http://www.faz.net/s/Rub99C3EECA60D84C08AD6B3E60C4EA807F/Doc~EDBFB74C1D1114FE2AEA0917043918AE3~ATpl~Ecommon~Scontent.html> (accessed 8 Aug 2007) [on the relations between ECJ and BVerfG in the light of the new Reform Treaty]

<sup>6</sup> See, eg, Goldsmith and Posner, *Limits of International Law* 205 et seq.; Hillgruber, 'Souveränität' ; see also U Haltern, *Was bedeutet Souveränität?* (Tübingen, Mohr, 2007) (describing the mythology of 'sovereignty'). For recent attempts to re-interpret sovereignty to fit into the modern development of international law see C Warbrick and S Tierney (eds), *Towards an International Legal Community* (British Institute of International and Comparative Law, London 2006); N Walker (ed), *Sovereignty in Transition* (Hart, Oxford/Portland 2003).

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whom the collection is dedicated), in her writings on the status of Jerusalem,<sup>7</sup> has shown herself to be an expert on the complexities of the ‘allocation of authority’ in the Holy City, and beyond. Ruth Lapidoth has also not failed to observe that the term ‘sovereignty’ has undergone great changes that render it quite malleable to functional considerations. Indeed, she has maintained that ‘the diminished concept of sovereignty may assist in the quest for a compromise on Jerusalem’<sup>8</sup>. It appears fitting to follow her cue by pointing to the relativity of other ostensibly absolute concepts such as ‘subsidiarity’ and ‘democracy’. Yet, just as with ‘sovereignty’, these terms should not be disposed of altogether. Rather, the task is to present arguments that take due account of conceptual as well as factual complexities.

Democracy requires an agreement of the minority that it will abide by the decisions of the majority. In the strong version of the ‘no demos’-thesis, democracy can only be exercised by a relatively homogeneous people. In other words: No democracy without demos.<sup>9</sup> While criticizing the German *Maastricht* decision for its apparent exclusion of a democracy beyond the State, its critics nevertheless agreed that democracy in an international or supranational setting requires modification of the State-model of democracy.<sup>10</sup> Thus, in a hypothetical example provided by Joseph Weiler, if Denmark were – heaven forbid – forced to join Germany, it would be of no solace to the Danish if they possessed their own elected

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<sup>7</sup> See, eg, R Lapidoth, 'The EU, Jerusalem and the Peace Process' in CD Classen and others (eds) *Liber amicorum Thomas Oppermann* (Duncker, Berlin 2001) 267; R Lapidoth, 'Jerusalem - Some Jurisprudential Aspects' (1996) 45 *Catholic University Law Review* 661; more generally R Lapidoth, 'Israel and the Palestinians: Some Legal Issues' (2001) 76 *Die Friedens-Warte* 211 at 223-227.

<sup>8</sup> Lapidoth, 'Jerusalem - Some Jurisprudential Aspects' note 6 above at 684.

<sup>9</sup> See J Isensee, 'Nachwort. Europa - die politische Erfindung eines Erdteils' in J Isensee (ed) *Europa als politische Idee und als rechtliche Form* (2d edn, Duncker & Humblot, Berlin 1994) 103 at 133; P Kirchhof, 'Der deutsche Staat im Prozeß der Europäischen Integration' in J Isensee and P Kirchhof (eds) 7 *Handbuch des Staatsrechts* (C.F. Müller, Heidelberg 1992) 855 paras 33, 39, 46, 52 *et passim*; cf the *Maastricht* decision of the German Constitutional Court, 89 BVerfGE 155 at 186, which substitutes Kirchhof's and Isensee's 'never' by a 'not yet' and requires limits to European integration; see also 83 BVerfGE 37; 83 BVerfGE 60 (communal right to vote of foreigners); partial Engl. transl in DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2d edn, Durham, London, Duke UP, 1997) 197-99.

<sup>10</sup> JHH Weiler, 'The State "über alles". Demos, Telos and the German Maastricht Decision' in O Due, M Lutter and J Schwarze (eds) *Festschrift für Ulrich Everling* (Nomos, Baden-Baden 1995) 1651 at 1667, 1670-1677. On the problem of multiple 'demoi' in the European Union see also JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge UP, 1999) 344. For a recent concession to the no demos-thesis, see JHH Weiler, 'The Geology of International Law' 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547 at 560: '[T]here is no convincing account of democracy without demos'.

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representatives in the German Bundestag.<sup>11</sup> The acceptance of majority decisions presupposes a general agreement on the framework in which democratic decision-making can take place. In the absence of a global demos, international law has difficulty in commanding respect from democratically-elected representatives of the nation State or a local community. In other words, cosmopolitan morality alone appears insufficient as a basis for the creation of rights and obligations that would overrule local or national democratic decisions.

Therefore, it should surprise no one that the 'democratic deficit' is held against international law, in particular when international law requires changes in national policies and laws going beyond narrowly tailored functional regulation. Accordingly, international law does not possess any inherent authority because it does not relate to a more deeply seated community that goes beyond immediate self-interest. In the absence of a true international community, we should be sceptical if anyone cloaks their own more particular interests by employing the language of 'community' or pretends that 'humanity' could ever become such a community of morals and laws.<sup>12</sup> In the words of Proudhon, 'whoever says humanity wants to cheat'.<sup>13</sup> Thus, the authority of international law is limited to the reflection and coordination of immediate State interests. In cases of clashes between international and domestic law, the latter is supposed to prevail over domestic law emanating from the people's representatives.

A second criticism of 'general' international law deals with the increasing compartmentalization of international society that requires specifically tailored solutions to common and indeed collective action problems of States. Thus, in a move 'from territoriality to functionality' (a move identified by Niklas Luhmann),<sup>14</sup> legal regimes need to be *specific*, not general. Under this criticism, the lofty abstractness of classical international law leads it to oblivion. Rather, international law ought to become divided up into different issue areas: criminal law, trade law, human rights law, etc. 'General' international law has all but ceased

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<sup>11</sup> Weiler, 'The State "über alles"', note 9 above, at 1660, 1662.

<sup>12</sup> For diverse approaches on the notion of international community see AL Paulus, *Die internationale Gemeinschaft im Völkerrecht* (München, C.H. Beck, 2001), 89-223.

<sup>13</sup> Cited after M Koskeniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113 at 116.

<sup>14</sup> N Luhmann, *Das Recht der Gesellschaft* (stw edn, Frankfurt/Main, Suhrkamp, 1995) 571 ff.; N Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt/Main, Suhrkamp, 1997) 158-160.

