NGO participation in international lawmaking and democratic legitimacy

*The debate and its future*

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Introduction

This study discusses the claim that the participation of non-governmental organizations (hereafter NGOs) in international lawmaking contributes to the democratic legitimacy of international law. In democratic societies, legal subjects traditionally accept that legal rules shape their lives and choices, obliging them to undertake certain actions or to refrain from undertaking action as long as they can equally determine the content of such rules. It is only upon this condition that rules are deemed democratically legitimate. International law is often criticized for not living up to the promise of democratic legitimacy understood as the possibility for actors to contribute to those authoritative standards to which their behaviour must be subjected.¹ The specific characteristics of international lawmaking are believed to demand alternative ways of thinking about democratic legitimacy from those that we are used to in a domestic democratic state context.² One of the proposed remedies for the democratic deficits of international law concerns the participation of NGOs in international lawmaking.³ For the sake of this study, this proposition is called the ‘NGO democratic legitimacy thesis’. It is the aim of the following chapters to critically evaluate the NGO democratic legitimacy thesis.

State of the debate

The participation of NGOs in international lawmaking itself is nothing new, nor the thesis that their involvement contributes to the democratic legitimacy of international law.⁴ Strong claims have been advanced that the participation of NGOs, often captured in the broad term of ‘civil society’, is essential for a more democratically legitimate international order.⁵ NGOs involved in international lawmaking allegedly advance the possibilities of participation and control in global governance through pushing for more transparency, policy monitoring, and review, and promotion of formal accountability mechanisms.⁶ Scholars present NGOs as

² McGrew 1997a, p. 241. McGrew argues that ‘if the aspiration for substantive democracy is to be realized under contemporary conditions then liberal democracy must embrace those global and transnational spheres of modern life which presently escape its territorial jurisdiction’. He continues that ‘[s]uch a project requires, in the first instance, a normative vision of ‘democracy beyond borders’, an account of what democracy might be or could become; a cogent rethinking of democracy.’
³ Around the turn of the century the existence of NGOs and their involvement in International Organizations lawmaking processes is re-valued by academics as a contribution to the democratic legitimacy of international law. See Spiro 2002; Crawford and Marks 1998, p. 72; Kamminga 2005, p. 83.
⁵ See Pierik and Gordon 2011, p. 5. And see Charnovitz 2011, p. 899-900, referring to Feinberg 1932, p. 631 (Charnovitz’s translation); Kunz, 1958, reviewing Zemanek 1957.
representatives of marginalized people, as facilitators of a flourishing global public sphere, and as contributors to the strengthening of deliberations taking place during international lawmaking processes. The NGO democratic legitimacy thesis is generally accompanied by a call for creative institutional innovations to connect governments, international organizations, civil society, and corporate actors, which have been endorsed by many international organizations.

The claim that the participation of NGOs contributes to the democratic legitimacy of international law began to gather momentum a couple of decades ago, around the turn of the twentieth century. Around that time, international law scholars increasingly begin to study, describe, and map legal frameworks of different legal regimes providing an institutional route for NGOs to become involved in different lawmaking processes. Based on the awareness of the growing opportunities for NGOs to influence international lawmaking, a group of legal theorists seeks to reconcile NGOs’ actual impact on the formation of international law with international law theory, which has traditionally focused on the relationships between sovereign states. Issues are theorized, such as whether international law should diversify its understanding of legal subjects and whether the related issue of international legal personality should be adjusted. An example is the work of the International Law Association (ILA) committee on non-state actors. From 2008 onwards the ILA committee on non-state actors undertakes research and prepares reports on the legal position of non-state actors, including but not limited to NGOs, evaluates the challenges to international law posed by the proliferation of non-state actors in the international political and legal arenas, and maps the relevant legal issues. Although some scholars briefly touch upon the democratic potential of NGO participation, most scholarly

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7 Especially in the human rights field, NGOs are seen as the ‘new’ representatives of the people. The idea of NGOs as serving a representative function at the United Nations goes back to how UN member governments implemented Article 71 in 1950 in calling for an accredited NGO to ‘represent a substantial proportion of the organized persons within the particular field in which it operates’. Görg and Hirsch 1998, p. 599.
8 Esty 1998, p. 135. The active engagement of civil society in international lawmaking is considered ‘a critical if not imperative component in delivering policy outcomes that are timely, effective and legitimate’. Pfaller and Lerch 2005, p. 109.
10 As will be explained in chapter 1, this research takes as its starting point the desirability of democratically legitimizing international law, as it assesses the existing claim that NGOs contribute to the democratic legitimacy of international law. One could raise objections towards the assumption that law should be democratically legitimized in se. The principled discussion whether or not the desire to assess the democratic legitimacy of law is based on an ethnocentric bias that ‘every right minded’ person will embrace fails, although highly interesting, out of the scope of this study. See Anheier 2005.
12 See Higgins 1994; Reismann, Wiessner and Willard 2007. Transnational Process scholars employ the dynamic concept of ‘transnational legal personality’ to describe those actors whose action, through any number of social interactions, influence the content of international law norms. See Koh 1996.
13 See for example Ben-Ari 2012; Bianchi 2009; Noortmann and Ryngaert 2010. This move towards contemplating on international subjects is understandable given the tendency to use the ‘legal subject of international law’ as an academic label. As Klabbers states, ‘a subject of international law is the legitimate subject of international legal research and reflection’. Klabbers 2005a, p. 43.
work remains largely descriptive and focuses on the institutional framework for NGO participation, refraining from passing judgments on whether NGO participation in international lawmaking is ‘good’ or ‘bad’.

Other scholars have primarily focused on what NGOs have contributed in particular international legal contexts. The wide varieties of forms of NGOs, and their varying contributions to lawmaking, are the subject of empirical examination. Studies demonstrate NGOs’ impressive track record of contributing to the content of international law. NGOs have managed to put pressure on international lawmaking to promote their views on international policies, arising out of actions originally designed with a singular purpose or goal, simply demanding rectification of ‘unjust’ situations, and out of long-term projects concerning the formulation of global standards. The Geneva Convention of 1864, the World Anti-slavery Convention, private international law on shipping, the Statute of the International Court of Justice, the Convention on the Rights of the Child, the Convention on International Trade in Endangered Species, and the Ottawa Landmine Convention are but a few examples of treaties influenced by the pressure exerted by NGOs. The results of these empirical studies are cited and relied upon in some instances in the following chapters.

Notwithstanding the insights they offer into the practice of NGO participation in international lawmaking, these studies have not convincingly shown whether or not it is normatively desirable to take the opinions and practices of NGOs into account in our assessment of the current state of the law and norms that regulate our world affairs, based on the central standard of assessment of this study: democratic legitimacy. This study focuses on the body of scholarly work that has normatively assessed NGOs’

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17 Specifically the actions of NGOs at international organizations enjoy academic attention. The increased attention paid to NGOs mirrors the increase in lawmaking practices in which state actors interact with private organization, leading to ‘a peculiar process of interaction between traditional law mechanisms and transnational social processes with the mediation of non-State actors has become a novel method of lawmaking and law enforcement’. Bianchi 1997, p. 210.

18 The common contributions of NGOs include ‘problem definition, agenda and goal setting, enforcement of principles and norms, provision of information and expertise, public advocacy and mobilization, lobbying, direct participation in the formulation of international agreements, monitoring and other assistance with compliance’. See Albin 1999, p. 3.


22 See for NGOs’ influence on the Statute of the International Court of Justice, Kirsch and Holmes 1999, pp. 2-12.


26 Vedder 2007; Steffek, Kissing, and Nanz 2008.

27 Noortmann 2011, p. 79-80.

28 Some empirical studies assess the contribution of NGOs to democratic legitimacy of international lawmaking. See work of Vedder 2007 and Steffek, Kissing and Nanz 2008. The tendency to refrain from normative elaborations on NGO participation can be explained, according to Boyle, as follows: ‘Faced with an international system that we cannot even describe without taking a political position’, it is tempting to ‘simply look at what happens’ without attempting to construct a descriptive or prescriptive international theory about it. See Boyle 1985, p. 343.
participation in international lawmaking, using the vocabulary attached to democratic legitimacy.29

The existing democratic deficit of international law forms the primary incentive for these studies.30 Held, Young, Archibugi and Köhler, Boyle and Chinkin, Kamminga, Lindblom, and Charnovitz, among others, claim that the participation of NGOs in international lawmaking is indispensable for building a more democratically legitimate international legal order. Young, for example, notes that NGOs play a vital role in promoting political dialogue in developing government policy,31 which leads to an increase in democratically legitimate lawmaking. McGrew argues that the democratization of world order and global governance not only promises ‘a means to reclaim and regenerate the ethic of self-governance, which is at the heart of democratic politics, but also to harness the democratic energies of those progressive social forces which increasingly operate across, below and above the nation-state’.32 Görg and Hirsch claim that, in the face of the tendency of ‘global society towards fragmentation’, NGOs have to a certain extent become a stand-in for democracy.33 Cameron, Lawson, and Tomlin confirm these accounts of the NGO democratic legitimacy thesis. According to them, the emergence of global civil society (of which NGOs are considered to be part) holds the promise of transforming international organizations through innovation and experimentation, anchoring them in world opinion, and therefore making them more democratically legitimate.34

It is noteworthy that around the turn of the twentieth century, an increase in critical scholarly work was also witnessed, mainly from scholars originating from the developing world. These critical notes on the NGO democratic legitimacy thesis might represent something of an adverse reaction towards the scholarly fascination with the ‘innate goodness’35 of NGOs. Scholars, including but not limited to Anderson, Clarke, and Johns, have contested the NGO democratic legitimacy thesis. Democratic expectations regarding NGOs’ participation in international lawmaking are considered naïve and optimistic.36 The increasing participation of NGOs in international lawmaking, that was most unprecedented around 2000 and recently plateaued,37 fuels scholarly debate not only about their contribution to the democratic status of international lawmaking, but also about the

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29 Due to the connection made with democratic legitimacy, this latter group is part of a very broad collection of scholars, primarily legal theorists, political scientists and international relations scholars, that try to make sense of the concept of democratic legitimacy of international law, but not primarily of the role of NGOs. The most prominent legal scholars engaged in this normative discussion on NGO participation in international lawmaking and the alleged contribution to democratic legitimacy of international law are: Peters, Koechlin, Förster, and Zinkernagel 2009; Wheatley 2010; Macdonald 2008.


31 See Young 2000.


34 See Young 2000.

35 Perez for example calls the claim that NGO involvement substitutes democratic legitimacy a ‘universalistic dream’. Perez 2003, p. 42.

legitimacy of NGOs themselves when they partake in international lawmaking. Critics point to the weak democratic legitimacy of NGOs, being unrepresentative and unaccountable. Critics thereby shift the focus from the question of whether NGOs can be used as a cure for the current undemocratic domination by international law to the possible domination exercised by NGOs themselves.

Object and structure of this study
This study revisits the debate on NGOs alleged contribution to the democratic legitimacy of international law and provides new insights to evaluate the question whether the participation of NGOs in international lawmaking contributes to the democratic legitimacy of international law. This study will be structured as follows.

Part I sets the stage by reviewing the various characteristics of democratic legitimacy and spelling out the way in which this notion is used throughout this study. Chapter 1 explores the principles that form the rationale of democratic legitimacy of law. Chapter 2 explains what an assessment of the democratic legitimacy of law entails.

Part II focuses more specifically on the NGO democratic legitimacy thesis. Chapter 3 describes the context in which the NGO democratic legitimacy thesis has been advanced, which is the development in modes of international lawmaking and the growing concerns regarding the democratic legitimacy of international law. It thereby discusses the object of democratic legitimacy: international law. Chapter 4 explores the characteristics of the actor that is supposed to democratically legitimize international law: the NGO. It examines the legal frameworks that are the basis for NGOs’ participation in international lawmaking. Chapter 5 presents the arguments of both the proponents and the opponents of the thesis to answer how the claim that NGOs contribute to the democratic legitimacy of international law is discussed in the literature.

Part III expresses general observations based on the study of both context and debate, in light of the conceptual framework of democratic legitimacy as laid down in Part I. Chapter 6 provides a critique of the deficiencies in the NGO democratic legitimacy thesis. Chapter 6 concludes that the way democratic legitimacy is used in most of the academic work, if at all, pays insufficient attention to the necessary institutional preconditions for a successful application of democratic legitimacy as an evaluative tool to assess the exercise of international authority. Chapter 7 concludes with a reflection on what could be the next step in the debate, now that the presented relation between NGOs participation in international lawmaking and the analytical terms of democratic legitimacy has been found unconvincing. It suggests that instead of using the analytical term ‘democratic legitimacy’, it might be more fitting to use the analytical term ‘quality justification’.

