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# A Democratic Rule of International Law

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## Abstract

*This article examines the way in which we should make sense of, and respond to, the democratic deficit that results from global governance through international law following the partial collapse of the Westphalian political settlement. The objective is to evaluate the possibilities of applying the idea of deliberative ('democratic') legitimacy to the various and diverse systems of law. The model developed at the level of the state is imperfectly applied to the inter-state system and the legislative activities of non-state actors. Further, regulation by non-state actors through international law implies the exercise of legitimate authority, which depends on the introduction of democratic procedures to determine the right reasons that apply to subjects of authority regimes. In the absence of legitimate authority, non-state actors cannot legislate international law norms. The article concludes with some observations on the problems for the practice of democracy in the counterfactual ideal circumstances in which a plurality of legal systems legislate conflicting democratic law norms and the implications of the analysis for the regulation of world society.*

## 1 Introduction

This article analyses the way in which we should make sense of, and respond to, the democratic deficit that results from global governance through international law following the partial collapse of the Westphalian political settlement. The law norms that regulate the conditions of social, economic, and political life are no longer the exclusive product of domestic, democratic processes (consider, for example, the regulatory role of international human rights law and resolutions adopted by the Security Council of the United Nations). International law increasingly asserts a right to

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determine the normative situation of citizens of democratic states, without, it would seem, any meaningful connection to the idea of democratic legitimacy. The increase in global regulation and reduction in the importance of sovereign consent for the introduction of international law norms reflect a shift from an essentially contractual model of inter-state relations to an international public law governance model that constrains the exercise of domestic political self-determination, resulting in a loss for democracy, as the people no longer decide all of those issues that are politically decidable through democratic procedures.<sup>1</sup>

No authoritative meta-narratives have emerged to explain the revised allocation of political authority, or to provide justification for the consequential deficit in the practice of domestic democracy. Four possibilities present themselves: to abandon the project of democracy beyond the state,<sup>2</sup> and look for other bases of legitimacy – the delegation of ‘sovereign powers’, welfare enhancing benefits of global governance ‘for the people’, or good governance by experts (those who ‘know better’); to democratize global governance through the introduction of democratic institutions and principles; to introduce *ex ante* popular controls (referendums, etc.) in relation to the adoption of the more important international law obligations; or to allow the *ex post facto* rejection of international law norms by the state in accordance with the will of the people.<sup>3</sup> Once the exercise of domestic political self-determination is understood in the context of the authority of international law, the choice is straightforward: we must abandon the project of democracy beyond the state, or look for ways in which the systems of global governance can be made more democratic, given that the concept of ‘international law’ becomes incoherent in the absence of a presumption that its norms are binding: the rule of international law.

The objective here is to evaluate the possibilities of applying the idea of deliberative (‘democratic’) legitimacy to the various and diverse systems of law. Following an overview of the problematic relationship between international law and democracy and the literature on the democratization of global governance, the article outlines Jürgen Habermas’ model of deliberative democracy, which argues that, in the absence of objective ‘truths’ that determine ‘right policy’, political truths (i.e., contingent, contestable positions) can be established only through acts of communicative reason in which all those subject to a regulatory regime (or their representatives) agree, through reasoned discussions, the scope and content of regulatory norms. The

<sup>1</sup> Cf. Michelman, ‘The 1996-97 Brennan Center Symposium Lecture’, 86 *Californian L Rev* (1998) 399, at 412.

<sup>2</sup> See Goodhart, ‘Europe’s democratic deficits through the looking glass: the European Union as a challenge for democracy’, 5 *Perspectives on Politics* (2007) 567; also Weiler, ‘The Geology of International Law: Governance, Democracy and Legitimacy’, 64 *ZaöRV* [Heidelberg Journal of International Law] (2004) 547; Christiano, ‘A democratic theory of territory and some puzzles about global democracy’ 37 *J Social Philosophy* (2006) 81; and Nagel, ‘The Problem of Global Justice’, 33 *Philosophy and Public Affairs* (2005) 113.

<sup>3</sup> Cf. judgment of the German Federal Constitutional Court on the Acts approving the Treaty of Lisbon: Bundesverfassungsgericht (Treaty of Lisbon), BVerfG, 2 BvE 2/08 of 30 June 2009, available at: [www.bverfg.de/](http://www.bverfg.de/).

model developed at the level of the state is (imperfectly) applied to the inter-state deliberations that lead to the adoption of international law norms (a form of 'deliberatively diplomacy') and to the 'legislative' activities of non-state ('non-sovereign') actors. The argument is that systems of global 'law', properly so called, are established where the participants and observers code normative obligations in terms of the binary legal/illegal divide, with some form of legal infrastructure, i.e., 'lawyers', to judge compliance. Further, the idea of regulation implies the exercise of authority, and the idea of legitimate authority depends on the introduction of democratic procedures to determine the right reasons that apply to subjects of authority regimes. In the absence of legitimate authority, an institution does not possess the ability to determine the normative situation of others: it cannot legislate (international) 'law' norms. The article concludes with some observations on the problems for the practice of democracy in the counterfactual ideal circumstances in which a plurality of legal systems legislate conflicting democratic law norms, and the implications of the analysis for the regulation of world society.

## 2 The Democratic Deficit of Global Governance

The Westphalian settlement, according to the positivist orthodoxy, constructed the modern political world, establishing the sovereign territorial state and dividing the idea of law along a strict binary line: (internal) state law in accordance with a self-given constitutional law order, and (external) inter-nation law that relied on sovereign consent for the establishment of international law norms (the 'Lotus' principle).<sup>4</sup> The settlement provided a clear demarcation of regulatory responsibilities between the domestic law system (social, economic, and political life within the state) and international law (relationships between sovereigns). Within the state, it is now accepted that the legitimacy of law depends on the institutionalization of democratic procedures. The legitimacy of international law is provided by the requirement of sovereign consent, constructing a counterfactual ideal in which political legitimacy rests on an expression of sovereign will and the consent of all subjected states. This two-track model is no longer sufficient to explain the legitimacy and authority of political power, given that global law norms are increasingly intrusive in the regulation of issues previously within the *domain réservé* of the state; sovereign will is no longer central to the development of international law; and non-state actors, such as the United Nations (UN) and European Union (EU), have emerged as significant producers of law norms. An essentially contractual model of inter-state relations is replaced, or supplemented, by an international public law model of global governance, reflected, for example, in the development of a normative hierarchy in international law (norms of *jus cogens*, etc.) and the emergence of a modern form of customary international law that relies on widely accepted international law-making treaties and ('soft') resolutions of international organizations as evidence of state practice and the requisite *opinio juris*.

<sup>4</sup> *Case of the S.S. 'Lotus'*, PCIJ, Ser. A, No. 10, at 18.

Following the identification of a democratic deficit that results from the globalization and fragmentation of governance functions,<sup>5</sup> a literature on the democratization of global governance has emerged which can, broadly, be divided into three. First, arguments that locate the practice of democracy within the Westphalian frame (i.e., democracy in the context of the state), and which call for an affirmation of the importance of state sovereignty to protect domestic democracy;<sup>6</sup> or the establishment of a global democratic (federal) state;<sup>7</sup> or the establishment of a covenant of peace between democratic states.<sup>8</sup> Secondly, arguments for compensatory forms of democratization at the global level, principally through an application of the parliamentary principle of democracy to international organizations;<sup>9</sup> or the enhancement of their accountability to those affected by their regulatory activities.<sup>10</sup> Thirdly, arguments that seek to subject the amorphous conditions referred to as ‘globalization’ to the disciplinary constraints of democracy, that is to apply the principle of cosmopolitan democratic law to fragmented political communities of fate;<sup>11</sup> or allow the dominant global discourses to be challenged by providing a greater role for international non-governmental organizations and other civil society actors.<sup>12</sup>

The various arguments are in many ways illuminating, but not convincing to the discipline of international law. The consequences of industrialization, globalization, and modernization have resulted in policy issues that states acting alone cannot

<sup>5</sup> Cf. Alvarez, ‘Introducing the Themes [International law and democratic theory]’, 38 *Victoria U of Wellington L Rev* (2007) 159.

