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Democratic Representation within International Organizations

From International Good Governance to International Good Government

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Abstract

International organizations (IOs) have become key institutions in contemporary international law-making. Their increase in authority has, however, come together with a decrease in politicization. This has led, when the question of their control arose, to largely distracting discussions about 'good governance' and 'accountability'. This article focuses on one of the central dimensions of what could amount instead to 'good government' by IOs, including their democratic legitimacy, and explains how IOs could be designed so as to ensure sufficient democratic representation. It argues that IOs' institutional specificities actually make them pivotal to the realization of multiple international representation. As public, universal and external international institutions, they could and should contribute to implementing a system of international representation that approaches multiple public and private institutions claiming to represent peoples as a part of an institutional continuum. This is true with respect to the organization of the correctives to the democratic shortcomings of each representative institution in the system, as much as to the mutual compensation of their respective deficits.

Keywords

international organizations – depoliticization – good government – democratic legitimacy – multiple international representation – non-ideal political theory – institutional design

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Introduction

International organizations (IOs) play a central role in contemporary international law-making: they institutionalize many of the processes through which international law is adopted today, be it through international law-making conferences, international courts or as IO secondary law.

Interestingly, however, the increase in the authority of IOs has come together with a decrease in their politicization.[1] True, when IOs' ability to contribute to international law-making independently from their Member States became more apparent, the question of control over them arose. What it has led to, however, are largely distracting non-political and usually delegalized discussions about IOs' so-called 'good governance' and 'accountability'. At the moment, indeed, and unlike States, those organizations are merely expected (rather than 'required' under general [public] international law)[2] to give evidence of 'compliance' with good 'governance' (as opposed to 'government') standards. They are held 'accountable' (as opposed to 'responsible') for it to their 'stakeholders' (as opposed to 'constituents' or 'citizens'), for instance through various 'audits' and other internal and self-referential efficiency assessment mechanisms.[3]

1 See Marieke Louis and Lucile Maertens, *Why International Organizations Hate Politics: Depoliticizing the World* (Routledge, London, 2021); Franck Petiteville, 'International Organizations beyond Depoliticized Governance' (2018) 15:3 *Globalizations* pp. 301–313.

2 See Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' in A. von Bogdandy, R. Wolfrum, J. von Bernstorff, P. Dann and M. Goldmann (eds.), *The Exercise of Public Authority by International Public Institutions: Advancing International Institutional Law* (Springer, Heidelberg, 2010), pp. 777–806, 778–779 and 800.

3 See e.g. Pierre Bodeau-Livinec, 'Le droit administratif global et l'organisation de la bonne gouvernance' in C. Bories (ed.), *Un droit administratif global ?* (Pedone, Paris, 2012), pp. 219–236; Pierre Bodeau-Livinec and Laurence Dubin, 'La responsabilité des institutions internationales dans tous ses états' in L. Dubin and M.-C. Runavot (eds.), *Le phénomène institutionnel international dans tous ses états: Transformation, déformation ou réformation* (Pedone, Paris, 2014), pp. 231–259; Richard Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108:2 *American Journal of International Law* pp. 211–270; Laurence Dubin and Marie-Clotilde Runavot, 'Représentativité, efficacité, légitimité: Des organisations internationales en crises ?' in E. Lagrange and J.-M. Sorel (eds.), *Droit des organisations internationales* (LGDJ, Paris, 2013), pp. 77–103, 100–103.

The weakness of the corpus of international 'public' law[4] constraining the internal organization of IOs, both general and specific to those IOs,[5] may come as a surprise given their institutional continuity with sovereign States.[6] As we will see, however, it may also be considered a consequence thereof.[7] In reaction, the present article focuses on what could amount to a standard of legitimate or 'good government' by IOs, and on one of its central dimensions: democratic legitimacy. It explores how IOs could be designed and organized under international law so as to ensure sufficient democratic representation of all those they claim to bind legally, either directly or through their Member States.

The political legitimacy crisis now facing IOs makes this concern even more pressing.[8] Indeed, lacking a 'voice' in international law-making, the peoples of democratic States, often led by populist governments, are increasingly choosing to 'exit' from IOs.[9] As to the governments and, sometimes, even the

4 On this term, see von Bernstorff (2010), *supra* note 2, p. 778; Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International Law to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28:1 *European Journal of International Law* pp. 115–145; Matthias Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and not Law)' (2016) 5:1 *Global Constitutionalism* pp. 48–84; Benedict Kingsbury and Megan Donaldson, 'The Global Governance of Public Law' in N. Walker, C. Mac Amhlaigh and C. Michelon (eds.), *After Public Law* (Oxford University Press, Oxford, 2013), pp. 264–285.

5 Interestingly, European Union law scholars differ on the existence of a 'public' (as opposed to 'administrative') law. See e.g. Armin von Bogdandy, 'The Idea of European Public Law Today' in A. von Bogdandy, P. M. Huber and S. Cassese (eds.), *The Max Planck Handbook in European Public Law Volume I: The Administrative State* (Oxford University Press, Oxford, 2017), pp. 1–29.

6 See von Bernstorff (2010), *supra* note 2, pp. 780–783 and 789; Raphaële Rivier, 'L'utilité de la conceptualisation d'un genre "organisation internationale"' in L. Dubin and M.-C. Runavot (eds.), *Le phénomène institutionnel international dans tous ses états: Transformation, déformation ou réformation* (Pedone, Paris, 2014), pp. 19–37, 29.

7 See Samantha Besson, 'Sovereign States and their International Institutional Order: Carrying Forward Dworkin's Work on the Political Legitimacy of International Law' (2020a) 2:2 *Jus Cogens* pp. 111–138, 134; Samantha Besson, *Reconstructing the International Institutional Order* (OpenEdition Books and Collège de France, Paris, 2021b), paras. 34, 58 and 76.

8 See Jochen von Bernstorff, 'New Responses to the Legitimacy Crisis of International Institutions: The Role of "Civil Society" and the Rise of the Principle of Participation of the "Most Affected" in International Institutional Law' (2021) 32:1 *European Journal of International Law* pp. 125–57.

9 See Albert Hirschmann, *Exit, Voice and Loyalty. Responses to Decline in Firms, Organizations, and States* (Harvard University Press, Cambridge Mass., 1970). See also Samantha Besson, 'Que fait l'Europe ? Ce que le Coronavirus nous dit de l'état de l'Union européenne' in Fondation du Collège de France (ed.), *Une boussole pour l'après* (Humensciences, Paris, 2020f), pp. 101–10.

peoples of non-Western States, they have long lamented the political inequalities that characterize the decision-making processes within multilateral organizations.[10] The most recent expression of that discontent is the late 2020 UN General Assembly Resolution on a more democratic international order,[11] a resolution supported mostly by Global South States. In a similar vein, one should also mention the 2021 Joint Statement by the Foreign Ministers of China and Russia[12] that stressed the need to organize a "more democratic and rational multipolar world order". So far, however, the latter States' institutional achievements, within universal IOs, have taken the very oligarchic shape of the IOs originally instituted by post-war powers.[13] They have also made the most of newly created regional IOs to institutionalize the equality of those IOs' Member States, but at the price of the (unequal) exclusion of other States.[14] As to the States considered as post-war powers, finally, they too have expressed their growing discontent with the new distribution of international rights, albeit mostly by reference to the loss of their original international privileges in multilateral arenas. The United States-China standoff at the World Health Organization's (WHO) in 2020 was the best example thereof, together with the political crisis that ensued.[15] Politics and especially democratic politics seem to have caught up with international organizations, at last.

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10 Cf. Andrew Hurrell, 'Power, Institutions, and the Production of Inequality' in M. Barnett et R. Duvall (eds.), *Power in Global Governance* (Cambridge University Press, Cambridge, 2005), pp. 33–58; Lora A. Viola, Duncan Snidal and Michael Zürn, 'Sovereign (In)equality in the Evolution of the International System' in S. Leibfried, E. Huber, M. Lange, J. D. Levy, F. Nullmeier and J. D. Stephens (eds.), *The Oxford Handbook of Transformations of the State* (Oxford University Press, Oxford, 2015), pp. 221–236; Samantha Besson, 'L'égalité des Etats membres de l'Union européenne : un nouveau départ en droit international de l'organisation des Etats ?' in E. Dubout (ed.), *L'égalité des Etats membres de l'Union européenne* (Bruylant, Brussels, 2022), pp. 263–298.

11 See UN General Assembly, Resolution 75/178, *The Promotion of an Equitable and Democratic International Order*, 28 December 2020 (UN Doc. A/RES/75/178), Preamble p. 3 and para. 6(g).

12 See the *Joint Statement by the Foreign Ministers of China and Russia on Certain Aspects of Global Governance in Modern Conditions*, 23 March 2021, paras. 1 and 4.

13 See Tom Ginsburg, 'Authoritarian International Law?' (2020) 114:2 *American Journal of International Law* pp. 221–260; Anastassia V. Obydenkova and Alexander Libman (eds.), *Authoritarian Regionalism in the World of International Organizations* (Oxford University Press, Oxford, 2019).

14 See Lora A. Viola, *The Closure of the International System: How Institutions Create Political Equalities and Hierarchies* (Cambridge University Press, Cambridge, 2020), pp. 171 and 228.

15 See e.g. Samantha Besson, 'COVID-19 and the WHO's Political Moment', (2020b) *EJIL Talk!*, <https://www.ejiltalk.org/covid-19-and-the-whos-political-moment/>, 20 April 2022.

Seizing this political momentum, the present article proceeds in three steps. In a first section, it provides an account of how the 'good government' standard applicable to States under international law was replaced by a 'good governance' standard for all public international institutions, including States and IOs (1). The second section argues for the identification of an international standard of good government for IOs, and explains how it could be grounded in an interpretation of contemporary international law (2). Finally, the article's third section focuses on one of the central dimensions of the good government by IOs, i.e. their democratic legitimacy, and shows how IOs could be designed so as to ensure sufficient international democratic representation in international law-making (3).

What this article proposes is an argument in normative international legal theory: it puts forward an interpretation of international law and institutions, especially IOs, that best fits and justifies their practice. More specifically, it defends a democratic interpretation of that practice. Although the proposed democratic approach to international law relies, at least in part, on some ideal theorization, it is primarily an exercise in non-ideal theory: it reacts to deficits in political legitimacy in the international legal and institutional order, and especially in democratic representation, by making proposals. It is to be expected therefore that some of its proposals may suffer from legitimacy shortcomings of their own.

A few precisions are in order about the notion of 'international organizations' used in this article and about the type of IOs considered. Specifying those raises a well-known difficulty, however, to the extent that there as many definitions of IOs[16] as there are IOs.[17] The corresponding categorical malaise[18] actually reflects the very 'institutional' problem with IOs that this article purports to address, and especially the issue of their political legitimacy.[19] Indeed, it is the proposed argument's premise that no complete conceptual clarification of the institutions referred to as IOs may be provided outside of a normative argument about what kind of institutions they should be and, more

16 See Laurence Dubin and Marie-Clotilde Runavot (eds.), 'Propos introductifs' in *Le phénomène institutionnel international dans tous ses états: Transformation, déformation ou réformation?* (Pedone, Paris, 2014), pp. 5–16.