Methods of the inquiry and preliminary caveats
This study primarily offers an assessment of the existing literature. The aim is to take stock of the literature on the NGO democratic legitimacy thesis and to reevaluate it with a view to proposing a new perspective. With this in mind, it is important to highlight that this study

38 See Wheatley 2012, 161-162.
39 They predominantly argue that civil societies and NGOs are often fragmented, unorganized, uncooperative, and weak. See Mercer 2002, p. 13.
does not evaluate the practice of international lawmaking as such. Likewise, the type of literature that discusses the NGO democratic legitimacy thesis has different disciplinary backgrounds. This study is the product of an examination of relevant works in legal, international relations, and political studies on NGOs, democratic legitimacy and international lawmaking.

One of the main methodological challenges of the evaluation carried out here is the accurate delineation of state of the debate and the selection of literature. In this respect, it is important to point out three methodological choices that inform this study. First, the standard upon which the legitimacy of law should be evaluated concerns democratic legitimacy. Consequently, this study demonstrates only the necessary and sufficient conditions for authority to be democratically legitimate, and leaves aside conceptualizing other grounds for legitimacy. Second, the NGO democratic legitimacy thesis focuses on the activity of a distinct type of public authority: the public authority to make law. Democratic legitimacy is approached primarily for its relevance for lawmaking, as a specific branch of the exercise of authority. This study confines itself to the normative quality of the legislative process. The conception of democratic legitimacy that is taken as an analytical starting point for the assessment of the NGO democratic legitimacy literature is inspired by the republican ideal of freedom from domination. Constitutional thinking informs the study on theories of democratic legitimacy and on international lawmaking, as these theories refer to the values by which we have ordered political communities. Third, the thesis that NGOs’ participation in international lawmaking contributes to the democratic legitimacy of international law indicates a focus on actors involved in the process of lawmaking. In this

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40 This is commonly understood as an external perspective on the subject matter. However, when describing the legal frameworks of NGO participation in international lawmaking in chapter 4, an internal perspective to positive law seemed appropriate. See for further reading on external/ internal perspective in legal scholarship: Tamanaha 2006.

41 It therefore does not engage with the question of legal subjects and objects, and only briefly touches upon the international legal personality of NGOs. Consequently, it does not examine how NGOs affect international law-creation, application, adjudication, and enforcement; likewise, it does not address how international law affects NGOs. The committee on non-state actors, International Law Association, formulates tentative answers to these questions. http://www.ila-hq.org/en/committees/index.cfm/cid/1023 (last visited January 2016). The influence of NGOs on judge-made law and customary law also falls outside the scope of this study. See for an overview International Law Association 2012, referring to Final Report of ILA London Conference 2000, Committee on Formation of Customary (General) International Law, at p. 16. See for a discussion on non-state actors’ impact on customary law: Wolfke 1993, p. 3; Hoof 1983, p. 63. Compare Meijers 1978, p. 9 (acknowledging that in the first stage of CIL formation ‘many examples ... stemming from a great variety of persons or institutions’ may actuate state behavior).

42 Although we will see that a democratic qualification is not always presented by scholars as a distinct concept with regard to legitimacy, - instead, democracy often conflates with legitimacy -, and although democracy as a concept is broadly acknowledged to be indeterminate in itself, the democratic qualification of legitimacy suggests some specific requirements for a legitimate exercise of public authority.

43 The democratic qualification is in this respect tailored to legal norms. See Habermas 1996, p. 111.

44 According to Krems, the legislative doctrine consists of three parts: the legislative process, the legislative method and legislative technique. Eijlander 1993, p. 11, referring to Krems 1979, p. 38. It is the method of legislation to design a system of interrelated legal rules (legal content). The technique of legislation involves the formulation and presentation of these legal norms in the language (legal standard phrases) within the act. The focus on the legislative process also explains the scant attention paid to the concept, the character, and the essence of law. See for further reading, among many other works on the concept of law, Hart 1997; Ross 2004.

45 Including a private actor in the study of the exercise of lawmaking acknowledges the dynamic compilation of actors, groups, political leaders, and political parties that are involved. Although a plurality of actors involved in
respect, this study is in line with the current trend to examine the international legal order through the lens of the participants.46

Given the existing theoretical contention regarding the core conceptions of the NGO democratic legitimacy thesis, this study adheres to certain sensitivity towards different perspectives.47 In contrast to most terms, the central concepts of this study, such as ‘global civil society’ or ‘public authority’, or ‘democratic legitimacy’, do not refer to concrete objects.48 Equally, describing developments in international lawmaking that are considered relevant in light of the assumed democratic deficits cannot be decoupled from the author’s normative perspective.49 The desirability of democratic legitimacy as an evaluation tool to assess the exercise of international authority is contentious.50 This study aims to carefully assess the invocation of these terms and concepts.51 Obviously the way it is done is the result of the given perspective of the author.52

Objectives and expected contribution of this research
Although it is often generally embraced or refuted, the claim itself that the participation of NGOs in international lawmaking lends greater democratic legitimacy to international law has not been subjected to extensive study. Notwithstanding the considerable body of scholarly work dedicated to the role of NGOs in international lawmaking, the question of how to evaluate the participation of NGOs in those processes is still often vaguely answered. This study purports to contribute to the debate on the democratic legitimacy of international law at three levels.

Firstly, with the assessment of the NGO democratic legitimacy thesis, this study tries to restore a certain balance in international legal scholarship. Classic international legal scholarship is generally focused on adjudication, and is mainly court-centric.53 There is considerably less attention paid to the procedural and normative aspects of international lawmaking; the way the processes of lawmaking shape that same product, and the justification of that process and product. One could explain this gap in research pertaining to lawmaking seems obvious to the practitioner, we scholars often tend to simplify lawmaking processes by speaking of ‘the legislature’ in singular sense. See for a critique: Waldron 1999a. 46 Higgins 1994, p. 49. Higgins states that ‘the whole notion of ‘subjects’ and objects’ has no credible reality’... ‘We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constrain.’ See also Aspremont 2011a.
47 Kennedy 2000, p. 343-344; Koskenniemi 2006a, p. 568-569. Koskenniemi’s assumption is that ‘there is no access to legal rules or the legal meaning of international behaviour that is independent from the way competent lawyers see those things’. Koskenniemi 2006a, p. 563.
48 Witteveen 1996, p. 34. Their meaning can only be understood through a critical approach to what scholars do with these terms. See Wharf 2012, p. 272.
49 Koskenniemi 2011, p. 223; Koskenniemi 2005a, p. 569-572; See also Aspremont 2014.
50 We should be aware that the relationship between democracy and legitimacy remains contested. Democracy has a ‘radical’ bite, and is not, outside Western political thinking, broadly accepted as the most desirable ground of legitimacy.
51 Therefore, this study considered it necessary to study how the concepts central to this study, even with the emphasis on their relationships, are invoked in the academic discussions on the NGO democratic legitimacy thesis so as to make or oppose particular claims; otherwise, ‘they remain floating autonomously in conceptual space’. Koskenniemi 2006a, p. 572.
52 As Macintyre argues, it is impossible to have meta-standpoint, i.e. to have an α-perspectivist approach. See Macintyre 2007.
to lawmaking as a matter of scholarly division of labor. Lawmaking is considered to some extent as ‘pre-legal’, to be political, relevant for political scientists. This study aims to contribute to the efforts of the group of international legal scholars who are engaged in studies on lawmaking to fill this lacuna.

Secondly, with the focus on the participation of NGOs, this study contributes to legal studies that concern the practice of participation of a private actor in the traditionally public activity of lawmaking. Compared to the extensive theories on the state, the private entity is relatively under-theorized in international legal scholarship. The recognition of the de facto private impact of NGOs on international lawmaking affects the doctrine of the liberal representative state and consent-based notions of international law. However, the de jure insignificance of private actors in the face of their de facto significance reflects a disjunction between theory and practice. This study aims to contribute to a clarification of the current role and meaning of one specific private actor, the NGO, in a legally public constellation.

Thirdly, a normative assessment of the merits of NGOs as democratic legitimizers contributes to a clarification of the current discussions in legal scholarship on how to organize a democratic relationship between individuals and law in an international constellation. What should be understood as democratic legitimate law is a contentious topic. There is little consensus on the meaning, interpretation, and scope of democratic legitimacy in the context of international law. Nonetheless, this seems to form no barrier for the many discussions on how to organize democratic venues for legal subjects with regard to international lawmaking, or what instruments might serve the democratic legitimacy of international law. Transparency in the underlying assumptions concerning the conception of democratic legitimacy is therefore all the more important, and this study aims to contribute to it.

The argument
While the above introductory considerations show that this study constitutes a critical assessment of the validity of the NGO democratic legitimacy thesis, it must be stressed at this very preliminary state that the center of gravity of our critique is different from the current dominant body of critical work. Opponents of the thesis largely focus on NGOs, their poor performance, and their internal organizational failings, or on the strategic motives for international organizations and states to include NGOs in lawmaking processes. Our critique, on the contrary, focuses primarily on the insufficient attention paid in current scholarly

54 The results of lawmaking are considered ‘not-yet-law until a legal authority or official says it is law’. Flores 2005, p. 6. See Wintgens 2002, p. 13-14.
55 Recognition of private actors as a ‘subject’ of international law is considered ‘inconsistent with the liberal belief that the processes of democratically elected government ought to be the only legitimate means of curtailing individual liberty’. Cutler 2001, p. 149, referring to Johns 1994, p. 913.
56 Cutler 2001, p. 149-150; Meyer and Sanklecha state that ‘[c]hanging circumstances have made this exclusive focus (red: on states) seem, at the least, incomplete, leading naturally to the question of how to accommodate the widened range of actors within any systematic explanation of what justice (and legitimacy) involve at the international level’. Meyer, and Sanklecha 2009, p. 14.
57 Omelicheva underscores the importance of discussions on what is meant with democratic legitimacy. ‘Being more explicit about researchers ontological and epistemological stances, articulating research questions, honing the methods of collection and analysis of data that incorporate more observational and personal experience techniques, and critically evaluating the findings while remaining cognizant of limitation of the data at hand, will help to launch more constructive dialogues within the discipline and diminish skepticism over the impact of non-governmental actors on global politics’. Omelicheva 2009, p. 127.
58 As discussed under ‘methods’, we aim to do so by being sensitive for different perspectives. See for a plead for more sensitivity for different perspectives of the writers: Wittenveen 2011, p. 457.
debate on the NGO democratic legitimacy thesis to the fundamental question of whether any democratic legitimation of law is possible in se at the international level.

When studying the debate, profound deficiencies were found in the greater proportion of the scholarly work in the way democratic legitimacy is conceptualized. Two layers of analysis occur in the presentation of the NGO democratic legitimacy thesis. The first layer concerns whether or not an NGO specifically is a defensible source for the democratic legitimation of international law. The second layer concerns the extent to which applying the standard of democratic legitimation to international lawmaking is possible. Often, the scholarly focus on the first question (including the work of the critics) seems to imply an affirmative answer to the second. However, there has been little attention paid to contemplation on how democratic legitimacy should be adopted in the international legal order. This is remarkable in light of the observation that the underlying tension between opponents and proponents of the NGO democratic legitimacy thesis can be traced back to a fundamental difference in opinion precisely on the question of what the necessary conditions are for an application of the standard of democratic legitimacy. In the debate on the alleged contribution of NGOs to the democratic legitimation of international law, one can observe a general tendency to approach democratic legitimacy in a fragmented way. This fragmented approach manifests itself on the one hand by the scholarly tendency to focus mainly on NGOs and their own legitimacy in the discussion on how to democratically legitimize international law, and on the other hand, by the selective focus of scholars on single democratic practices. This study demonstrates the consequences of a lack of attention to institutional preconditions in such approaches for the integrity of the concept of democratic legitimacy.

The findings presented and defended in this study should be seen as supplementing and refining the work of theorists who have similarly reevaluated, although on different grounds, the democratic premises of NGOs participation in international lawmaking. Those theorists include (but are not limited to): Anderson, Wheatley, Scheuerman, Bohman, Besson, Erman and Uhlin. 59 This study purports to offer further contextualization, justification, and deepening of their own objections. By virtue of a renewed analytical framework, it similarly aims to assess the use of the analytical terminology of democratic legitimacy, to critique the lack of attention to institutional preconditions that are, according to the author, necessary for any democratic legitimation of law, to discuss the impasse of institutional preconditions at the international legal level, and to move beyond the NGO democratic legitimacy debate by proposing an analytical term that better fits understanding NGOs’ contributions to international lawmaking: a quality justification. After taking into consideration all the different themes, claims, and elements that have passed in our review of the debate on NGO participation in international lawmaking, it will suggest that the most appropriate grounds for justification of international law by the participation of NGOs, are the procedural quality of the lawmaking process and the substantive quality of the resulting law.