<sup>6</sup> Young, ‘The Trouble with Global Constitutionalism’, 38 *Texas Int’l LJ* (2007) 527; also J. Rabkin, *Law without nations? Why constitutional government requires sovereign states* (2005); Bolton, ‘Should we Take Global Governance Seriously?’, 1 *Chicago J Int’l L* (2000) 205; Yoo, ‘UN Wars, US War Powers’, 1 *Chicago J Int’l L* (2000) 355; and Bradley and Goldsmith, ‘Federal Courts and the Incorporation of International Law’, 111 *Harvard L Rev* (1998) 2260.

<sup>7</sup> Cf. Lu, ‘World Government’, in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2006 Edition).

<sup>8</sup> See I. Kant, *Perpetual Peace: a philosophical essay, 1795* (trans. M. Campbell Smith, 1903); also J. Rawls, *The Law of Peoples* (1999).

<sup>9</sup> See Dahl, ‘Can International Organizations be Democratic? A Skeptic’s View’, in I. Shapiro and C. Hacker-Cordón (eds), *Democracy’s Edges* (1999); also Franck, ‘Fairness in Fairness Discourse’, in ‘Citizens in the international realm: the new participatory demands’, *American Society of International Law, Proceedings of the Annual Meeting* (2001), at 162; Falk, ‘On the Creation of a Global People’s Assembly: Legitimacy and the Power of Popular Sovereignty’, 36 *Stanford J Int’l L* (2000) 191; and Peters, ‘Dual Democracy’, in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009) 263.

<sup>10</sup> Majone, ‘Europe’s “Democratic Deficit”: the Question of Standards’, 4 *European LJ* (1998) 5; Lindseth, ‘Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community’, 99 *Columbia L Rev* (1999) 628; Grant and Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *Am Political Science Rev* (2005) 29; Keohane, ‘Global Governance and Democratic Accountability’, in D. Held and M. Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (2003), at 130; and Krisch and Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’, 17 *EJIL* (2006) 1.

<sup>11</sup> D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (1996); also Pogge, ‘Cosmopolitanism and Sovereignty’, 103 *Ethics* (1992) 48.

<sup>12</sup> Dryzek, ‘Transnational Democracy’, 7 *J Political Philosophy* (1999) 30; also Perez, ‘Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law’, 10 *Indiana J Global Legal Studies* (2003) 25.

regulate effectively (global warming, the international financial markets, and international terrorism, etc.), and states accept the need for highly focused cooperation and coordination efforts in the various sectors of global society (trade, environment, human rights, etc.). The two-track model of democratic legitimacy (democratic within the state and sovereign will for the establishment of international law norms) could be sustained on two conditions: that the scope and content of international law norms was subject to the democratic will of all states (and not only at the moment of adoption), and that states enjoyed a monopoly in the production of law norms. Given that this is not the case, the democratization of global governance cannot be achieved by proxy through state governments, i.e., by citizens influencing domestic governments with the expectation that their opinions will be accurately reflected and acted upon in global settings.

Arguments for the strengthening of sovereignty, for a confederation of democratic states, or the replication of state-like institutions at the global level fail to recognize and accommodate the extant nature of global governance, which operates without clearly defined jurisdictional boundaries or overarching constitutional framework. In the absence of agreement on a new international Constitution, the democratization of international law cannot proceed through the establishment of a world legislative assembly as there is no coherent system of world law that can be subjected to a process of democratization. Nor is there any prospect of a global state, democratic or otherwise, and there appears little to be gained from imagining the extant system as a global federation with the principle of democracy applied to each of the constituent units (the UN and member states). Any analysis of the possibilities of democratizing world society must first accept the realities of the partial collapse of the Westphalian political settlement, and recognize that the world of law is no longer constrained by the positivist analysis, which fails to capture the richness and diversity of legal regulation, including governance by formally constituted international organizations (the UN, EU, etc.); informal networks of national officials (Basel Committee on Banking Standards); public–private partnerships (The Global Fund to fight AIDS, Tuberculosis, and Malaria); informal groupings (Commission on Food Safety Standards); self-regulatory regimes (International Court of Arbitration for Sport); private institutions (Internet Corporation for Assigned Names and Numbers); private international governance mechanisms (Forest Stewardship Council and Fairtrade Labelling Organization); and the new *lex mercatoria* developed by informal communities of lawyers and arbitrators and codified in the UNIDROIT Principles of International Commercial Contracts 1994.

Unless we hold to the hitherto dominant positivist understanding that valid law is defined by reference to an expression of sovereign will, any analysis of the legitimacy and authority of law must accommodate the reality that the world of law includes both (Westphalian) state and international law, and forms of global regulation framed in terms of law not directly tied to an expression of sovereign will ('international governance'). Actors engaged with the practice of law beyond the state (i.e., 'international lawyers') are not only required to determine what states have willed through an exercise of sovereign authority, but also to evaluate the claims to authority of 'non-sovereign' systems of global regulation, and scope and content of their regulatory

norms. The necessary step in order to make sense of the democratization of global governance is to allow the possibility that systems of global regulation can be autonomous systems of law, with the existence and jurisdictional scope of the various ('self-contained') systems defined by a basic norm, or rule of recognition,<sup>13</sup> which functions as a conceptual device to allow those concerned with the identification and interpretation of law norms, in whatever capacity, to recognize and treat as 'law' the norms of the emergent systems of global governance. In relation to the United Nations, for example, the autonomy of the UN law is reflected in the constituent instrument (Article 103 UN Charter); in other cases autonomy is asserted through judicial decision.<sup>14</sup> Two possibilities present themselves: to accept that all global regulation framed in terms of law is part of international law (the argument might be particularly attractive where a putative regulator enjoys *de facto* authority, although it is contrary to our intuitions as lawyers to conclude that the ability to command in terms of law accords a right to command), or develop an analytical concept of law that allows a presumption in favour of the authority of valid 'law' norms. It is the second argument which is developed here.

### 3 A Revised Concept of (International) Law

There are any number of ways in which actors can frame their social relationships. A notable feature of global regulation is the framing of regulations in terms of 'law', i.e., in terms of the binary coding legal/illegal, as opposed, for example, to behaviour being 'undesirable', or not in accordance with 'best practice'. A notable example is the framing of 'soft' resolutions of the UN General Assembly in terms of 'hard' international law norms. Law is, at its most basic, as Niklas Luhmann observes, a system of communication that constructs its own boundaries through the operation of the binary distinctions between norms/facts and legal/illegal: the application of law norms to facts must be capable of resulting in a determination that impugned conduct is either lawful or unlawful, or some equivalent, judgmental, terminology.<sup>15</sup>

The existence of primary norms of obligation framed in terms of the binary coding is not sufficient to demonstrate the existence of a system of law. The concept of law developed by H.L.A. Hart has proved highly influential in the identification of systems of law, and ontological concerns around the status of international law as 'law'. In addition to primary norms of obligation, there must be secondary rules of recognition, change, and adjudication which 'specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined'.<sup>16</sup> These secondary (or 'constitutional') rules (about rules)

<sup>13</sup> H. Kelsen, *General Theory of Law and State* (trans. Anders Wedberg, 1961), at 111; H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 233.

