

ON INTERNATIONAL LEGAL DEMOCRATIZATION

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Globalization is said to have brought about a shift from “classical international law” to “international law as governance”.¹ This development, broadly characterised as devolution of decision-making authority from individual states to international institutions, is perceived to constitute a contemporary challenge to the legitimacy of international law on both democratic and loss of domestic sovereignty accounts. Responses to this democracy-legitimacy deficit, viewed as a negative externality of globalization on the international plane, could *prima facie* comprise: firstly, claims for democratising the international legal system by increasing the scope and importance of decision-making through majoritarian voting by states;² secondly, claims for democratising international institutions by making them more representative by means of increasing the influence of various non-state actors on the making, application and enforcement of international law; thirdly, claims for enlarging the democratic-state constituency of international law. These three international law-democracy related responses correspond to the major axis of the relationship between democracy and international law: the international legal democratisation of the inter-state level, the international legal democratisation of the supra-state level and the international legal democratisation of the intra-state level. Judgement is suspended on whether the term “international law of democracy”³ does, as such, cover the entirety of its polyhedron-like spectrum.

This three-levelled framework of international legal democratisation has been largely influenced by two historical developments: the horizontal extension of the international community of states as a product of the de-colonisation process which has known a resurgence after the end of the Cold War, thus allowing that, in conjunction, with the

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¹See: Krisch, Nico & Kingsbury, Benedict, “Introduction; Global Governance and Global Administrative Law in the International Order” *European Journal of International Law* Vol.17 (2006), No.1, pp. 1-15. For a highly critical analysis of eight general and overlapping features that together “limit the possibilities of global redistributive justice and the genuine democratization of both inter-state and intra-state relations” by setting the basis of a “nascent imperial global state” and six alternative general recommendations for “democratizing the global state”, see interestingly, Chimni, B.,S., “International Institutions Today: An Imperial Global State in the Making”, *European Journal of International Law* 2004, Vol.15, No.1, pp.1-37. For a practical overview of the plural and diverse reactions of national constitutions “to the need to address the interface between national and international legal systems” in light of this phenomenon, See: Franck, Thomas, M.& Thiruvengadam, Arun, K., “International Law and Constitution-Making” in 2 *Chinese Journal of International Law* 2003, pp. 467-518

² Buchanan, Allen & Golove, David, «Philosophy of International Law» in the *Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. by Jules Coleman and Scott Shapiro, Oxford University Press, 2002, pp.868-934

³ See: Burchill, Richard, “The Developing International Law of Democracy” in 64 *The Modern Law Review*, 2001, pp.123-134 arguing: “the various roles democracy has in the international legal system enables us to speak of the development of an international law of democracy. This international law of democracy contains a variety of principles and ideas that have the purpose of regulating distinct areas of action (...) the development of an international law of democracy is undoubtedly in its formative stage” This author concludes: “The international law of democracy will aid in the development of international law only if it develops beyond elections, regardless of the difficulties inherent in taking such an approach” at p.134.

burgeoning vertical extension of the international community⁴ from the 1990ies,⁵ the current international scenario could today be described as one of *moins d'Etat et plus des Etats*. While the latter historical development does also mirror what has been doctrinally depicted as the fourth wave of internal renewal in the history of international organisations in the 20th century,⁶ the three levels appear largely intertwined.

This stated, the aim of this paper is that of providing a selected synthesised overview of some international legal doctrinal key insights within each of these areas so as be able to procure a clearer, while necessarily brief, general perspective on the internal trends and dynamics responsible for the blurred ideational balance existing within the scholarly spectrum covered by the still disaggregated field of international legal democratization.

1. The international legal democratisation of the inter-state level

The legal goal of inter-state democracy project can be equated to the attainment of the rule "one state, one vote" weighting procedurally the same than any other state's vote within a international law-making process. Inspired by the principle of individual electoral equality within domestic popular sovereignty-based democratic systems, this doctrine, that purports to transpose democracy as a constitutive principle to inter-state relations, is, occasionally, presented as the synthesis of the principles of equal sovereignty of states, the self-determination of peoples and that of distributive justice.⁷ The anthropomorphic vision of the state system from which it attempts to stem its democratic credentials has been criticised, firstly, as "a misuse of the term"⁸ fraught with illegitimacy for giving "individuals in small states greater influence on decision-making than individuals in large ones"⁹, thus raising "a question as to the fairness of the fairness discourse that occurs"¹⁰ in international fora ruled by the principle of legal equality and, secondly, majoritarian statism has also been criticised for having "an inbuilt propensity to descend into rule by bribery by the rich".¹¹ While this second critique is not exempt of a veiled criticism of those states that negotiate the weight ascribed by voting rules to their sovereignty within the internal dynamics proper to diplomatic fora, it is more interesting, as far as theory is concerned, to focus on the first of them.