59 Erman and Uhlin have most explicitly and extensively studied the normative strength of the NGO democratic legitimacy thesis. See Erman and Uhlin 2010a.
Part I

Democratic Legitimacy
Part I – Preliminary remarks

Part I presents what is understood in this study to be the meaning of democratic legitimacy. Chapter 1 explores the main features of democratic legitimacy. Chapter 2 reflects on the dual evaluation that is required when assessing the democratic legitimacy of law. Especially due to the many existing different interpretations of democratic legitimacy, the subsequent chapters require some preliminary explanatory remarks and caveats.

The following exploration does not offer an absolute, monolithic account of the collective concept of legitimacy as such. In this respect, it does not contradict the current scholarly trend to consider any validation of the exercise of authority as bound to be patterned after the nature of the object. As international law is far from centrally organized, but rather fragmented and multipolar, scholars generally have accordingly constructed legitimacy as a collection of parts. In their conceptions of legitimacy, these scholars chose to mould legitimacy according to the specific characteristics of international law. However, instead of searching for a type of legitimacy that suits the international exercise of authority best, the NGO democratic legitimacy thesis already provides an answer to how to evaluate international law, namely through democratic legitimacy by means of NGO participation in the making of it. Consequently, Part I aims to develop an independent standard of democratic legitimacy without rejecting in principle the premise as generally expressed by scholars that different types of authority might be judged by different criteria. We take as a pre-determined starting point ‘democratically legitimate law’ as ‘the ideal’, without giving an all-encompassing judgment on the ratio between democratic legitimacy and other

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60 This chapter does not attempt to explain when, how, and why democratic legitimacy as a concept to evaluate public authority was introduced. We only scantily touch upon the origins and causality of ‘democratic’ events. See for further reading on the history of origin, Mazo 2005, p. 3, referring to Geddes 1999; Dix 1994; Moore 1966; Binder 1971. See also Lipset 1994, p. 3-4; O’Donnel and Schmitter 1986, p. 10.

61 Such a construction is found in the work of Besson, who developed a concept of legitimacy, which is coordination-based, on Raz’s service conception of authority, which has a piecemeal character and encompasses many different justifications that can fit different social and cultural contexts. It is also found in the work of Buchanan, that also offers a model of legitimacy for international law specifically. In addition, Bernstein collects different grounds of legitimacy. Bernstein 2011, 17-51. The same has been done by Majone, who also assembles in his conception of legitimacy of international law different grounds of legitimacy. Majone 1996, p. 291.

62 Raz also acknowledges the theoretical space for different ways to justify authority. Raz therefore calls his justification thesis the ‘normal justification’. He indicates that his conception is not the only way but the normal and primary way to justify authority. See Raz 1989, p. 1179.

63 It is not the purpose of the subsequent chapters to demonstrate that democracy as a ground for the acceptability of authority to rule leads to the effective acceptance by the legal subjects of the rules to which they are submitted. A normative approach assumes, but cannot proof, that the leading criteria are ‘the criteria people in fact use in assessing the legitimacy of an institution’, Bodansky 2012, p. 7 (unpublished manuscript), p. 10. This research does not aim to present democracy as a dominant social fact. A constant awareness of our Western perspective is obligatory. Democracy is not taking root in much of the former Society Union, in the less industrialized Muslim states, and in many nations in Africa.
ideals, such as justice, or pleading for the primacy of democratic legitimacy above other forms of legitimacy.

The conception of democratic legitimacy serves to provide an analytical framework for evaluating the NGO democratic legitimacy thesis. It remains, as far as possible, indifferent to the type of political authority that produces the law. This is in line with Tasioulas’ assumption that every type of law, when it is indicated that it has or should have democratic legitimacy, should be evaluated according to the same standard of democratic legitimacy. Notwithstanding our non-territorial interpretation of a political community, the consolidated practice of lawmaking at the domestic level, including the democratic traditions that are found, functions as a source of inspiration, due to the long and rich history of democracy theory that has been developed in the domestic context. However, our conception of democratic legitimacy does not provide a normative presupposition about what specific manifestations of democracy ought to be pursued. Instead, the basic principles of democracy are considered in the abstract, in an attempt to account for the value or importance of different manifestations of democratic legitimacy. The selected sources of literature might seem eclectic from the outset. However, in the opinion of the author, these different strands of thought are more or less integrated by a traditionally republican motive for pursuing the democratic legitimacy of the authority to rule: that is, freedom from domination.

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64 See for a scholarly approach to a reconciliation of democratic legitimacy and justice, Buchanan 2004. Buchanan concludes, ‘if the wielding of political power is morally justifiable only if it is wielded in such a way as to recognize the fundamental equality of persons, and if democracy is necessary for satisfying this condition, then political legitimacy requires democracy, at least in circumstances in which democratic institutions are feasible’. Buchanan 2004, p. 250.

65 Many scholars uphold the idea that only if governments are democratically organized one can perceive them as representative agents of their peoples and hence as legitimate. See for example, Buchanan 2004, p. 142-143. See for an exploration of the general aspirations shared by many democratic theorists: Held 2006, p. 263.

66 In line with what Tasioulas has stated, and contrary to Buchanan, we hereby aim to protect ‘the univocal concept of legitimacy’ and a ‘fully legal characteristic’ of international law. Tasioulas 2010, p. 98-99. See for a dissenting opinion Buchanan 2010.

67 The institutions and manifestations as described in the inquiry rest upon different conceptions or ‘schools’ of democracy. And although many common democratic manifestations will pass in review, the conception of democratic legitimacy is in principle indifferent to the type of democratic decision-making, whether that is based on elections, on lottery systems, on referenda, on initiative, on representative recalls. It is aimed to achieve to understand the purpose of these democratic decision-making methods, what democratic legitimacy aims to protect. This is what is called the rationale of democratic legitimacy.

68 The discourse concerning democratic legitimacy is not only huge, but it is also very eclectic. We seem to have difficulties to agree on content of democracy, on hierarchy between democratic principles and even on the causes for a governing structure to become democratic. In his study of the democracy literature concerning democratization of the late twentieth century, Huntington finds no less than twenty-seven independent explanatory variables for democracy. Huntington 1991, p. 37-38.
1 Principles of democratic legitimacy

The appreciation of what counts as an adequate concept of democratic legitimacy is colored by the spirit of a particular time. Understandings of democratic legitimacy are continuously reinterpreted and may change radically over time. Notwithstanding these changes and differences, practically every approach to democratic legitimacy refers to the ideal of popular power, and the necessity for broad public support for governmental acts. Underlying the apparent consensus there are many essential nuances, perspectives, and variations in methodology that lead to different interpretations of democratic legitimacy. Some scholars primarily focus on the social conditions for public support, others on voting systems, some emphasize the origins of democratic thought, others the influence of different constitutional and political institutions on public support, and so on. These different accents, in often-implicit conceptions of democratic legitimacy, can easily result in a confusion of tongues.

This chapter aims to explore the main features of democratic legitimacy. It starts with a consideration of the collective term ‘legitimacy’ by distinguishing legitimacy from concepts that are interrelated with, but of a fundamentally different nature from, legitimacy. To demonstrate the characteristic features of legitimacy, section 1.1 discusses public authority, the acceptance of public authority, and the reasons for accepting public authority. Second, the concept of democratic legitimacy is explored. Section 1.2 discusses democratic legitimacy’s essential principles: freedom and equality. Section 1.3 focuses on the central manifestation of these principles: participation by all legal subjects in the making of the law by which they are governed. Section 1.4 concludes with a discussion on the relationship between trust, distrust, and democratic legitimacy.

1.1 Legitimacy

Law presents itself as prescriptive and mandatory. A legal rule is an authoritative instrument to guide, change, or create social constructions between legal subjects. Law requires justification with regard to its legal subjects to be legitimately authoritative, regardless of

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70 See for an overview: Held 2006.
71 See Lipset 1959, pp. 69-105.
72 See Dahl 1956.
73 See for example Reybrouck 2013, in which Van Reybrouck critically assess the current scholarly reliance on electoral representative democracy, holding it against conceptions of democracy developed in earlier historical periods, such as the Greek polis. For an overview on historical developments in conceptions of democracy, see Dunn 2005.
74 Cohen argues that ‘[w]e know much too little about the relationship between consensus, pluralist and majoritarian varieties of democracy, presidentialism and parliamentarianism, federalist and unitary states, and the development of associations and publics a active components of will formation’ Cohen 1999, p. 242. In legal and political theory, there is a wide-spread awareness that democratic legitimacy is one of those essentially contested concepts. An essentially contested concept is a term or concept that inevitably entails endless discussions about the appropriate use and interpretation. The concept was introduced in 1956 by the English philosopher Walter Bryce Gallie in a letter to the Aristotelian Society. Gallie 1956, p. 167–198. For an accessible start to study different democracy theory approaches, studies and theoretical work see Dahl, Shapiro and Cheibub 2003, containing excerpts of many influential scholarly works on democracy.
75 This section is inspired by the recommendation of Priel to make distinctions between legitimacy and closely related concepts. See Priel 2010.
whether it concerns a small or large and institutionalized group of subjects.\textsuperscript{77} Legitimacy of law functions as an evaluation tool. It refers to an idea or a feeling of legal subjects towards the law. More specifically, legitimacy concerns the acceptance or acceptability of a particular law. Acceptance of a law relies on the amount of trust of the legal subject in the institution that exercises the authority to rule. The legitimacy of a legal rule is confirmed when legal subjects believe that political institutions are worthy of trust.\textsuperscript{78} The conception of trust to which this research refers is ‘generalized trust’, and includes trusting institutions, such as the product law itself, process of lawmaking, and the makers of the law.\textsuperscript{79} Such general trust in institutions is implicitly associated with risk.\textsuperscript{80} Trust in a person or system is particularly relevant and deemed necessary when one has no clear insight into and knowledge of, respectively, the actions of the individual or the operation of the system.\textsuperscript{81} The trust that an individual places in an ‘expert system’, which lawmaking generally is for a complex and diversified society, cannot be based on a full review of the system. In this regard, a pragmatic element is inherent to trust, based upon the experience that such systems generally work as they are supposed to do.\textsuperscript{82}

Trust is assumed necessary to maximize the chances that a legal subject will comply with the legal rule that prescribes a certain behavior.\textsuperscript{83} Compliance in its turn is necessary to maximize the effect of laws: to offer a stable legal order where the well-being and safety of legal subjects is protected. The assumption of the legitimacy doctrine is that obeying rules

\textsuperscript{77} Nagel 2005, p. 124.
\textsuperscript{79} Warren explains trusting an institution as ‘a way of saying that one knows the normative idea of the institution, which one extends to the individuals who populate it on the assumption that they are motivated to abide by its normative expectations’. Warren 1999c, p. 349-350. There are scholars that doubt the very possibility of individual trust in institutions. Hardin argues that for most people, most of the time, government institutions are too distant for the basic condition of trust – knowledge of the interests of the trusted – to be met. See Hardin 1999. Cohen admits that ‘[i]t makes little sense to use the category of generalized trust to describe one’s attitude toward law or government. On can trust only people because only people fulfill obligations. But institutions (legal and other) can provide functional equivalents for interpersonal trust in impersonal settings involving interactions with strangers because they institutionalize action–oriented norms and the expectation that these will be honored.’ Cohen 1999, p. 222.
\textsuperscript{80} Warren 1999a, p. 1.
\textsuperscript{81} To trust something or someone is to some extent based on ‘blind faith’, a leap into faith that one is willing to make based on the experience that it usually ends well. One can contrast the current importance of trust for the legitimacy to rule with the absolute character of legitimation in the ancient regime. The monarchs had an indisputable right to rule attributed by gods. However, a monarch did not reign in his own name but in name of something that all, both himself and his people, transcends. The monarch could derive its power from a divine law or from an enlightened reason. The authority of the monarch was legitimized by the belief that the monarch himself is bound and accountable to that external body. Finer 1997, p. 39. Although the legitimacy was based on an external source, monarchies were not freed from commitments to law, which are illustrated by, to use a well-known example the Magna Carta, protecting the people (or barons) against the king. See Tamanaha 2004.
\textsuperscript{82} Giddens 1990, p. 29.
\textsuperscript{83} Franck, as one of the first international legal scholars concerned with legitimacy issues, has proposed the following working definition of legitimacy: ‘Legitimacy is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.’ Franck 1990, p. 24. The question remains open whether legitimacy generates an obligation to obey. Or that, even when legitimate, there are particular cases justification not to obey. See Dworkin 1986, p. 191. See for further reading the ‘normal justification theory’ and the ‘service conception’ of Raz 1986, p. 56.
out of habit or self-interest cannot provide the same level of stability in a legal order as the sociological fact that legal subjects have a certain amount of trust in a particular social order. When accepted by legal subjects, a lawmaking institution is less vulnerable when there are gaps in its capacity to exert coercion or when a reasonable alternative to the rules of the institution occurs. The beneficial consequence of the trust of legal subjects in the exercise of authority is an increasing likelihood that these legal subjects will obey the law, as they recognize and confirm the legitimacy of the authority to rule.