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to exist, or matter.<sup>15</sup> In the most elaborate version of this critique, Gunther Teubner and Andreas Fischer-Lescano have argued that legal systems can establish themselves in acts of ‘autopoiesis’ (self-creation) without the need of a centralizing and overarching system of law.<sup>16</sup> Accordingly, international law cannot constitute an overarching system of universal law because it lacks a subject in need of regulation.

Both of these critiques – the democratic and the functional-fragmentational critique – are related to the concept of ‘subsidiarity’ as a de-centralizing principle. In fact, they radicalize a ‘subsidiarity’ approach by asserting that there simply is no ‘higher level’ of decision-making than the nation-State or functional sub-systems of international law, respectively.<sup>17</sup> Whereas much of the democracy critique is rooted in traditional sovereignty cloaked in the language of democracy, the fragmentational critique can point to the shift from the national to the functional level associated with the phenomenon of ‘globalization’. While national decision-making processes benefit from the democratic legitimacy of the decisions taken, international decisions are justified in a functional way; as a gain rather than loss of national decision-making power through the ‘pooling’ of pre-existing common interests of democratic sovereigns in a functionally limited issue area. In the absence of international community, functionalism reigns, but it is only skin-deep. In situations of conflict, the national sovereign must prevail because of its greater democratic legitimacy.<sup>18</sup>

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<sup>15</sup> See, in particular, Teubner and Fischer-Lescano, ‘Regime-Collisions’ (note 3 above); G Teubner, ‘Global Bukowina’. Legal Pluralism in World Society’ in G Teubner (ed) *Global Law Without a State* (Dartmouth, Aldershot et al. 1997) 3; similarly Zumbansen, ‘Die vergangene Zukunft des VR’ note 3 above).

<sup>16</sup> Teubner and Fischer-Lescano, ‘Regime-Collisions’ (note 3 above) at 1009, 1014, 1032 *et passim*. On auto-poiesis generally, see G Teubner, *Recht als autopoietisches System* (Frankfurt am Main, Suhrkamp, 1989).

<sup>17</sup> For an argument as to the inapplicability of the principle of subsidiarity to a non-hierarchical international legal order see U Fastenrath, ‘Subsidiarität im Völkerrecht’ in D Wyduckel (ed) *Subsidiarität als rechtliches und politisches Ordnungsprinzip in Kirche, Staat und Gesellschaft* (Duncker & Humblot, Berlin 2002) 475 at 480. Only in the limitation of the local and personal scope of international regulation and in the ‘margin of appreciation’ of States in the implementation of international law one could see characteristics of subsidiarity. In this sense the term is used here, too, namely as decision-making at the lowest and most specialized level. However, subsidiarity in the narrower sense can also be applied to the vertical structures of public international law, see *Fastenrath, ibid.*, at 482.

<sup>18</sup> See, e.g. U Haltern, ‘Gemeinschaftsgrundrechte und Antiterrormaßnahmen der UNO’ (2007) 62 *Juristenzeitung* 537 with regard to the anti-terror measures of the UN.

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Such a 'necessary' combination of democracy and subsidiarity is, however, too easy to be true. This contribution attempts to show that 'democracy' does not work in only one direction, ie, in favour of the national or subsystemic level of decision-making. While it is certainly correct that the attachment of citizens to international decisions is much more limited than their attachment to national or local decisions, this is not the end of the matter. Subsidiarity does not only work in favour of the lower level, but may also require the lifting of authority to the higher level, if and to the extent that the higher level appears better suited to fulfil the task in question and guarantees the participation of those being subjected to the decision.<sup>19</sup> Thus, democracy may also be an argument in favour of, and not only against regulation of matters of international concern by international law.

National democracies only represent the domestic electorate; subsystems, for all their auto-poietic qualities, do have functional limitations that prohibit them from letting all relevant constituencies participate in their decision-making processes. Common tasks for the survival and well-being of humankind, from the protection of the environment to the non-proliferation of weapons of mass destruction,<sup>20</sup> require a minimum of central decision-making. In these cases, subsidiarity and democracy may point to central decision-making procedures rather than to individual decisions by decentralized actors.

This article proceeds in three steps: First, I shall deal with the democratic critique of both general international law and its fragmented equivalents that seek to bind international decisions to the democratic acceptance within nation States. Second, I shall look at the

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<sup>19</sup> See the wording of Art. 5, para. 2 TEC, OJ C 321 E/37 at 46: 'In areas which do not fall within its exclusive competence, the Community shall take action, *in accordance with the principle of subsidiarity*, only if and in so far as *the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.*' (our emphasis). See also C Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (Baden-Baden, 1996) at 28, 168 (solidarity as corrective for subsidiarity); SU Pieper, *Subsidiarität* (Köln et al., Heymanns, 1992) at 72 (subsidiarity as expression of effectiveness).

<sup>20</sup> These considerations are usually framed as 'community interests', see B Simma, 'From Bilateralism to Community Interest in International Law' (1994 VI) 250 *Recueil des Cours* 217, at 236-43. The present author prefers the term 'values' to interests because of the normative element contained in their assessment, see Paulus, *Internationale Gemeinschaft* note 11 above at 251-52. Cf. the interchangeable use by L Henkin, *International Law: Politics and Values* (The Hague, Kluwer Law International, 1995) 97-108. Fastenrath, 'Subsidiarität im Völkerrecht' note 17 above at 488 n. 88, points out that the term 'values' connotes, at least in the German language, too much of a relationship with 'Wertphilosophie', arguing from an objective, not a subjective perspective on values. This, of course, is the opposite of what I intend to convey. Thus, the term 'community interests' will be used here.

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fragmentation critique of the international legal order that grounds international legitimacy in the self-ordering of functional issue areas. In the conclusion, we try to identify the contribution 'subsidiarity' can make to our discussion of both fragmentation and democracy.

## **II. Subsidiarity and the 'Democratic Deficit' of International Law**

International institutions increasingly shape domestic decision-making, up to a point where national processes are losing much of their relevance. Moreover, the traditional means of international diplomacy do not fit the new circumstances. While, at least in democratic States, public decisions derive their legitimacy from democratically-elected representatives of the people,<sup>21</sup> at the international level, the State is often represented by technical experts whose main interest lies in certain issue areas rather than the general interest. On the other hand, national parliaments prove more and more incapable of making decisions that reject regional or international regulation. For instance, most States do not have a real choice whether or not to participate in international regimes such as the World Trade Organization, both for political and for economic reasons. Democratic representation at the real loci of decision-making is becoming more and more remote. Market actors do not have – and in most cases do not need – democratic legitimacy, but they do increasingly influence international decision-making. "Altruist" Non-Governmental Organizations may claim the public interest for themselves, but they do not enjoy democratic legitimacy either. Certainly, all these non-State actors derive legitimacy from their expertise and sometimes benevolent motivation with regard to certain issue areas, and their contribution is often indispensable for reaching effective and efficient decisions. But expertise and democracy are two different things. For example, environmental risks that a scientist may find acceptable because of potential benefits in the future may be unacceptable in the view of the general lay population. While most NGOs are certainly well-intentioned, this does not mean that the general public shares their views, whether on the nationalization of refugees or regarding drastic measures for environmental conservation.