17 See Union of International Associations, *Yearbook of International Organizations 2020–2021: Guide to Global Civil Society Networks Vol. 3* (Union of international Organizations, Brussels, 2020), p. XXXV.

18 See Rivier, *supra* note 6; Angelo Golia and Anne Peters, 'The Concept of International Organizations' in J. Klabbers (ed.), *Cambridge Companion to International Organizations Law* (Cambridge University Press, Cambridge, 2022), pp. 25–49.

19 See Besson (2021b), *supra* note 7, paras. 75–80.

specifically, about how they should relate to the peoples whose legitimate law they adopt. However, to the extent that a preliminary clarification is required as to the identity of the international institutions whose good government is at stake here, two delineations may be drawn.

The article uses the term IO to refer, first, to a legal understanding of international organization with independent *legal personality*. Accordingly, it will not examine forms of international institutional cooperation with no independent organizational identity, such as networks or mere conferences. The latter cannot adopt binding international law independently of the States participating therein.[20] Of course, those looser, so-called 'informal' or even 'softer',[21] forms of international institutional cooperation are increasingly integrated within formal IOs today,[22] including in their international law-making processes. However, the present article will argue that the latter IOs should be re-instituted so as to ensure sufficient democratic representation in international law-making. Only so could they adopt international law norms that are justified in their claim to authority over States and, ultimately, their peoples. To that extent, IOs' legal personality is not merely a social fact threatened by the increasing 'softening' or 'deformalization' of international institutions,[23] but a normative feature of those institutions that ought to be organized. It is arguably the point of such 'international organizations' to be organized in a specific way.

Within this first subset of IOs, second, this article will concentrate on organizations whose members are States, i.e. on so-called *public*, 'interstate' or 'intergovernmental' organizations. This excludes private organizations or hybrid and public-private ones even when they are active internationally (e.g. International Organization for Standardization [ISO] or Internet Corporation

20 Because the analytical question of the 'legality' of international law is not entirely distinct from the normative question of its 'legitimacy', I abstain from specifying the concept of international 'law-making' at this stage. Instead of assuming that 'informal law' and informal IOs *are* the new international law and IOs (see e.g. Anne Peters, 'Constitutional Theories of International Organizations: Beyond the West' (2021) 20:4 *Chinese Journal of International Law* pp. 649–698, para. 47), thereby entrenching their current depoliticization and delegalization and making the prospect of their legitimacy even more distant, I consider that the two questions need to be addressed together.

21 See Jan Klabbers, *An Introduction to International Organizations Law* (4th edition, Cambridge University Press, Cambridge, 2022), pp. 1–15.

22 See Dubin and Runavot (2013), *supra* note 3, pp. 96–100; Dubin and Runavot (2014), *supra* note 16.

23 See Charles B. Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance are Shifting, and Why it Matters* (Oxford University Press, Oxford, 2020).

for Assigned Names and Numbers [ICANN]).[24] Of course, the latter's normative role also raises important issues of democratic legitimacy. However, it will be the argument of the present article that intergovernmental IOs should be instituted as the public international institutions comprised of States, and possibly other public institutions (such as cities, regions), that may work as a pivotal public referent for further international representation purposes within them, including by private organizations.[25]

The article will draw no further distinctions between the IOs just identified, including by reference to their scope, size, resources or area of specialization. Good government, and especially democratic legitimacy, should be expected of all of them when they claim to adopt international law.[26] Of course, the institutional design of international representation depends largely on the context, as we will see, and there can be no 'one (institutional) design fits all'.[27] The scope of this article precludes, however, addressing each IO in detail.[28]

1 From the Good Government of States to the Good Governance of International Organizations

In the course of a century, the standard of 'good government' of States (e.g. rule of law, democracy, judicial review, separation of powers, transparency and

24 See Gerd Droesse, 'Decline or Disaggregation of the Nation State, Dichotomy of Public and Private and Constitution and Constitutionalization' in *Membership in International Organizations: Paradigms of Membership Structures, Legal Implications of Membership and the Concept of International Organization* (Springer and Asser Press, The Hague, 2020), pp. 89–132; Dubin and Runavot (2013), *supra* note 3, pp. 96–100.

25 On private representation within ISO, see e.g. Marieke Louis and Coline Ruwet, 'Representativeness from Within: A Socio-Historical Account of the Concept and its Uses through the Comparison of the ILO and the ISO' (2017) 14:4 *Globalizations* pp. 535–549.

26 *Contra*: Martin Krajewski, 'International Organizations or Institutions, Democratic Legitimacy' in R. Wolfrum (ed.), *Max Planck Encyclopedias of International Law* (Oxford University Press, Oxford, 2019), 20 April 2022, para. 12; Peters (2022), *supra* note 20.

27 Samantha Besson and José Luis Martí, 'The Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (2018) 9:3 *Jurisprudence* pp. 504–540, 538.

28 As a matter of fact, there has been more research on the good government of the EU, and especially on its democratic legitimacy, than on any other IO. The EU has the specificity indeed of being a (federal) polity with its own citizens. However, even in the EU, 'good governance' requirements have largely replaced the 'good government' standard thanks to the development of EU administrative law: see e.g. Deirdre M. Curtin and Ramses A. Wessel (eds.), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance* (Intersentia, Antwerp, 2005).

other basic procedural principles) has progressively been replaced by a 'good governance' standard that applies to States as much as to IOs. The scope of this article precludes providing a complete legal and political genealogy of this shift. It suffices to say that it grew out of a conjunction of factors that have affected the internal organization of both States and IOs. Those developments occurred separately at first, but quickly merged when States moulded their IOs by reference to their own domestic organizational model,[29] on the one hand, and when, conversely, Member States' internal organization also became a matter of IO law, on the other.[30]

States were the first to be affected and, by extension, the domestic and international public law that developed to organize those States in the late 19th century.[31]

Among the factors that brought this shift to good governance, one should mention Weberian (State) functionalism and, later on, the privatization of the State induced first by capitalism, and later on by neoliberal theories of law. This notably led to the inclusion of 'new public management' methods into domestic and then international public law. Those methods included resorting to ready-made and legalized procedural standards of so-called 'good administration',[32] but also, in some cases, to non-legal, economic or technoscientific standards or quantitative indicators of how States should be organized.[33] In short, the standard of the 'good' State was gradually replaced, under international law, by that of an 'organized' or 'administered' State, or even, more recently, of a 'developed' or 'scientific' State.[34]

29 See Besson (2020a), *supra* note 7, p. 130; Besson (2021b), *supra* note 7, para. 52.

30 See Guy F. Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, Oxford, 2017); Luis Eslava and Sundhya Pahuja, 'The State and International Law: A Reading from the Global South' (2020) 11:1 *Humanity: An International Journal of Human Rights, Humanitarianism and Development* pp. 118–138; Samantha Besson, 'International Courts and the Jurisprudence of Statehood' (2019) 10:1 *Transnational Legal Theory* pp. 30–64, 51–53.

31 Besson (2019), *supra* note 30, pp. 30–64, 32; Besson (2020a), *supra* note 7; Besson (2021b), *supra* note 7.

32 See Bodeau-Livinec, *supra* note 3.

33 See Martti Koskenniemi, 'The Politics of International Law: 20 Years Later' (2009) 20:1 *European Journal of International Law* pp. 7–19; Besson (2019a), *supra* note 30, p. 57.

34 See Nehal Bhuta, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order' in K. E. Davis, A. Fisher, B. Kingsbury and S. Engle Merry (eds.), *Governance by Indicators: Global Power Through Qualification and Rankings* (Oxford University Press, Oxford, 2012), pp. 132–162.

All this had consequences, secondly, for the internal organization of the IOs States started instituting from the late 19th century onwards.[35]

Of course, when the first IOs were instituted, they were meant to remain under their Member States' sovereign control. Conceived through the same functionalist lenses as their Member States, IOs were merely to fulfil the powers those States had delegated to them.[36] Against this background, expecting IOs to comply with the 'good government' standard would have been, and still is, contradictory.[37] Indeed, to the extent that States were, and still are, meant to remain in charge of the sovereign 'government' over their peoples, IOs could not and have not been designed to 'govern' those peoples as well. In fact, they did, and still do, not claim to do so (except for the European Union (EU) whose official 'subjects' are both EU States and citizens), even when they adopt rules those people are eventually subjected to in practice.

As a result, provided IOs may be said to be 'public', this was, and still is, only in a functional or instrumental way. They are public only in so far as they have been instituted to serve the so-called 'public functions' of their Member States.[38] As to their alleged 'public authority',[39] it amounts to an exercise of *de facto* authority at the most.[40] Neither does that authority claim to be exercised in the name of an instituted public nor, when it does claim to be, is it controlled by that public that cannot therefore be considered as the 'author' of IO

35 See Besson, *supra* note 30, p. 58.

36 See Jan Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26:1 *European Journal of International Law* pp. 9–82; Jan Klabbers, 'Beyond Functionalism: International Organizations Law in Context' in J. Klabbers (ed.), *Cambridge Companion to International Organizations Law* (Cambridge University Press, Cambridge, 2022), pp. 7–24.

37 See von Bernstorff (2010), *supra* note 2, pp. 780–783 and 789; Rivier, *supra* note 6, p. 29.

38 See Besson (2020a), *supra* note 7, p. 130 and Besson (2021b), *supra* note 7, para. 79 on how functionalism has facilitated the delegation of public powers *qua* 'functions' to IOs and, in turn, their re-delegation by IOs to private institutions, and hence their privatization. See also Samantha Besson, 'The International Public: A Farewell to Functions in International Law' (2021c) 115 *American Journal of International Law Unbound* pp. 307–311, 308–309; Samantha Besson, *The Public/Private Distinction and International Law* (Brill/Nijhoff, Leiden/Boston, 2023, forthcoming).

39 See on that public authority *qua* '*öffentliche Gewalt*', Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer, Heidelberg, 2010); Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'Gemeinwohl im Völkerrecht: Eine Theorie internationaler öffentlicher Gewalt' in R. Forst and K. Günther (eds.), *Normative Ordnungen* (Suhrkamp, Berlin, 2021), pp. 300–328.

40 See Samantha Besson, 'The Authority of International Law: Lifting the Veil' (2009) 31:3 *Sydney Law Review* pp. 343–380, 345–356.

law.[41] Clearly, then, IOs were not designed by their Member States to be political institutions. Worse, and according to some, IOs were actually instituted by States so as to remain unpolitical. To this date, they are still being actively 'depoliticized' through various political deflection mechanisms.[42] Most IOs have been organized or, more accurately, 'managed' in practice so as to favour 'governance' by the recommendations of technoscientific experts (gathered in committees) over 'government' by international law (adopted by their Member States gathered in interstate organs). They have been institutionalized so as to prefer what one may refer to as the 'rule of expertise' over the 'rule of law'.[43] Good examples thereof are the WHO[44] or the International Organization for Migration (IOM).[45]

All this explains why IO Member States did not originally consider it necessary to insert public law rules and principles into IO internal law so as to organize the good government of their IOs. As to the few procedural provisions that were introduced in certain IOs' founding treaties, they were mostly imprecise.[46]

A turning point occurred in the 1990s, however. IOs started to become more independent in their international law-making endeavours and, so doing, to subject States and, directly or indirectly, their peoples to their legal decisions. This is when the question of their control or so-called 'containment'[47] emerged.