Trust and acceptance are no static touchstones for a legitimate governing system. Trivial events and larger calamities can interrupt almost constantly the balance of trust of legal subjects in the institutions of law, lawmaking, and lawmakers. Legitimacy aims to capture this specific dependency relationship between law and legal subjects. Legitimacy is the qualification of the exercise of authority. A lack of trust would in this reading lead to the appraisal of the exercise of authority to rule as illegitimate.

The motives for accepting law may differ per legal subject. They range from motives relating to the content, the efficiency, and the legality of law. Conferring legitimacy on laws is not always an explicit act. Legal subjects could also accept in general every act, including laws, or exercisers of authority because these exercisers of authority are considered to be charismatic leaders or deputies of god. To think about law and the acceptability of law in a more abstract way, this chapter forgoes a discussion on individualized motives for accepting law, and focuses on common grounds that are, from a normative perspective, considered the most desirable grounds for accepting public authority.

1.1.1 Accepting public authority
Authority, according to the general meaning of authority, can be vested in someone or in offices. Authority’s main characteristic is the aim to gain ‘unquestioning recognition by those who are asked to obey; neither coercion [n]or persuasion is needed’. The public

85 Buchanan 2010, p. 81.
87 Wheatley would object this, as in his opinion ‘(…) there is no such thing as illegitimate authority – an ‘illegitimate authority’ is not an authority.’ Wheatley 2012, p. 162. In his conception of authority, authority derives from legitimacy. ‘An authority which does not claim to be legitimate, or which is not recognized as being legitimate, is not an authority (…).’ Wheatley 2011, p. 533. Although we agree with the general claim of authorities to be legitimate, in this study, as will be discussed in the subsequent subsections, we understand legitimacy and authority as two separable concepts. In our opinion, the exercise of authority does not inherently imply that it is legitimate, it rather constantly requires confirmation of its legitimacy.
88 See Weber 1968, p. 46.
89 See for an alternative approach to legitimacy: Fossen 2011. Fossen pleads for a pragmatic strategy. As Fossen states, ‘[t]hey embark from different starting points, and so they incur different theoretical commitments: a normativist approach takes a kind of theorizing aimed at the philosophical justification of norms for granted, whereas the pragmatist approach starts from an account of the political practice of ascribing and contesting legitimacy, and thereby presupposes a theory of language and practice’. Fossen 2011, p. 5.
90 Parents can exercise authority over their children, just as teachers over their pupils. Authority is understood in line with how McDougal, Lasswell, and Reisman perceive it: ‘By authority is meant expectations of appropriateness in regard to the phases of effective decision processes. These expectations specifically relate to personnel appropriately endowed with decision-making power; the objectives they should pursue; the physical, temporal and institutional features of the situations in which lawful decisions are made; the values which may be used to sustain decision, and so forth.’ McDougal, Lasswell, and Reisman 1966, p. 256.
91 Arendt 1972, p. 144.
authority to create laws is a form of practical authority: the authority to direct the behavior of others. Law is also a manifestation of public authority. Public authority is understood as the actual exercise of power by governmental officials: as Follett has called it, the ‘power over’ people. Public authority in this respect represents having a ‘right to rule’, a right to issue commands and, possibly, to enforce these commands using coercive power. Public authority refers to institutionalized power in organized communities, and is uncoupled from the general concept of power, which terms, in colloquial language, are often conflated. As further explained in section 1.2.1, this research understands power as a type of spontaneous power, based on Arendt’s concept of power. This spontaneous power has the potential to transform into public authority.

The concept of legitimacy bridges public authority and this type of spontaneous power. Evaluating authority on its legitimacy qualifies the extent to which legal subjects support public authority. When one assesses the legitimacy of a law, one tries to assess whether legal subjects withhold or grant the ‘right to rule’ to a public authority that enacts the law. The rightfulness of the law’s claim to authority might derive from different sources: from the characteristics of the law, of the lawmakers, or from the way the lawmakers exercise their authority to rule.

Notwithstanding the dependency of a law on the acceptance by legal subjects, the legitimacy of a law does not affect the existence of that law. Legitimacy as such is not engaged in the determination of whether law is law. Contemplating the normativity of law invites us to judge whether, apart from a legal subject’s motivation to comply with laws, a law provides normative reasons for action, whether a specific norm creates rights and duties. In respect of the normativity of law, it can be questioned whether, and based on what grounds, the very existence of laws that centrally regulate the behavior of individuals

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93 Parker Follett 1942, p. 76. In footnote 3 at p. 77, Follett remarks that the definition of power she formulated here should be understood as a temporary working definition.
94 See Peter 2014.
95 How public authority is created and constituted, is left aside here. Whether public authority is created by a social contract and serves to ensure self-preservation, as Hobbes influential account of authority in Leviathan prescribes, or that authority is created by convention, reached in a civil state as Rousseau states in, Social Contract I:6; cf. section 3.3 will not be discussed here. We follow Hampton, who states that political authority ‘is invented by a group of people who perceive that this kind of special authority is necessary for the collective solution of certain problems of interaction in their territory and whose process of state creation essentially involves designing the content and structure of that authority so that it meets what they take to be their needs’. Hampton 1998, p. 77. This perception is comparable to Arendt’s perception that we need promises in order to prevent the unpredictability of individuals’ capacity of action to derail into something e as society cannot accept. ‘The remedy for unpredictability, for the chaotic uncertainty of the future, is contained in the faculty to make and keep promises’. Arendt 1998, p. 237.
96 See section 1.2.1 on power.
98 While focusing on the state as executor of political authority, Simmons argues that the justification of political authority, based on its moral defensibility should show that having a state is morally better than not having a state. The justification of the existence of the executor of political authority is a necessary condition for generating obligations such as laws. Simmons 2001, p. 125.
99 Normativity is concerned with the question ‘how (...) a social, factual, practice, [could] create norms?’, while legitimacy deals with the question, ‘what gives any particular putative law-maker the right demands that one should, prima facie, obey?’. Priel 2011, p. 6.
is acceptable. This leads to the fundamental matter of how law can guide behavior. It relates to the determination of the extent to which the content prescribed by a legal norm is ‘non-optional’; the way in which legal norms create obligations that people take, or refrain from taking, certain actions. Legitimacy, on the other hand, presupposes law as an ordering instrument. Even without or before legal subjects grant legitimacy to a particular law, law relies on a claim to authority, derived from the lawmakers’ claim to authority. Postema insightfully describes this claimed authority of lawmakers aside from its legitimacy quest.

“[C]ertain persons in society are designated as officials and are charged with special responsibility for maintenance of the system of rules – some watch for rules that need to be made or repealed, others will watch for compliance, others will settle disputes that arise with respect to the rules. They will be able to accomplish this in part because their actions and decisions are accorded a special status or authority and they are able, in a way no other members of the society can, to give their resolutions about matters – whether making of rules, interpreting them or enforcing them – a degree of finality. That is, they have the power of making decisions that in an important respect and to a significant degree hold or bind even if others regard them as mistaken. So, authoritative decisions and the rules put in place through them are able to claim a kind of practical significance apart from their merits. This makes it possible for such officials to create rules and expect them to govern citizens’ conduct even before they are widely practiced. Thus, law can create and seek to control social practices, rather than being entirely dependent on them.”

However, in order for law to be accepted, the legitimacy doctrine is based on the assumption that law requires more than claimed authority, backed up by (the threat of) force to enforce compliance. Coercion is only a means that the institutions use to secure authority, but it does not automatically contribute to upholding authority. Legitimacy is considered decisive for public authority to have a systemic ‘title to rule’. In other words, legitimacy is understood as the acceptance of a governing law or régime as an authority that distances itself from a raw assertion of authority but claims the right to exercise it. Instead of

100 The study of normativity has many different focal points. See for further reading on normativity of law, Bertea and Pavlakos 2011.
102 As Besson defines normativity; ‘[b]y contrast to the plain normativity of social rules in general, legal rules are characterized by their claim to exclusionary normativity’. Besson 2010, p. 173.
103 There are also conceptions of legitimacy that primarily focus on the legitimacy of coercive power instead of law. In this thesis the focus is on the legitimacy of the authority to rule, as lawmaking is central to this research, instead of law-implementation or compliance. See for an elaboration on the two different functions of legitimacy: Ripstein 2004, p. 2-35.
105 In Greens words, ‘[c]oercion threats provide secondary, reinforcing motivation when the political order fails in its primary normative technique of authoritative guidance’. Green 1988, p. 75.
106 Lipset 1994, p. 7, referring to Dogan 1988; As Buchanan states, ‘[a]n institution that attempts to rule (govern) is legitimate in the normative sense if and only if it has the right to rule’. Buchanan 2010, p. 79.
107 Raz 1986, p. 25-28. This is contrary to alternative ‘Hobbesian’ approaches to legitimacy that might argue that the main function of legitimacy is exactly to justify the raw coercive power itself. See Ripstein 2004; Habermas 1996, p. 90.
seeking to justify the political authority of the lawmakers to rule in se, legitimacy focuses on the rightfulness of the makers, the resulting laws, or the way that ruling is exercised.\textsuperscript{108}

It is debatable what the consequences are for the effectiveness of the authority of law when laws are illegitimate. Some scholars argue that without legitimacy, the exercise of authority is unjustifiable. Consequently, these acts of authority cannot entail any obligation to obey. This approach questions whether illegitimate authority has any ‘authority’ to make laws.\textsuperscript{109} This research does not consider acceptability or acceptance decisive for effectiveness of the authority to rule. Even when the exercise of authority cannot be accepted, and legal subjects have no reason to trust political institutions, these institutions may still be effectively authoritative. As long as the claimed authority to rule leads to compliance, and thus in that respect is effective, the exercise to rule can be considered de facto authoritative, although not legitimate.\textsuperscript{110} Such an exercise of authority does not hold the right to rule and to create political obligations, but it can still claim the authority to rule.\textsuperscript{111} De facto authority remains in this conception independent from, and unaffected by, legitimacy concerns.\textsuperscript{112} The reason for following Raz’s account is that law, as an instrument of guiding societal behavior, should uphold the status as a continuous, stable instrument, which is hard to maintain when the authority to make law is directly dependent on the legitimacy.\textsuperscript{113}

\textsuperscript{108} The authority theory of Raz, for example, does not exclude claims made by law independently of the officials themselves. In this sense we can refer to the authority of the law itself. This stance is often criticized, among other by Himma, but for Raz it explains the authority of customary rules, which arises independently of official enactment. See Raz 1979, p. 29; Himma 2001, pp. 271–309.

\textsuperscript{109} See for this conception of illegitimate authority, Rawls 1993. See also Wheatley 2012, p. 162. Others argue that even when legitimate, the exercise of authority might be disobeyed on other ground. Additional normative conditions need to be satisfied. See Buchanan 2002, p. 689-719. Weber would contest this view, as for Weber, practically all successful domination, is inherently ‘legitimate’ domination. Weber stated that ‘[a]lside from the extreme case of slavery, domination in the sense of brute force without some belief in legitimacy – at least on the part of staff enforcing the order - is untenable. Weber 1978, p. 214. The ‘continued exercise of every domination (…) always has the strongest need of self-justification through appealing to the principles of its legitimation’. Weber 1978, p. 954. Weber seems to approach the legitimacy/illegitimacy quest descriptively and argues that if there is a type of exercise of authority that entails domination, excluding the exceptional case of slavery, it will be based on a ground for legitimacy, although the ground for legitimacy might have been shifted normatively.


\textsuperscript{111} This conception, and the conception followed in this research, is in sharp contrast with a school of philosophical anarchists that argue that there cannot be a legitimate right to subject one’s will to that of another. See Wolff 1998.

\textsuperscript{112} Raz even argues that for legal authorities, such a de facto authority might be an additional necessary condition of legitimacy. The primary role of legal authority is to solve coordination problems, and those problems can only be successfully solved when the entity in the authoritative role is being generally obeyed. Raz 1985, p. 21; Raz 1986, pp. 49-50, 56.