Hence, the inherent 'democratic deficit' of international decision-making appears, at first sight, as the major objection to the existence of a 'general' international law and to its capacity to contribute to the solution of common and/or collective problems in the contemporary

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<sup>21</sup> For the theory of the 'democratic chain of legitimation' for all holders of public office in German constitutional law, see eg 47 BVerfGE 253 at 275; 52 BVerfGE 95 at 130; 107 BVerfGE 59 at 187; E-W Böckenförde, 'Demokratie als Verfassungsprinzip' in J Isensee and P Kirchhof (eds) 2 *Handbuch des Staatsrechts* (3d edn, C.F. Müller, Heidelberg 2004) 429 at 438, § 24 note 16.

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world. Democracy in a meaningful sense of the term appears only possible within a nation State or local setting, not on the world stage.

Even within Europe, there is much scepticism as to the prospects of a democratization of the European Union. The BVerfG, in its *Maastricht* decision, rejected the idea of the transfer of the separation of powers and domestic democracy to a supranational body, in spite of the common value system embraced by Europe, because it lacked the required social reality, in particular a common public opinion in which stable majorities could be formed around common projects.<sup>22</sup> While some have criticized the decision for its apparent exclusion of democratic processes at the European level,<sup>23</sup> even critics have agreed that the establishment of a supranational parliament alone does not suffice for multi-level democracy.<sup>24</sup>

In the United States, some of the opposition to the decisions of international bodies is also grounded in an apparent lack of democratic control over these institutions. Law without democracy, the argument goes, is not much more than an imposition that needs to be judged on the individual merits of the law in question, not on any inherent legitimacy of international law. In the words of professors Jack Goldsmith and Eric Posner:

[W]e presume that domestic laws are good in a liberal democracy, where citizens have influence over the political process. The same cannot be said about international law. Much of the foundational rules of international law evolved long before liberal democracy became a common mode of political organization; more recent international law, it is generally agreed, almost always reflects the interests of the powerful (and not always liberal) states rather than the interests of the world at large.<sup>25</sup>

And further they argue that international law:

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<sup>22</sup> 89 BVerfGE, 155 at 187, [1994] 1 CMLR 57 at 88.

<sup>23</sup> Weiler, *Constitution of Europe* (note 9 above) at 345, speaking of the 'fallacy of the German Constitutional Court in its Maastricht decision: conceptualizing the European *demos* in the way that the German *demos* is conceptualized.' For a more extensive critique on these lines, see Weiler, 'The State "über alles"' (note 9 above) at 1653-54 *et passim*, see also at 1654-55, n. 10 on Heller and Schmitt.

<sup>24</sup> Weiler, *Constitution of Europe*, note 9 above, p. 269-70, 344 ff; S Besson, 'Institutionalizing Global Demoi-cracy' in L Meyer (ed) *International Law, Justice and Legitimacy* (Cambridge UP, Cambridge 2007) forthcoming, embracing a pluralist theory of multiple *demos* in a democratizing European Union.

<sup>25</sup> Goldsmith and Posner, *Limits of International Law*, note 5 above, at 195.

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can have no democratic pedigree because there are no international institutions that reliably convert the world public's needs and interests into international law and that can change existing international law when the world public's needs and interests change.<sup>26</sup>

It is hardly surprising that the same authors reject a larger role for, as they call it, 'global governance schemes', let alone the establishment of a world State.<sup>27</sup> A world State is indeed not a promising perspective, be it organized in a more or less democratic fashion or otherwise.<sup>28</sup> In a globalized world, which seems to exert a strong pull towards harmonization, many people regard their national allegiance as the best conceivable defence of their peculiarity and cultural difference. Nevertheless, it appears that Posner and Goldsmith throw out the baby with the bath water. Precisely these cultural, political, and economic differences in the contemporary world demand a democratized international decision-making procedure complementing the existing democratic control mechanisms at the domestic stage. The reason is that, in a globalized society, different societies are so much linked with and dependent on each other that a limitation of democracy to the domestic level gives the stake holders not more, but less influence on decisions affecting them.

Thus, the question does not consist of a choice between national democracy and international legality. Such a choice may occasionally impose itself upon political decision-makers, whether governmental, administrative or judicial, and one would indeed presume that, in such instances, democracy prevails.<sup>29</sup> However, the processes of international law usually prevent

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<sup>26</sup> Ibid at 199.

<sup>27</sup> Ibid at 223: 'There are obvious objections to ... quasi-world government or global democracy proposals. ... The most obvious difficulty concerns the democratic deficit associated with ever-broadening governmental institutions. A related concern is that large-scale uniformity inherent in global governance schemes comes at the expense of too many unsatisfied individual preferences. Finally, there is the difficulty of human motivation and loyalty with respect to large, impersonal organizations.'<sup>27</sup> (citation omitted).

<sup>28</sup> Even Immanuel Kant was, for all his enthusiasm for a universal history towards an enlightened new world, rather sceptical regarding not only the prospects, but also the desirability of a Republican world state, see I Kant, 'Die Metaphysik der Sitten' in W Weischedel (ed) 4 *Werke in sechs Bänden* (Wissenschaftliche Buchgesellschaft, Darmstadt 1798) 309 at 474-75 § 61; I Kant, 'Zum ewigen Frieden: Ein philosophischer Entwurf' in W Weischedel (ed) 6 *Werke in sechs Bänden* (Wissenschaftliche Buchgesellschaft, Darmstadt 1983) 194 at 208-213. But see, based on Kant's arguments, the federalizing vision of O Höffe, *Demokratie im Zeitalter der Globalisierung* (München, Beck, 1999). Neo-Kantians go much beyond what Kant had envisaged, see eg FR Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53.

<sup>29</sup> For a conspicuous example, see the recent *Waldschlösschen* case, in which the people of the German city of Dresden decided to build a bridge against the wishes of UNESCO, thus risking the status of the

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this choice from presenting itself. Hardly any Constitution admits of the direct applicability of international norms without a process of legislative and/or executive review. Rather, in most countries, important agreements, in particular multilateral, quasi law-making treaties require the assent of both executive branch and parliament. It is also hardly true – at least, I hope, not universally true<sup>30</sup> – that parliamentarians are unable to form an opinion on international agreements while being perfectly capable of assessing the desirability of often arcane domestic rules. Even when incorporating customary international law in their constitutions, States tend to do this only with broadly accepted customary rules or general principles of international law.<sup>31</sup> The danger of trespass into national law without implicit legislative or constitutional agreement is thus not negligible, but rather reduced.