Because there was no general public international law one could resort to and, moreover, very little IO internal law on the matter, the only available legal resource was domestic public law and analogies with the good government

41 On political authority, 'authorization' and 'authorship', see Besson and Martí (2018), *supra* note 27, p. 56.

42 See Louis and Maertens, *supra* note 1; Petiteville, *supra* note 1.

43 See also Jochen von Bernstorff, 'The Decay of the International Rule of Law Project (1990–2015)' in H. Krieger, G. Nolte and A. Zimmermann (eds.), *The International Rule of Law. Rise or Decline?* (Oxford University Press, Oxford, 2019), pp. 33–55.

44 See Besson (2020b), *supra* note 15. *Contra*: Armin von Bogdandy and Pedro Villarreal, 'International Law on Pandemic Response: A First Stocktaking in the Light of the Coronavirus Crisis' (2020) 7 *Max Planck Institute for Comparative Public Law & International Law Research Paper*; Jan Klabbers, 'The Second Most Difficult Job in the World: Reflections on COVID-19' (2020) 11:2 *Journal of International Humanitarian Legal Studies* pp. 270–281.

45 See Jan Klabbers, 'Note on the Ideology of International Organizations Law: The International Organization for Migration, State-Making and the Market for Migration' (2019) 32:3 *Leiden Journal of International Law* pp. 383–400.

46 See von Bernstorff (2010), *supra* note 2, pp. 778–779 and 800.

47 See Peters (2022), *supra* note 20.

standard applicable to States under international law. By then, however, as I explained before, the domestic and international public law of statehood and its good government standard mentioned before had already evolved.[48] Its new avatar, the hybrid public-private 'good governance' approach, was transposed to IOs, as a result.[49] At a time when domestic public institutions had largely been privatized and private organizations were publicized in return, the understanding of the public/private distinction and relation,[50] and especially of the 'public position' underpinning 'public law'[51] and, further, of the connection between public law and politics[52] had been lost. As a result, applying domestic public law to international institutions such as IOs did not strike anyone as incongruous, even though the latter were deemed 'public' without instituting a 'public' and were intentionally depoliticized. After all, those were the years of the so-called "global administrative law" (GAL),[53] a law that seemed to exist without institutions – and still does – ,[54] and, even more curiously, without reference to an 'administered people'.

The project failed, as a result, at least in containing IOs. Worse, it led to the introduction of some of the tenets of global administrative law into domestic law and, thereby, to the further dilution of what was left of domestic public law.

Accordingly, what has sometimes been referred to, with a certain exaggeration, as the 'constitutionalization' process of IOs,[55] largely boiled down to a self-referential managerial exercise and a process of 'internal rationalization'.[56] The recent discussion about the due diligence of IOs is a case in point. Under that name, certain IOs resort not so much to the standard of due diligence applicable to States and hence to another dimension of good government under

48 See e.g. Besson (2019a), *supra* note 30, p. 58.

49 See von Bernstorff (2010), *supra* note 2, by reference to the International Law Association, 'Berlin Conference (2004): Accountability of International Organizations' (2004) 1:1 *International Organizations Law Review* pp. 221–293.

50 See Besson (2021c), *supra* note 38, p. 311.

51 See Alain Supiot, 'The Public-Private Relation in the Context of Today's Refeudalization' (2013) 11:1 *International Journal of Constitutional Law* pp. 129–145.

52 See Martin Loughlin, 'The State: *Conditio sine qua non*' (2018) 16:4 *International Journal of Constitutional Law* pp. 1156–1163; Besson (2020a), *supra* note 7, p. 119.

53 See e.g. Stewart, *supra* note 3.

54 See Édouard Fromageau, *La théorie des institutions du droit administratif global: Étude des interactions avec le droit international public* (Bruylant, Brussels, 2016).

55 See Peters (2022), *supra* note 20 on this second generation of IO constitutionalism.

56 See von Bernstorff (2010), *supra* note 2, pp. 797 *et seq*.

general public international law, but to a standard developed in corporate business governance and simply transposed to IOs.[57]

What makes the current global governance scheme difficult to criticize in this respect, however, is that the appearances of politics are saved. Terms are steadily borrowed from the domestic and international public law lexicon, including from the constitutional[58] and democratic[59] jargon, albeit devoid of their original meaning.[60]

For instance, the 'legitimacy' of IOs and their international law-making processes[61] is described as the central concern of contemporary IO good governance. However, what is meant is mostly output legitimacy *qua* efficacy or effectiveness in fulfilling an IO's functions.[62] It is sometimes approached as input legitimacy, but then exclusively by reference to the input in the form of knowledge of private (e.g. military, economic, environmental) experts whose quality is precisely to be neutral and apolitical.[63] Of course, there is talk of 'participation' or 'inclusion', as there should be in a democratic regime.[64] Again, however, the term has been used mostly to refer to various kinds of informal association or consultation

57 See Diane Desierto, 'Due Diligence in World Bank Project Financing' in H. Krieger, A. Peters and L. Kreuzer (eds.), *Due Diligence in the International Legal Order* (Oxford University Press, Oxford, 2020), pp. 329–347. For a critique, see Samantha Besson, 'La *due diligence* en droit international' (2020c) 409 *Recueil des cours de l'Académie de droit international de La Haye* pp. 153–398, paras. 5, 29, 155–156, 482 and 494–496.

58 See e.g. Peters (2022), *supra* note 20.

59 See e.g. Robert O. Keohane, 'Global Governance and Democratic Accountability' in D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (Polity, Cambridge, 2004), pp. 130–159; Alexandru Grigorescu, 'International Organizations and their Bureaucratic Oversight Mechanisms: The Democratic Deficit, Accountability and Transparency' in B. Reinalda (ed.), *Routledge Handbook of International Organization* (Routledge, London, 2013), pp. 176–188.

60 I referred to this elsewhere as "fast-democracy" just as there is fast-food or fast-fashion: see Samantha Besson, 'The Democratic Legitimacy of WTO Law: On the Dangers of Fast Democracy' (2011) 72 *World Trade Institute Research Papers*.

61 See Dominik Zaum, 'Legitimacy' in J. K. Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford University Press, Oxford, 2016), pp. 1107–1125.

62 See Bodeau-Livinec, *supra* note 3.

63 See Louis and Maertens, *supra* note 1, p. 148. See on the functionalist legitimacy gain through original civil society inputs into IOs, von Bernstorff (2021), *supra* note 8, pp. 130–140; Anne Peters and Simone Peter, 'International Organizations: Between Technocracy and Democracy' in B. Fassbender, A. Peters and S. Peter (eds.), *The Oxford Handbook of the History of International Law* (Oxford University Press, Oxford, 2012), pp. 170–197, 186.

64 See Peters (2022), *supra* note 20; Klaus Dingwerth and Patrizia Nanz, 'Participation' in J. K. Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford University Press, Oxford, 2016), pp. 1126–1145.

of private 'actors'. It is justified by reference to the need to include (undefined) 'stakeholders' or 'most affected persons' rather than citizens.[65]

'Accountability' is another example of a term borrowed from the democratic vocabulary.[66] However, in this context, the term's meaning refers neither to *ex ante* electoral control nor to *ex post* responsibility.[67] It is a curious hybrid or in-between, therefore, whose procedures are not political, on the one hand, and whose consequences are not legal, on the other.[68] Accountability takes place through various 'audits' and other internal, and self-referential, efficiency assessment mechanisms that enable IOs to provide evidence of their 'compliance' with 'good governance' standards.

2 Towards a Good Government Standard for International Organizations

As hinted at in the introduction, it no longer seems to be enough for IOs to invoke their administrative efficacy or, even during a pandemic, their technoscientific expertise or epistemic authority to establish legitimacy.[69]

65 See Terry MacDonald, 'Citizens or Stakeholders? Exclusion, Equality and Legitimacy in Global Stakeholder Democracy' in D. Archibugi, M. Koenig-Archibugi and R. Marchetti (eds.), *Global Democracy: Normative and Empirical Perspectives* (Cambridge University Press, Cambridge, 2012), pp. 47–68; Coline Ruwet, 'Que représentent les *stakeholders*?' (2010) 60:6 *Revue Française de Science Politique* pp. 1115–1135; Dubin and Runavot (2013), *supra* note 3, p. 81; Jan A. Scholte, 'Relations with Civil Society' in J. K. Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford University Press, Oxford, 2016), pp. 712–729; von Bernstorff (2021), *supra* note 8, p. 141 *et seq*. See also Kenneth Anderson and David Rieff, '"Global Civil Society": A Sceptical View' in M. Glasius, M. Kaldor and H. Anheier (eds.), *Global Civil Society 2004/5* (SAGE, Thousand Oaks, 2005), pp. 26–39; Ayelet Berman, 'Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors' (2021) 32:1 *European Journal of International Law* pp. 227–254 on this 'false sense of legitimacy'.

66 See International Law Association, *supra* note 49, p. 225.

67 See Kristen E. Boon and Frédéric Mégret, 'New Approaches to the Accountability of International Organizations' (2019) 16:1 *International Organizations Law Review* pp. 1–10; Bodeau-Livinec and Dubin, *supra* note 3.

68 See Jan A. Scholte, 'Global Governance, Accountability and Civil Society' in *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge University Press, Cambridge, 2011), pp. 8–41; Mathias Koenig-Archibugi, 'International Organizations and Democracy: An Assessment' in L. Cabrera (ed.), *Institutional Cosmopolitanism* (Oxford University Press, Oxford, 2018), pp. 154–185.

69 See Koskenniemi, *supra* note 33. *Contra*: von Bogdandy and Villarreal, *supra* note 44; Klabbers (2019), *supra* note 44.

What we are facing at last, therefore, could be a 'political moment' for IOs.[70]

Seizing that political moment implies leaving aside the last decades' quick fixes of global 'governance', be it through managerial reforms, indicators or 'result-chains'. Nor is it only a matter of organizing political 'contestation' and 'resistance' to IOs outside of IOs.[71] It is also, and primarily, about instituting IOs politically in themselves. It means re-organizing IOs so as to make them comply with the standard of 'good government' since those requirements should apply to all decisions affecting individual and social life, be it on the national or the international plane. Why, for instance, should health be a political issue domestically and be governed by our representatives, while it is depoliticized and managed by experts internationally? One may ask the same about migration, climate change or security.

Regrettably, and for the reasons presented in the previous section, 'politics' still has a bad name in multilateral organizations[72] where it is equated with power play.[73] The only way to rule power, however, is precisely to bring politics into IOs and to address their lack of political legitimacy openly. Most IOs' institutional weaknesses, including their lack of deliberative contestability or transparency, are indeed but the symptoms of a deeper institutional deficit in political representation. If we keep addressing each of those issues separately one by one, and through individualized reforms, as we have so far, we cannot hope to solve that problem at its root. As long as IOs' political legitimacy is not enhanced, States have a right to invoke their equal sovereignty to fight back certain politically illegitimate (albeit scientifically or technically correct in many cases) expert rulings. Of course, State sovereignty and the legitimacy of international law do not overlap entirely.[74] However, the only way to disqualify invocations of State sovereignty in IOs by State officials who do not represent their people is by taking that sovereignty seriously when they do. This is exactly what improving the political legitimacy of IOs could achieve.