\textsuperscript{113} Postema 2011, p. 315. Compare this perspective with Lipset who states, in the context of a democratic system, that; According to Lipset, ‘The best immediate institutional advice is to separate the source and the agent of authority’. (…) ‘The agent of authority may be strongly opposed by the electorate and may be changed by the will of the voters, but the essence of the rules, the symbol of authority, must remain respected and unchallenged. Hence, citizens obey the laws and rules, even while disliking those who enforce them.’ Lipset 1994, p. 8. However, this approach towards a detached conception of legitimacy from de facto authority does not solve the issue of authority when the exercise of authority is normatively illegitimate, and lacks compliance. Notwithstanding the assumed stability of a legal order, this situation might lead to revolt.
1.1.2 Reasons to accept public authority
What instigates legal subjects to trust authority, and accept law? Studies that aim to understand the origins of the behavior of a specific political community approach legitimacy from a sociological perspective. Trust is determined descriptively by empirical studies, focusing on what was, in a certain situation, by a certain group of individuals, perceived as a valid ground for trust in lawmaking institutions. As trust and acceptance are individual experiences, the grounds constituting them might differ per legal subject. Legal subjects take into account many different aspects to assess the legitimacy of a law, concerning among others the efficiency of a law, the congruity of law with justice considerations, democratic procedural considerations, the content of a specific law, or the level of expertise that characterizes the lawmaking process. Also, the legal validity of the rule might form an incentive for the legal subject to accept the authority of the law. The mere existence of a lawmaking authority can be enough; the source of the exercise of authority might be decisive for acceptance of the result of the exercise of authority. The legitimacy of a certain law depends in that case on the legitimacy of the institution that created and applied the law.

Another reason to accept the exercise of authority lies in the procedures followed by the lawmaking authority. These descriptive conceptions of legitimacy are primarily concerned with the social acceptance of authority and with the instrumental questions of whether or not an institution is likely to be effective or stable.

One could also theorize normative grounds as to why legal subjects ought to accept the exercise of the authority to rule. These normative grounds focus on law’s acceptability. They are abstracted from individual motivations that have led to acceptance of the authority of law. Such a normative approach to legitimacy does not aim to discover, but instead, to prescribe the grounds on which trust in public authority is justifiable. The actions of an entity are thus placed in a broader framework and measured by pre-determined standards.

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114 Questions central to descriptive approaches to legitimacy are: What standards do actors actually use in assessing the legitimacy of institutions? To what degree are institutions in fact accepted as legitimate? What are the causal consequences of an institution’s perceived legitimacy? Bodansky 2012.

115 The relational aspect is best illustrated by Raz’s Normal Justification Condition. Raz has developed the Normal Justification Condition (NJC) as the condition for legitimate authority. NJC: A has legitimate authority over B if the latter would better conform to reasons that apply to him if he intends to be guided by A’s directive that if he does not. See Raz 2006, 1014; Raz 1986, pp. 53-69, and chapter 3. See for an international perspective on this issue: Weiler 2004, p. 548.

116 See Bodansky 1999, p. 596; Besson and Tasioulas 2010a, p. 176.

117 In section 1.2 we come back to the distinct but often closely related concept of validity of law.

118 Buchanan 2010, p. 80.

119 Whether or not one of these approaches of legitimacy is in se correct, or whether the different conceptions of legitimacy compete or complement each other, is outside the scope of this research, as it exclusively focuses on democratic legitimacy.

120 In one of the classical texts on legitimacy, for instance, Weber identifies rational, traditional and charismatic legitimacy as the three pure types of legitimacy. By analyzing legitimacy in terms of the motivations that underlie individual action, Weber’s concept of legitimacy is sociological rather than normative. For a strong piece on the discussion of normative versus sociological concepts of legitimacy in the global governance literature, see also Bernstein 2001.

121 While taking a normative perspective, scholars assess the legitimacy of an institution through an internal and evaluative statement. This is a political and philosophical question, in which notions of fairness, justice and consent play a role. See Meyer 2009; Bodansky 2012, p. 7.

122 As Suchman clarifies, normative legitimacy is a ‘generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed systems of norms, values, beliefs and definitions’. Suchman 1995, p. 574.
A normative approach to the evaluation of the exercise of authority tells us something about the features of the subject of legitimacy itself, and less about the individual legal subject’s beliefs in, or support for, the authority. A normative justification of law’s authority is autonomous from law’s claim to authority, or the de facto exercise of authority. However, one can doubt whether, in the long run, a normative account of legitimacy is justifiable if it has never been subjected to empirical studies to test the assumptions on which legitimacy is built. Notwithstanding the abstracted grounds for understanding the acceptability (in contrast to acceptance) of law, legitimacy is still primarily characterized by a relational aspect as it functions as an evaluation tool of the relationship between an act or exercise of authority and legal subject.

Besides democratic legitimacy, which will be explained in the following section, there are other abstracted, pre-determined grounds that have been theorized for legal subjects to find the exercise of legislative authority acceptable. Two grounds can be considered dominant. Authority can be regarded as acceptable because of the validity of a law or because of the content of a law. These grounds are briefly discussed in order to contrast them with democratic legitimacy. One dissimilarity between these two grounds for legitimacy and democratic legitimacy immediately catches the eye: whereas validity and content focus specifically on the characteristics of a law, the conception of democratic legitimacy adhered to in this study focuses on the specific properties of the making of the law and the authors of a law.

Validity

The validity of a law refers to the question of whether a particular rule is part of a legal system. The concept of legal validity explains why a certain rule should be indicated as a legal norm, and in what ways it distinguishes itself from a moral norm or a social convention. A legal system consists of, besides the behavior-regulating norms, criteria of valid enactment that distinguish law from non-law. Legal validity departs from the process of lawmaking by the focus on the event and moment of enactment. The validity of law is decoupled from the process of possible deliberation and decision-making preceding the enactment of the law.

123 See Besson 2011a, p. 5.
124 As Simmons explains in relation to the legitimacy of the state: ‘That a state is legitimate with respect to a subject will typically, we hope, result in that subject’s actually having feelings, beliefs, or attitudes that generate allegiance, support, etc. But this will, of course, not necessarily be the case. States may actually be legitimate with respect to us without their in fact receiving from us much or any support, provided only that we are sufficiently immoral, deceived, stupid, overwhelmed (by war or disaster, say), weak-willed, or manipulated. In such cases it is correct and perfectly natural to say that a state is legitimate, but unstable or unpopular or unsupported. When people fail to uphold a state due to their own shortcomings, rather than to its lack of moral authority, this cannot plausibly be described as a diminution of its legitimacy.’ Simmons 2001, p. 134.
125 There are also alternative conceptions of democratic legitimacy that see specifically on the content of the law, and its democratic characteristics. Dworkin indicates this approach as the ‘dependent condition’. The dependent condition is based on the substantial appraisal of the result of a democratic law-making process that should lead to an equal treatment of all members of the community with equal concern. Dworkin 2000, p. 186. In this version one may observe that democracy is in fact a derivative of justice, or of substantive equality in general: our opinions regarding which laws treat people with equal concern, in whatever field of distribution, may be decisive for our views about whether the system that creates the laws is democratic. See Sadurski 2008, p. 74.
126 See Hart on rule of recognition, the most important social rule (not a law itself), on the basis of which officials can judge on the validity of law. Postema 2011, p. 269.
127 Waldron 1999a, p. 34. See for further reading: Postema’s overview on different legal theorists’ conception of, a.o., the validity of law. Postema 2011.
result of these processes, and obviously excludes all parts of discussions that did not make it into law.\textsuperscript{128}

Hart famously explains that the decision as to whether a law is valid, and thus whether a law is part of a legal family, should exclusively be taken by law-applying officials. They rely, to make that decision, on a (established by convention) social rule of recognition.\textsuperscript{129} The political legislature determines whether a rule has the validity of law and courts ‘settle contests of interpretation over the application of valid but interpretable norms in a manner at once judicious and definitive for all sides’.\textsuperscript{130} Part of the function of legal validity and the systematics of validity is to deny ‘legal persons in their role of addressees of the power to define the criteria for judging between lawful and unlawful’.\textsuperscript{131} The validity of a legal norm, the fact that the legal norm is recognized as being part of a legal system, can be a ground for legal subjects to accept a legal rule.

Closely related to the validity of a rule is the broader concept of legality.\textsuperscript{132} Both concepts give legal subjects reasons to accept the law by the anchoring of a legal rule in the law. Legality is understood as compliance of the exercise of public authority with law.\textsuperscript{133} According to the principle of legality, governments may restrict the liberty of citizens only if these restrictions are equally applicable to all, and are laid down by laws, which are enacted via procedures which rules are also laid down in legislation.\textsuperscript{134} Only public authority based on legal standards might be exercised.\textsuperscript{135} Different scholars have different views on the relationship between legality and legitimacy. Some scholars argue that legitimacy is an essential part or function of legality, in the sense that ‘the law should be made in such a way that it can claim to be legitimate and hence to bind those to whom it applies’.\textsuperscript{136} But also, vice versa, the recognized validity of a rule or the legality of the exercise of authority can be a source of legitimacy of rules. Legal norms demarcate the extent to which the legislature is legally authorized to create laws. When authority is (perceived as) legitimate, it is lawful by virtue of being authorized by or in accordance with law.\textsuperscript{137} As Kelsen argues:

‘The validity of legal norms may be limited in time, and it is important to notice that the

\begin{footnotesize}
\begin{enumerate}
\item Waldron 1999a, p. 40-41.
\item Habermas 1996, p. 115.
\item Habermas 1996, p. 115.
\item Not always is a distinction made between the two concepts. However, we understand validity as a more narrow conception than legality that refers to the specific qualification of a specific rule, and legality as a qualification of a governing system or exercise of public authority.
\item Besselink, Pennings and Prechal distinguish three functions of legality: 1. The democratic function of legitimating the existence of public authorities, their powers and the exercise thereof within the limits of the set legal rules;
2. The instrumental function of attributing public authorities with powers and responsibilities in line with preferences and the local situation, and in accordance with a prevalent distribution of powers;
3. The normative function of regulating the use public authorities can make of such powers. Besselink, Pennings and Prechal 2011, p. 6-7.
\item The distinction between legality and legitimacy does not exclude mutual interrelationships between the two concepts. We saw a similar mutual dependency between legitimacy and authority. See subsection 1.2.1.
\item Besson 2009a, p. 60. See also Besselink, Pennings and Prechal 2011, p. 6.
\item See Hart 1997.
\end{enumerate}
\end{footnotesize}
end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way, which the legal order itself determines. This is the principle of legitimacy.138

This has led to a concept of legal legitimacy, the condition of being in accordance with law or principle. Legal legitimacy takes an internal perspective: particular directives are justified in terms of a regime’s secondary rules about who can exercise authority, according to what procedures, and subject to what restrictions.139 In this regard, the legitimacy of the law is based on a rational, coherent judgment of correctness that illustrates a belief in the value of truthful legal procedure.140 Instead of trusting an authority to rule based on the content, process, and merits of the enacted laws, which inherently has an ad hoc character, the system of legal rules is accepted as a whole, and individual rules are accepted based on the fact that they are part of that legal system. Luhman is explicit about the role of legality in maintaining trust in lawmaking: ‘Legal arrangements which lend special assurance to particular expectations, and make them sanctionable, are an indispensable basis for any long-term considerations of this nature; thus, they lessen the risk of conferring trust.’141

Content
The exercise of lawmaking authority could also be acceptable based on the fact that the content of the laws serves the legal subjects ruled by it. The content of a legal norm is what a specific norm stipulates, proscribes, and authorizes legal subjects to do. Taking the content of a law as decisive for its legitimacy is often called ‘output legitimacy’.142 When the content of a law is acceptable because it is considered a ‘good’ law, it is considered to enjoy legitimacy. The qualification of ‘good’ in this respect is often related to the effect of a law: the prosperity, stability, and security a law might bring about.143 It is generally assumed that a basic level of trust is reached when legal subjects are convinced that the laws established by the lawmaking authority develop a fair and stable legal order. Legitimacy in this case originates from a mixture between the fact that a law is able to achieve certain objectives, and a general satisfaction of the legal subject with the results of a particular exercise of legislative authority. The authority to make laws in the latter case is justified by referring to the effectiveness of the resulting laws.144

138 Kelsen 2007, p. 117.
139 See Bodansky 1999.
140 This is called legal-rational authority, in line with Weber’s theory of legitimacy. Legal rational authority rests upon norms whose legitimacy is ascribed to the fact that they have ‘... been established in a manner which is recognized to be legal’. Spencer 1970, p. 125.
141 Luhmann 1979, p. 34. Luhmann further states that ‘possibilities of sanction produce a generalizing effect in the context not only of hierarchical relations, but also in between equals. They stabilize interaction through the anticipation of extreme contingencies’, which it makes it easier to extend trust.’ Luhmann 1979, p. 37.
142 Output legitimacy refers to the problem solving quality or the efficiency of laws and rules, which can be observed by a researcher or interpreted by participants of the lawmaking processes, or the people who are subjected to the rules. Zürn distinguishes output legitimacy from throughput legitimacy, and input legitimacy. Zürn 1998, p. 233-236.
143 For example, legal subjects understand peace and security as a precondition for a good life and consider law as a necessary and legitimate instrument to create and maintain peace and security. Goossens 2003a, p. 31.
144 Weiler illustrates this type of legitimacy with regard to the legitimacy of a war, ‘[t]here is no better way to legitimate a war than to win it’. Weiler 2012, p. 828.
The acceptability of the content of law can also be based on the conviction that laws express values that convey moral issues. The authority to rule is justified in this respect by the congruence between the substance of the law and a generalized perception of morality. The content of the law reflects principles that are consonant with what is perceived morally ‘right’ or ‘just’ in a society. Fuller, while focusing on the necessary congruence between law and social practice, states that efforts to legally guide the behavior of legal subjects can only succeed when legal norms conflate with their ordinary practices and customs. There should be a ‘sufficient degree of substantive congruence between law and extralegal social practices’. The moral acceptance of law also touches upon the relationship between legitimacy and a more generalized perception of justice. The rightful content of a law as a ground for legitimacy should correspond with communal practice and a common spirit regarding the understanding of what is ‘just’. The complexities associated with a ground for legitimacy based on content are obvious, as who is to interpret and decide what is ‘just’, and what behavior of what part of society is decisive to forming a ‘communal practice’ or ‘common spirit’?