In fact, the criticism addressed to the anthropomorphic vision of the state system as the source of the inter-state democratization pretension would as such be even further evidenced by acknowledging that not even a population-based project of inter-state democracy could rightly aspire to fly a "democratic" flag. The current weighted voting

⁴ Noticeable, of course, is the elimination of the term "of states". See further: de la Rasilla del Moral, Ignacio "Hobbes, Kant and the Likely Impact of the I.L.C.'s Articles on State Responsibility" in *Revista Electrónica de Estudios Internacionales* No. 11, January, 2006, pp.1-16

⁵ See: Medhi, Rostane and Perrin, Delphine, "Rapport Introductif. A la recherche d'une démocratie onusienne" in Rostane, M. (dir.) *La démocratisation du système des Nations Unies. Neuvièmes rencontres internationales d'Aix-en-Provence*, Editions Pédone, 2001, pp.21-39 at 25

⁶ See: Kennedy, David, "A New World Order: Yesterday, Today and Tomorrow" in *Transnational Law and Contemporary Problems*, 330, 1994, pp. 329-376

⁷ Pinto, M.C.W., "Democratization of International Relations and Its Implications for Development and Application of International Law" *Asian Yearbook of International Law* Vol.5, 1995, pp.111-124

⁸ See: Bodansky, Daniel, "The Legitimacy of International Governance: A Coming Challenge for International Law?" in *93 American Journal of International Law*, 1999, pp.596-624 at 614

⁹ Ibid 614

¹⁰ Franck, Thomas, M., "Fairness in Fairness discourse" *95 American Society of International Law Proceedings*, pp.167-172 at 168

¹¹ See: Kuper, Andrew, *Democracy Beyond Borders: Justice and Representation in Global Institutions*, Oxford University Press, 2004 at 161

mechanisms pervading existing international institutions, namely the Security Council,¹² the World Bank¹³ or the International Monetary Fund,¹⁴ which, as it is widely known, conform the principal stated goals for institutional reform of the inter-state democracy project, do provide guiding-examples on how a population-based international voting system could be ideally reconciled with the principle of sovereign equality understood as the “constitutive fiction of the current international legal order”.¹⁵ A population-based voting system in international law-making institutions could not be able, however, to claim to embody the principle of universal or global popular sovereignty as by definition, the principle of universal or global popular sovereignty would be premised on a previous global constituency of democratically constituted states.

Although nothing, however, prevents that a Peoples Assembly informed by “some degree of representation by population”¹⁶ could legally coexist with a principle of state-majoritarianism at the inter-state level based on a population-based weighted voting system,¹⁷ the truth still remains that the current international legal order is largely state-centric,¹⁸ with the factual inequalities’ variations so far allowed by a consent-based international law-making process on the principle of sovereign equality,¹⁹ fundamentally grounded on other considerations than the quantitative sum of each state’s own nationals. The prospects for incorporating institutional reforms within international organisations in line with the international legal legitimacy associated to the variant of the state demographic weight by adding a third component to the already existing mixed-regime are, thus, likely to be conditioned on the previous democratisation of the intra-state level. While this conditioning could gradually evolve into, a non-discardable in terms of policy-making and to a great extent also existent, progressively rewarding system on an individual state basis, it does not, as such, justify the exclusive re-channelling of the notion of representation by population and its associated weighted voting mechanisms solely to the establishment of a Peoples Assembly through direct elections as implicitly put forward by Thomas M. Franck.²⁰ Whether as an alleviating device for “the serious fairness deficit” suffered by the international system on account of the aforementioned “equal voice in discourse”, or its twin blot on international society, what Franck calls “the single voice in discourse” (...), this hypothetical elected international forum, that has been both theoretically located within or outside the United Nations’ framework, pertains, however, to the conceptual framework provided by the international legal democratisation of the supra-state level.

In focusing back now on the classical version of the legally-oriented inter-state democracy project amounting to majoritarian voting of States in the international decision process on the basis of a strict application of the sovereign equality principle, this is retraceable to the horizontal extension of the international community of states brought about by the

¹² See: Article 23 of the UN Charter.

¹³ See: Article II, sect.3 of the Statute of the World Bank

¹⁴ See: Article XII, sect. 5 of the IMF Statute

¹⁵ See : Dupuy, P-M., *L’unité de l’ordre juridique international: cours général de droit international public*, RCADI, Vol. 297, 2000, pp.9-489 at 245-269

¹⁶ Franck supra note 10, at 170

¹⁷ See: e.g.: Köchler, Hans, *The UN and International Democracy*, Studies in International Relations, XXII. Vienna: International Progress Organization, 1997.

¹⁸ See e.g. Marks, Susan, «State Centricism, International Law and the Anxieties of Influence» *Leiden Journal of International Law*, 19, 2006, pp.339-347

¹⁹On the content of the principle of sovereign equality *strictu sensu* see :Kohen, Marcelo, G., « Article 2.1 » in J.Cot, A, Pellet et M.Forteau (Ed.) *La Charte des Nations Unies : Commentaire article par article*, 3ème édition, Ed. Economica, 2005, pp.399-416 at 407

²⁰ Franck supra note 10

decolonization process²¹ in the sixties and finds a governmental back up in political terms in the 1970 Lusaka Declaration issued by the third conference of the non-aligned movement²² which opposes the democratisation of international relations understood “an imperative necessity of our times” to the “tendency on the part of some of the big powers to monopolise decision-making on world issues which are of vital concern of all countries”.²³ This anthropomorphic inspired goal to democratise international relations through state majoritarianism formulae is closely associated with the New Economic International Order²⁴ and, as such, a component of a broader “have not” agenda.²⁵ It can be framed as an procedural strategy adopted by the Third World States in their attempts to use his sovereignty, understood, in the academic talk of the time, as “the hard long prize of their own struggle for emancipation” or “the legal epitome of the fact that they are masters in their own house”,²⁶ to develop a new international law. Among the international legal developments that purported “to create an international law responsive to their needs”²⁷ ranks the category of community-oriented rights -also known as third generation rights or solidarity rights-, paramount among which is the right to development²⁸ posited by its supporters as “the alpha and the omega of human rights, the first and the last human right, the beginning and the end, the means and the goal of human rights.”²⁹