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70 See on the WHO, Ilona Kickbusch, 'No "Back to Normal" for the WHO' (2020) <https://www.cigionline.org/articles/no-back-normal-who/>, 20 April 2022; Besson (2020b), *supra* note 15.

71 See e.g. Isabelle Ley, 'Opposition in International Law: Alternativity and Revisibility as Elements of a Legitimacy Concept for Public International Law' (2015) 28:4 *Leiden Journal of International Law* pp. 717–742; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy & Contestation* (Oxford University Press, Oxford, 2018).

72 On the politics of IO depoliticization, see also Louis and Maertens, *supra* note 1, p. 187; Petiteville, *supra* note 1.

73 See Besson (2020b), *supra* note 15 on the WHO.

74 See Besson (2009), *supra* note 40, pp. 372–374.

There are at least two paths one could explore to bind IOs to a standard of legitimate or good government under general public international law.

Importantly, none of those proposals to consolidate general public international law around a good government standard should be equated with a proposal for a world State governing a single people,[75] with the potential imperialist consequences it may have.[76] The original common law or *jus commune* of the 'good government' actually pre-dated the State in the history of law and institutions.[77] It applied then, and could therefore apply again to other public institutions than the State, including IOs, and to all at the same time. The international standard of good government could actually even play the minimally institution-unifying role the domestic standard of good government endorsed, from the 12th century onwards, for the institution of the State at a moment of post-imperial institutional fragmentation. This time around, however, it could contribute to the (re-)institutionalization of various (public) IOs.

The first route towards consolidating such a good government standard for IOs under international law is precisely that of comparative public law.[78] The project is to devise a *jus commune* of good government based on the comparison and the convergence of domestic public law, albeit on a universal scale this time.[79] Recent projects pertaining to the comparative identification of principles of either transparency for IOs[80] or separation of powers[81] within IOs may be mentioned in this context.

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75 See Besson and Martí (2018), *supra* note 27. See also Francis Cheneval, *The Government of the Peoples: On the Idea and Principles of Multilateral Democracy* (Palgrave Macmillan, Oxford, 2011).

76 See Bhupinder S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15:1 *European Journal of International Law* pp. 1–37.

77 See Alain Wijffels, *Le droit européen a-t-il une histoire? En a-t-il besoin?* (Collège de France and Fayard, Paris, 2017).

78 See von Bernstorff (2010), *supra* note 2, pp. 802–803.

79 See Samantha Besson, 'L'autorité légitime du droit international comparé: Quelques réflexions autour du *monde* et du *droit des gens* de Vico' in S. Besson and S. Jubé (eds.), *Concerter les civilisations: Mélanges en l'honneur d'Alain Supiot* (Seuil, Paris, 2020d), pp. 49–60, 57–58; Samantha Besson, 'Du droit de civilisation européen au droit international des civilisations: Instituer un monde des régions' (2021a) 31:3 *Swiss Review of International and European Law* pp. 373–400, 378.

80 See Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (Cambridge University Press, Cambridge, 2013).

81 See Joana Mendes and Ingo Venzke (eds.), *Allocating Authority: Who Should do What in European and International Law?* (Hart, Oxford and Portland, 2018); Miriam Cullen, 'Separation of Powers in the United Nations System?: Institutional Structure and the Rule of Law' (2020) 17:3 *International Organizations Law Review* pp. 492–530.

However promising, the difficulty with those proposals is that, as I explained before, it does not suffice to apply (what is left of) domestic public law to IOs to turn them into public institutions. Indeed, following the privatization of States' public 'functions' and the reverse publicization of private organizations' rights and obligations, the latter organizations may also claim to be 'public' in that sense.[82] While the specificity of public authority lies in part in the rule of law, it also lies in its institutional dimension, and in particular in the institutional representation of the public.[83] I have actually argued elsewhere that contemporary international law, as a practice and a discipline, suffers from an institutional blind spot.[84] It has mostly treated institutions as mere legal by-products and become blind to the mutual relation between international law and institutions: international law rules those institutions, but is also ruled over by them in return.

This very institutional dimension distinguishes the present proposal from alternative ones. The latter indeed have favoured the substance of public law over its institutional dimension and, to a certain extent, have perpetuated the purely substantive containment of IOs criticized in the previous section. It has been the case of so-called 'international public law',[85] 'interpublic law'[86] or 'international constitutional law'[87] approaches to those issues, at least in their first generations.

A second, potentially complementary, route has been taken in order to flesh out a good government standard for IOs: international human rights law.[88] The latter is indeed the international law regime where the common standard of good government is being specified and consolidated today in the form of general positive human rights duties of political organization by States (e.g. the right to a fair hearing or to a reasoned decision).[89] To that extent, it is a relevant place to look for the corresponding positive duties of IOs or, at least, of IOs' Member States to organize their IOs accordingly.

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82 See Besson (2020a), *supra* note 7, p. 130; Besson (2021b), *supra* note 7, para. 79; Besson (2021c), *supra* note 38, p. 308.

83 See Besson (2021b), *supra* note 7, paras. 75–80.

84 See *ibid*, paras. 29–31.

85 See e.g. von Bogdandy, Wolfrum, von Bernstorff, Dann and Goldmann, *supra* note 39; von Bogdandy, Goldmann and Venzke, *supra* note 4.

86 See e.g. Benedict Kingsbury, 'International Law as Inter-Public Law' in H. S. Richardson and M. S. Williams (eds.), *Moral Universalism and Pluralism* (New York University Press, New York and London, 2009), pp. 167–204.

87 See e.g. Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15:5 *European Journal of International Law* pp. 907–931.

88 See von Bernstorff (2010), *supra* note 2, pp. 802–803.

89 See Besson (2019a), *supra* note 30, pp. 47–48.

However promising, the difficulty with this approach is that international human rights law itself has not been spared by the good governance trend. States' various general positive duties to organize themselves so as to effectively protect human rights have been heavily proceduralized lately. 'Compliance' with those duties, together with their control, have turned into processes. Moreover, those general positive duties pertaining to the good organization of States, including their democratic regime, do not yet apply to IOs. The obstacle is not actually one of source, however, but a conceptual and normative one. To the extent that IOs are not (yet) organized as political institutions, indeed, they do not (yet) have the capacity, as democratic institutions, to protect the equality of the alleged right-holders and the latter's equal right to participate in the determination of their human rights.[90] Because 'ought implies can', this disqualifies them (for the moment) as potential international human rights duty-bearers.[91]

This difficulty actually brings us back to the institutional question left open by the first approach mentioned before. If the human rights route to the standard of good government is to lead us anywhere, it will have to also be a democratic one: they go hand in hand, and human rights protection is one of the dimensions of international democratic legitimacy as much as the reverse.[92]

3 The Good Government of International Organizations and Democratic Representation

Under contemporary international law, a 'good' government is also a democratic one.[93] Together with international human rights law,[94] the international

90 See Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution' (2015) 32:1 *Social Philosophy & Policy* pp. 244–268, 249, 252 and 256–257.

91 See *ibid*, pp. 252–253.

92 See ECHR Preamble; *Zdanoka* v. *Latvia*, 16 March 2006, European Court of Human Rights (Grand Chamber), Judgement, *Reports 2006-IV*. See for further references, Samantha Besson, 'The Human Right to Democracy in International Law: Coming to Moral Terms with an Equivocal Legal Practice' in A. von Arnauld, K. von der Decken and M. Susi (eds.), *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press, Cambridge, 2020e), pp. 481–489.

93 See Christian Pippan, 'Democracy as a Global Norm: Has it Finally Emerged?' in M. Happold (ed.), *International Law in a Multipolar World* (Routledge, Abingdon and New York, 2012), pp. 203–223; Krajewski, *supra* note 26, para. 5; Besson (2020e), *supra* note 92 for further references on democracy and international law.

94 See Samantha Besson, 'The Egalitarian Dimension of Human Rights', (2013) 136 *Archiv für Sozial- und Rechtsphilosophie Beiheft* pp. 19–52, 30–32.

principle of democracy protects the political dimension of individual equality, itself a principle guaranteed under customary international law.[95]

Of course, the international principle of democracy has mostly applied to States so far, with the exception of the EU. Nothing precludes, however, applying it to other institutions of international law such as IOs *mutatis mutandis* and reforming them accordingly. In light of the identity of the ultimate subjects to both domestic and international law, democratic legitimacy cannot be exclusive to domestic political contexts: the reasons one has to endorse democracy domestically apply just as much to international law-making.[96]

This section is devoted to exploring what democratic legitimacy could and should mean for IOs. They are indeed one of the main institutions and processes through which international law-making is adopted today. After a few reminders about the notion of democratic legitimacy in international law-making and, more specifically, about the contours of the multiple international representation system, I will turn to how IOs could be organized so as to enhance the democratic legitimacy of international law.

3.1 *The Principles of International Democratic Legitimacy*

Building on a previous article co-authored with José Luis Martí,[97] this argument understands democratic legitimacy, in quite a standard way, to refer to the questions of who has the right to rule (or the right to adopt legal norms) and how such a right to rule should be exerted in order to generate obligations for those subject to such rule.

The democratic legitimacy of any law-making institution, including at the international level, should be assessed by reference to four basic, and scalar, abstract principles.[98]

First of all, *the principle of ultimate, effective popular control*. It derives directly from the ideal of popular sovereignty: all peoples subjected to

95 See James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des cours de l'Académie de droit international de La Haye* pp. 9–369, paras. 272 *et seq*. and 487 *et seq*., by reference to *Barcelona Traction, Light and Power Company, Limited* (*Belgium* v. *Spain*) (*Second Phase*), 5 February 1970, International Court of Justice, Judgement, *I.C.J. Reports 1970*, p. 3, paras. 34 and 41.

96 See Besson (2009), *supra* note 40.

97 See Besson and Martí (2018), *supra* note 27.

98 José Luis Martí, 'Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law' in S. Besson and J. d'Aspremont, *The Oxford Handbook of the Sources of International Law* (Oxford University Press, Oxford, 2017), pp. 724–745.

international law should have a say in the process of making that law.[99] Of course, they may delegate that power to representatives. The peoples should, however, retain ultimate, effective control over their representatives (who may otherwise only claim to be such) and, through them, over international institutions and decision-making processes in order to make popular sovereignty possible. This may take place through periodic elections, but not only. Second, *the principle of political equality*. The peoples represented should have an equal share, directly or through their representatives, in holding that ultimate power of control.[100] That means that no people should be able to impose its views unilaterally or have significantly greater political power to determine the law than others. Among other egalitarian implications, international political power should be proportional to the size of each people.[101]

Third, *the principle of deliberative contestability*. The peoples – or their representatives – should be able to contest, through deliberation, the laws and decisions made internationally. They should also have the capacity to engage in deliberative interaction with each other, thus promoting public debate.[102] Fourth, *the principle of human rights' protection*. Individuals' human rights that are constitutive of their basic moral equality and enable them to exercise ultimate control should also be protected in international law-making processes and institutions in order for the latter to be democratically legitimate.[103]

What are those four principles' concrete implications for the legitimate institutions of international law-making? The first democratic principle is quite clear in this respect. Given that a system of direct popular decision-making is impossible at the international level, all peoples subjected to international law necessarily have to delegate their power to representatives. This turns the question of the democratic legitimacy of international law into one of democratic representation.[104] Accordingly, the assessment of the legitimacy of

99 See Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, Cambridge, 2012).

100 See Thomas Christiano, 'Democracy' in E. N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (2015), <https://plato.stanford.edu/archives/spr2015/entries/democracy/>, 20 April 2022.