Finally, if a potential clash between national preferences and international legality arises, domestic institutions may either follow the international stricture or strive for a modification of domestic law to meet their international obligations. Either States may achieve a modification of the international rule and thus free themselves from the charge of violating the law.<sup>32</sup> Or States need to go through the domestic legislation process to implement their

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Elbe valley as a World Heritage Site under the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage of 16 Nov 1972 (1037 UNTS 153), see, BVerfG, 2 BvR 695/07 of 29 May 2007, para. 35, available at [http://www.bverfg.de/entscheidungen/rk20070529\\_2bvr069507.html](http://www.bverfg.de/entscheidungen/rk20070529_2bvr069507.html) (visited 6 Aug 2007). The German court decided that a Convention that does not contain clear obligations binding on the federal State of Saxonia may well be overruled by a local referendum in spite of the risk of international sanctions.

<sup>30</sup> However, for an example of the incapacity of national parliaments to control international legislation see, in the context of the implementation of European Union law, *European Arrest Warrant*, 113 BVerfGE 273; English press release no. 64/2005 of 18 July 2005, available at <http://www.bverfg.de/pressemitteilungen/bvg05-064en.html> (visited 6 Aug 2007).

<sup>31</sup> Thus, Article 25 of the German Basic Law only incorporates the ‘general rules of public international law’ (‘allgemeine Regeln des Völkerrechts’) into domestic law. For an overview, see I Pernice, in H Dreier (ed), *Grundgesetz-Kommentar* (2d edn, Mohr Siebeck, Tübingen 2006) Article 25 MN 11-14. Whereas the common law generally recognizes, in the words of Blackstone’s Commentaries, international law ‘as part of the law of the land’ (4 W Blackstone Commentaries on the Law of England 1979, Book IV, Chap. V, at 67; on the respective case law see I Brownlie, *Principles of International Law* (6th edn, Oxford, Oxford UP, 2003) at 42 ff), the US constitution does not mention customary international law, and its internal effect is in dispute until this day, see the diverging interpretations of *Sosa v Alvarez-Machain*, 542 US 692 at 712 (2004) by CA Bradley, JL Goldsmith and DH Moore, ‘*Sosa*, Customary International Law, and the Continuing Relevance of *Erie*’ (2007) 120 Harvard Law Review 869 and WS Dodge, ‘Customary International Law and the Question of Legitimacy’ (2007) 120 Harvard Law Review Forum 19.

<sup>32</sup> This is what Iceland achieved with regard to the extension of the Exclusive Economic Zone in the framework of the law of the sea after its defeat in *Fisheries Jurisdiction (United Kingdom v. Iceland)*,

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international obligations. In this regard, States have broad discretion as to how international obligations are implemented.<sup>33</sup> But, of course, this margin cannot be unlimited. Thus, the International Court of Justice rejected a US attempt to implement its obligation of consular information under the Vienna Convention on Consular Relations<sup>34</sup> pursuant to the *LaGrand* judgment<sup>35</sup> within the framework of the clemency process rather than by a judicially enforceable right.<sup>36</sup> Nevertheless, similar to subsidiarity, the margin-of-appreciation for the implementation of international law allows for some measure of accommodation rather than all-out confrontation.

The problem is much more complex, though. It is not so much international rules themselves, but rather their application and interpretation by international bodies that create the clash between domestic and international law. The further development of international law by these institutions can hardly be controlled by the constituency or the legislative body of a single State. In some instances, States may prefer to violate an international obligation rather than to modify their national legislation or jurisprudence in order to comply with international law. Thus, the Supreme Court of the United States recently denied domestic effect of key portions of the *LaGrand* and *Avena* judgments, arguing that the Court had misconstrued the adversarial criminal justice system.<sup>37</sup> The German BVerfG, in turn, treated both ICJ and the European Court of Human Rights as authoritative for the interpretation of international law, but preserved for itself the resolution of eventual conflicts with German constitutional law.<sup>38</sup>

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Merits, Judgment, ICJ Reports 1974, p. 3; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, ICJ Reports 1974, p. 175. The Exclusive Economic Zone in the UN Convention on the Law of the Sea of 30 Apr 1982, 1833 UNTS 3, Art. 55 ff followed the position of Iceland, however, so that the country got away with its non-compliance with the judgment. For details see C Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford, Oxford UP, 2004) at 144-58.

<sup>33</sup> The European Court of Human Rights has developed an elaborate theory on the 'margin of appreciation' of domestic implementation of the European Convention on Human Rights, see *Lawless v Ireland*, Series A, no. 1; *Kokkinakis v. Greece*, Series A, no. 260-A.

<sup>34</sup> Vienna Convention on Consular Relations of 24 Apr 1963, 596 UNTS 261.

<sup>35</sup> *LaGrand (Germany v US)*, ICJ Rep. 2001, 466.

<sup>36</sup> *Avena (Mexico v US)*, ICJ Rep. 2004, 12 at 66 para 143.

<sup>37</sup> *Sanchez-Llamas v Oregon*, 126 S.Ct. 2669 (2006) 2686-87.

<sup>38</sup> For the interpretation of the European Convention on Human Rights by the European Court of Human Rights, see *Görgülü I*, 111 BVerfGE 307 (2004), official English transl. available at <[http://www.bverfg.de/entscheidungen/rs20041014\\_2bvr148104e.html](http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104e.html)>, accessed 6 Aug 2007, paras. 35, 53, 62; for the implementation of ICJ decisions, see the Chamber decision in BVerfG, 2 BvR

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Similarly, regarding the barrier in the West Bank, the Israeli High Court of Justice has recognized the authority of the ICJ to interpret international law<sup>39</sup> – even in the case of a non-binding Advisory Opinion – but has strived to preserve its own prerogative to decide on the domestic implementation of international law including the assessment of the relevant facts.<sup>40</sup>

While the German and Israeli courts did not put into question the international legal authority of international courts and tribunals as such, the US Supreme Court did not shy away from charging the ICJ with the wrong application of international law and maintained its own primacy with regard to the interpretation of the international legal obligations of the United States.<sup>41</sup> However, one reason for this difference may well lie in the different domestic laws to be applied: Whereas the US constitution maintains, in Article VI, that self-executing treaties are the ‘law of the land’ equal in rank to Congress legislation,<sup>42</sup> German constitutional law with regard to treaty law is essentially dualist in nature: only the transformation of international into domestic law renders it equal in rank to domestic legislation.<sup>43</sup> Thus, it appears sufficient to block the direct effect of an international decision in order to prevent modification of domestic laws by a new international legal rule. In Israel, in turn, the non-binding nature of the Advisory Opinion gave the Court additional leeway regarding its implementation, which may have played a role in its rejection of the treatment of facts by the ICJ.