<sup>14</sup> Cf. Case 26/62, *NV Algemene Transport en Expeditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1.

<sup>15</sup> See N. Luhmann, *Law as a Social System* (trans. Klaus Ziegert, 2004), at 58.

<sup>16</sup> Hart, *supra* note 13, at 94.

are acknowledged by the law officials of the legal system,<sup>17</sup> who act in accordance with a rule of recognition, which provides validity for all norms in the legal order and constitutes the normative order as a single system of law.<sup>18</sup> The distinctive characteristic of legal systems is that they are administered by law officials, broadly defined to include all those concerned with the interpretation and application of law norms, in whatever capacity.

The difficulty with the reliance on a concept of law developed at the level of the state, and based ultimately on an idea of law as a system of coercive, institutionalized norm enforcement, is that the concept proves problematic when applied in other contexts.<sup>19</sup> Brian Tamanaha observes that the assumption is that the criterion that defines state law ('institutionalized norm enforcement', for example) can define the idea of 'law'.<sup>20</sup> The essentialist definition includes state law, because state law served as the basis for formulating the abstract concept of law.<sup>21</sup> The definition proves problematic, however, when applied to other normative orders, as it includes normative systems that few would regard as law, and excludes normative orders generally accepted as law, including international law. Tamanaha accepts that the idea of law as an institutionalized system involving a union of primary and secondary rules is illuminating, but only in the context of state law systems. He concludes that '[w]hat law is and what law does cannot be captured in any single concept, or by a single definition'. Law is whatever we attach the label law to, and we have attached it, *inter alia*, to state law, international law, transnational law, international human rights law, customary law, natural law, and religious law. Despite the shared label, these are diverse phenomena and not manifestations of a single phenomenon: law has no essence.<sup>22</sup> The concept of law is not defined for all people, in all places, at all times by the hegemonic claims of jurisprudence: '[I]aw is whatever people identify and treat through their social practices as "law" (or *recht*, or *droit*, etc.).' The distinctive content of the manifestations of law are determined by the social actors who give rise to them.<sup>23</sup> Law exists whenever there are social practices giving rise to 'law'.<sup>24</sup> A legal system does not require formal institutions, or law officials: 'any members of a given group can identify what law is, as long as it constitutes a conventional practice'.<sup>25</sup> Where there is a system of rules referred to as law, it is a legal system.

The analysis is important in removing the concept of law from its association with state law and allowing us to recognize and treat as 'law' aspects of global regulation framed in terms of law: international treaties and custom, 'soft law', and the legal regimes developed by transnational communities of bankers and lawyers, etc. There is, though, little to be gained analytically by accepting that a form of global regulation

<sup>17</sup> *Ibid.*, at 61.

<sup>18</sup> *Ibid.*, at 233.

<sup>19</sup> Cf. Kingsbury, 'The Concept of "Law" in Global Administrative Law', 20 *EJIL* (2009) 23.

<sup>20</sup> B. Tamanaha, *A General Jurisprudence of Law and Society* (2001), at 178.

<sup>21</sup> *Ibid.*, at 192.

<sup>22</sup> *Ibid.*, at 193.

<sup>23</sup> *Ibid.*, at 194.

<sup>24</sup> *Ibid.*, at 165.

<sup>25</sup> *Ibid.*, at 166.

is part of international law simply on the basis that the participants describe their normative arrangements in terms of (international) law. Whilst a large number of phenomena, including state law, international law, the customary law of indigenous peoples, etc., are conventionally described as law, Tamanaha accepts that the only elements common to all of these versions ‘are that they in some sense involve rules or principles and *all make a claim to authority*’.<sup>26</sup> Law is a social practice that involves the exercise and acceptance of authority framed in terms of law.

## 4 The Idea of Authority

The most influential account of authority is provided by Joseph Raz, who follows John Lucas: ‘[a] man, or body of men, *has authority* if it follows from his saying “Let *X* happen”, that *X* ought to happen.’<sup>27</sup> Authority is the ability to change the normative situation of others.<sup>28</sup> It is relational and dyadic, involving the issuing of directives by an authority to a subject, framed in terms of norms, standards, principles, doctrines, etc. The normal way to establish that a person has authority over another (the ‘normal justification thesis’ (NJT)) ‘involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly’.<sup>29</sup> The NJT is concerned with establishing that an actor has authority, not that the actor is entitled to authority. On this understanding, legitimate authority is likely to be established only where the putative authority already enjoys some measure of recognition and exercises power over its subjects, i.e., where it is also a *de facto* authority.<sup>30</sup>

The NJT is an ideal-type theory providing an explanatory basis for how authorities are supposed to function, how they should understand their function, and for evaluating their performance; it does not argue that authorities will always act for dependent reasons, only that they should do so.<sup>31</sup> The exercise of authority is justified if the authority is more likely to regulate in accordance with the ‘right reasons’ that apply to subjects than the subjects themselves.<sup>32</sup> The reasons that apply to subjects are the reasons for action or inaction that already apply to subjects. The exercise of authority is not justified on the basis that it serves some concept of the public interest; the requirement to coordinate the actions of subjects might be a necessary condition of political legitimacy, but it is not a sufficient condition. For an authority directive

<sup>26</sup> Tamanaha, ‘Law’, *Oxford International Encyclopedia of Legal History* (2008), available at: [http://papers.ssm.com/so13/papers.cfm?abstract\\_id=1082436](http://papers.ssm.com/so13/papers.cfm?abstract_id=1082436), at 14 (emphasis added); also Tamanaha, *supra* note 20, at 168–169.

<sup>27</sup> J. Lucas, *The Principles of Politics* (1966), at 16, quoted in J. Raz, *The Authority of Law* (1979), at 11 (emphasis in original).

<sup>28</sup> *Ibid.*, at 12.

<sup>29</sup> J. Raz, *The Morality of Freedom* (1986), at 53.

<sup>30</sup> *Ibid.*, at 56.

<sup>31</sup> *Ibid.*, at 47.

<sup>32</sup> *Ibid.*, at 61.



to be binding on subjects, it must be justified by reference to considerations that bind subjects.<sup>33</sup> The justification for the exercise of authority is that the individuals subject to the authority directive will be more likely to succeed in realizing what reason requires of them if subject to the directive than if left to themselves to determine what actions the right reasons that apply to them require.<sup>34</sup> The authority directive must express a view about what ought to be done, and it should be possible for the subject to comply with the directive without recourse to the reasons or considerations on which the directive purports to adjudicate. Individuals should accept the authority directive and not seek to reflect or deliberate on the relevant issues or come to an independent judgement. An authority cannot succeed in ensuring that subjects act in compliance with the right reasons that apply to them if it does not pre-empt reflection on the background reasons and seek compliance with authority directives.<sup>35</sup>

## 5 Authority and Democracy

No particular form of government, certainly not a democratic form,<sup>36</sup> appears to be required by the normal justification thesis and service concept of authority. Wojciech Sadurski accepts that the NJT is vulnerable to the criticism that it cannot be reconciled with the idea that citizens should have a 'critical, reflective attitude towards the authorities that govern them; a critical attitude characteristic of a democratic society'.<sup>37</sup> The problem lies in the focus on authority: Raz is less interested in the problem of legitimacy than in that of authority, with the analysis proceeding from a conception of legitimate authority (law must have or claim legitimate authority).<sup>38</sup> The concept of authority derives conceptually from the property of legitimacy. An authority which does not claim to be legitimate, or which is not recognized as being legitimate, is not an authority, a point emphasized in the vocabulary that describes the exercise of political power that does not make any claim to legitimacy: tyranny, occupation force, etc. The idea of authority implies some connection between the exercise of authority and the exercise of authority in accordance with the interests of the subjects of the authority regime. An 'authority' that did not even pretend to respect such a connection, even if exercising *de facto* control, would not be an 'illegitimate authority', it would not be an authority. It would represent nothing more than the exercise of 'naked power'.<sup>39</sup> The notable feature of institutions that exercise power is that they invariably make a claim to legitimacy: authority is inherently related to legitimacy.