101 On individual equality, the equality of peoples and State sovereign equality under international law, see Besson (2022), *supra* note 10.

102 See John Parkinson and Jane Mansbridge (eds.), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, Cambridge, 2012); Samantha Besson and José Luis Martí (eds.), *Deliberative Democracy and its Discontents* (Ashgate, Aldershot, 2006).

103 See Besson (2020e), *supra* note 92.

104 See Samantha Besson and José Luis Martí, *Democratic International Law-Making* (Cambridge University Press, Cambridge, 2023, forthcoming).

current or potential institutions of international law-making crucially depends on whether those institutions' powers have been delegated to them by the peoples subject to the decisions to be made, and, more importantly, on whether those peoples have effective mechanisms of ultimate control over them.

In our traditional (modern) understanding of representative democracy, at least when it applies to domestic law-making, these four principles have required the existence of a parliament with fundamental powers of legislation whose members are elected democratically, a directly or indirectly elected executive and an independent and self-standing judiciary, among other democratic institutions. Nothing like this, of course, exists at the international level, including within IOs.[105]

However, this does not imply that the principles of democratic legitimacy cannot be respected in other ways. If creating a world parliament and calling for a global election is not an available option, we should explore other ways by which peoples can exert ultimate control over international law-making, and do so in conditions of political equality, deliberative contestability and human rights' protection.

Importantly, and to the extent that it should aim at ensuring ultimate, effective popular control, the proposed model of international democratic legitimacy cannot be reduced to the kind of inter-State 'democracy' propounded by (usually non-democratic) States who regard State equality and the principle of 'one State, one vote' in international law-making as the only requirement of international democratic legitimacy. On the contrary, from a democratic perspective, when States participate in international law-making, especially as members of IOs, it is as officials and representatives of their peoples, and not as such and in themselves.[106] Not only do those peoples need to exert an ultimate, effective control over those States, but the latter are not the only institutions involved in international law-making processes and that may be controlled effectively. Indeed, when civil society institutions 'participate' in international law-making, it is as representatives of the same peoples,[107] and not as such and

105 See e.g. Robert A. Dahl, 'Can International Organizations Be Democratic? A Skeptic's View' in I. Shapiro and C. Jacer-Córdon (eds.), *Democracy's Edges* (Cambridge University Press, Cambridge, 1999), pp. 19–36; Koenig-Archibugi, *supra* note 68.

106 See Besson (2009), *supra* note 40, pp. 360–363; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22:2 *European Journal of International Law* pp. 315–343. This is a common confusion, however: see e.g. Dubin and Runavot (2013), *supra* note 3, p. 82.

107 On the distinction and relations between public and private political representation, see Besson and Martí (2018), *supra* note 27.

in themselves either. This differs from what many authors seem to consider,[108] especially when they refer to 'civil society' or 'stakeholders' participation in IOs, for instance through non-governmental organizations (NGOs), as a form of 'direct democracy'.[109]

3.2 *The Multiple International Representative System*

In previous publications co-authored with José Luis Martí,[110] we replied to the question of how to ensure compliance with the four principles of democratic legitimacy by the various public institutions (e.g. States, cities, regions) and private organizations (e.g. NGOs, transnational corporations [TNCs]) currently involved in the international law-making system with a two-pronged argument.

We started with an *insufficiency argument*. Due to their respective democratic deficits, neither public nor private institutions involved in international law-making should be considered as sufficient, on their own, to represent the peoples of the world in a way that may be considered democratically legitimate.

Among the democratic shortcomings of States as representatives, one may mention the following eight deficits. With respect to the principle of

108 This is another common confusion, however (see e.g. Evelyne Lagrange, *La représentation institutionnelle dans l'ordre international: Une contribution à la théorie de la personnalité morale des organisations internationales* [Kluwer Law International, The Hague, London and New York, 2002]; Dubin and Runavot [2013], *supra* note 3, pp. 86–88). It conflates the participation in IOs of private representatives of the (States) peoples with that of 'non-members' such as third States, other IOs or non-representative institutions, on the one hand, and hence equates 'representative' participation by the former with mere 'participation' of the latter, on the other.

109 See e.g. Anne Peters, 'Dual Democracy' in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009), pp. 263–341; Krajewski, *supra* note 26, paras. 19 *et seq.*; Christian Marxsen, 'The Promise of Global Democracy: The International Impact of Civil Society' (2015) 47:4 *NYU Journal of International of International Law and Politics* pp. 719–782. They oppose it to the 'indirect democracy' or representative role of parliamentary assemblies in IOs. By contrast, I see both mechanisms ([directly elected or delegated] parliamentary assemblies and civil society participation) as forms of (public and private) representative democracy: either by States (and their different organs: legislative in this case) or by civil society organizations such as NGOs. See Besson and Martí (2018), *supra* note 27; Eva Erman, 'The Political Legitimacy of Global Governance and the Proper Role of Civil Society Actors' (2018) 24:1 *Res Publica* pp. 133–155; Martine Beijerman, 'Conceptual Confusions in Debating the Role of NGOs for the Democratic Legitimacy of International Law' (2018) 9:2 *Transnational Legal Theory* pp. 147–173.

110 Besson and Martí (2018), *supra* note 27; Samantha Besson and José Luis Martí, 'Cities as Democratic Representatives in International Law-Making' in H. Aust and J. Nijman (eds.), *Research Handbook on International Law and Cities* (Edward Elgar, London, 2021), pp. 341–353.

ultimate, effective popular control, first, one should emphasize the existence of non-democratic States and the limited accountability of State governments, even in democratic regimes, when it comes to external relations. With respect to the principle of political equality, second, one should mention disproportions in State demography, imbalances of informal political power among them, the existence of permanent minorities and the unequal distribution of views geographically. Finally, with respect to the principle of deliberation, one should emphasize a certain bias in the international representation of self-interested national concerns by States at the price of common concerns, and the recourse to State consent as a veto right.

Of course, representation by private organizations, such as NGOs, may compensate some of those democratic deficits in State representation. However, those organizations also suffer from their own distinct democratic shortcomings. With respect to the ultimate, effective popular control principle, first of all, one should mention the fact that they usually are not elected. Moreover, they are mostly not controlled otherwise by those they claim to represent (provided they even claim to do so, of course; indeed, many NGOs do not claim to represent anyone, but merely to defend general interests or to 'be' the people participating).[111] As to political equality, second, and in the absence of an equal category and status of NGOs under international law, one should emphasize their unequal demographic and geographic distribution, the unequal distribution of interests promoted and their unequal financial means and power. Finally, with respect to deliberation, one should stress the lack of transparency and contestability of NGO decision-making processes.

In reaction to those deficits, we developed a second, *systemic argument* claiming that those public and private representatives should be approached, first, as multiple in themselves with many public, but also private institutions representing the same peoples and, second, as constituting, together, the complementary parts of the Multiple International Representation System (MIRS).

The *Multiple Representation Model* underpinning the MIRS is an aspirational model that guides the proposed normative approach to the international institutional order. According to that model, the international order as a whole, *qua* system, should aspire to be democratically representative of all peoples of the world. This is precisely where the 'multiplicity' of the model lies. It sees a variety of public and private institutions of different kinds playing a legitimate part in representing the same peoples in the international law-making process.

111 On those new NGOs that are progressively replacing the 'classical' ones, i.e. the so-called 'Affected Persons Organizations', and their democratic deficits, see von Bernstorff (2021), *supra* note 8, pp. 148–155.

That multiplicity does not, however, equate with mere plurality. The model differs therefore from radical pluralist models of the international order. True, there should be different kinds of representatives endorsing different roles and forms of participation in different contexts and fora. However, all of them should, ideally, be organized so as to complement one another in a unique and continuous representative system.[112]

More specifically, the Multiple Representation Model provides an alternative to the two most prominent models of international democratic representation. The first one is the traditional Statist Model. It relies on a monist view according to which there is only one kind of legitimate representative of peoples in international law-making: States. As to the second model, the Dualist Model, it includes, besides States, private organizations from the so-called 'global civil society', such as NGOs, TNCs, trade unions, churches and so on, into the group of legitimate representatives.

The proposed model of international democratic representation shares one important tenet with the *Statist Model*: the idea that public representatives and, more specifically, democratically elected ones such as States should retain a central role in international law-making.

To this date, public and elected representation is indeed what States do best. Not only do they match already instituted political communities and peoples worldwide, but they are the main institutions able to fulfil the factual conditions for political equality and the claim to democracy, i.e. the sharing of equal and interdependent stakes and the capacity for an effective government,[113] both of them being requirements of the international law of statehood.[114]

112 See Jane Mansbridge, James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis F. Thompson and Mark E. Warren, 'A Systematic Approach to Deliberative Democracy' in J. Parkinson and J. Mansbridge (eds.), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, Cambridge, 2012), pp. 1–26; Felipe Rey, 'The Representative System' (2020) 25:1 *Critical Review of International Social and Political Philosophy* pp. 1–24.

113 See Thomas Christiano, 'Democratic Legitimacy and International Institutions' in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010), pp. 119–138; Thomas Christiano, 'The Legitimacy of International Institutions' in A. Marmor (ed.), *The Routledge Companions to Philosophy of Law* (Routledge, New York, 2015), pp. 380–394.

114 See Samantha Besson, 'Investment Citizenship and Democracy in a Global Age: Towards a Democratic Interpretation of International Nationality Law' (2019c) 29:4 *Swiss Review of International and European Law* pp. 525–547.

Moreover, the equality of States guaranteed under international law[115] (e.g. Art. 2(1) United Nations Charter [UNC]) is conceptually and normatively related to the international law principles of equality not only of peoples, but also of individuals within those States.[116] Of course, individual and State equality are not fully transitive, and treating States equally may not lead to treating all individuals equally.[117] Democratic correctives (such as e.g. proportional voting) are required indeed to ensure the equality of peoples even under conditions of perfect State equality in international law-making.[118] All the same, the guarantee of State equality under international law makes the representation by equal States the best approximation of the equal representation of their peoples.

However, the Multiple Representation Model also implies a more expansive, and certainly non-monist, view of representation that broadens the Statist Model in two different ways. First, the Multiple Representation Model grants other kinds of public institutions than States – such as regions and cities – [119] a greater representative role than the one they currently enjoy in the Statist Model. Second, it broadens the principle of State consent into something more general and deliberative, and less focused on veto, that might be called the principle of State participation.