All of these decisions, however, imply that it is the domestic legal order that ultimately determines how international law is to be implemented. Both democracy and subsidiarity

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2115/01 of 19 Sept 2006, 2 BvR 2115/01, available at <[http://www.bverfg.de/entscheidungen/rk20060919\\_2bvr211501.html](http://www.bverfg.de/entscheidungen/rk20060919_2bvr211501.html)> accessed 18 Mar 2007.

<sup>39</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136

<sup>40</sup> *Mara'abe v. The Prime Minister of Israel*, H.C.J. 7957/04, judgment of 15 Sept 2005, para. 74.

<sup>41</sup> *Sanchez-Llamas*, note 37 above.

<sup>42</sup> For the dominant doctrinal interpretation, see L Henkin, *Foreign Affairs and the US Constitution* (2d edn, Oxford, Clarendon Press, 1996) 198 ff. While denying domestic effect to the ICJ interpretation of the VCCR, even the *Sanchez-Llamas* majority decision emphasizes the importance of international treaty obligations, see *Sanchez-Llamas*, 126 SCt at 2687-88: ‘Our holding in no way disparages the importance of the Vienna Convention. ... It is no slight to the Convention to deny petitioners' claims under the same principles we would apply to an Act of Congress, or to the Constitution itself.’

<sup>43</sup> This is particularly relevant in the German *Waldschlösschen* case (note 29 above) because the UNESCO Convention was not put to the German legislature for a vote previous to its ratification by the Federal President.

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considerations point into this direction. Whereas the US Supreme Court comes to this conclusion by rejecting the ICJ's interpretation of international law, the BVerfG and the Israeli Supreme Court modified the application of the international decision in the respective domestic legal orders rather than questioning the international legal authorities as such.

Indeed, if (and to the extent) the national court is nearer to the problem in question and enjoys better democratic legitimacy through the 'stakeholders' of the issue at hand, its 'gate-keeping'<sup>44</sup> against international decisions abstracting from social reality may not be a matter of concern. However, this implies that the international stakeholders are represented at the domestic level as well as they are represented internationally.

Alas, this is not always the case.<sup>45</sup> The critics of general international law seem to presume that 'democracy' leads to identical solutions whether it is exercised by a national of the US as the world superpower or a Sudanese Darfurian. The interests of the latter are, however, neither represented by its government,<sup>46</sup> nor by the democratic governments of other countries that adopt decisions pursuant to the interests of their own population. To give another example, when the democratically-elected Knesset in Israel makes decisions regarding the treatment of Palestinians in the West Bank, the decision will not be recognized as 'democratic' by the Palestinians in the Occupied Territories because they are not represented in the Knesset. The same is valid for the adjudication of claims: the Supreme Court of Israel may well be commended for its even-handedness in cases involving the occupied territories. However, as long as the Palestinians there are not represented on the bench (or on the judge-appointing body), they will not recognise the Israeli court's decisions as legitimate.

In other words, democratic legitimacy depends on the representation of the principal stakeholders. Any democratic legitimacy of decision-makers towards a certain population is not enough. Representation by a non-democratically-elected government or NGO at the international level may be preferable to no representation at all, but is hardly equivalent to the representation by an elected government. A truly global democracy that would rely on a

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<sup>44</sup> The notion is from Kirchhof, 'Der deutsche Staat im Prozeß der Europäischen Integration', note 8 above, para. 183, note 65.

<sup>45</sup> For a similar argument, see Besson, 'Institutionalizing Global Democracy', note 24 and accompanying text.

<sup>46</sup> See the alleged crimes committed by their government against them: Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc S/2005/60 (1 Feb 2005).

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weighing of international votes according to the sizes of the respective population would fail to respect the inherent limitation of democracy, namely that it presupposes a consensus that the minority will accept the rule of the majority. To put it mildly, such an international consensus is internationally not forthcoming. It could lead to a directorate of some great powers (China, India, Russia, the US, for example) to the exclusion of Europe, Africa, or Latin America. While the current composition of the Security Council may be regarded unjust, its competences are limited to the maintenance of international peace and security<sup>47</sup> and do not extend to other matters.

One may regard the specific attention to one's fellow nationals rather than other humans elsewhere as the strong side of both nationalism and communitarianism. If one cares for everybody, one cares for nobody. But the inherent 'democratic deficit' of international decision-making will not, as conventional wisdom has it, go away when the final decision is made at the national or local level, as democratic as it may be. And this argument has not even yet taken account of the fact that refraining from a decision may be tantamount to taking one – in other words, both positive and negative decisions have consequences for stakeholders. For instance, when a majority of French and Dutch citizens rejected the European Constitutional Treaty, while the people of Luxembourg and Spain approved it, both the entry-into-force of the treaty and the preservation of the *status quo* were undemocratic with regard to parts of the European electorate. Therefore, the negotiation of a new Reform Treaty that preserves the basic features of the Constitutional Treaty appears as the most 'democratic' solution that accommodates both sides of the debate.<sup>48</sup>

If it is true that more and more decisions, both at the international and the domestic levels, affect a great amount of people without regard to the boundaries of nation-States, and that many tasks cannot be realized at the national level only, from free trade to struggles against terrorism, climate change, global poverty and AIDS<sup>49</sup> it is simply not good enough to point to national democratic processes as the solution for the problem of legitimacy. On the one hand, decisions taken, or not taken, at the domestic level affect not only the citizens of a single

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<sup>47</sup> Articles 24, 25, 39 UN Charter.

<sup>48</sup> See Presidential Conclusions of the European Council, 21/22 June 2007, available at [http://www.consilium.europa.eu/cms3\\_applications/applications/newsroom/loadDocument.ASP?cmsID=221&LANG=en&directory=en/ec/&fileName=94932.pdf](http://www.consilium.europa.eu/cms3_applications/applications/newsroom/loadDocument.ASP?cmsID=221&LANG=en&directory=en/ec/&fileName=94932.pdf) (accessed 26 Jul 2007), p. 15.

<sup>49</sup> On these 'community interests' see Simma, 'From Bilateralism to Community Interest' (note 20 above).

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State, but of humanity at large, from the provision of AIDS medication to the waging of wars. On the other hand, international decisions have different effects on different national or international constituencies. Thus, the democratic deficit of international decisions cannot be balanced by domestic democratic processes.