The normal justification thesis is concerned with establishing the requirements for the exercise of legitimate authority, not the development of a normative political

<sup>33</sup> *Ibid.*, at 72.

<sup>34</sup> *Ibid.*, at 76.

<sup>35</sup> Raz, 'The Problem of Authority: Revisiting the Service Conception', 90 *Minnesota L Rev* (2006) 1003, at 1019.

<sup>36</sup> Raz is explicit on this point: 'I do not believe that democracy is the only regime that can be legitimate, nor that all democratic governments are legitimate': *ibid.*, at n. 20.

<sup>37</sup> Sadurski, 'Law's Legitimacy and "Democracy-plus"', 26 *Oxford J Legal Studies* (2006) 377, at 380.

<sup>38</sup> *Ibid.*, at 385.

<sup>39</sup> *Ibid.*, at 386.

theory about the necessary and sufficient conditions of legitimacy. Raz' concept of authority is not incompatible with democratic procedures; as Sadurski observes, 'it is only a matter of interpreting the meaning of "the reasons which apply to the subjects" of authoritative directives'.<sup>40</sup> Legitimate authorities must mediate between subjects and the right reasons that apply to them, but 'what reasons can "apply to the subjects" other than those that they actually have?' The only way in which an authority can ascertain the reasons that apply to subjects of authority directives is by asking the subjects themselves, 'through democratic elections, representative bodies, referenda, etc.'. The only plausible authority that can be legitimate 'is one that is procedurally democratic'.<sup>41</sup>

## 6 Law and Democratic Legitimacy

The preceding sections suggest the following. First, in order for law to exist, actors must frame the norms that structure their social, economic, and political relations in terms of law, i.e., directives framed in terms of norms, rules, standards, or principles. Law is a system of communication expressed in terms of law, and it makes no sense to talk about a legal system where none of the relevant actors refers to the idea of law or codes norms in terms that a lawyer would recognize. Secondly, law is a system of communication that constructs its own boundaries through the operation of the binary distinctions between norms/facts and legal/illegal: the application of law norms to facts must be capable of resulting in a determination that impugned conduct is either 'lawful' or 'unlawful', as determined by the application of the legal system. Thirdly, there is no reason to consider that only Westphalian forms of state and international law are 'law'. Fourthly, the recognition by subjects and 'lawyers' of the existence of a system of law follows the assertion of regulatory authority framed in terms of law. (In relation to customary law, including customary international law, authority is provided by the authority of law.<sup>42</sup>) Fifthly, law norms cannot exist outside a system of law: transient or idiosyncratic identifications of law do not constitute a legal order, or create binding obligations. Sixthly, given the indeterminacy of law norms and disputes over meaning and application, the assertion of authority must be accompanied by an interpretive community of law-actors capable of determining whether impugned conduct is norm-violating or not, i.e., to give concrete meaning to normative obligations, and in doing so to interpret and develop the law. Finally, law must have authority, i.e., for a regulator to determine the normative situation of others it must be a legitimate

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, at 387. See also Himma, 'Just 'Cause You're Smarter than Me Doesn't Give You a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis', 27 *Oxford J Legal Studies* (2007) 121, at 142.

<sup>42</sup> J. Raz, *The Authority of Law* (1979), at 29. In relation to customary norms, including customary international law norms, the source of authority is a social practice recognized as legally binding by a particular community. The assertion of political authority is undertaken by a 'secondary', or 'interpretive', actor (who may also be a member of the community), who asserts that a social practice in a defined community of actors is binding in terms of law.

authority, it must regulate in accordance with the 'right reasons' that already apply to subjects, determined through democratic procedures.

## 7 Deliberative Democracy

One focus of this article is the democratic deficit experienced by citizens where the conditions of social, economic, and political life are regulated by international law norms and the 'legislative' activities of non-state, 'non-sovereign', actors. The normal justification thesis is concerned with the exercise of authority, not the exercise of authority in democratic societies. It may be the case that the members of all societies regard democracy as the only legitimate form of government, although this seems implausible; in the case of democratic societies, including democracy states, however, it seems reasonable to conclude that individuals will not accept the exercise of authority in accordance with the right reasons that apply to subjects in the absence of engagement by the authority with subjects through procedural mechanisms. The normal justification thesis suggests that the citizens of democratic societies will conclude that the reasons that apply to them can only be determined through democratic procedures to establish those reasons. In terms of the procedural requirements for engaging with citizens for the exercise of legitimate authority, the most compelling account of democracy, consistent with the normal justification thesis, is the deliberative model developed by Jürgen Habermas.<sup>43</sup> In conditions of uncertainty and disagreement, the democratic legitimacy of laws depends on recognizing those subject to the law as being, albeit indirectly, the authors of the law. Whilst noting the importance of competitive elections, the focus is on discourse and debate. Political truths emerge through processes of deliberation and bargaining that lead to a consensus on public policy positions. Laws are valid only where all possibly affected persons could agree as participants in rational discourses. Legitimate authority rests on institutionalized procedures for deliberation and decision-making; the ideal is rational persuasion (the idea of public reason).

The deliberative model requires that democratic politics are grounded in arguments around what is equally good for all (it is not sufficient simply to aggregate a majority of self-interested positions), and conducted in accordance with the principles of rationality and public reason. The objective is the establishment of political truths, defined in terms of right regulation or the adoption of agreed justice norms, not the establishment of political majorities. It is for each political community to work out its own version of political truth and justice, which equates to the consensus that would be arrived at through dialogue in an ideal speech situation in which positions were accepted as legitimate only where agreed through un-coerced discussions by those affected by the outcomes.<sup>44</sup> Those seeking to demonstrate the 'rightness' of their position must rely on reasoned arguments if they are to convince others. The language

<sup>43</sup> Cf. Coleman, 'Authority and Reason', in R. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (1996), at 287, 312–314.

<sup>44</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans. William Rehg, 1996), at 104.

of politics must be orientated towards mutual understanding as participants vindicate claims by reference to reasons that others are able to accept if agreement is to be reached. When an argument is not accepted there is a shift from justification to discourse, with claims and arguments tested through reasoned deliberations. Where consensus is not possible the relationship shifts again from discourse to bargaining, in which each participant engages in strategic argumentation. Bargaining is permissible to the extent that the process is deliberative and the compromises acceptable in principle to all participants, who may agree for different reasons (in contrast to a discursive consensus).<sup>45</sup> All interested parties should have an equal opportunity to exercise influence in the process of bargaining and have an equal chance of prevailing. Where these conditions are met the presumption is that the outcomes of negotiated bargains are fair and should be respected.<sup>46</sup>