Although it has been noted that the claim behind some of those economic and social rights to development “fitted more in the national-populist conception of development prevalent in the 1960s and 1970s than into a genuinely democratic project for multilateral adjustment on a world scale”³⁰, the truth remains that the group of 77 and the group of non-aligned countries’ demands for democratising international relations constitute the avant-garde of today’s ever-growing literature on the topic. It should, however, be noted that the Third World countries’ enthusiasm for democratizing the inter-state level in line with state majoritarianism formulae in the so called “development decades” did not find a corollary in their pursue of forms democratic government at the domestic level, a goal as such subordinate to economic national development. While a number of UN institutional reforms met the original claims related to the quantitative increase of the number of states,

²¹ NAC See, provisionally, in this respect Pinto: “We may search in vain for any suggestion the “democracy” prevailed or should be adopted as the constitutive principle in the world of states before the decade of the 1960s” Pinto, M.C.W., “Democratization of International Relations and Its Implications for Development and Application of International Law” *Asian Yearbook of International Law* Vol.5, 1995, pp.111-124 at 113. This article constitutes an analysis of the transposition of democracy to the inter-state level with special attention to international treaty-making process.

²² See : Pinto *op.cit.* at 112

²³ Lusaka Declaration on Peace, Independence, Development, Co-Operation and Democratisation of International Relations, Third Conference of Non Aligned Countries (Held at Lusaka, September 8-10, 1970) 10 *International Legal Materials*, 1971, pp.215-218 at 217

²⁴ See e.g.: Noel Dias, Fr., “The NIEO Revisited”, *The Sri Lanka Journal of International Law*, 1996, pp. 27-58

²⁵ See: Doxey, Margaret “Strategies in Multilateral Diplomacy: The Commonwealth, Southern Africa and the NIEO”, 35 *International Journal*, 1979-1980, pp. 329-356 at p.334

²⁶ Abi-Saab, Georges, “The Newly Independent States and the Rules of International Law: An Outline” 8 *Howard Law Journal*, 1962, pp.95-121 at 103

²⁷ Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2004, p.198

²⁸ See e.g., for a legal overview in Spanish, Perez Gonzalez, Manuel, “Algunas reflexiones sobre el derecho al desarrollo en su candidatura a derecho humano” in *El Derecho internacional en un mundo en mutación Liber Amicorum Eduardo Jiménez de Arechaga*, Fundación de Cultura Universitaria, Montevideo-Uruguay, 1994, pp.321-344

²⁹ Bedjaoui, Mohammed. ‘The Right to Development’, in Bedjaoui, M. (ed.). *International Law: Achievements and Prospects*, 1991 at 1182

³⁰ Amin, Samir, *Beyond US’ Hegemony: Assessing the Prospects for a Multipolar World*, Zed Books, London & New York, 2006 at 115

the extent to which they are also reflective of the underlying qualitative aspiration born with it, remains, however, uncertain: the enlargement of the Security Council,³¹ of ECOSOC,³² of the International Law Commission,³³ the modification in the composition of the International Court of Justice.³⁴ The constitution of a Work Group on the reform of the Security Council in 1992³⁵ has also been seen to a consequence of such claims.

From a contemporary perspective, a non-exhaustive stocktaking of well-known proposals intended to foster the international legal democratisation of the inter-state level would, exemplarily limited to those related to the International Court of Justice, comprise: first, reform of the composition of the International Court of Justice to be more representative of “civilizations” and “legal systems”.³⁶ Second, the establishment of compulsory jurisdiction of the ICJ.³⁷ Third, reforms of the ICJ to confer the SC with the power to ask for an advisory opinion. Fourth, the need for judicial review of Security Council actions by the ICJ so that it acts in conformity with the UN Charter.³⁸ Fifth, the conferral of standing to international organisations before the Court beyond the advisory opinion realm and the limitations established in article 96.2 of the UN Charter.³⁹

2. The international legal democratisation of the supra- state level

The decrease of compliance-pull⁴⁰ exerted by international rule-making institutions on the ground of its lack of democratic legitimacy and ensuing threat of “democratic displacement”⁴¹ in the domestic level, perceived as one of the causes of the political backlash movement against the internationalisation of decision making, has been enshrined by a convergence of viewpoints around the term “international legal imperialism”.⁴² This has been embodied although not solely by both anti- or alter-globalization movements and specific “new sovereignistic”⁴³ positions. This has made possible that “at a time when the

³¹ Res. 1991 (XVIII) of 17th Dec., 1963. : to 15 members.

³² Res. 2847 (XXVI) of 20th Dec.1971 : from 27 to 54. It had already been enlarged from 18 to 27 in 1965.

³³ Res. 36/39 of 18th Nov., 1981 : from 25 to 34 members.

³⁴ The composition changed from 1 African judge to 3.

³⁵ See : SC Res. 47/62 of 11th Dec. 1992

³⁶ See : Pinto *supra* note 7, at 115.