Of course, in the current system of international law, representation goes through States. This two-level system is under threat from liberal ethicists and sovereigntists alike. While the latter reject any long-term international decision-making not subject to domestic ratification, the former demand the construction of something akin to a world democracy by introducing domestic constitutional processes in international decision-making.<sup>50</sup> Fortunately, for the reasons pointed out above,<sup>51</sup> none of them has been successful. Rather, what is required for the improvement of the legitimacy of international decisions is both a strengthening of the domestic representativeness of States as well as a more open, transparent process of decision-making at the international level that would allow for the interests of additional stakeholders to be taken into account in the decision-making process. By simply leaving decisions to the lowest possible level, however, be it democratically constituted or not, international decisions affecting the lives of many, if not all human beings do not become inherently more democratic.

Thus, democracy may indeed constitute an argument in favour of leaving decisions at the lowest possible level. It does not, however, point against the attempt of construing multilateral institutions that are both capable of inter- and supranational decision-making, if the task in question requires an answer which goes beyond the purview of the nation-States. Thus, the democratization of global institutions, as limited it may be, is preferable to a simple throw-up of arms and a return to domestic regulation. When global decisions are concerned, the democracy of domestic decisions alone is undemocratic when seen from the perspective of outsiders.

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<sup>50</sup> See, in particular, D Archibugi and D Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order* (Polity Press, Cambridge 1995); D Held, *Democracy and the Global Order* (Cambridge, Polity Press, 1995). For a more moderate version see Höffe, *Demokratie im Zeitalter der Globalisierung* (note 27); Besson, 'Institutionalizing Global Democracy' (note 24 above).

<sup>51</sup> See note 9 ff. above and accompanying text.

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### **III. Subsidiarity and “Fragmentation”**

The critique of international law from the standpoint of national democracy somewhat contradicts another experience of the contemporary lawyer, in particular in Europe: According to the European experience shaped by the process of European integration, the unity of the nation state appears increasingly illusory. Accordingly, the international legal realm is characterized by a fragmentation into different issue areas. Although States are represented in the vast majority of decision-making bodies, whether at the WTO or Basle Committee on Banking Supervision, it may be more important whether a State representative regards herself as trade lawyer, environmental lawyer, or human rights lawyer, than whether she represents the United Kingdom or Morocco. Of course, national procedures will counter-balance the impact of assigning specialists to international bodies by inter-agency and – ministerial processes and the monitoring of its representatives. In addition, national governments and parliaments may be able to deny their assent to the results of any international agreement. Nevertheless, the more important an international agreement is, the less likely, or even feasible, its rejection becomes.<sup>52</sup> In addition, the domestic interest in any deal may outweigh any disadvantage incurred during the negotiation process. Thus, most states can hardly afford to withdraw from an international consensus on most issues. Many lawyers have thus concluded that globalization is characterized by a shift from territorial borders to functional boundaries.<sup>53</sup> Most issue areas such as trade, environment, or human rights have left territorial boundaries behind and cannot be dealt with effectively at the national level only.

According to the proponents of auto-poiesis, each sub-system of international law is itself capable of developing the relevant decision-making processes in a transparent and democratic

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<sup>52</sup> See Weiler, 'Geology of International Law' , note 9 above at 557.

<sup>53</sup> See, in particular, Luhmann, *Recht der Gesellschaft* ; Luhmann, *Gesellschaft der Gesellschaft* (note 14 above) and the radicalized version of A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999 (note 15 above). On this shift see also AL Paulus, 'From Territoriality to Functionality? Towards a Legal Methodology of Globalization' in IF Dekker and WG Werner (eds) *Governance and International Legal Theory* (Martinus Nijhoff, Leiden, Boston 2004) 59; on the problem of the 'linkage' between these issue areas see DW Leebron, 'Linkages' (2002) 96 *American Journal of International Law* 5.

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fashion.<sup>54</sup> But this proposition pre-supposes an analysis of the "proper identification" of those affected by the decisions within a given issue area. Due to the uncertainty and fallibility of all consequential analysis, however, the effects of decisions in one subsystem on others will also be indeterminate and uncertain. Therefore, the presumption underlying the general competence of States – namely, that most decisions in the public sphere affect all citizens and must therefore be legitimized, directly or indirectly, by all of them – is also valid internationally, whether one deals with human rights, the environment, or trade and development. In turn, this demonstrates that the compartmentalization of political decisions into issue areas carries considerable political and democratic costs.

Furthermore, general international law still provides the basic rules on international law-making and, at least subsidiarily, on their enforcement<sup>55</sup> and the subsystems often refer back to general international law on these matters. The legal regulations applied in the different issue areas, from Internet regulation to the WTO, from environmental treaties to the International Criminal Tribunal for the Former Yugoslavia, stem from the very State or inter-State bodies which proponents of fragmentation have dismissed before as increasingly irrelevant. Thus, a trend from territorial to functional tasks will be followed by functional rather than territorial conflicts of norms. These conflicts, however, cannot be decided at the national level, but require international regulation. Hence the perceived need of some sort of international constitution as repository of conflict rules between different issue areas.<sup>56</sup>

The parsimonious character of international law makes it quite malleable for the self-ordering of regimes, within certain limits. International law grounds its obligations either in consent or in custom and recognizes certain general principles, either internationally or as derived from domestic legal systems. One may dispute whether such an order fulfils Hart's requirements for a legal system,<sup>57</sup> but it certainly provides enough leeway for the *leges speciales* of

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<sup>54</sup> On auto-poiesis, see the contributions to G Teubner (ed), *Autopoietic Law: A New Approach to Law and Society* (de Gruyter, Berlin/New York 1988).

<sup>55</sup> See B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483 at 529 *et passim*.

<sup>56</sup> In this vein see JP Trachtman, 'The Constitutions of the WTO' (ibid) 623 at 627; but see JL Dunoff, 'Constitutional Conceits: The WTO's 'Constitution' and the Discipline of International Law' (2006) 17 *European Journal of International Law* 647 at 674 [arguing that the WTO lacks the 'sociological legitimacy' required for a constitution].

<sup>57</sup> HLA Hart, *The Concept of Law* (2d edn, Oxford, Clarendon, 1994), 213 ff., arguing that international law lacks the so-called 'secondary rules' to make it a complete system of law. But see JP

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functionally differentiated regimes. The main problem does not lie in the international legal requirements for binding norms, but in the limitation of its law-making subjects to States. Yet this problem is not impossible to overcome if one contemplates applying the same criteria – namely, the legally binding nature of formal commitments and of custom accompanied by a joint conviction regarding their legally binding nature – to the pronouncements of non-State actors. Moreover, non-State actors can only bind themselves. As soon as public interests are at stake, only public decision-making appears legitimate, because only public actors can claim to be representative of the whole of society independent of a specific issue area.