The deliberative model establishes the counterfactual ideal that the democratic legitimacy of laws depends on an institutionalization of the principle of discourse in a constitutional order that recognizes the equality of citizens and the voluntariness of the legal order, i.e., the democratic state imagines itself to be an association of free and equal persons who agree to regulate their lives in accordance with the principles of democratic law. Citizens must understand themselves as both the subjects of the law and its authors. Democratic laws result from the institutionalization of discursive procedures of opinion- and will-formation 'in which the sovereignty of the people assumes a binding character'.<sup>47</sup> This leads Habermas to his principle of discourse: 'D: Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses'.<sup>48</sup> A distinct principle of democracy follows: the validity of statutory law relies on the adoption of laws that can meet with the assent of all citizens in a discursive process of legislation that has been legally constituted.<sup>49</sup> Given that it is not possible for all persons to engage directly on all issues, citizens must be represented by others in formal, deliberative, decision-making institutions: the parliamentary principle of democracy.<sup>50</sup> The principle of discourse establishes a principle of political pluralism both inside and outside representative bodies; it requires that legislative bodies remain open to the 'better arguments' that might emerge in the informal public sphere in which problems can be identified and solutions proposed by political parties, civil society associations, non-governmental organizations, and citizens.<sup>51</sup>

The deliberative model is applicable in counterfactual conditions in which a legal order constitutes itself as a voluntary association that is not subject to the jurisdiction of another legal order. Political truths emerge through democratic deliberations in the form of a consensus arrived at through dialogue in an ideal speech situation, in

<sup>45</sup> *Ibid.*, at 108.

<sup>46</sup> *Ibid.*, at 167.

<sup>47</sup> *Ibid.*, at 104.

<sup>48</sup> *Ibid.*, at 107.

<sup>49</sup> *Ibid.*, at 110.

<sup>50</sup> *Ibid.*, at 170.

<sup>51</sup> *Ibid.*, at 171.

which positions are accepted as legitimate only where agreed through un-coerced discussions by those affected by the outcome of the process. The difficulty with the analysis is that it fails to locate the democratic state in world society and the regulatory framework of international law, broadly defined to include both inter-state law and forms of international governance by non-state actors. Where democratic legitimacy is understood in terms of 'right regulation', or the establishment of political truths through a process of communicative reason, it becomes possible to apply the concept of (deliberative) democratic legitimacy to the systems of governance beyond the state, in what might be regarded as a compensatory form of democratization for the deficit experienced by citizens at the level of the state.

## 8 Deliberative Diplomacy

According to the argument from deliberative democracy, the laws of the international community of states enjoy democratic legitimacy where agreed through a rational process of diplomatic deliberations in which outcomes are agreed by all states affected by the relevant international law norms. The argument is made by Thomas Risse, who observes that states may interact through the use of bargaining, where each tries to maximize its preferences; the use of rhetoric, whereby each attempts to persuade others that they should change their positions; and 'arguing', understood in terms of giving reasons, not heated discussions, in which the focus of diplomatic communications is the achievement of a reasoned consensus, and not the realization of pre-determined objectives.<sup>52</sup> It is an application of Habermas' principle of discourse: actors are engaged in a form of collective communication that aims to establish whether their assumptions about the world are correct (theoretical discourses), and which norms should apply under given circumstances (practical discourses). Actors will challenge the claims of others and accept that their claims will be subject to challenge, and that their position will be changed when faced with the force of the better argument, with relationships of power and social hierarchies receding in the background.<sup>53</sup>

Argumentative rationality requires the existence of a number of preconditions: participants must have the ability to empathize, i.e., to see the world through the eyes of others; they must share a 'common lifeworld', a common understanding of the world, and their role and that of other participants, and a common system of norms and rules perceived as legitimate to which actors refer in the process of argumentation; finally, participants must recognize each other as equals, and have equal access to the discourse, which must also be open to other participants and be public in nature. The preconditions for argumentative rationality in the international community are provided by the mutual recognition of sovereign states as equals and by the common lifeworld reflected in the rules of the international law game.<sup>54</sup>

<sup>52</sup> Risse, "'Let's Argue!': Communicative Action in World Politics', 54 *Int'l Org* (2000) 1, at 9. See also Risse, 'Global Governance and Communicative Action', 39 *Government and Opposition* (2004) 288.

<sup>53</sup> Risse, 'Let's Argue', *supra* note 52, at 7.

<sup>54</sup> *Ibid.*, at 10–11.

One of the difficulties in applying any concept of deliberative legitimacy to the international system is the differences in power between the various actors. Relations of power impact on the possibility of truth-seeking, i.e., the formation of international laws in accordance with the requirements of communicative reason, in one of two ways: by restricting access to the deliberations (consider, for example, the limited membership of the UN Security Council), and by limiting what counts as a good argument.<sup>55</sup> The issue is not whether power relations are present in international relations (they are), but the extent to which they explain the ‘argumentative outcome’. The following are examples of inappropriate recourse to bargaining or rhetoric, rather than discourse: where actors refer to their status as being relevant in determining outcome (consider, for example, the idea that there are civilized and non-civilized states); where actors change their positions simply to win the argument (actors must display ‘argumentative consistency’); and any assumption that ‘the materially more powerful actors’ have the better arguments.<sup>56</sup>

Ian Johnstone concludes that, whilst it is ‘an open question’ whether the ideal of deliberative democracy is possible in international relations, there is evidence of legal discourse and argumentation within the international community. States justify their actions largely in terms of international law and challenge other states to justify their actions in the same terms. The requirement to engage in ‘meaningful legal discourse [and give reasons] generates an expectation that claims will be based on conventions of argument and discourse that operate in the discipline of international law’. Once international relations are framed in terms of law, they operate within the disciplinary constraints of an interpretive community of international lawyers.<sup>57</sup> States must offer reasonable arguments in diplomatic conversations within a shared understanding about the rules that structure inter-state relations, with international law defining and delimiting what counts as a good argument. There are two objections to developing a concept of democratic legitimacy on this basis: first, that governments ‘merely pay lip service to the law and, because international law is so malleable, a legal justification can be found for any action’; secondly, that powerful actors ‘so dominate the interpretive community that they are able to control the terms of discourse, resulting in legal judgments that invariably suit their interests and wishes’.<sup>58</sup> There is, though, a limit to which any legitimating language, including the language of law, can plausibly be stretched. Rich and powerful states may be better able to shape global discourses and ‘dominant actors are better able to write and amend the rules of the game’; they cannot, however, ‘change those rules (and shift the terms of debate) instantaneously and at will. To the extent that they engage in deliberations at all, they are obliged to respect the conventions of argument, persuasion, and justification associated with the particular enterprise in which the deliberations occur.’<sup>59</sup>

<sup>55</sup> *Ibid.*, at 16.

<sup>56</sup> *Ibid.*, at 18.

<sup>57</sup> Johnstone, ‘The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism’, 43 *Columbia J Transnat’l L* (2005) 337, at 381.

<sup>58</sup> *Ibid.*, at 382–383.

<sup>59</sup> *Ibid.*, at 383.

The arguments of Risse and Johnstone present important insights for accepting the democratic legitimacy of international law focused on the ability of states to develop international law norms through a process of communicative reason that approximates to the deliberative ideal. The requirement of rational deliberations and application of the consensus principle prescribes a mechanism for the conduct of diplomatic conversations, a form of deliberatively diplomacy. In the hypothetical ideal speech situation, international law norms should enjoy the consent of all possibly affected states arrived at through rational discourses. The analysis is limited, however, in that not all international law norms emerge through a positive expression of sovereign will (cf. the role of customary international law, for example).<sup>60</sup> Inter-state deliberative diplomacy and sovereign consent cannot, by themselves, provide democratic legitimacy for the system(s) of international law.