1.2 Democratic legitimacy

The NGO democratic legitimacy thesis urges us to investigate a specific moral reason to obey legal rules: law is assumed to be acceptable when it is democratically made. Scholars

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145 This might be the case with laws relating to criminal behavior, family law, but also with laws relating to civil rights. Spencer 1970, p. 127.
146 What should be perceived as morally right or just is inherently subject of controversy and has led scholars to offer a coherent and persuasive vision of a society, well ordered by principles of justice and right, in order to answer the fundamental normative question ‘what should the law be’. An often-cited theory is in this regard Rawls’s ‘Theory of Justice’, publicized in 1971. See for an overview of contemporary theories of justice, Kymlica 2002. See for an account in which content plays a role in the normativity of law; Brunnée and Toope 2000-2001, referring to Postema, who argues that ‘legal norms and authoritative directives can guide self-directed social interaction only if they are broadly congruent with the practices and patterns of interaction extant in the society generally’. Postema 1994, p. 265.
147 Postema 2011, p. 320-321 referring to his explanation of Fuller’s work in chapter 3, p. 146-153.
148 Although this section discusses the content of the law as reason to accept authority, justice as standard of legitimacy might, besides evaluating the content of the norm, also evaluate the procedure in which the norm is created. Sometimes legitimacy and justice are presented independently from each other, sometimes the two concepts are conflated, and sometimes a hierarchy is applied between the two. Some scholars define justice as necessary element of legitimacy, while others explicitly define legitimacy as a criterion for minimal justice. See for an example of the latter: Buchanan 2002, p. 689-719. Rawls however separates the concept of justice and legitimacy, and subordinates legitimacy under justice. Legitimacy is related primarily to political institutions, while justice includes the broad scope of social and economic institutions. Rawls 1993; Rawls 1995, p. 132-180.
149 Spinoza stated in this respect that peace implies that citizens not only renounce violence, but also that citizens form a community characterized by ‘one spirit’ (una veluti mens). The common spirit is expressed in the law and consequently determines the commonality of the community in a fundamental way. The commonality in the law expresses the broader commonality existing in civil society, existing of many and varied spontaneous and voluntary social relationships and groups of citizens among themselves (family, neighborhood, associations, parties, churches) without which, more or less common values would not be formulated or would not be passed on. See De Dijn 2003, p. 88.
150 The focus on the moral reasons to obey legal rules does not imply that we focus on the moral correctness of the content of the law, but ‘on the moral duty to obey the law qua law’. Besson 2009a, p. 344-345.
151 Our focus on democracy as ground for legitimacy consequently does not tell us whether democratic legitimacy alone effectively leads to an unconditional duty of obedience to a legitimate law. We follow in this respect Sadurski, who argues that ‘it is impossible to combine the justification, legitimacy, and the duty to obedience in
engaged in the NGO democratic legitimacy thesis join a large cohort of scholars that assumes that in the current normative climate, democracy is one of the strongest justifications for the exercise of lawmaking authority. Democratic legitimacy as an evaluation tool to assess the authority to rule is quite a demanding standard. As Keane states, ‘understood simply as people governing themselves, democracy implied something that continues to have a radical bite: it supposes that humans could invent and use institutions specially designed to allow them to decide for themselves, as equals, how they would live together on earth’.

The now broadly embraced ideal that those who exercise authority should act in the name of the people has caused an immense conceptual change in terms of the legitimation of law. When the legitimacy of laws is accepted on democratic grounds, governments cannot rely on the authority to rule based on the conviction that any metaphysical forces have delegated the power to rule to the ruler, or on the authority of enlightened reason. Any external, transcendental body, whether it is reason or God, is replaced by the principled belief that the people should govern themselves; that they should provide for their own welfare, which terms are also to be determined by themselves, whether or not through representatives.

The dominant starting point in the literature concerning democratic legitimacy is that democratic legitimacy is provided when legal subjects, who are directly or indirectly affected by the law, have a say in its wording. This highlights the focus on a specific part of a lawmaking procedure when assessing the democratic legitimacy of law. The focus is on ‘legislature-made’ law, and not on ‘judge-made’ law. ‘Having a say’ in this respect concerns the opportunities for the legal subjects to participate in the creation of a new rule,
and opportunities to control the governing authority, which is considered to establish a ‘fair’ decision-making procedure.\textsuperscript{158} Two disclaimers often follow. First, most scholars tend hastily to add that democracy has too many contradictory meanings to allow for any definitive qualifications.\textsuperscript{159} Second, scholars broadly accept that the general mission statement of democratic legitimacy does not lead to the conclusion that only direct democratic procedures can be accepted as democratically legitimizing law.\textsuperscript{160}

In a way, the necessity of the concept of legitimacy in itself, as a tool to test the acceptability of the authority to rule, implies that there is a distance between the ones that have the privilege to make the laws, and the rest of the political community that are expected to obey. A broad specter of modes of decision-making is often considered justifiable in terms of its democratic legitimacy in which the ‘say’ of legal subjects, or respect for the ‘say’, differs in form and intensity. From a substantive perspective, it is often assumed that when public concerns and interests determine the outcome of the exercise of authority, one can already speak of democratic legitimate law.\textsuperscript{161} From a procedural perspective many theorist have argued that indirect democratic decision-making through representatives suffices. What democratic legitimacy exactly entails, and how it can be contrasted with other related concepts, often remains unclear in these accounts.

This section aims to offer a presentation of the two central principles of democratic legitimacy: freedom and equality. The subsequent section 1.3 further explains the main vehicle for protecting these principles: participation in the exercise of authority. The essential principles of freedom and equality are closely related to the concept of power, as conceptualized in the next sub-section. Whereas freedom concerns the status of individuals that needs to be respected and guaranteed, and equality functions as a precondition for freedom to be of any relevance in a democratic sense, power relates to the activity of individuals who desire to effectuate their freedom to take their equal share in governing. This sub-section starts with the concept of power to clarify what type of activity requires protection and support. The following sub-sections on freedom and equality explain why power requires protection and support.

1.2.1 Power

In general, power is understood as the capacity ‘to bring about changes in the action of other units, individual or collective, in the processes of social interaction’.\textsuperscript{162} As mentioned above,

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  \item \textsuperscript{158} See Gibson 1989, p. 483-86, discussing the importance of fair decision-making procedures to legitimate outcomes – even outcomes that are disliked.
  \item \textsuperscript{159} Koskenniemi for example warns that the concept of democracy is in any case ‘too general to provide political guidance’. Koskeniemi 1996, p. 234-235.
  \item \textsuperscript{160} Only a handful of scholars refuses ‘to accept in principle any conception of the political good other than that generated by ‘the people’ themselves’. Held 2006, p. 260.
  \item \textsuperscript{161} Held 2006, p. 260-261. For some scholars, taking into account legal subjects’ interests, or consulting individuals can sufficiently contribute to the democratic legitimacy of law. Dunn for example states that the essence of democracy is respect for the individual as a human being, which ‘… includes the right to be consulted in regards to matters affecting his welfare, since consultation is one of the best ways of showing deference to him’. Dunn 1941, p. 18. One should be aware that in this assumption a specific notion of democracy is accepted in which a division between rulers and ruled is accepted. Hershovitz would argue against any division as from a democratic perspective there is no sharp division between the ‘binders’ and the ‘bound’. Hershowitz 2003, p. 201.
  \item \textsuperscript{162} Parsons 1963, p. 232.
\end{itemize}
this study takes a different starting point and relies on Arendt’s conception of power. Arendt’s concept of power refers to the existential power to express oneself and to act as a human being between other human beings. This conception of power distinguishes itself from the more general concept of power by focusing on the origins of power instead of on the means of employment. In the words of Follett, power in this sense is ‘defined as simply the ability to make things happen, to be a causal agent, to initiate change’. Power focuses on ‘power with’ instead of ‘power over’ and is distinct from authority, strength, force, and violence. Arendt subjectifies power as an act, or the effect, of gathered individuals acting in concert. Power is dependent on a plurality of individuals who use that power collectively. Any potential transformation in political constellations, whether related to a single legislative action, or to the overthrowing of a political constellation, depends on the collective action of individuals. Power refers to the capacity to act in concert for a public-political purpose. The resulting power is what keeps in existence the public realm, which Arendt understands as the potential space of appearance between acting and speaking men.

The usefulness of Arendt’s notion of power for our conception of democratic legitimacy lies in this practical application. Arendt’s account of power is particularly relevant in understanding the generation of power, which clarifies the foundation of democratic legitimacy. As discussed, it is generally assumed that in the long term, rules and the consequential authority to command and force legal subjects to obey these rules can only

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163 Arendt’s concept of power is in our understanding not inherently related to a democratic reading of power. There is an interesting debate whether Arendt’s work on power and authority should be understood as inherently non-democratic or democratic. Its critics argue that Arendt offers an elitist understanding of political action, as only some are considered to have the virtues to participate in politics. See Wolin 1983. Scholars in favor of a democratic reading argue that Arendt’s concept is inherently democratic, as Arendt’s critique on representative democracy should be read as a plea for a richer reading of democracy, where representative democracy is complemented by bottom-up democratic processes, rising from every group of individuals gathering and acting together. See Isaac 1994.

164 To act is something fundamentally different from doing something in order to make a certain object. Acting as being-between-others has no finality other than itself. The same is true for speaking, as it coexist between others. Goossens 2003a, p. 14-15.

165 Follett 1942, p. 76. She adds in her footnotes that this is not her final definition of power. See for a demonstration of how Arendt’s conception of power differs from other leading conceptions of power and for a exploration of its weaknesses, Habermas 1977.

166 Arendt 1972, p. 143-155. Unlike strength, it is not the property of an individual, but of a plurality of actors joining together for some common political purpose. Unlike force, it is not a natural phenomenon but a human creation, the outcome of collective engagement. And unlike violence, it is based not on coercion but on consent and rational persuasion.

167 According to Arendt, ‘Power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together. When we say of someone that he is ‘in power’ we actually refer to his being empowered by a certain number of people to act in their name’. Arendt 1972, p. 143. Habermas understands Arendt’s concept of power as communication power, ‘it is a collective effect of speech in which reaching agreement is an end in itself for all those involved’. Habermas 1977, p. 6.

168 Political power’s limitation is the existence of other people, but this limitation, Arendt notes, ‘is not accidental, because human power corresponds to the condition of plurality to begin with’. Arendt 1958, p. 201. Arendt defines plurality as ‘the fact that men, not Man, live on the earth and inhabit the world’, and states that it is the condition of human action ‘because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live’ Arendt 1958, p.7-8.

169 For Arendt, power is a sui generis phenomenon. Power results out of action shows its collective characteristics by the fact that in order for action to become power, action relies on persuading the other in debates in order to secure consent. Arendt notes, ‘is not accidental, because human power corresponds to the condition of plurality to begin with’. Arendt 1958, p. 201.
be effective when power belonging to everyone supports these rules. That specific support is the proof of acceptance and is indicated as the conferral of legitimacy to both rules and rule makers. However, Arendt’s conception of power is not very helpful for understanding the employment of power, relating to the ‘power to rule’.\textsuperscript{170} This is why we distinguish the ‘power to rule’ from our conception of power, by defining it as the ‘exercise of public authority’.\textsuperscript{171}

The potential of generating power is important here. In Arendt’s words, ‘power springs up between men when they act together and vanishes the moment they disperse’.\textsuperscript{172} Actions by individuals, and especially concerted action resulting in power, but also the results of power, are unpredictable.\textsuperscript{173} The desire to reduce the chances of the possibly unwanted consequences of people acting collectively that arises from a ‘suspicion for acting’, as Arendt calls it, could be understood as one of the main motivations for setting rules to which everyone who is part of a specific community should adhere.\textsuperscript{174}

Such mutual self-restraint by laws facilitates mutual ‘traffic’ between people. Laws offer members of society guidance in order for them to live together and interact with each other as fairly as possible. Laws also contribute to mutual protection, striving to safeguard individuals from predation by others. The attractiveness of mutual protection and regulation by law might be based on the realization that the costs of self-protection or self-regulation are too high.\textsuperscript{175} Besides, by agreeing to the setting of laws, individuals can undertake constructive projects that would be too large to do on their own.\textsuperscript{176} Law is considered a favorable instrument for solving demanding coordination problems such as the ones that can arise by the unpredictable exercise of power by a collective gathering and acting of individuals. Members of a specific community can lawfully and politically live together based on these laws only when some are entitled to command and the others to obey.\textsuperscript{177} In order for laws to be acceptable because of their democratic legitimacy, the exercise of authority,
during that specific law formation but also in general, is required to respect the two essential principles of democratic legitimacy: freedom and equality. These principles protect the potential of every legal subject's capacity to act and speak in concert for public political purposes.