³⁷ For a critique of this aspiration see : Crawford, James and Marks, Susan, “The Global Democracy Deficit: An Essay in International Law and its Limits” in Archibugi, Daniele, Held, David and Kohler, Martin, *Re-Imagining Political Community. Studies in Cosmopolitan Democracy*, Stanford University Press, 1998, pp.72-90 at 83-84

³⁸ Chimni, B.S., “International Institutions Today: An Imperial Global State in the Making”, *European Journal of International Law*, 2004, Vol.15, No.1, pp.1-37 at 34-

³⁹ Bowett, Derek, Crawford, James, Sinclair, Ian and Watts, Arthur, «The International Court of Justice: efficiency of procedures and working methods », *International and Comparative Law Quarterly* supp. , 45 (1996), pp.24-5

⁴⁰ See: Franck, Thomas, M., *The Power of Legitimacy among Nations*, Oxford University Press, 1990

⁴¹ For use of this term, see Donoho, Douglas, Lee, “Democratic Legitimacy in Human Rights: The Future of International Law Making” 21 *Wisconsin Law Journal*, 1, 2003 pp.1-64 at 16

⁴² See: Anderson, Kenneth, “The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organisations and the Idea of International Civil Society” in *The European Journal of International Law*, Vol. 11, No.1, 2000, pp. 91-120 at 104. For a critical response, see: Hathaway, James, C., “America, Defender of Democratic Legitimacy” in *The European Journal of International Law*, Vol.11, No.1, 2000, pp.121-134.

⁴³ Spiro, Peter, “The New Sovereignists: American Exceptionalism and Its False Prophets” *Foreign Affairs*, 79.6, 2000, pp.9-15.

whole fabric of international law becomes more individually oriented”,⁴⁴ general criticisms addressed to the absence of democratic accountability on the international stage had become reversibly paralleled by concerns, non exclusive of any side of the international ideological spectrum, ranging from the purportedly anti-democratic international democratisation of the supra-state level by non representative non-state actors⁴⁵ to the anti-democratic character of international law in view of its non-global democratic constituency or to the risk of accepting the crystallisation of international obligations of supra-national “constitutional” nature over on-going democratic constitutional domestic processes.⁴⁶

This form of converging and to a certain extent disparate plural discourse appears prominent in the debate concerning the international legal democratisation of the supra-state level as well as, in diverse forms, occasionally blending loss of democratic sovereignty and defence of national interests’ rhetoric, in both the legal democratisation of the -inter and -intra state spheres. Phenomenological source of a varied range of criticisms, any clarifying attempt to locate the different doctrinal positions responsive to it, should, thus, be regressively searched not at the problem-setting level, but at the remedial or palliative one. One can, preliminarily, differentiate, in this respect, an offensive-democracy approach from a defensive-democracy viewpoint that would broadly fall under the category of what has been termed “democracy-protecting devices”.⁴⁷ While, as noted Alvarez, the fears to empower non-state actors as law-making agents “are not limited to fringe right-wing groups in the U.S.”,⁴⁸ a paradigmatic form of this sort of understanding is exemplified by the doctrinal work of a number of authors doctrinally identified as the “American Nationalist School of International Law”⁴⁹(NIL) which their emphasis in untying the “external sovereignty” of this particular state. The set of democracy-protecting remedies put forward by NIL should not, however, be only considered responsive to specific U.S. nationalist account of international law, but also possessing a veiled-calling effect to other non-U.S., but still bluntly national interest-driven legal doctrines on the subject matter. Elsewhere, I have termed 9/11 “a historical watershed used by NIL to settle scholarly accounts with those who, like Louis Henkin, were preaching in the 90ies the “away with the “S” word” whether on self-labelled Kantian premises or in pragmatic or utilitarian terms in favour of global governance and a post-sovereignty world order”.⁵⁰

NIL’s authors do not constitute an exception to the ideational blurring that prevails in this intertwined field. The appeal of democracy as intellectual banner has provoked that all arguments become used in a double-edged sword manner by clearly opposite ideological trends. In other words, the triadic set of international legal democracy-related responses aforementioned in the introduction mirrors highly influential trends of thought that allow

⁴⁴ Hafner, Gerhard, “Accountability of International Organizations – A Critical View” Ronald St. John Macdonald&Douglas M. Johnston (eds.), *Towards World Constitutionalism*, Koninklijke Brill, NV, pp. 585-630 at 591

⁴⁵See: Anderson, Kenneth, “The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organisations and the Idea of International Civil Society” in *The European Journal of International Law*, Vol. 11, No.1, 2000, pp. 91-120 at 104. For a critical response, see: Hathaway, James, C., “America, Defender of Democratic Legitimacy” in *The European Journal of International Law*, Vol.11, No.1, pp.121-134.

⁴⁶ See: Debate: Is International Law a Threat to Democracy?, With the participation of Jeb Rubinfeld, Anne-Marie Slaughter and Fareed Zakaria. Transcript. Council of Foreign Affairs, February 27, 2004. <http://www.cfr.org/publication.html?id=6829> (last accessed 9 May 2007)

⁴⁷ Alvarez, Jose, E. *International Organizations as LawMakers* Oxford University Press, 2005 at 631.

⁴⁸ Ibid., at 628

⁴⁹ Alejandro Lorite Escorihuela, *Cultural Relativism the American Way: The Nationalist School of International Law in the United States* 5 *Global Jurist* Issue 1, Frontiers, (2005) at 70