## 9 Democracy and the Non-sovereign Legislative Actor

In his writings, Habermas observes the difficulty in applying the model of deliberative democracy beyond the state, given the absence of any possibility of opinion- and will-formation by the 'people' of supranational organizations – the democratic loyalties of citizens remain tied to the state. What emerges is a functional governance elite, nominally responsible to states and their publics, but in reality operating autonomously with regulatory norms adopted with little possibility that those affected are able to influence the legislative process.<sup>61</sup> It is not possible to apply the model of deliberative democracy to the emergent global regulators, given the absence of coercive institutions to ensure the enforcement of agreed law norms or a global *demos* capable of imagining itself as both the subject of an international regulatory order and its author, albeit indirectly.<sup>62</sup>

Democratic law-making is possible only within the state. The desirability, or otherwise, of supranational and regional forms of global regulation is determined by the implications for democratic self-government: certain, limited, forms of global regulation may be good for domestic democracy and the welfare state, which are under threat from the forces of economic globalization, but global governance presents a threat to domestic democracy for the very reason that it cannot be democratic. The function of any world organization should, Habermas concludes, be limited to securing international peace and security, and promoting human rights.<sup>63</sup> Beyond this,

<sup>60</sup> Cf. E. de Vattel, *Le droit des gens, ou, Principes de la loi naturelle: appliqués à la conduite et aux affaires des nations et des souverains*, with an introduction by A. de Lapradelle (1916), Vol. III, at 7–9, 'Introduction', paras 21–25. The law of nations is divided into three: the voluntary law of nations, established by presumed consent, concerns the acceptance by sovereign and independent states of a universal binding law of nations; the conventional law of nations, also referred to as the law of treaties, proceeds from express consent; the customary law of nations develops by tacit consent through long use and observation by states of certain customs in their mutual intercourse with each other.

<sup>61</sup> Habermas, *supra* note 44, at 503.

<sup>62</sup> Habermas, 'Does the Constitutionalization of International Law Still have a Chance?', in J. Habermas, *The divided West* (ed. and trans. Cronin, 2006), at 115, 132.

<sup>63</sup> *Ibid.*, at 134.

coordination problems in the international community are essentially ‘technical’ (as opposed to ‘political’), and do not require a framework of international legislation or collective will-formation. The absence of any sense of civil solidarity beyond the state limits the possibilities of supranational constitutions to those of the liberal type that provide for the exercise of political authority in conformity with relevant treaties and human rights norms, leaving the responsibility for applying and developing the law to courts.<sup>64</sup> The United Nations might provide the focus for a legitimate form of global governance, with a reformed General Assembly composed of representatives of cosmopolitan citizens and delegates from the democratically elected parliaments of member states. Its function would be that of a ‘World Parliament, although its *legislative* function would be confined to the interpretation and elaboration of the Charter’.<sup>65</sup> Supranational politics would be more judicial than political. The exercise of global public authority by the reformed General Assembly would be legitimized by a ‘functional global public sphere’ which would require that vigilant civil society actors generate worldwide transparency on global political issues, allowing cosmopolitan citizens to develop informed opinions and positions. A diffuse world public opinion would exert only a weak form of control over the world organization through a process of ‘naming and shaming’, although the deficit might be made good, to some extent, through enhanced internal controls, including a right of veto for the General Assembly in relation to the resolutions of a reformed Security Council and rights of appeal to an international court for parties subject to Security Council sanctions.<sup>66</sup>

The deliberative model developed by Habermas is a counterfactual ideal in which a legal order is understood to constitute itself as a voluntary association. This work suggests one, significant, modification: the state should not be regarded as a voluntary association of free individuals, but a community constituted by the exercise of authority through law. *Demos* does not define its own boundaries; it is constituted by the exercise of political authority. The function of democracy is to legitimate the exercise of regulatory power. There is, on this understanding, no reason to conclude that the model could not be applied to governance regimes beyond the state. The democratic concept of authority (the ‘normal’ justification for the exercise of authority in relation to democratic societies) establishes that the justification for authority is that subjects are more likely to act in accordance with the right reasons that already apply to them by subjecting themselves to the authority than by attempting to form an independent judgement on the right course of action. The acceptance of authority follows the assertion of authority, i.e., the claim of the regulator to determine the normative situation of subjects. Where the exercise of authority is not accepted, the regulator is not an authority. In the absence of legitimate authority, the norms adopted by international organizations and other non-state actors cannot be regarded as ‘law’ norms: they do not enjoy the authority implicit in the idea of the (international) rule of law.

<sup>64</sup> *Ibid.*, at 139.

<sup>65</sup> Habermas, ‘The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society’, 15 *Constellations* (2008) 444, at 449 (emphasis in original).

<sup>66</sup> *Ibid.*, at 451.



The analysis suggests the following in relation to the exercise of governance functions by international organizations and other non-state ('non-sovereign') actors. First, the exercise of authority by global regulators cannot be justified by reference to global public goods (the interests of international peace and security, a globalized economy, etc.); it must be justified by reference to the right reasons that apply to the subjects of governance regimes. Secondly, the citizens of democratic societies will not accept that the right reasons that apply to them (or to democratic states) can be determined by experts, or any other groups or persons, who claim to know better; the determination of the right reasons that apply to subjects must be established through democratic procedures. Thirdly, in the absence of democratic procedures a global regulatory body does not enjoy legitimate authority; it cannot determine the normative situation of others, i.e., it cannot legislate international law norms. Fourthly, in order to ascertain the reasons that apply to subjects, a global regulator must engage with the subjects of the regime through democratic procedures to ensure the inclusion of their interests and perspectives in any law-making processes. In this way, those subject to the law can come to regard themselves as the authors of the law (as well as its subjects). Fifthly, regulatory norms must be established through a process of public reasoning that determines the content of authority directives in accordance with the right reasons that apply to subjects, requiring the establishment of representative, deliberative bodies and formal consultation mechanisms to engage with the subjects of regulatory regimes, and others.

## 10 Those Subjected

Democratic legitimacy for the exercise of political authority requires that the members of a political community regard themselves as both the authors and subjects of the law. This is central to the deliberative ideal outlined by Habermas: 'D: Just those action norms are valid to which all possible affected persons could agree as participants in rational discourses'. The idea of 'those affected' includes 'anyone whose interests are touched by the foreseeable consequences of a general practice regulated by the norms at issue'.<sup>67</sup> At the level of the state, the identity of the political community is relatively uncontroversial. The state law system defines its own constituency (the people of the state) and enters into an accountability relationship with that constituency. There is a taken-for-granted relationship between the state law order and those subject to the law. This is not the case in relation to the jurisdictional assertions of non-state actors where there is no taken-for-granted political community, or *demos*. Once the locus for law-making shifts from the relatively settled jurisdictional boundaries of the state to the more amorphous spaces of global regulation, the first 'democratic' problem is the identification of those persons whose interests and perspectives are entitled to representation.

At the level of the state, 'those affected' are a subset of those subject to the state law order (all of whom, *ceteris paribus*, have the right to a vote and voice in the deliberations

<sup>67</sup> Habermas, *supra* note 44, at 107.

about political law norms and conditions of domestic justice). The ‘all affected’ principle proves unsuitable in relation to the exercise of political authority by non-state actors. First, the idea is invariably defined by reference to international human rights norms or material and financial considerations, reflecting particular world views and value systems. Secondly, reliance on the principle leads to shifting boundaries of political constituency on policy issues, with international organizations finding themselves accountable to different constituencies on different questions of policy, with different requirements for representation. Thirdly, given that it is often possible for an individual to claim, and demonstrate, that they have in some way been affected by a global regulatory norm, the principle is invariably reformulated to include only those who are ‘significantly affected’ (etc.), with the test for inclusion, i.e., the claim to be affected, becoming both more indeterminate and subjective. Finally, the interconnectedness of legal persons in a globalized world raises the possibility that all actors are potentially affected in some way by the activities of international organizations and institutions.