It is thus not surprising that the need for legitimation beyond one single sub-system leads to the acceptance of rules for the common ordering of the international realm, such as human rights or the protection of the global commons. Some of these rules will be more of a formal nature – how rules are to be made and to be interpreted – others will be substantive, setting material limits to the self-ordering of subsystems.

Ultimately, of course, it is a matter of perspective whether one interprets the use of norms from other systems as an autonomous incorporation or as evidence for the existence of one common system. On the other hand, though, recognition of the same body of non-derogable norms beyond the fall-back rules of international law demonstrates the 'staying power' of an international *jus cogens* over and above the ordinary norms of specific legal régimes.<sup>58</sup> The main problem with the theory of the autopoietic character of the law of new legal regimes most likely relates to its lack of attention for questions of legitimacy – a legitimacy which each subsystem alone cannot provide.

To give an example: In the Yahoo! case,<sup>59</sup> a French court decided that Yahoo! had to block a racist memorabilia auctioning webpage as far as it can be accessed in France because its

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Trachtman, 'The Constitutions of the WTO' (2006) 17 *European Journal of International Law* 623 (note 56 above) at 627, arguing for 'tertiary' rules of allocation of rule-making authority.

<sup>58</sup> On *jus cogens* see, recently, C Tomuschat and J-M Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff, Leiden/Boston 2006); AL Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation' (2005) 74 *Nordic Journal of International Law* 297 with further references.

<sup>59</sup> In France see, *LICRA et UEJF v. Yahoo! Inc.*, Ordonnance Référé, T.G.I. Paris, Nov. 20, 2000, in English available at <http://www.lapres.net/yahen11.html> (Daniel Lapres trans.). For the quite fragmented US litigation drawing on questions of competence rather than substance, see *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir., 12 Jan 2006 *en banc*). On this case see also M Reimann, 'Introduction: The Yahoo! Case and Conflict of Laws in the Cyberspace' (2003) 24 *Michigan Journal of International Law* 663 with further references.

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display there violates section R.645-2 of the French Criminal Code. Should we allow such questions to be decided by the 'Web community,' for instance the Internet Corporation for Assigned Names and Numbers (ICANN), because a regulation by a territorial State alone is not fully possible and the Internet should be regulated internationally rather than nationally? Or should we allow the French courts to order Yahoo! to at least take those steps to block territorial access that appear technically feasible (which would block access in France to about 90 percent)? The result of the first solution would be a unified regulation mainly in the interest of most Internet service providers and of most customers. In the second case, 100 percent efficiency cannot be reached (if one does not allow for a complete shutdown of the Internet in France which no reasonable person would contemplate), but the majority of the French society which legitimizes the outlawing of neo-Nazi propaganda would prevail over the interests of the global Internet community.

However, the solution on the basis of Internet self-ordering appears illegitimate. The eighty-year-old Holocaust victim is affected (and offended) by neo-Nazi propaganda on right-wing-websites even if she does not use the Internet, but learns of the contents of the sites in her local newspaper. She is not represented, however, when the Internet community is allowed to regulate itself. Likewise, everybody, not only the potential Internet users, will be affected by the success of strategies to improve access to the Internet. This would require, in turn, that legitimate decisions need to include representatives of society as a whole – and leads, in the absence of representative international fora, to a preference for local or national decisions based on democratic legitimacy rather than for international decisions of unaccountable expert bodies. The best solution, however, would consist in a truly international regulation that takes account of the non-systemic concerns – ie, the integration of internet regulation in the general international legal regime – which may include the delegation of competences to the most subsidiary and most special level.<sup>60</sup>

Because decisions made within many systems profoundly influence the fate of those not

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<sup>60</sup> For a comment on the Tunis World summit of the Information Society 2005 on these lines see KW Grewlich, "'Internet governance" und "völkerrechtliche Konstitutionalisierung" nach dem Weltinformationsgipfel 2005 in Tunis' (2006) *Kommunikation und Recht* 156; for a summary of the international legal regulation see F Mayer, 'Völkerrecht und Cyberspace: Entgrenztes Recht und entgrenzte Medien' in U Thiedeke (ed) *Soziologie des Cyberspace: Medien, Strukturen und Semantiken* (VS Verlag für Sozialwissenschaften, Wiesbaden 2004) 491. But see JMEA Caral, 'Lessons from ICANN: Is Self-Regulation of the Internet Fundamentally Flawed?' (2004) 12 *International Journal of Law and Information Technology* 1 who argues in favour of self-regulation.

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within the system, some general system of accountability and legitimacy appears necessary. At the very least, functional systems should be built by processes of a general nature – such as public international law treaties – and not by custom-designed special procedures. In other words, the move from territoriality to functionality should not be accompanied by a move from democracy to technocracy. But such subsystems must include a minimum degree of public control over the private exercise of power.

In the end, decision-makers do not represent functional systems, but human beings, human beings who are not – or at least should not be – the objects, but the subjects of the system. Although each human being belongs to several functional associations, she is a whole, not a functionally disaggregated entity. As such, she needs not only functional systems that serve her specific needs, but also a comprehensive system of representation which is able to weigh different interests against each other. Thus, States as representatives of the public appear to be not at all redundant. The disaggregated character of power in the European legal orders may sometimes appear to dissimulate the representative character of the democratic nation-State, but the discussion of the democratic deficit of European institutions brings the point home. As I have attempted to show above, this does not imply that legitimacy can be provided only at the domestic level. Parliamentary approval in nation-States is not equivalent to adequate international decision-making procedures. But the knowledge of international law-makers that they will have to justify the outcome before their domestic parliaments and the general public constitutes a healthy constraint on their decisions.

Thus, fragmentation does not do away with the need for the intervention by the general body politic. However, it makes the absence of a global public opinion, let alone a global democracy of a representative nature, even more glaring. If the analysis is correct and many global problems can only be solved at the world level, decisions should not be left to bureaucratic functionalists, but to representatives of broader constituencies.