1.2.2 Principles of democratic legitimacy

Freedom and equality together form the essential principles of democratic legitimacy. The outline that follows, in conjunction with the further elaboration of their infrastructure and operational aspects in chapter 2, establishes an analytical yardstick for assessing the extent to which the thesis that NGOs contribute to the democratic legitimacy of international law approximates this ideal.

Freedom

The concept of freedom has been the subject of study for many influential philosophers, from Hobbes, Locke, Bentham, and Mill to Hegel, Marx, Arendt, and Habermas. Most democratic theorists consider freedom to relate to concepts of autonomy and self-government that in concert form the fundamental premises of democracy. Testing the democratic legitimacy of the exercise of authority evaluates the extent to which the exercise of public authority respects an equal regard of citizens’ individual freedom, or, put in a more emancipatory way, the right of individuals to autonomy. Public authority based on the principle of freedom facilitates ‘each citizen to exercise his or her powers of agency, to develop the capacities for judgment and to attain by concerted action some measure of political efficacy’.

To remain free, everyone should be able equally to exercise capacity to act in concert for public political purposes independently, which collectively leads to self-government. This understanding of freedom points towards a participative account of freedom, focusing on the opportunities to act. Freedom in this respect means that everyone is able to pursue the essence of being a political human. Freedom is understood as self-realization as a citizen, and is related to a legal subject’s admission to a political realm. Therefore, freedom

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178 See chapter 2 in which the dual evaluation (of the specific lawmaking process and of the system at large) is explained.
179 Only if we understand what the ideal we are striving for actually aims to protect are we in a position to say ‘how far existing legislatures fall short of that ideal and what exactly, it is that they fall short of’. Waldron 1999a, p. 33.
181 Locke is considered the founding father of classical liberalism. He wrote ‘no one ought to harm another in his life, health, liberty, or possessions’. See Locke 1988; Mill 1993; Hayek 1960. See for an introduction to moral right to freedom as non-domination and autonomy as the basic premise of democratic theory, Waldron 1999a, p. 215.
183 See d’Entreves 2008.
184 This reading of freedom understands freedom as a relational concept, enabling political action and participation. A republican approach to freedom is based on certain skepticism towards the liberal conception of freedom that focuses primarily on rights as the moral property of isolated individuals. See Waldron 1987.
186 Arendt 1998, p. 217. "The chief difference between slave labor and modern, free labor is not that the laborer possesses personal freedom—freedom of movement, economic activity, and personal in-violability—but that he is admitted to the political realm and fully emancipated as a citizen."
embodies a political achievement and a civic status.\(^{187}\) In the end, legal subjects understand the exercise of public authority as created by themselves.\(^{188}\) This conception of freedom also includes a reference to the accompanying responsibilities of individuals to other individuals,\(^{189}\) and refutes a liberal conception of freedom that is disconnected from social ties.\(^{190}\)

Notwithstanding the emancipatory attraction, this ideal-type understanding of freedom is difficult to reconcile with being ruled by laws that other people have created if one has at least let go of the somewhat alienating idea that the exercise of authority can be equated with the ‘general will’ of the people.\(^{191}\) Being the subject of a legal rule inevitably involves a submission to the exercise of public authority by others. Therefore, an emancipatory approach to freedom should be complemented by an emphasis on how to protect the freedom of legal subjects in a context in which they are inherently submitted to law they did not directly make themselves. A situation in which legal subjects are considered free while submitted to legal rules points towards the paradoxical relationship between law and freedom. The ‘sobering truth about law’\(^{192}\) is that law is not only instrumental in preventing oppression, but also increases the chances of oppression.\(^{193}\) Law itself might result in a form of domination,\(^{194}\) which, due to the continuous characteristics of law, involves a significant level of voluntary compliance.\(^{195}\) The question arises to what extent the principle of freedom can effectively guide an evaluation of the acceptability of the exercise of authority.\(^{196}\)

The fact that being both free and part of a political community is impossible in the absolute sense does not affect the possibility of using freedom as a persuasive tool for evaluating the way we are governed. The fact that the exercise of public authority through law interferes with, or hinders one’s freedom can be acceptable.\(^{197}\) A promising route to


\(^{188}\) As Habermas states: ‘Legitimate law is compatible only with a mode of legal coercion that does not destroy the rational motives for obeying the law: it must remain possible for everyone to obey legal norms in the basis of insight. In spite of its coercive character, therefore, law must not compel its addressees but must offer them the option, in each case, of foregoing the exercise of their communicative freedom and not taking a position on the legitimacy claim of law, that is, the option of giving up the performative attitude to law in a particular case in favor of the objectivating attitude of an actor who freely decides on the basis of utility calculations.’ Habermas 1996, p. 121.

\(^{189}\) Rights, from a republican perspective, rely on the support and cooperation of others for their enforcement.

\(^{190}\) Liberals focus primarily on the domain of action in which individuals are not constrained. As Pettit states: a republican conception of liberty is a ‘social ideal that presupposes the presence of a number of mutually interactive agents’. Pettit 1997, p. 99.

\(^{191}\) The most famous founder of the idea of the general will is Rousseau. See Rousseau 1943.

\(^{192}\) Hart even states that without law, forms of exploitation and oppression are practically unimaginable. ‘The gains [red: of a legal world] are those of adaptability to change, certainly, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not.’ Postema 2011, p. 333, referring to Hart 1994, p. 202.

\(^{193}\) Waldron 1999c, p. 175, 181.

\(^{194}\) Weber has also characterized law as domination, pointing towards the capacity of law to constitute a compulsory relationship. Weber 1978, p. 52-53.

\(^{195}\) Weber 1978, p. 212.

\(^{196}\) As ‘no society tolerates absolute freedom even of conscience and of speech, no society reduces that sphere to zero’, compliance with the principle of freedom evidently becomes a matter of degree. See Schumpeter 2003, p.11.

\(^{197}\) This deviates from a more Hobbesean account of freedom, which focuses on both the exercise of authority and interference, which were understood as a disempowerment that makes you unfree, as you are prevented to take action or you are compelled to take action. Berlin explains this account of freedom as follows: ‘If I am prevented
reconciling submission to law and one’s freedom is to specify freedom as freedom from domination.\(^{198}\) The concept of domination here refers to ‘the authoritarian power to issue commands that are heeded to a significant extent’,\(^{199}\) and to ‘offer interpretations of the public good’.\(^{200}\) Freedom from domination requires an organization of the political system to defy tyrannical (autonomy-constraining) forms of exercises of authority.\(^{201}\) Freedom requires a balancing act in which individual autonomy needs to be preserved to the highest level that matches with the existence of authority.\(^{202}\) In other words, absolute freedom from domination is nuanced by a conception of freedom in which one agrees to a certain form of domination, provided that these forms of domination can constantly be adjusted and controlled, which one could call ‘constrained interference’.\(^{203}\)

Constrained interference should be distinguished from arbitrary interference. Someone living under the discretion of an exerciser of authority, even when that exerciser prefers not to interfere, cannot be considered free. This conception of freedom emphasizes the non-arbitrariness of the exercise of authority over others, and consequentially the opportunities of subjects of authority to intervene. Pettit emphasizes in this regard the difference ‘between just happening to avoid such arbitrary interference – say, because the powers that be quite like you – and being more or less invulnerable to it’.\(^{204}\) This conception of freedom from domination has been developed in republican democratic theory. Freedom is illustrated by the famous distinction between a citizen and a slave. Being unfree, being a slave, means that interference with your freedom contrary to your interests may occur. Due to one’s dependency, that interference can be enacted at the arbitrary will or power of the dominating party.\(^{205}\)

The key merit of democratic legitimacy is the ability to serve that intrinsically problematic relation between law and freedom. Precisely because the form of domination by law is perceived as necessary, a strong legitimation of the exercise of authority is required. The wish to be part of a society ruled and ordered by law requires us to turn the question around and ask to what extent legal subjects find it acceptable that their freedom is infringed. A democratic legitimation could explain why a ruler can have an impact on the autonomy of legal subjects to direct their own lives. Democracy, as a ground for legitimation, meets this existential requirement by arranging that it is not the ‘other’ who is impacting upon the individual’s autonomy, but the individual him or herself. A legal subject cannot speak of

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198 The subsequent exploration of the rationale of democratic legitimacy is predominantly inspired by a republican approach to democracy as articulated by Arendt and Pettit. Pettit has brought back into scholarly debate on democracy the republican account of freedom. Pettit 2006; Pettit 1997; Pettit 2000. The centralization of the principle of freedom is typical to a republican approach in democratic theory.
200 Bohman 2007c, p. 100.
201 Macdonald 2008, p. 36.
203 Pettit 2012, p. 152.
204 Pettit 2010, p. vii-viii.
205 Skinner 2014.
arbitrary domination when a law is the result of a democratic process, even if his or her specific opinion on the subject matter is not congruent with the majority of the political community. Provided that the exercise of lawmakers has taken place in a political construction that offers every legal subject the opportunity to act, the fact that an individual’s own opinion is not reflected in the final result of legislative procedures is not itself a threat to his or her freedom from domination. The key test is whether those who disagree with enacted policies and laws have full civic and political freedom to mobilize others, to deliberate on laws, and to contest laws, which might eventually lead to democratically realized change.

Equality
An understanding of freedom from domination incorporates an ‘inclusive conception of the members of any society’. Particularly in a democracy where individuals are free from unwanted domination, it is essential to speak of capacity to act and speak in concert for public political purposes that every citizen can enjoy equally. Every legal subject should be able to have the opportunities to ‘begin’, to mobilize others, and to deliberate. The equal opportunity to exercise power is simultaneously a manifestation and a proof of the existence of freedom from domination.

The principle of equality not only refers to a right but also to an obligation. Lawmakers have the duty to ‘express public recognition of the equal worth of persons, conceived as autonomous centres of deliberation and action’. The principle of equality is lived up to when all citizens are equal before the law and have equal opportunities to capacity to act and speak in concert for public political purposes and to participate in the making of law. This obligation for the exercisers of public authority to respect equality is twofold: lawmakers should offer every legal subject an equal opportunity to participate in lawmaking, and they should guarantee that the product of lawmaking establishes a certain equality of legal subjects before and by the law, in line with a rule of law doctrine.

Although from a rule of law perspective it is a value in itself, equality is understood here as an essential property of democratic legitimacy, complementary and instrumental to freedom from domination. The complementarity of freedom and equality can be explained by the inherent reciprocal characteristics of freedom as a democratic principle. First, there is no reason to be concerned about the protection of one’s freedom and autonomy outside

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207 In this conception of freedom as basic rationale for democratic legitimacy we refrain from adding substantive accounts on what is necessary in terms of recourses for citizens to protect their freedom from domination by others. These resources might include financial means, and social standing. Here discussions on democratic legitimacy meet discussions on distributional ideals related to theories of justice. In this sense, we take a procedural approach to democratic legitimacy, notwithstanding its possible theoretical shortcomings. See Pettit 2008, p. 4.
208 As Pettit states, ‘they include at least all permanent residents who are adult and able-minded, not just the propertied, mainstream males on which political theory had traditionally focused.’ Pettit, 2008, p. 3.
209 Political equality as Arendt conceptualized it, does not rely on a theory of natural rights or on some natural condition that precedes the constitution of the political realm. ‘Rather, it is an attribute of citizenship which individuals acquire upon entering the public realm and which can secured only by democratic political institutions.’ See d’Entreves 2014.
211 Beitz 1989, p. 92.
212 See Dworkin 2000.
the context of a plurality of individuals forming a political community. Second, the reciprocity of the principle of freedom entails a responsibility not only for one’s own freedom but also for the protection of freedom of others. In this respect, freedom directly relies on the principle of equality. A situation in which one individual enjoys structurally more freedom and privileges than another, based on legal rules created by public authority – in other words, in which one legal subject is less obstructed by governmental interference than another individual – implies that the latter is inherently subject to domination. The impact of laws on individuals must therefore be egalitarian.