⁵⁰ De la Rasilla del Moral, Ignacio «Some Remarks on Post-Sovereignty and International Legal Neoconservatism» in 8 *German Law Journal* No. 8 (August 2007)

for a combination of its variables of dramatically diverging degree and scope affecting, likewise, the *échantillon* of legal positions available. A terminologically counterpoint-like example shall suffice to introductorily prove this basic point. While, if put to a test, a supporter of the so-called “cosmopolitan democracy project” would stress the interdependence of the -inter, supra and intra-state levels of democracy, an author ascribed to the “liberal cosmopolitan agenda”⁵¹ will, by contrast, in the same instance, tend to put the accent exclusively on the international legal democratisation of the intra-state level, and support, likewise, a *lege ferenda* legal differentiation of states according to regime type beyond the level of international liberal toleration of “hierarchical decent peoples” put forward by John Rawls⁵², thus, including a legal doctrine of humanitarian intervention⁵³ towards all non-democratic states said to commit grave abuses of human rights. As far as the debate on the *jus ad bellum* is concerned, the second element of the latter equation can, broadly speaking, be doctrinally labelled, in contemporary terms, as an “adaptionist” position as, respectively, janus-liked confronted to the “revisionist” and “conservationist” doctrinal positions on “the laws of war”.⁵⁴ This self-labelled “liberal cosmopolitan agenda” can also be identified as pertaining to what has been doctrinally defined as the “liberal anti-pluralist” trend and, within it, as representing a strong version of it.⁵⁵

Depicted as the world’s greatest political anomaly,⁵⁶ the lack of global democratic institutions mirrors the stato-centric,⁵⁷ rather than demo-centric,⁵⁸ bias of international institutions. This state of affairs has been severely criticised by authors ascribed to the project of cosmopolitan democracy (not to be confounded with the “liberal cosmopolitan agenda” already mentioned) which stated goal is “to globalize democracy while, at the same time, democratizing globalisation”⁵⁹. While a diverse array of rationales for a greater level of democratic participation in global governance co-exist (among which the fear of global corporate ruling⁶⁰ or, what a well know critic, has termed “the liberal logic of collective triad imperialism”⁶¹ into which fits the project of US’ hegemonism implicit in NIL’s

⁵¹ See e.g. Fernando Tesón labelled “as the most radical and prolific writer on international law from a liberal cosmopolitan view” in Janse, Ronald, “The Legitimacy of Humanitarian Interventions” *Leiden Journal of International Law* 19 (2006), pp. 669-692 at 685. For other authors ascribed to this the liberal cosmopolitan agenda, see: Tan, Kor-Chon, “International Toleration: Rawlsian versus Cosmopolitan” *Leiden Journal of International Law*, 18 (2005) pp.685-710

⁵² Rawls, John, *The Law of Peoples with “The Idea of Public Reason Revisited”*, Harvard University Press, 1999. For an ultra-synthesised overview, see: Pierik, Roland and Werner, Wouter, «Cosmopolitanism, Global Justice and International Law” in *Leiden Journal of International Law*, 18, 2005, pp.679-684

⁵³ For a synthetic critique of the very term “humanitarian intervention”, see: Marks, Susan, «State Centrism, International Law and the Anxieties of Influence” *Leiden Journal of International Law*, 19, 2006, pp.339-347 at 346

⁵⁴ Contreras, Jose F. & De la Rasilla, Ignacio, «Of War as Law and Law as War» in *Leiden Journal of International Law* 2007 (forthcoming)

⁵⁵ Noticeable, of course, is the elimination of the term “of states”. See further: de la Rasilla del Moral, Ignacio “Hobbes, Kant and the Likely Impact of the I.L.C.’s Articles on State Responsibility” in *Revista Electrónica de Estudios Internacionales* No. 11, January, 2006, pp.1-16

⁵⁶ Falk, Richard and Strauss, Andrew, “On the Creation of a Global Peoples Assembly: Legitimation and the Power of Popular Sovereignty” in 36 *Stanford Journal of International Law* 191, 2000, pp.191-220 at 192

⁵⁷ See : e.g. Marks, Susan, «State Centrism, International Law and the Anxieties of Influence” *Leiden Journal of International Law*, 19, 2006, pp.339-347

⁵⁸ See : Sheppard, Robert, “Towards a UN World Parliament: UN Reform for the Progressive Evolution of an Elective and Accountable Democratic Parliamentary Process in UN Governance in the New Millennium” 1 *Asian-Pacific Law & Policy Journal* 4, 2000, pp.1-20 at 2

⁵⁹ Archibugi, Daniele “Cosmopolitan Democracy and its Critics: A Review” in *European Journal of International Relations*, Vol.10 (3), 2004, pp. 437-473 at 438

⁶⁰ Barber, Benjamin, R., *Pasión por la democracia*, Editorial Almuzara, 2006.

⁶¹ Amin, Samir, *Beyond US’ Hegemony: Assessing the Prospects for a Multipolar World*, Zed Books, London & New York, 2006 at 122. For this neo-marxist author’s “proposals for a renaissance of the UN”, see: p.131-145

approach already referred) in a specific international legal doctrinal trend, the philosophical underpinnings of the cosmopolitan democracy project are exemplified by one of its principal conceptual architects as “democracy should be seen as an endless process, such that we lack the ability to predict today the directions in which future generations will push the forms of contestation, participation and management”.⁶²