The focus on ‘those affected’ follows from the liberal concern for injustice and the unjustified exercise of political power. The establishment of political law norms is, though, the right and responsibility of all members of the political community (‘citizens’ in the nomenclature of the state), with a particular concern for those subjects that will bear the burden of the regulatory measure (‘those affected’). The idea of ‘affectedness’ is defined first in terms of an actor being subject to the normative authority of another. ‘Those affected’ are those who are in fact subject to the exercise of regulatory authority. Political communities are defined by the principle of ‘subjectedness’. The assertion and acceptance of authority defines the subjects of the regime, who are also, as a matter of democratic theory, the authors of the law norms. The subjects of the legal order are those legal persons (states, individuals, and corporations, etc.) referred to in regulatory provisions (or more generally subject to the legal order).<sup>68</sup> An autonomous law order establishes its own jurisdictional boundaries and enters into an accountability relationship with those subject to the legal order. The exercise of political authority defines ‘those subjected’. The members of the communicative community of the international governance regime – ‘those subjected’ – have the right to participate in decision-making processes, directly or through representatives. In this way, those subject to the law can regard themselves as the authors of the normative order, as well as its subjects.

## 11 The Practice of Democracy beyond the State

The second democratic question concerns the nature of the institutions and mechanisms that allow for the practice of deliberative democracy beyond the state. One part

<sup>68</sup> A legal system has a moral responsibility to take into account the interests of legal persons *de facto* subject to its normative provisions. This responsibility is not concerned with establishing democratic legitimacy for the regulatory norms of the system. Consider the lack of requirement for democratic states to take into account the interests of those outside their borders in the formulation and adoption of laws. Cf. von Bogdandy, who refers to the idea of international law as providing ‘foreigners a voice in national law-making’: von Bogdandy, ‘Globalization and Europe: How to Square Democracy, Globalization, and International Law’, 15 *EJIL* (2004) 885, at 901.

of the solution may lie in establishing state-like institutions, principally representative assemblies, directly elected or otherwise, within international organizations. The more important global law norms, the identification of which may be subject to reasonable disagreement, might be adopted by representative institutions to ensure that as many diverse perspectives and ways of understanding the social, economic, and political world as possible can be brought into the discussions. This may include the establishment of assemblies with elected members along the lines of the European Parliament or Pan-African Parliament. Whilst there might be agreement on the necessity for some form of direct representation in relation to the United Nations, for example, it is not conceivable that parliamentary assemblies could be established for the 250 plus international institutions that currently play some role in global regulation, or that citizens could remain sufficiently knowledgeable about their respective activities to participate effectively in political deliberations or direct elections, and there has been, with the exception of the African Union and EU, no serious attempt to replicate the democratic institutions of the state at the international level.

There is no single model of representative law-making that can be applied to all international organizations. The idea of legitimate authority establishes that a regulatory body, i.e., an institution that claims the right to determine the normative situation of others, unable to demonstrate that it is undertaking its regulatory function in accordance with the right reasons that apply to the subjects of its directives, is not an authority: it cannot legislate international law norms. In order to be effective regulators, non-state actors must demonstrate to sceptical domestic publics in democratic societies that they take seriously the requirements of democratic law-making: the inclusion of the interests and perspectives of those subject to the regime, with the conclusion of political deliberations representing a fair bargain in terms of the interests and perspectives of the subjects of the regime; institutionalized mechanisms to ensure the representation of a diversity of perspectives in legislative procedures; decision-making following reasoned deliberations; the adoption of regulations consistent with international human rights norms (human rights are understood to be integral to the practice of democracy); and a sense of epistemic humility, in that any absence of consensus within formal decision-making bodies and the global public sphere emphasizes the importance of formal mechanisms of review and challenge, and the need to allow issues to be brought back on the agenda where new evidence or arguments are adduced.

Representative deliberative bodies are insufficient in themselves to provide democratic legitimacy in a political system in which the people must regard themselves as both subjects and authors of the law. Global regulators must remain open to the possibilities of a public opinion emerging in the informal global public sphere constituted by the exercise of political authority and develop mechanisms to allow opinions within the global public sphere to influence debates within formal institutions. This will require proactive engagement with those subject to the global regulatory regime and their representatives, and new mechanisms to allow all voices to be heard and exercise influence on deliberations. No single template can apply. James Bohman, relying on Neil MacCormick, concludes that the issue is not whether some public sphere 'is

totally or completely democratic, but whether it is adequately democratic given the kind of entity we take it to be'.<sup>69</sup> For a state to be democratic, it requires a strong public sphere that is capable of influencing parliamentary debates. Global regulators require a different form of (global) public sphere capable promoting democratic deliberation, debate, and contestation over policy. The minimum requirement is that opinions emerging in the global public sphere are able to influence relevant decision-making processes. This weak form may become a strong form of global public through the introduction of 'institutionalized decision procedures with regularized opportunities for ex ante inputs'.<sup>70</sup>

Non-state actors are required to legislate in accordance with the right reasons that apply to those subject to the regime, and it is not possible to do this in the absence of the representation of the interests and perspective of subjects through formal processes for the legislation of global law norms. No one template can be applied to all non-state actors, but the failure to ensure the effective representation of the right reasons that apply to subjects in decision-making processes will preclude the recognition of the global actor as a legitimate authority. The democratic legitimacy of an international governance regime requires that an international organization or other non-state actor operates within a constitutional framework that recognizes those subject to the normative regime as its authors, albeit indirectly. A non-state actor seeking to determine the normative situation of others, i.e., to legislate international law norms, must engage with the subjects of the legal regime, requiring both the establishment of a formal deliberative body and engagement with the global public sphere constituted by the exercise of authority. (The argument is concerned with *de jure* regulation and not *de facto* regulation.) The application of the deliberative model to the exercise of political authority beyond the state suggests the following indicators of legitimacy: deliberations in formal settings, including representations by those subject to the legal order; the practice of deliberative politics, in which the welfare of the subjects of the governance regime is the central focus of reasonable and rational deliberations; the conclusion of fair bargains that reflect the interests of those subject to the regime; global regulation consistent with international human rights standards; and a sense of epistemic humility, in that the global regulatory body must accept the possibility of error, and establish procedures and mechanisms to allow for the review and challenge of the adoption and implementation of regulatory norms.

## 12 Global Legal Pluralism and the Democratic Ideal

The idea of legitimate authority, understood in terms of deliberative legitimacy, can be applied to the state law system and, imperfectly, to the systems of public international

<sup>69</sup> Bohman, 'Expanding Dialogue: the Internet, the Public Sphere and Prospects for Transnational Democracy', in N. Crossley and J.M. Roberts (eds), *After Habermas: New Perspectives on the Public Sphere* (2004), at 131, 148, relying on MacCormack, 'Democracy, Subsidiarity and Citizenship', 16 *Law and Philosophy* (1997) 331, at 345.

<sup>70</sup> *Ibid.*

law and the global regulatory functions of autonomous non-state actors. The analysis is relatively coherent when applied to a legal system in isolation: legitimate authority exists where law norms are adopted in accordance with the right reasons that apply to subjects, determined through democratic procedures. A complexity emerges, however, where more than one legitimate authority regulates the same actor, on the same issue, at the same point in time, leading to a conflict of democratic laws. In the counterfactual ideal of globalized deliberative democracy, the problem may be one of too much democracy, given that there is no external perspective capable of structuring the relationships between autonomous systems of law, where autonomy is understood in terms of legal autonomy, not autonomy from political and other influences. In the absence of a global constitution or organizing meta-principle, it is for each system to determine its own relationship with each of the other legal orders.