Nevertheless, the Multiple Representation Model also follows closely on the *Dualist Model* to the extent that even such an extensive revision of the monist view of international representation is insufficient, on its own, to secure democratic legitimacy. Public representation by States suffers from many democratic shortcomings under the four principles presented before that may only be compensated by including private institutions as representatives into international law-making processes.

Still, the proposed model differs from the Dualist Model in two respects. First, public representation remains at the centre of the MIRS, not the least because of some of the important deficits of private institutions in terms of democratic representation, including NGOs. Second, private institutions may only participate as representatives in certain adequate contexts and fora, in

115 See e.g. Ulrich K. Preuss, 'Equality of States: Its Meaning in a Constitutionalized Global Order' (2008) 9:1 *Chicago Journal of International Law* pp. 17–49; M. G. Kohen, 'Article 2, paragraphe 1' in J.-P. Cot, A. Pellet and M. Forteau (eds.), *La Charte des Nations Unies: Commentaires article par article* (3rd edition, Economica, Paris, 2005), pp. 399–400.

116 See Besson (2020a), *supra* note 7, pp. 113 and 127, based on Larry Siedentop, 'Political Theory and Ideology: The Case of the State' in D. Miller and L. Siedentop (eds.), *The Nature of Political Theory* (Clarendon Press, Oxford, 1983), pp. 53–73.

117 See also Viola, Snidal and Zürn, *supra* note 10, pp. 231–232; Besson (2022), *supra* note 10.

118 See Besson and Martí (2018), *supra* note 27; Besson (2022), *supra* note 10.

119 See Besson and Martí (2021), *supra* note 110.

certain specific ways and only to the extent that is necessary to complement public representation and overcome public institutions' democratic deficits. This requires public representative institutions in order to identify, constrain and organize the complementarity of private representative organizations in each case.

In short, the Multiple Representation Model reacts to the underrepresentation of peoples that characterizes the current international system where States often still have the monopoly of representation, albeit in a way that addresses the democratic strengths and weaknesses of the various public and private institutions involved in international law-making. It proposes to maximize the representation of peoples by vesting a variety of public and private institutions with different complementary representative roles in international law-making processes and international institutions.

This argument leaves many questions open, however. The most important one is how to organize the complementarity among public and private institutions involved in international law-making processes in order both to enhance their individual democratic strengths and to correct and compensate their democratic deficits through complementary representation. There is one type of international institutions that may be designed effectively as background institutions for multiple international representation: IOs.

3.3 *International Organizations for International Democratic Representation*

The time has come to explore how multiple international representation could and should be organized inside the internal structure of IOs in order to enhance the democratic legitimacy of the international law adopted by or within those IOs. I will first explain how IOs may contribute to the multiple international representation system in general, before making specific institutional proposals with respect to their internal organization.

3.3.1 International Organizations as Institutions of Multiple International Representation

There are many reasons to be interested in IOs when exploring ways to reform the international institutional order so as to comply with the multiple representation model. One should mention at least three institutional virtues of IOs in this respect: their publicness; their universality; and their external and, strictly speaking at least, non-representative role.

First of all, what makes IOs pivotal for the multiple international representation system defended in this article is that, having States as main institutional members, IOs have the capacity to guarantee the central place and, as argued

before, the priority of *public* representation in international law-making without, however, amounting themselves to another public representative institution. This has at least two kinds of benefits in terms of multiple international representation.

On the one hand, *the articulation between public and private representation*. The public position held by IOs provides the perfect institutional setting to organize the complementary representation of the same peoples by multiple public and private institutions and to articulate the different types of representatives on the international plane.

Through their various organs, IOs offer the conditions for a complementary articulation, in the same institutional context, between public representatives (like States, regions or cities) and private representatives (like NGOs, TNCs, trade unions or other civil society institutions), without however losing their role as a public referent or guarantor of that representation. Here, the example of the International Labour Organization (ILO) comes to mind: it is a public organization constituted by Member States that institutionalizes the tripartite representation of the same peoples through public institutions (States), on the one hand, and private ones (trade unions and employers' associations), on the other.[120]

Moreover, IOs can actually organize the coexistence of multiple public and private representatives on each side and at the same time. They have the capacity, for instance, to articulate the implication of States, on the one hand, and regions and/or cities, on the other, among the public representatives included in international law-making, instead of preferring one over the other. They may even include public institutions other than States, such as cities or regional institutions, not only among the institutions allowed to participate as representatives in certain procedures or organs, but also among IO members themselves. After all, this is what used to be the case in the first IOs.[121] The same may be said with respect to the private institutions participating in international

120 See Francis Maupain, 'Gouvernance mondiale et cohérence de l'action des acteurs multilatéraux en matière économique et commerciale' in L. Dubin and M.-C. Runavot (eds.), *Le phénomène institutionnel international dans tous ses états: Transformation, déformation ou réformation* (Pedone, Paris, 2014), pp. 95–102; Dubin and Runavot (2013), *supra* note 3, pp. 92–93; Marieke Louis, *Qu'est-ce qu'une bonne représentation? L'organisation internationale du travail de 1919 à nos jours* (Dalloz, Paris, 2016); Louis and Ruwet, *supra* note 25.

121 See Jean-Marc Sorel, 'La prise en compte des collectivités territoriales non-étatiques par les organisations internationales à vocation universelle' in Société française pour le droit international (ed.), *Les collectivités territoriales non-étatiques dans le système juridique international* (Pedone, Paris, 2002), pp. 125–144; Viola, *supra* note 14, pp. 185–186.

law-making processes in IOs, albeit not as members: they need not be limited to one type of private representative only. Here again the ILO comes to mind with the recent controversy around the international representation of workers by trade unions, at first, and then by NGOs as well.[122] One may also mention the trade-offs made in certain IOs such as the UN Food and Agriculture Organization between the representative role of so-called 'classical' NGOs and that of 'affected persons' organizations' (APOs).[123]

On the other hand, *the articulation between public executive and parliamentary representation*. Some IOs (e.g. Council of Europe [CoE], North Atlantic Treaty Organization [NATO] or Organization for Security and Cooperation in Europe [OSCE], and most regional IOs actually)[124] have parliamentary assemblies where (States) peoples are represented by members of their domestic parliaments, and not only by governmental delegations in the IOs' executive organs. This kind of parliamentary representation by delegation within IOs is still a case of democratic representation by States and, moreover, one that, most of the time, does not imply law-making powers. However, it comes the closest to having directly elected international representatives in IOs and hence to the democratic principle of ultimate, effective popular control mentioned before.

This public role IOs could play in the multiple international representation system may actually be one of the reasons, as mentioned in the introduction, one should aim at (re-)institutionalizing IOs as public international institutions in the face of growing deformalization and public-private hybridization of IOs.[125] It is not enough to claim that IOs promote 'public interests' or 'goods'[126] or exercise 'public authority'[127] to conclude that they should be considered 'public'. IOs also need to actually embody by law the public position they claim to hold and be vested with the public authority they purport to exercise.[128]

Secondly, another institutional feature of many so-called 'universal' IOs that makes them pivotal in the multiple international representation system lies in

122 See Maupain, *supra* note 120; Dubin and Runavot (2013), *supra* note 3, pp. 92–93; Louis and Ruwet, *supra* note 25.

123 See von Bernstorff (2021), *supra* note 8, pp. 126 fn. 2, 127–129 and 148.

124 See Bjørn Høyland, 'Parliaments' in J. K. Cogan, I. Hurd and I. Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford University Press, Oxford, 2016), pp. 783–801. On this regional specificity, see Dubin and Runavot (2013), *supra* note 3, p. 90.

125 See Roger, *supra* note 23.

126 See e.g. Golia and Peters, *supra* note 18.

127 See e.g. von Bogdandy, Goldmann and Venzke, *supra* note 4; Krajewski, *supra* note 26.

128 See Besson (2021c), *supra* note 38, p. 311; Besson (2023), *supra* note 38.

their *universality*. Their being open to all States equally,[129] their guaranteeing the sovereign equality of those States (e.g. art. 2(1) UNC),[130] together with their granting each of them one seat and then one vote[131] enables them to guarantee and even protect the political equality of all those States' peoples, one of the four democratic principles mentioned before.

By being, in principle, open to all States, universal IOs may indeed contribute to correcting the imbalances of political power between States in other international law-making processes, and hence counterbalance the permanent minority status of certain States therein, such as Global South States for instance. Their political equality may even be protected more effectively by IOs through various egalitarian correctives.[132] IOs could do so, for instance, through the introduction of quotas of national officials in their various organs. One should also mention the egalitarian role that could be played by regional groups[133] within universal IOs or, in some cases, by regional IOs[134] within universal IOs. By introducing such regional correctives, universal IOs may indeed ensure that the unequal distribution of certain views across the world and the skewed representation thereof by States be corrected and especially that all legal cultures be represented, and not only the most prevalent ones.[135]

Finally, the universality of IOs may also enable them to ensure more equality in the representation by other public or private institutions such as cities or NGOs that, left to their own means, would over-represent certain peoples or certain region(s) and under-represent others. Thus, IOs could require the latter's participation to be conditional upon a universal coverage of all peoples or region(s) within the IOs' law-making processes.

129 See e.g. Athena D. Efraim, *Sovereign* (*In*)*equality in International Organizations* (Martinus Nijhoff, The Hague, 2000).

130 See Besson (2022), *supra* note 10.

131 See e.g. Boutros Boutros-Ghali, 'Le principe d'égalité des États et les organisations internationales', (1960) 100 *Recueil des cours de l'Académie de droit international de La Haye* pp. 9–71.

132 See Besson (2022), *supra* note 10.

133 See Mathias Forteau, 'International Organizations or Institutions, Regional Groups' in R. Wolfrum (ed.), *Max Planck Encyclopedias of International Law* (Oxford University Press, Oxford, 2008), 20 April 2022.

134 See Besson (2021a), *supra* note 79, pp. 388–391; Catherine Brölmann, 'Review of L. Boisson de Chazournes (2017) Interactions between regional and universal organizations: A legal perspective' (2020) 114:2 *American Journal of International Law* pp. 335–340; Damian Chalmers, 'Regional Organizations and the Reintegrating of International Law' (2019) 30:1 *European Journal of International Law* pp. 163–167.

135 See Besson (2021a), *supra* note 79, p. 397.

Thirdly, to the extent that IOs work themselves as institutional fora of international law-making and do not in principle represent peoples in other international law-making processes or institutions, they do not play a strictly representative role. This is what one may refer to as their *external* role in the multiple international representation system. This partly overlaps with IOs' role as a public referent or guarantor of international representation mentioned earlier.

IOs' external position may enable them to require all public and private representatives involved in its organs and procedures to comply, internally, with the four principles of democratic legitimacy presented before and thereby to compensate for their respective democratic shortcomings. This is even more important for public and private institutions other than States, such as regions, cities, NGOs or even TNCs, that do not yet have a clear institutional status under international law.[136] The institutionalization of their democratic representative role within IOs may give the latter the power to steer their organization under international law in general.