#### **IV. Conclusion: Democracy and Subsidiarity in the Contemporary International Legal Order**

In conclusion, both processes appear necessary and legitimate – on the one hand, democratic processes within nation-States to ascertain the general acceptance of solutions taken at the international level; on the other hand, the technocratic expertise and exchange of local views towards the solution of global problems. International regulation only appears acceptable for

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democratic states, however, when it meets at least two conditions that may be described by the terms representation and subsidiarity:

(1) The views of the relevant national and international constituencies must be taken into account – Albert Hirschman’s famous element of ‘voice’ as opposed to the ‘exit’ towards more parochial regimes.<sup>61</sup> Similar ideas are connected with models of ‘deliberative democracy’.<sup>62</sup> However, it appears that these models are much more about deliberation than about rule by the demos – although the latter notion is what democracy originally meant.<sup>63</sup>

(2) International regulation is necessary because nation States cannot solve the problem at hand domestically. The development of a global public may complement such a development. International NGOs can help to bring about a more representative nature of international decisions. However, in the terminology used by Hauke Brunkhorst, as long as the global public remains ‘weak’ in the sense that it does not benefit from institutionalized ‘channels’ that ascertain its influence on the outcomes of global decision-making,<sup>64</sup> national processes of ‘ratification’ of global developments remain central.

Nevertheless, fragmentation is real, and reaffirmations of orthodoxy will be of little help. In spite of an ever-growing functional differentiation, issue areas are held together by a minimum of common values and decision-making procedures – in other words, by general international law which bases its legitimacy on decisions of, ideally democratic, national processes of decision-making. Linking international decisions to national democratic affirmation is not sufficient for guaranteeing international democratic legitimacy. Thus, both fragmentation and democracy may indeed favour subsidiarity in the sense of decision-making at lower and more specific levels instead of the level of general international law. But the other element of subsidiarity, namely the intervention from ‘above’ when a more parochial

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<sup>61</sup> See AO Hirschman, *Exit, Voice and Loyalty. Responses to Decline in Firms, Organizations and States* (1990 edn, 1970). See also Weiler, *Constitution of Europe*, at 17.

<sup>62</sup> On ‘deliberative democracy’ see S Besson and JL Martí (eds), *Deliberative Democracy and Its Discontents* (Ashgate, Aldershot 2006); J Cohen and C Sabel, ‘Directly-Deliberative Polyarchie’ (1997) 3 *European Law Journal* 313; D Held, *Models of Democracy* (3d edn, Cambridge, Polity Press, 2006) 231-55; J Bohman and W Rehg (eds), *Deliberative Democracy* (MIT Press, Cambridge, Mass./London 1997).

<sup>63</sup> The Greek term *δημος* means ‘people’ and the term *κρατειν* means ‘to rule’.

<sup>64</sup> H Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (Frankfurt, Suhrkamp, 2002) 184 ff, in English H Brunkhorst, *Solidarity. From Civic Friendship to a Global Legal Community* (Cambridge, Mass., MIT Press, 2005).

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level is either incapable or not legitimated to take a decision alone, should be kept in mind, too. Subsidiarity thus may develop into a principle of international law as well as democracy<sup>65</sup> – but, in a time of globalization, it will not lead to the removal of general international norms for international decision-making.

Of course, in the absence of a central global ‘democracy’, the problem of the (at least) bifurcated structure of the international community remains. It is exacerbated by the establishment of multiple fora within the international realm itself. These are mainly composed by experts, be they State or non-State actors, egoist or altruist.<sup>66</sup> The move from territoriality to functionality is in danger of becoming a move from nationalism to technocracy. ‘Subsidiarity’ should thus not become yet another heading for an argument in favour of the more parochial, more narrow-minded, more technocratic decision-making procedure. Instead, ‘real’ subsidiarity requires both the general and the special level, both the international and the domestic realms. Thus, this contribution suggests to understand by ‘subsidiarity’ a principle according to which decisions should be taken at the lowest, and most specialized, possible level, but that allows, even requires, intervention from the general, international or rather global level.

This argument does not answer the question of how to establish anything like global democratic procedures. A global democracy remains elusive, in spite of numerous attempts to create a quasi-global parliamentary body, for example a peoples’ chamber at the UN General Assembly.<sup>67</sup> In the alternative, we should rather reflect on a political structure for the global realm that does not end up in a – democratic or autocratic or expertocratic – world State, but in an accommodation of the different levels of authoritative decision-making with a view to achieving a balance that may not be based on the utopia of genuine global majority voting but on less formalized, democratising but not necessarily fully democratic, procedures for the

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<sup>65</sup> See, famously, T Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46. For more detailed treatment see GH Fox and BR Roth (eds), *Democratic Governance and International Law* (Cambridge UP, Cambridge 2000). But see also the healthy skepticism expressed by writers such as S Marks, 'The End of History? Reflections on Some International Legal Theses' (1997) 8 *European Journal of International Law* 449 and Weiler, 'Geology of International Law' at 552-53.

<sup>66</sup> See, in particular, A-M Slaughter, *A New World Order* (Princeton and Oxford, Princeton UP, 2004).

<sup>67</sup> See eg T Franck, *Fairness of International Law and Institutions* (Oxford, Clarendon, 1995) at 483, who does not advocate a binding decision-making capacity, though.

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involvement of all stakeholders in global decision-making.<sup>68</sup> In the allocation of legal authority in such a multi-level system, subsidiarity may indeed constitute a guiding principle, but only if both of its aspects are taken into account – the decentralized decision-making *and* the need for global intervention where different nations, or issue areas, ought to be balanced.

Current international law meets some of those criteria, such as the establishment of special institutions, or the delegation of important functions in rule-making, rule-interpretation and rule-application to States, as well as a margin of appreciation in the execution of international rules.<sup>69</sup> Non-state actors may play an important role in that regard, but their own problems of transparency and accountability and their lack of democratic legitimacy prevent ‘international civil society’ from taking over the legitimizing role of the State in international rule-making. Thus, a more representative nature of governments is rightly regarded as a central challenge for the international order. Democracy itself needs to be combined with subsidiarity: as much local – or special – democratic decision-making as is possible and acceptable from the view of the stakeholders, as much international, or global, intervention as may be necessary for achieving a maximum of democratic legitimacy and efficiency.

In her famous treatment of the intractable legal situation of the city of Jerusalem, Ruth Lapidot has shown that complexity is not only a vice, but also a virtue of legal regulation. The same may be valid for the democratic legitimation of international law: It will require more than simply tying international decisions back to national democratic processes; but it is also not open to the easy solution of pointing to the auto-poiesis of legal regimes legitimating themselves. Universal international law will remain with us, but so will the problem of its democratic credentials. It cannot be solved by local decision-making alone.

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<sup>68</sup> For such an attempt see Besson, 'Institutionalizing Global Democracy' (note 24 above). For the problem of 'translation' of concepts tied to the State to an international environment see N Walker, 'Postnational constitutionalism and the problem of translation' in JHH Weiler and M Wind (eds) *European Constitutionalism Beyond the State* (Cambridge UP, Cambridge 2003) 27; Weiler, *Constitution of Europe* at 270.

<sup>69</sup> For a description of those features in detail see Fastenrath, 'Subsidiarität im Völkerrecht' (note 17) at 482 ff.