Numerous are the institutional proposals of different scope and ambition generally ascribed to this project which is programmatic stated goal of implementing forms of democratic governance within, among and beyond states⁶³ on an interdependent basis. While the issue of the UN reform can rightly aspire to constitute a *locus classicus* of the discipline that amounts to an international legal field compartmentalised in a number of specific sub-areas, it should not, however, be seen as an exclusive aspiration of democracy-oriented projects in the cosmopolitan sense. Other set of UN reform plans and projects inspired by other consideration exists. Among which, *exempli gratia*, those calling for the reform of the membership criteria established by the UN Charter so as to condition the UN membership to “democratic states” as seen in the previous brief preliminary analysis of NIL or those, that under the catchphrase of democratising international relations are grounded on augmenting the scope of state “majoritarianism” as briefly seen in the analysis of the inter-state democracy project. It is, however, worthwhile recalling, before going any further, that the UN Charter has not been neither substantially amended nor revised since the United Nations’ inception. As most of the reform proposals would require of such an amendment, any serious study on the matter should first analyse in international legal terms the main features of the UN Charter amendment procedure (articles 108 and 109) and those rare occasions when they had actually been triggered. In general terms it can be stated that while every UN democracy-oriented reform proposal deals concretely with each of the UN principal organs, they do also usually include reforms aiming at the creation of new organs within the UN architecture as well as engineered divisions of competence among UN organs giving place to new complex organic interactions. Any accurate stock-taking presentation of those proposals related to the creation of new organs should, thus, be methodologically seen from the perspective of their organic relationship with each of the UN principal organs. Being the General Assembly and the Security Council the most prominent principal organs within the UN structure, it is compulsory within the scope of this brief overview to provide at least a general picture of the doctrinal state of the art in this domain as far as they are concerned. I shall later on look beyond the UN institutional framework.

While most UN democracy-reform proposals do concur in the need of revitalising the General Assembly as a goal per se, such revitalisation becomes highly dependent in each respective model of reform of the new resulting architectural organic design produced by the incorporation of new organs. No existing model of UN reform proposes to eliminate the General Assembly as consisting in the diplomatic representatives “of all the Members of the United Nations”; in fact, most of them attempt to re-balance in favour of the GA the preponderance accorded by the original drafters of the UN Charter to the Security Council. Although the world parliament idea has a long pedigree in international legal scholarship, its contemporary predicament has been largely influenced by the European Parliament model. Object of a great number of plans and proposals, two broad parallel strands of reform can be identified in this realm depending on whether an amendment or

⁶² Archibugi, Daniele “Cosmopolitan Democracy and its Critics: A Review” in *European Journal of International Relations*, Vol.10 (3), 2004, pp. 437-473 at 440

⁶³ For the quotation, see: Archibugi, Daniele “Cosmopolitan Democracy and its Critics: A Review” in *European Journal of International Relations*, Vol.10 (3), 2004, pp. 437-473 at 438

revision of the Charter becomes or not compulsory at such effect. The first one propounds the creation of a second UN Peoples Chamber or Assembly created by the General Assembly itself through the power conferred to it by Article 22 of the UN Charter.⁶⁴ This Peoples' Chamber would thus organically become a specialised agency. The second option would require to put into effect the procedure of amendment or revision as such previewed by the Charter. Most proposals coincide that this new chamber as such originated would be directly elected on the basis of universal suffrage, although they diverge on how to delineate the quantitative and territorial boundaries of each constituency with plans ranging from the constitution of an Electoral Commission within the UN Secretariat to leave up the concrete delimitation to each State. Some authors even condition the UN State's membership on compliance with these requirements.⁶⁵ The powers ascribed to the Peoples' Assembly range in the different proposals, although the house of review model of the European Parliament as monitoring both decisions and deliberations of other UN organs and depending agencies, reassembles many of them. While legislative functions are accorded to it or not ⁶⁶ depending of the scope of the proposal, some projects do also include the creation of a third Chamber under different guises or denominations. Among them, it ranks the Consultative Assembly,⁶⁷ with a tri-partite composition including transnational firms, trade unions and professional associations and a range of public interest organisations around issues central to the UN' agenda which in their author's scheme would exercise similar powers and functions than the People's Assembly.

Being the master key of any likely reform of the UN Charter, the veto power of the current five permanent members of the Security Council enshrined by Article 27.3 constitutes the traditional bone of contention of both UN reform projects and, within it, of those specific proposals affecting the organ on which the UN members confer "the primary responsibility for the maintenance of international peace and security".⁶⁸ Although the constitution of an UN Work Group on the reform of the Security Council was only possible in 1992,⁶⁹ the veto power question is retraceable to the very onset of the UN with proposals to alter the veto power ranging from claims for its complete elimination to phased approaches to introduce modifications on it relating to both the frequency of its use and the issues on which it can be exercised. At the diplomatic level, the most developed attempt to introduce limitations in the former sense, out of concern for the historic record of its abusive exercise,⁷⁰ was embodied by the non-aligned movement's set of proposals in 1981 and 1982.⁷¹ Complex schemes to eliminate the veto as such are more much easily found in the scholarly literature of international law and relations than in actual State

⁶⁴Proposals of very different scope have been put forward on this basis. For a sophisticated model for the evolution of democratic parliamentary processes within the UN system that seeks to address explicitly "a viable balance of the claims of "might and right" involving a World Parliament, an Economic Senate, a reform World Court by establishing circuit courts, courts of first instance and compulsory jurisdiction, the reform of the Security Council, the Creation of the World Court of Auditors, a World Commission and a General Assembly Council of Ministers, see: Sheppard, Robert, "Towards a UN World Parliament: UN Reform for the Progressive Evolution of an Elective and Accountable Democratic Parliamentary Process in UN Governance in the New Millennium" 1 *Asian-Pacific Law & Policy Journal* 4, 2000, pp.1-20

⁶⁵ Camilleri, Joseph, "Major Structural Reform" in *Democratizing Global Governance*, edited by Esref Aksu and Joseph Camilleri, Palgrave Macmillan, 2002, pp.255-271

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Article 24 of the UN Charter

⁶⁹ See : SC Res. 47/62 of 11th Dec. 1992

⁷⁰ Tavernier, Paul, « Article 27 » J.Cot, A, Pellet et M.Fortreau (Ed.) *La Charte des Nations Unies : Commentaire article par article*, 3ème édition, Ed. Economica, 2005, pp.935-957 specially at 949-953