Starting with their Member States, certain IOs (such as the EU, for instance) have required or could require them to be organized democratically. They may also call for those States' international law-making agenda within the IO to be deliberated over in domestic parliamentary settings and be based on a parliamentary mandate or, at least, to be part of the government's recurring electoral agenda, thus allowing for a domestic electoral sanction of the government's IO politics. IOs may also require, through an accreditation mechanism,[137] that State (executive, legislative or judicial)[138] representatives in the IOs' various (executive, legislative or judicial)[139] organs be politically accountable domestically. This could be the case when States delegate ministers, parliamentarians, judges etc. to various IO organs instead of only delegating professionals or experts. Further, IOs could also require their Member States to share, depending on the topics, their representative role in IOs with infranational public

136 See Besson (2021b), *supra* note 7, paras. 60–62.

137 See Louis and Maertens, *supra* note 1, pp. 159–60.

138 The question of the separation of powers within IOs is closely related to that of international (public, at least) representation, even if, for reasons of scope, the present article focuses on representation only.

139 On the prospects of the separation of powers within IOs, see Jochen von Bernstorff, 'Authority Monism in International Organisations: A Historical Sketch' in J. Mendes and I. Venzke (eds.), *Allocating Authority: Who Should do What in European and International Law?* (Hart, Oxford and Portland, 2018), pp. 99–113, 100; Cullen, *supra* note 81.

institutions, such as regions or cities, in order to compensate each of those public institutions' respective international representative shortcomings.[140]

Further, the same could apply to other public or private representative institutions whose internal organization may present democratic deficits. Thus, IOs may require that only NGOs that have been elected or, at least, controlled by the peoples they claim to represent or only NGOs that are sufficiently transparent about their decision-making process or their sources of funding be allowed to participate in given IO organs and processes.

Thanks to those three specificities, IOs offer, *per se*, a particularly able institutional platform to implement and organize a system of multiple international representation. This is true as much with respect to correctives to the individual democratic shortcomings of each public or private institution representing the peoples of this world, as to the mutual compensation of those deficits between those multiple representative institutions.

On the one hand, indeed, IOs may be organized so as to institutionalize *individual correctives* to the democratic deficits of public or private representatives.

IOs may foresee, within their own institutional settings, individual correctives to some of the democratic shortcomings of States. One may think, as I mentioned before, of IOs' requirement that their Member States be organized democratically and that State representatives within each IO be electorally accountable domestically for their IO agenda to their respective peoples. One should also mention the compensation of demographic inequalities between States through weighted voting rights or the introduction of double majorities in certain IO organs. A corrective for permanent State minorities may be the introduction of rotating presidencies or membership in IO executive bodies. A corrective for the unequal distribution of views across States could be inserting regional groups in the composition of IO organs and regional quotas in IO personnel. Another example may be the compensation for the non-deliberative use of State consent as veto through the introduction of a requirement of reason giving (e.g. at the UN Security Council)[141] or other participative requirements in certain IO decision-making processes (e.g. adopting memoranda of understanding as intermediary deliberative products before IO treaties are concluded).

140 See Jacob Katz Cogan, 'International Organizations and Cities' in H. Aust and J. Nijman (eds.), *Research Handbook on International Law and Cities* (Edward Elgar, London, 2021), pp. 158–172; Besson and Martí (2021), *supra* note 110, pp. 350 and 353.

141 See Daniel Moeckli and Raffael Fasel, 'A Duty to Give Reasons in the Security Council: Making Voting Transparent' (2017) 14:1 *International Organizations Law Review* pp. 13–86.

IOs may also be organized so as to fix the individual democratic shortcomings of other public or private institutions representing people. One may mention, for example, IOs' requirement that NGOs or other civil society representatives be democratically organized[142] and that NGO representatives within each IO be electorally or otherwise accountable for their IO agenda to their members. Another example is IOs' ability to compensate for the demographic or regional inequalities and over/under-representation in NGO representation through the introduction of representative quotas of peoples or regions represented by those NGOs in certain IO organs. Finally, a subsidy system may ensure that all relevant NGOs, including poorer or less powerful ones, be able to participate in IO procedures as representatives.

On the other hand, IOs may also be organized so as to enable the *mutual compensation* of democratic deficits of public and private institutions by articulating them properly.

As we have seen, indeed, IOs may contribute, through the organization of complementary representation, to overcoming the respective democratic shortcomings and the over- or under-representativeness of every single public and private institution claiming to represent the peoples of the world. Thus, IOs may contribute to compensating the egalitarian deficit of representation by weak or minority States by organizing the parallel and coordinated representation by powerful (and usually more densely populated, which also contributes to correcting demographic imbalances of pure State-based representation) global cities situated in those States. This was the case, for instance, of Brazilian cities whose inclusion in the 21st Conference of the State Parties (COP21) helped Brazil affirm its position in the treaty negotiations. Another example may be the compensation of the deficit in popular control in the representation within IOs of certain peoples by non-democratic States or by States whose authority is not recognized by those peoples (e.g. indigenous peoples), through the organization of the parallel and coordinated representation by NGOs or cities. Thus, one may mention the role played in the standard-setting procedures set up by various UN Agencies by Chinese cities whose authorities are often elected and hence under more effective, popular control than the Chinese government itself.

A final example may be the correction of States' recourse to potentially self-interested vetoes in multilateral IOs through the organization of the parallel and coordinated representation by cities and NGOs in the IO law-making

142 See also Peter J. Spiro, 'Accounting for NGOs' (2002) 3:1 *Chicago Journal of International Law* pp. 161–169.

processes. Cities and NGOs have clearly been associated with the promotion of global common concerns and have thereby contributed, when applicable, to enriching certain States' self-interested international agenda. This interceding ability of cities is actually something that many IOs in charge of matters such as climate, migration or poverty alleviation, like the UN, have understood.[143] As a result, they increasingly require their Member States to reform their internal organization in order to grant more political power to regional institutions, including cities.[144]

Finally, one should note that certain IOs have also tended to become members of other international institutions, including other IOs, or at least to become active participants in international law-making processes that take place outside the IO. As a result, those IOs may not only function as institutions of multiple international representation, as discussed so far, but also act themselves as representatives of (States) peoples in some other international institutions or processes.[145] One may think of the EU's external relations here, of course, but also, and increasingly so, of other regional or specialized IOs that engage in international law-making with other IOs or third States.[146] To the extent that some IOs have States as members and hence, when they represent those States' peoples, do so for the peoples those States already represent, this makes for a complex two-tier form of international public representation.[147]

It is important to stress, however, that all IOs are different in this respect of further international representation. Any generalizations would be difficult as

143 See Cogan, *supra* note 140.

144 See Besson and Martí (2021), *supra* note 110, p. 350.

145 This is a source of confusion in the literature where the term 'representation' by IOs is used to refer to different relations: (i) the participation of Member States (through officials and hence 'representatives' *stricto sensu*) in the organization *qua* members, including the association of third States or other institutions by extension (see e.g. Dubin and Runavot [2013], *supra* note 3, pp. 82–88; Stephen Mathias and Stadler Trengove, 'Membership and Representation' in J. K. Cogan, I. Hurd and I. Johnstone [eds.], *The Oxford Handbook of International Organizations* [Oxford University Press, Oxford, 2016], pp. 962–984); (ii) the (political) representation of Member States' peoples by the participation of those States (through their officials) and other public and private institutions within those IOs (see e.g. Dubin and Runavot [2013], *supra* note 3, pp. 88–93); and (iii) the representation of Member States' peoples by the IOs outside of the organization. On the ambivalence of the term 'representation' in IOs, see also Louis and Maertens, *supra* note 1, pp. 157 *et seq.*; Louis and Ruwet, *supra* note 25.

146 On the international law of regional IOs, see the work of the ILA Study Group created in 2021 and co-chaired by Samantha Besson and Eva Kassoti, <https://www.ila-hq.org/index.php/study-groups>, 20 April 2022.

147 See on the dual international representation by cities and States, Besson and Martí (2021), *supra* note 110.

a result. Moreover, unlike States, they are not equal under and before international law. To that extent, there are no international legal correctives as of yet for their material inequalities in size, resources, domains or scope (e.g. regional or universal). This makes it difficult therefore to simply transpose onto them the egalitarian and democratic argument made earlier for the pivotal role of States *qua* public representatives of (States) peoples in democratic international law-making.[148] In any case, those difficulties cannot be overcome before the role of those IOs as background or referent public institutions in the multiple international representation system is fully understood and institutionalized along the lines discussed in this section. Indeed, respect for the principles of democratic legitimacy by those regional or specific IOs will require one or many universal IOs as public external guarantors of their role in the multiple international representation system.[149]

3.3.2 Reforming International Organizations in a Multiple International Representation System

Whatever the general virtues of IOs for the institutionalization of the multiple international representation system just presented, one should also warn against some of their important drawbacks in practice.

To some extent, indeed, IOs have the capacity to exacerbate the democratic shortcomings of each of the public and private representative institutions involved in international law-making, and have often done so. This is due to their original non-politicized institutional set-up which I presented earlier, as much as to some of the good governance measures adopted since the 1990s to contain their independent international law-making and which I have criticized for their further depoliticizing effects. IOs may therefore be seen as a double-edged institutional sword in the current international representation system: they have the potential to be not only the guarantor of multiple international representation, but also its main threat.

The main difficulty lies in the institutional structure of IOs, and in particular in States' membership. Indeed, that membership does not only enable IOs *qua* public, universal and external institutional referents to correct the democratic deficits of their Member States, as I have just argued it could. It also enables

148 See Besson and Martí (2021), *supra* note 110; Besson (2021b), *supra* note 7, para. 70; Besson (2022), *supra* note 10. *Contra*: Jeffrey L. Dunoff, 'Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations' (2012) 43 *Netherland Yearbook of International Law* pp. 99–127.

149 See Besson (2021a), *supra* note 79, pp. 398–399.

them to magnify those shortcomings depending on some of those States' original and ulterior influence on their IOs' internal organization.

This depends in particular, on the one hand, on the military, political or economic power certain States exercised over others at the IO 'instituent' moment.[150] Think, for instance, of the political power imbalances that applied when the international institutional order was reformed in 1945 and the UN was created with its Security Council governed by five permanent members.[151] One may also think of the financially weighted voting structure within the International Monetary Fund (IMF). Another example is that of the economic power imbalances between World Trade Organization (WTO) Member States that brought some of them not so much to institutionalize those inequalities within the WTO itself, but to institute other competing regional IOs later on in order to preserve their privileges and entrench those imbalances.[152] The recent multiplication of regional IOs actually confirms this trend towards the selective inclusion of certain States and, accordingly, the promotion of the equality of some (regional) States at the price of the inequality of all.[153]

One may also mention, on the other hand, and at a later stage in the existence of an IO, the growing privatization of certain States' delegations and activities and its influence on the interstate processes within the IO.[154] Think, for instance, of how certain States in close relationship to certain private groups have organized for their IOs to delegate some of their law-making or law-enforcement powers to expert bodies or transnational networks featuring those very private groups. This is a way for those States to preserve their privileges in spite of the institutionalization of the formal equality of States within the IO, under the cover of market neutrality or universal technical expertise.