The question then returns to the problem of the deficit in the practice of domestic democracy experienced by citizens following the globalization and fragmentation of governance functions. There is no reason as a matter of legal theory to privilege the position of the state law system, although it remains the case that the state retains a monopoly on the coercive enforcement of law norms in the regulatory division of labour; democracy has only ever been (imperfectly) applied at the level of the state; the loyalties of citizens remain tied to the state; and there are emergent concerns around the extent to which global regulation undermines domestic democratic self-determination. Three issues will influence the attitude of the democratic state to the jurisdictional demands of conflicting international law norms: its constructed identity as a sovereign state; its rational self-interest in complying with international law; and a revised understanding of the idea of deliberative legitimacy following the globalization of certain regulatory functions.

First, an argument from constructivism: the democratic 'sovereign' state will accept that it is subject to international law norms, and in most cases it will simply not reflect on the issue, but understand itself within the Westphalian frame for the allocation of political authority. The constructivist argument is that actors acquire identities through participation in collective processes. The identity of the sovereign state as an actor in world society is created through interactions with other actors in both informal and formal contexts (international organizations).<sup>71</sup> States understand the concept of sovereignty through interactions with other actors. The idea of sovereignty exists through inter-subjective understandings that constitute a particular kind of international community based on the international law principle that promises must be kept: *pacta sunt servanda*. The state (defined by the exercise of political authority in accordance with a constitutional system of law) will understand itself as being bound to comply with those international law norms established following an exercise of its sovereign will. The existence of consent situates the analysis broadly within the Westphalian paradigm, albeit recognizing the absence, as a matter of legal theory, of any *a priori* hierarchy between systems of state and international law.

<sup>71</sup> Wendt, 'Anarchy is What States Make of It: the Social Construction of Power Politics', 46 *Int'l Org* (1992) 391.

Secondly, rational self-interest (or rational choice) will suggest that where a state does reflect on the necessity of complying with valid global law norms, it will conclude in most cases that its medium- to long-term interests are enhanced by a reputation of being an actor in good standing in the international community and a reliable partner for international cooperation. States accept the need for international cooperation in response to the pressures of globalization and make a strategic decision to comply with the majority of international law norms opposable to the state. Where political leaders judge the balance of interests to be against complying with international law, the democratic state retains the practical ability, if not the (international law) right, to follow the demands of the democratic will of the people, albeit at certain costs in terms of sanctions and reputation.<sup>72</sup>

Thirdly, the idea of communicative reason provides that the content of regulatory norms must be determined through deliberative processes. The idea of a conflict of laws might, then, be reformulated in terms of an evaluation of the democratic legitimacy claims of conflicting assertions of authority. There is no reason to conclude that an autonomous legal order would regard another legal order as being inherently superior; if that were the case it would presumably amend its legal order better to reflect the version of political justice manifested in the other legal system. Whether a legal system will defer to another cannot be determined in abstraction; it must be undertaken on a case-by-case basis. A legal order might recognize the assertion of authority by another as falling more clearly within the other's domain. Alternatively, a legal order might be persuaded by the authority of the conflicting norm, i.e., that it represents a better approximation of a political truth. In other words, the legal system might be open to the possibility that it has erred in the adoption of the regulation. This requirement of epistemic humility, a lack of certainty in the claim to know better, is inherent in the practice of deliberative democracy, in which an absence of consensus within the political community impugns the legitimacy claims of normative provisions. Where faced with a competing version of the political truth, a legal system must (again) reflect on the possibility that it has failed to regulate in accordance with the requirements of the right reasons that apply to subjects of the regime. The conclusion provides the basis for beginning to think about the relationship between the state law system and the systems of global governance: the practice of democracy following globalization of governance requires that a legal system not only regulate in accordance with the principles of deliberative democracy, but also reflect on the democratic legitimacy claims of conflicting assertions of jurisdiction by other systems of law. International law does not, from the perspective of the state system, subject the state law system to the authority of international law, or the self-contained regimes of international law; it challenges the state system to justify its version of political truth by holding up another version.

The democratization of global law can be achieved only through multiple articulations of a democratic world of law by democratic state law systems, which remain the central guarantors of public and private autonomy for the individual citizen. The

<sup>72</sup> Cf. J. Goldsmith and E. Posner, *The Limits of International Law* (2005), at 185.

legal institutions of the state, including courts, must evaluate global law norms to determine their legitimate authority in accordance with the deliberative ideal: laws are valid where all those subject to the law could agree to the norms following rational deliberations on policy proposals. The rule of international law creates a presumption in favour of the authority of international law norms (properly so-called) that can be rebutted where the law cannot claim legitimate authority. This occurs in two circumstances: where a global regulator does not enjoy legitimate authority it cannot legislate law norms; also where the democratic legitimacy of the state law norm, established through deliberative procedures, 'trumps' that of the international law norm, the state law norm is to be preferred (taking into account the lessons from constructivism and the strategic interests of the state). Where the claims to democratic legitimacy of the international law system are stronger, the international law norm is to be preferred. The requirement for democratic legitimacy for global norms will have the practical consequences of requiring global regulators to engage in a process of democratization, in order to overcome the problem of compliance. The rejection of the authority of international law norms by functioning democracies (the argument does not apply where non-democracies reject 'democratic' international law norms) will promote the development of democratic procedures in the international system in accordance with the deliberative ideal, whilst recognizing that no one approach or mechanism will be appropriate in all cases. The construction of a multiverse of democratic visions of global governance by democratic states will have the practical consequence of democratizing the international law order, providing democratic legitimacy for international law.

### 13 Conclusion

Democratic legitimacy for law in the modern age depends on the following (ideal) conditions: an international community of (deliberative) democratic states; deliberative diplomacy in the practice of international law, with a particular focus on international law-making through international conferences that allow for the participation of state and non-state actors ('those subjected') and the development of the modern form of customary international law; deliberative legitimacy for the global regulatory activities of non-state actors; and the acceptance by each (autonomous) legal system that it should structure its relationships with other legal systems by reference to the idea of democratic authority, taking into account the lessons from constructivism and rational choice. The advantages of this model of democratic pluralism lie in the possibilities of the democratization of existing regulatory regimes; in allowing for experimentation within each legal system and the establishment of a plurality of visions of political justice; in allowing democratic minorities to escape the framework of the state law order and influence and appeal to other legal systems in order to reframe domestic political conflicts as conflicts of law (state law, international human rights law, etc.); and in affirming the importance of reasoned argument, thus preventing the terms of domestic political debate from being constrained by the taken-for-granted

cultural norms of the majority. The dangers are that the analysis legitimates the exercise of global regulatory functions behind a façade of democratic legitimacy, given the necessary imperfections in the practice of democracy beyond the state, and that it fragments the lines of accountability between the subject and those in authority, i.e., it is no longer sufficient for the citizen to have a relationship of accountability with the state; and that the deliberative ideal operates as a hegemonic discourse delegitimizing other forms of governance by communities (including religious groups and indigenous peoples) that do not organize social, economic, and political life in accordance with the ideals of communicative and public reason. It is the case, however, that once a political decision is made to frame a normative regulation in terms of 'law', the democratic idea of the rule of law understands the exercise of political power in terms of legitimate authority and a requirement to establish valid law through deliberative processes in which subjects are able to participate effectively with the objective of reaching a consensus on the scope and content of regulatory norms. The idea of a democratic rule of international law is inherent in the idea of global governance through *law*.