⁷¹ See: A /AC/ 182/ L.29 of 12th March 1981 AND A/AC.182/L.18/ Rev 17th March, 1982.)

statements on the matter, with few exceptions.⁷² Closely related to the veto question ranks the general matter of the reform of the composition of the Security Council through enlargement and changes in the status of its permanent and non-permanent members. In what constitutes a culmination of the 1992 setting of the UN Work Group on the reform of the Security Council, the Secretary General Report In Larger Freedom (paragraphs 169 and 170) supported the position set out in the report of the High-level Panel on Threats, Challenges and Change (A/59/565) concerning the reforms of the Security Council and urged Member States to consider the two options, models A and B, proposed in that report or any other viable proposals in terms of size and balance emerged on the basis of that model. Model A provides for six new permanent seats, with no veto being created, and three new two-year term non-permanent seats, divided among the major regional areas as follows: Model B provides for no new permanent seats but creates a new category of eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas as follows.

The political difficulties looming behind what an author has termed “the necessary, but impossible”⁷³ reform of the UN in view of the frozen legal crystallisation of the aftermath international order of the post 2nd World War in the UN Charter have triggered a number of democracy-inspired proposals that go beyond the UN framework. Only if co-ordinated with domestic pressure to enlarge the constitutional granted powers of democratic citizenship could, however, the social pressure embodied in the so-called “global civic society” begin to affect the international *statu quo* in this domain. The former understanding follows naturally from the acknowledgement that, except for some isolated exception, every and each domestic constitution of the world makes the foreign policy realm a State’s “*domaine reservée*” that does not allow for any direct participation in the design and control of foreign policy affairs to even the peoples under the rule of democratic government. In a more technical and less idealistic note, the accountability and participation deficit brought about by the growing expansion of global governance has been met by a series of alternative mechanisms that “seek to enhance the accountability of global regulatory decision making”. The question to know “whether and to what extent ideas from domestic administrative law can help solve accountability problems in global governance including non-electoral accountability methods in global politics”⁷⁴ is the object of an emerging field of international law known under the rubric of global administrative law.⁷⁵

3. The international legal democratisation of the intra-state level.

The main debate on the multi-faceted field of international legal scholarship that deals with the democratisation of the intra-state level been so far constructed upon an otherwise disputed, in its merits, while not in its formulation, doctrinal premise: since the early nineties, the international legal system has been witnessing the emergence of a right to democratic governance within its legal order. Having elsewhere dealt respectively with this question from a normative-oriented perspective,⁷⁶ from an ideological-oriented

⁷² See Tavernier *supra* note 71, at 955

⁷³ See Falk, Richard, *Predatory Globalization: A Critique*, Polity press, 1999

⁷⁴ Krisch, Nico and Kingsbury, Benedict, “Introduction: Global Governance and Global Administrative Law in the International Legal Order” in *European Journal of International Law*, Vol. 17 (2006) No.1, pp.1-15

⁷⁵ See, generally: Krisch, Nico and Kingsbury, Benedict (special editors) “Symposium: Global Governance and Global Administrative Law in the International Legal Order” in *European Journal of International Law*, vol. 17 (2006) No.1, pp.1-278

⁷⁶ De la Rasilla del Moral, Ignacio, “The Boy Who Cried: Wolf! The Dimensions of Emergence of the Right to Democratic Governance and the Fundamentals of International Law: An Introductory Overview”

perspective⁷⁷ as well as from a doctrinal historical perspective⁷⁸, I will focus my present analysis in structural international legal terms.

In an age where international legal system is currently depicted as being strained between its own constitutionalisation and fragmentation, there is sufficient ground to question whether the emergence of a principle of international law in this domain can still be structurally envisaged. Are we witnessing, as suggested by the widely quoted statement made by the founder of the democratic entitlement school, Thomas Franck, "a sea change in international law as a result of which the legitimacy of each government will be one day measured by international rules and processes (...), the outlines of a new world in which the citizens of each state will look to international law and organization to guarantee their democratic entitlement"⁷⁹? Or, are we, instead, merely confronted to the occasional incipience of a non-hierarchically prescribed and unconnected number of democracy-related rule-complexes within an international legal system bound to grow fragmented?. While the International Law Commission has focused so far on the difficulties arising from the diversification and expansion of international law at the final legal stage, that, broadly speaking, of the application of the "conflicting and incompatible rules, principles, rule-systems and institutional practices"⁸⁰ ensuing from the fragmentation of international law, the question remains, however, whether the same phenomenon of fragmentation can affect precisely the opposite legal stage, that where the formation of customary norms in international law takes place. This can be seen specially worth of study if the norm under scrutiny which is purportedly conceived as a emerging principle of international law is built upon a number of legal phenomena found within a broad spectrum of fields within international law, the effects of which, should it finally emerge, at its turn, bound to deepen the changes already indicatively operated within the whole system of international law in a purposive way and, as such, progressively alter the interpretational stage so far covered by the ILC.

Against this background, the truth still remains that the present multifaceted field of legal scholarship has emerged around a three-lustra long doctrinal swarming around the merits – but not the formulation- of the aforementioned premise. Without prejudging, however, the response to the international legal structural-systemic doubts which can be raised by the formulation of what, likewise, constitutes the bone of doctrinal contention around which this, otherwise, multifaceted field has emerged and developed, some attention should be paid to the other extreme of the structural equation, otherwise, the constitutionalization of international law as confronted to the phenomenon of fragmentation already briefly referred.