It follows therefore that IOs' capacity to correct political inequalities between States and the peoples they represent, through the various institutional mechanisms discussed in the previous section, is as high as their ability to multiply those inequalities and even entrench or institutionalize them.[155]

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150 For a historical account, see Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, Cambridge, 2004).

151 On 'hierarchical multilateralism', see Viola, *supra* note 14, pp. 187 *et seq*.

152 See Lagrange, *supra* note 108; Dubin and Runavot (2013), *supra* note 3, pp. 82–84.

153 On 'exclusive multilateralism', see Viola, *supra* note 14, pp. 205 *et seq*. and 228.

154 See e.g. Berman, *supra* note 65, pp. 227–254.

155 See also Viola, *supra* note 14, p. 166; Viola, Snidal and Zürn, *supra* note 10, pp. 230–231; Franck Petiteville, 'Bilan contrasté des organisations internationales' in B. Badie and D. Vidal (eds.), *Un monde d'inégalités* (La découverte, Paris, 2017), pp. 121–131; Besson (2022), *supra* note 10.

IOs' informal institutional practice has confirmed the danger. In spite of their formally egalitarian legal framework and some of its legalized exceptions, indeed, IOs have a mixed record in terms of respect of political equality internationally,[156] not to mention of respect of the other democratic principles pertaining to democratic representation by States and other public or private institutions.

With respect to equal *State representation* in IOs, on the one hand, it suffices to mention the club-like organization of certain IO organs that favours certain powerful States over others,[157] thereby entrenching permanent majorities and minorities. Further, certain IOs have replaced the formal and sovereign equality-based 'one State, one vote' system[158] by a practice of less egalitarian and less transparent voting rules such as consensus.[159] The latter enables powerful States to exercise an unequal influence on consensus building thanks to existing coalitions and networks they belong to. Mention should also be made of the financing of IOs. The fact that the latter are increasingly dependent on voluntary donations by certain Member States, or even by private persons more particularly linked to certain States (notably because of their nationality), gives the latter a privileged status in the decision-making procedures of the IO.[160] Another deficit, in effective popular control this time, that characterizes the practice of highly professionalized IOs such as the ILO or the WHO, is that State representatives in the IOs' various organs (executive, legislative or

156 On the difference between legalized and simply institutionalized inequalities, see Besson (2022), *supra* note 10.

157 On States' clubs in general, see Viola, *supra* note 14, pp. 172 *et seq*.

158 *Article 3, Paragraph 2, of the Treaty of Lausanne* (*Frontier Between Turkey and Iraq*), 21 November 1925, Permanent Court of International Justice, Advisory Opinion, *Publications C.P.I.J. Series B. No. 12*, p. 29. Here the contrast is not between 'unanimity' and 'majority' voting to the extent that the latter is usually considered to be more egalitarian than the former in democratic theory. The same may be said about majority voting by States provided each State has one vote and has consented to majority voting in the IO (see also Cheneval, *supra* note 75). As a matter of fact, two thirds of existing IOs today apply some kind of majority-based voting procedures. See also Besson (2022), *supra* note 10.

159 See von Bernstorff (2010), *supra* note 2, pp. 792–794; Viola, Snidal and Zürn, *supra* note 10.

160 See Kristina Daugirdas and Gian Luca Burci, 'Financing the World Health Organization: What Lessons for Multilateralism?' (2019) 16:2 *International Organizations Law Review* pp. 299–338; Stacy Williams, 'A Billion Dollar Donation: Should the United Nations Look a Gift Horse in the Mouth?' (1999) 27:2 *Georgia Journal of International & Comparative Law* pp. 425–456, 449.

administrative) are usually not politically accountable officials, such as ministers or parliamentarians, but professional experts.[161]

Moving to actual law-making and law-enforcement, one should also emphasize the circumvention of by-default State representation in interstate (so-called 'political') IO organs. This occurs, for instance, through a high rate of delegation of law-making or, at least, of law-enforcement powers from those organs either to secretariats or technical organs inside the IOs or to expert networks or informal fora (such as G-groups) outside the IOs or even to private agencies.[162] This has enabled certain powerful States to circumvent political equality and to exert an undue influence in expert bodies when their larger domestic technoscientific or otherwise bureaucratic resources enable them to. One should also signal the growing recourse to standardization and, more generally, to soft law instead of IO formal secondary law. These procedures do not respect the principle of equal participation of States and therefore often favour the most powerful States or those States within the international organization with the strongest private connections in standardization bodies.[163]

On the other hand, one should mention the increasing role given since the 1990s to *other public* (*e.g. cities*) *and private* (*e.g. NGOs*) *institutions* by IOs,[164] often at the price of the latter's Member States.[165] Most of the time, indeed, this has occurred without a clear articulation of those other institutions' 'participation'[166] or 'association' with States', despite the fact that they represent the very same peoples. As a matter of fact, those allegedly 'participatory' mechanisms and 'partnerships' with NGOs and other private 'actors' have not even been organized so as to be very effective in representative terms: they are mostly advisory (e.g. they give private institutions a 'voice', but no 'vote'). Those other public or private institutions' distant involvement in IO processes somehow dispenses IOs and their Member States from drawing the full institutional consequences of their representative role.[167] For that to be the case, indeed,

161 See Louis and Maertens, *supra* note 1, pp. 159–60.

162 See von Bernstorff (2010), *supra* note 2, pp. 786–789 and 795 *et seq*.; Berman, *supra* note 65, pp. 234–235.

163 See e.g. Lorenz Langer, 'Implications of Soft Law Regimes for Small States: The Experience of Switzerland and Liechtenstein' (2020) 30:2 *Swiss Law Review of International and European Law* pp. 235–264; Berman, *supra* note 65, pp. 233–234.

164 See Besson and Martí (2021), *supra* note 110, p. 350; Cogan, *supra* note 140.

165 See Andrew Hurrell and Nicholas Lees, 'International Organizations and the Idea of Equality' in B. Reinalda (ed.), *Routledge Handbook of International Organization* (Routledge, London, 2013), pp. 106–118.

166 See e.g. Peters (2009), *supra* note 109; Krajewski, *supra* note 26, paras. 19 *et seq*.; Peters (2022), *supra* note 20.

167 See also Spiro, *supra* note 142, pp. 166–167.

NGOs' accreditation by IOs would have to require them to be democratically organized and controlled by the peoples they claim to represent (provided they do, rather than merely claim to 'be' those peoples),[168] but also to ensure that they do not over- or under-represent certain peoples.

Again, what this bleak picture of democratic representation by public and private institutions within IOs confirms is that the internal organization of IOs has not followed, and still does not follow any political design. Ironically, what makes the situation more difficult to criticize from a democratic perspective is that the association of those other institutions in IO processes is usually justified by the vague, and mostly empty, reference to the need for greater 'inclusion' or 'participation' of (more or all) 'stakeholders'[169] or of the 'most affected persons',[170] albeit without a truly political agenda.[171]

Multiple international representation does not simply occur by chance, especially in a context of global governance characterized by depoliticization. This calls for careful political reform of existing IOs and for a detailed institutional design of future ones. Those democratic reforms of the international institutional order need to be driven by the represented peoples themselves,[172] however, and through the control of all their public (esp. States and cities) and private (esp. NGOs) representatives at the same time. This is the only hope to constrain the various powers in place, be they public or private.

Of course, the institutional design of multiple international representation depends largely on the context, and IOs vary greatly in size or area of specialization. As a result, there can be no 'one (institutional) design fits all' IOs.[173] The difficulty is that reforming and designing each IO separately may actually exacerbate the inegalitarian tendencies that have just been discussed. It also raises a coordination problem. The priority should be placed therefore on re-institutionalizing the UN. Its very specific universality, publicness and generality

168 See e.g. von Bernstorff (2021), *supra* note 8, pp. 152–155.

169 See e.g. Jonas Tallberg, Thomas Sommerer, Theresa Squatrito and Christer Jönsson, *The Opening Up of International Organizations: Transnational Access in Global Governance* (Cambridge University Press, Cambridge, 2013); Alexandru Grigorescu, *Democratic Intergovernmental Organizations? Normative Pressures and Decision-Making Rules* (Cambridge University Press, Cambridge, 2015).

170 See e.g. von Bernstorff (2021), *supra* note 8, pp. 152–155.

171 See also Besson and Martí (2021), *supra* note 110, pp. 341–344.

172 Think, for instance, of how the peoples of small EU Member States negotiated the formal introduction of the principle of equality of EU Member States into Art. 4(2) of the Treaty on European Union in 2009. See Federico Fabbrini, 'States' Equality v States' Power: The Euro-Crisis, Inter-State Relations and the Paradox of Domination' (2015) 17 *Cambridge Yearbook of European Legal Studies* pp. 3–35.

173 Besson and Martí (2018), *supra* note 27, p. 538; Besson and Martí (2021), *supra* note 110.

make it an institutional framework of reference for international democratic representation *par excellence*. The question is whether the many reforms proposed here may actually take place at the UN without a 'revolution'.[174]

Conclusions

The international legal and institutional order is in crisis. Contestation is rising from different circles that range from disaffected citizens to unequally treated States, both democratic and non-democratic. This requires facing the question of that order's political, and especially democratic, legitimacy openly after years of unsuccessful containment and, as this article has argued, largely distracting discussions about global 'good governance'. Doing more than paying lip-service to the democratic legitimacy of international law, however, implies identifying, besides its legal aspects, the institutional contours of international 'good government'. This means caring for democratic representation in particular. This is how one may understand the UN General Assembly's call for 'a democratic international order', one that requires 'democratic institutions' and 'equal participation' in their decision-making processes.[175]

IOs have become key institutions in contemporary international law-making. Their increase in authority has, however, come together with a steady decrease in politicization. No wonder therefore they should be at the core of the proposed project of democratic re-politicization of the international institutional order. IOs' institutional specificities actually make them pivotal to the realization of the multiple international representation model endorsed in this article. As background public, universal and external institutions, they could, and should contribute to implementing a system of international representation that approaches multiple public and private institutions claiming to represent peoples of the world as a part of a continuum of international representatives. This is true with respect as much to institutionalizing correctives to the democratic shortcomings of each representative institution, as to organizing the mutual compensation of their respective deficits. In turn, this may actually lead to the (re-)institutionalization of a set of public IOs in international law in general.

Of course, a lot remains to be clarified. More research should be done, for instance, on the institutional design of the kind of universal public IOs, both

174 See Monique Chemillier-Gendreau, *Pour un Conseil mondial de la résistance* (Textuel, Paris, 2020). See also, more generally, von Bernstorff (2021), *supra* note 8, p. 157.

175 See UN General Assembly, Resolution 75/178, *supra* note 16, Preamble p. 3 and para. 6(g).

general and specific, needed for the multiple international representation system to be implemented, and especially the UN. On the other hand, more clarity is also called for about the increasing representative role of certain (usually regional) IOs themselves in international law-making processes, including in other (usually universal) IOs. The latter's role as public institutional framework of reference for international democratic representation is made even more pivotal as a result.

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