Biannual Conference of the European Society of International Law, Paris, La Sorbonne(May, 2006) published in January 2007 at the *Paris Fora of the European Society of International Law*, pp. 1-18.

⁷⁷ De la Rasilla del Moral, Ignacio « All Roads Lead to Rome or the Liberal Cosmopolitanism as a Blueprint for an Neoconservative Legal Order » in *Global Jurist, Advances*, 2007 (forthcoming)

⁷⁸ De la Rasilla del Moral, Ignacio « Kant as the Cold War Prophet? Remarks on the Evolving Path of the Right to Democratic Governance » in *Politics and International Affairs*, Athens' Institute for Education and Research, 2007 (forthcoming)

⁷⁹ Thomas M Franck « The Emerging Right to Democratic Governance" *American Journal of International Law*, vol. 86, January 1992 at 50

⁸⁰See Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi A/CN.4/L.682, par. 13 available at

<http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement>

While leaving aside the aspect of the analysis of what one can identify as the purported integrating dimension of the norm which deals with the question to know how do all the legal parallel developments, the so-called dimensions of emergence of the right to democratic governance in international law,⁸¹ interrelate to each other. That integrating dimension which would confront us with interrogations such as: is a second generation of the principle of self-determination, now legally constructed as internal or democratic self-determination, the umbrella under which all this dimensions of emergence will reassemble and converge, or are we witnessing the emergence of a new principle of international law which is independent of any self-determination related consideration?. A question which, as such, cannot be separated from the analysis of the different existing theories of customary law formation⁸² (CIL) or, should one accept a traditional approach to CIL, to basic considerations of the sort of how the practice and *opinio iuris* of anything but fully democratic States could be taken into account so as to support the customary emergence of a norm of this character.

Instead, I will point out to basic consideration related to the extent to which the importance of *opinio iuris* is gaining momentum in view of the emergence of the international community as a legal entity⁸³ and how that phenomenon could influence the emergence of the democratic principle or norm. In the same vein, it is also worthwhile noting that the link that can be draw between the achievement of community interests and intra-state democratization makes the norm of democratic governance a suitable candidate to be presented within the framework of a constitutionalist approach to international law.⁸⁴ The *erga omnes* character the norm would adopt according to Cassese,⁸⁵ could be seen as a further argument in approaching the emergence of the right to democratic governance from such conceptual viewpoint. In this respect, it should be noted that not attempt has been made yet at least “eo nomine” to present the emerging democratic entitlement of peoples as a “community interest” by placing it within the conceptual framework of a constitutionalist systematic approach to international law. The methodological question remains, however, whether the constitutionalist standpoint should influence the examination of the customary international formation process of the norm (in view of its various descriptive dimensions of emergence) *ex ante*. That is to say, whether one should adopt a constitutional methodological approach from the onset or whether these particular lenses should be reserved for its use once (and only if) enough legal evidence in line with a

⁸¹ See De la Rasilla *supra* note 77

⁸² See introductorily e.g.: Kelly, Patrick, J., “The Twilight of Customary International Law” 40 *Virginia Journal of International Law* 450, 1999-2000

⁸³ For a good array of inspiring readings on the emergence of the international community as a “legal entity” as put by professor Tomuschat, See: 1) Dupuy, Pierre-Marie, *L’unité de l’ordre juridique international*, Cours général de droit international public (2000) 297 Recueil des Cours, Deuxième partie, Chapitre II (2002). 2) Simma, Bruno, *From Bilateralism to Community Interests in International Law*, 250 Recueil des Cours, 298 (1994) 3) Gowlland Debbas, Vera, “Judicial Insights into Fundamental Values and Interests of the International Community” in A.S. Muller et al. (eds.), *The International Court of Justice: Its Future Role after Fifty Years*, Kluwer Law International, 1997, pp. 327-366 4) Villapaldo, Santiago Martin, *L’émergence de la communauté internationale dans la responsabilité des Etats*, Thèse présentée à l’Université de Genève pour l’obtention du grade de Docteur en relations internationales (droit international) Thèse N°659, 2003. 5) Voefray, François, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales*, Publications de l’Institut de Hautes Etudes Internationales, Genève, Presses Universitaires de France, 2004 (Prix Paul Guggenheim 2004) 6) Tomuschat, Christian, *Obligations Arising for States Without or Against their Will*, 241 Recueil des Cours, 236 (1993)

⁸⁴ See e.g. St. John Macdonald, Ronald & Johnston, Douglas M., (Eds), *Towards World Constitutionalism*, Koninklijke Brill, NV, 2005,

⁸⁵ See: Cassese, Antonio, *Self-determination of Peoples :A Legal Reappraisal*, Cambridge University Press, 1995

positivist approach to norm-identification, supporting the customary existence of the norm had already been put forward. The international constitutionalist approach could also prove to be a good channel to confront the “serious conflicts with the fundamentals of international law⁸⁶ that the hypothetically emerging norm could pose.

4. Conclusion

The aim of this paper was to identify, in its most basic form, the major tensional forces and some of the structural paradoxes that conform the theoretical space on which the inquiry on international legal democratization should as such be located within the current international doctrinal legal order. It will hopefully open new avenues of research and a greater understanding of the complex international legal reality underlying the still conceptually disaggregated field of international legal democratization for international relations theorists.

⁸⁶ See: Simpson, Gerry, «Imagined Consent: Democratic Liberalism in International Legal Theory», *Australian Yearbook of International Law*, 1994, pp.103-124 at 123.