The importance of equality for democratic legitimacy relates primarily to the obligation to offer every legal subject an opportunity to participate in lawmaking. A detached conception of democracy is taken as a starting point. Equality is understood in terms of equal political participation and can be seen as a procedural principle to enable freedom, and therefore to enable democratically legitimate law. An equal right to participate in lawmaking processes includes a commitment to an equal determination of the outcome.

As was reflected in the previous sub-section regarding the difficulty of reconciling political authority with a principle of freedom, the practice of the exercise of public authority is, at first sight, also difficult to reconcile with the principle of equality. Apart from direct democracy theorists, most conceptions of democratic legitimacy seem to deviate from the requirement of a direct equal opportunity to participate. How is it that we still refer to a principle of equality in a political constellation when we accept that some people have the

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213 Dworkin 2000, p. 186. Sadurski argues that a detached conception is congruent with the ‘contention that equality in political power is a valuable, attractive ideal, which is not parasitic on a more encompassing ideal of equality in a society, and that we should in effect be concerned about how power is distributed (that is, about how collective decisions are made), irrespective of, or in addition to our concern about what is the substance of these decisions and how they shape the distribution of other (other than political power) resources’. Sadurski 2008, p. 75-76.

214 Buchanan concludes the other way around: ‘if the wielding of political power is morally justifiable only if it is wielded in such a way as to recognize the fundamental equality of persons, and if democracy is necessary for satisfying this condition, then political legitimacy requires democracy, at least in circumstances in which democratic institutions are feasible’. Buchanan 2004, p. 250.

215 When we speak of equality in the context of democratic legitimacy, we refer to the political equality, not to be confused with social equality. However, not everyone will agree with the isolation of political equality from social equality. Some philosophers argue that a use of political equality is incomplete if it is not also deployed to evaluate the outcomes of the decision procedure and that where these outcomes seriously offend or violate the principle of political equality, some adjustment to its application to the decision procedure and to the inputs may be required. For example, Beitz argues that applying the principle of political equality simply to legitimize majority decision as a procedure narrows its meaning unacceptably. Political equality should in this regard also be called up to justify institutional arrangements dedicated specifically to scrutinizing the content of majoritarian outputs and screening out egregious violations. Beitz 1989, p. 64. Sadurski is also critical to what he understands to be Rawls ‘thinner’ conception of equality. ‘When, for instance, John Rawls defines ‘the principle of equal participation’ as the principle requiring ‘that all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply then this ideal is not vulnerable to collapsing into non-political goods but, under one (pedantic) interpretation at least, it is not ambitious enough to be attractive. For we can all have an ‘equal right’ to take part in the political process and to determine the outcome but it does not follow that, once we participate and determine the outcome, the actual level of determination of the outcomes will be roughly similar for the different participants.’ Sadurski 2008, p. 77-78, referring to Rawls 1971, p. 221. See for an overview of the inherent dilemma’s related to such a substantive evaluation of the outcome of a democratic procedure, Waldron 2012.

216 See for an overview on the characteristics of direct democracy, Held 2008, p. 96-123.
power to decide over others? Most democratic theorists argue that a certain division of labor is justifiable from a democratic legitimacy standpoint. Equality as presented in this study also upholds to a certain extent ‘the fiction of equal citizenship’. Here, the very concept of acceptability of law due to trust in law or in lawmaking processes based on democratic grounds again becomes relevant for our discussion. To be democratically legitimate, a law does not have to derive from a lawmaking process that is part of a governing system that takes up the responsibility of ensuring that participation by every legal subject is possible in every decision within the polity. Instead, due to the infeasibility, and in many cases the sheer impossibility of direct equal participation in the making of law because of the size and complexity of current democratic societies, Warren states that ‘trust would enable highly pluralized but relatively egalitarian patterns of participation. The pattern would be pluralized because at any point in time individuals selectively focus their participatory resources. The pluralism would be egalitarian if every individual possesses participatory resources (time, knowledge, security, rights of voting, association, speech etc) that provide them with roughly equal chances to influence political outcomes, should they choose to do so.’

The inevitable inequality in the exercise of public authority is justifiable if every citizen has the opportunity to participate equally in the decision-making processes as to who will exercise public authority and how it will be exercised. Withdrawal from politics, in the case where the choice to withdraw does not depend on an outside body and is not derogatory, is not contrary to the general principles of freedom from domination and equality as long as ‘those who do not belong are self-excluded’.

1.3 Participation

Democratically legitimate law, understood from a republican perspective, promises a reconciliation of the capacity of legal subjects to gather and act for public-political purposes with a submission to the exercise of public authority. In other words, democratically
legitimate law is the proof of the actuality of ‘a sort of regime that can coerce citizens without depriving them of their freedom’. The underlying rationale is that notwithstanding the fact that laws prescribe the behavior of legal subjects, ‘politically free is he who is subject to a legal order in the creation of which he participates’. Whereas the potential of power belongs to every individual and can materialize by the gathering and acting of individuals together, it derives its democratic connotation when legal subjects exercise it in freedom from domination. This freedom can be protected when their power is channeled equally into formal lawmaking processes, in order for everyone to have an equal say in the final decisionmaking on a law. An equal opportunity to participate in governing is a necessary condition of freedom from domination and, at the same time, its most evident manifestation. This figure demonstrates democratic legitimacy’s circularity.

Figure 1 - Democratic legitimacy’s circularity

The translation of the democratic ideal to participation in governing must support citizens’ shared convictions that they have not given up their essential autonomy in the assertion of their individual rights and freedoms and, collectively, their ultimate sovereignty. To remain free from domination, lawmaking practices should offer fair and unconstrained opportunities for participation, which should be understood to be as broad as the participation in mobilization of others to formulate desirable laws, deliberation with others over these laws, and decision-making in the final enactment of law. Evidently, lawmakers should be responsive to these participatory acts of their legal subjects.

How to demonstrate that the exercise of authority to rule is in line with what the people want is a recurring puzzle for legal and political theorists. Freedom entails, on the one hand, the freedom to have a say in the decisions on the laws that govern you and, on the other hand, the ability to control the exercise of delegated public authority. Participation can manifest itself proactively by the giving of consent to specific laws; continuously, by deliberation on laws; and reflectively, by control over the specific exercises of lawmaking authority, which might lead to an adjustment or even an annulment of a specific law. These

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223 Pettit 2012, p. 147.
224 Kelsen 2007, p. 284.
226 As Rousseau already stated: “To find a form of association which may defend and protect with the whole force of the community the person and property of every associate, and by means of which each, coalescing with all, may nevertheless obey only himself, and remain free as before. Such is the fundamental problem of which the social contract furnishes the solution.” Rousseau 1968, Book I, chapter vi.
manifestations are complementary to each other as, to a certain extent, they compensate for each other’s weaknesses. They are distinguished by their focus on a different moment in the continuous circle that characterizes participation in legislative processes. This section considers how participation meets the rationale of democratic legitimacy by focusing on consent as a means of demonstrating one’s approval of a specific law or of representatives that make laws; on deliberation, as the continuous opportunity to gather and discuss on the formulation of laws, and the desirability of old and new laws, and as the continuous activity of lawmakers to reach agreement on the specifics of a law; and on control, as a means of keeping the lawmakers in line with what the people want.

1.3.1 Consent
The first approach to participation relies on the democratic requirement to enable legal subjects to proactively exert influence in governing processes, and takes an activist approach towards the republican ideal of freedom from domination.\(^{227}\) In the beginning of republican thinking, freedom was predominantly conceptualized in light of the right of legal subjects to a share in government. The exercise of the authority to rule was considered democratically legitimate when it both empowers and enables citizens to decide collectively about the course of political events. The basic starting point of this account is that individuals desire to be their own master. To remain one’s own master one has to actively partake in decision-making that affects one’s life. To prevent being subject to another’s act of will, individuals want to rule themselves, to self-rule. As discussed, Arendt connects freedom to the ability to initiate, to collectively act and speak, referring to this proactive participative conception of freedom.\(^{228}\) Habermas translates this quite abstract strategy into legislative practice: ‘only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted’.\(^{229}\)

The proactive approach is well illustrated by the adage that the will of the people constitutes the ultimate source of the democratic legitimacy of public authority.\(^{230}\) The obligation to take into account individuals’ interests equally to respect individuals’ freedom from domination should entail more than the equal right to participate in the political process. To give substance to this principle, a commitment to operationalize opportunities is required that enables actually and equally partaking in lawmaking, ensuring that the ‘actual level of determination of the outcomes will be roughly similar for the different participants’.\(^{231}\)

Whether or not different participants have had the actual and equal opportunity to take part in lawmaking can be demonstrated by their consent or dissent. A strong tradition in democratic thought holds that democratic legitimacy rests on some comprehensive democratic approval. The proof of such approval is captured by the notion of consent. The emphasis on consent can be traced back to the Aristotelian notion of the self-governing citizen and the Roman dictum that ‘what concerns all, all must discuss and approve’.\(^{232}\)

\(^{227}\) See Morone 1998.
\(^{228}\) d’Entreves 2008.
\(^{229}\) Habermas 1996, p. 110.
\(^{230}\) Roth 2000, p. 38
\(^{231}\) Sadurski 2008, p. 77-78.
\(^{232}\) Karlsson 2006, p. 3. Karlsson further states, ‘[b]oth the Aristotelian notion of the self-governing citizenry and the Roman dictum imply that liberty means living according to laws that you have given yourself’. Karlsson 2006, p 3.
Democratic approval is often even equated with democratic legitimacy. Manent, for example, argues that democratic legitimacy is served best when individuals give their consent to the exercise of political authority.\textsuperscript{233}

The ideal of consent and the relation to democratic legitimacy theory recognizes different levels of abstraction. It might refer to the consent of legal subjects to actual laws, but also to the fundamental idea that the basic structure of the state should be based on the consent of the governed, as introduced by Hobbes. The state, while perpetrating interference against its citizens, can only be legitimate when the subjects have the freedom of contract. The idea is that if someone consents to an arrangement with another under which they suffer the other’s intervention, in this regard through the establishment of a political constellation which enacts laws that are binding for all legal subjects that are part of that constellation, then such an invited form of intervention does not count as interference and does not take away the autonomy of the legal subject.\textsuperscript{234} This idea of a private contract in which the governed establish an ex ante, or in our words, a proactive, commitment to be submitted to the exercise of authority is persistent in legitimacy theory.\textsuperscript{235}

An obvious criticism of the Hobbesian version is grounded in the idea that giving an initial consent to a governmental structure that provides legitimation for all subsequent exercises of authority lacks persuasiveness for the citizens who are born into an existing governmental structure.\textsuperscript{236} Theorists have abandoned this private understanding of a contract and have

\textsuperscript{233} Manent 1997, p. 92-102.
\textsuperscript{234} Pettit 2012, p. 151.
\textsuperscript{235} This idea has several versions that are well elaborated by Raz 1995, p. 356. Locke has developed the social contract theory, that was strongly criticized by Hume, in his essay ‘Of the Original Contract’ that proposed a justification of political authority, not based on consent but on its beneficial consequences. See for a concise presentation of the development of the idea of consent. See Peter 2010.
\textsuperscript{236} In a sophisticated manner Habermas criticizes consent theory, of which he is predominantly skeptical about the assumption that rational individuals, from the perspective of the first-person singular, close a contract. He considers this a false assumption, as a person will trade his or her unlimited autonomy for a system of generally coercive laws only under two conditions: ‘On the one hand, the parties would have to be capable of understanding what a social relationship based on the principle of reciprocity even means. The subjects of private law, who are at first only virtual present in the state of nature, have, prior to all association, not yet learned to “take the perspective of the other” and self-reflexively perceive themselves from the perspective of a second person. Only then could their own freedom appear to them not simply as a natural freedom that occasionally encounters factual resistance but as a freedom constituted through mutual recognition. In order to understand what a contract is and know how to use it, they must already have at their disposal the sociocognitive framework of perspective taking between counterparts, a framework they can acquire only in a social condition not yet available in the state of nature. On the other hand, the parties who agree on the terms of the contract they are about to conclude must be capable of distancing themselves in yet another way from their natural freedoms. They must be capable of assuming the social perspective of the first-person plural, a perspective always already tacitly assumed by Hobbes and his readers but withheld from subjects in the state of nature. On Hobbesian premises, these subjects may not assume the very standpoint from which each of them could first judge whether the reciprocity of coercion, which limits the scope of each’s free choice according to general laws, lies in the equal interest of all and hence can be willed by all the participants. In fact, we find that Hobbes does acknowledge in passing the kinds of moral grounds that thereby come into play; he does this in those places where he recurs to the Golden Rule – Quod tibi fieri non vis, alteri ne feceris – as a natural law.’ Habermas 1996, p. 92 referring to whatsoever you require that others should do to you, that do ye to them’. Hobbes 1991, p. 92, 117, 188. Habermas continues: ‘But morally impregnating the state of nature in this way contradicts the naturalism presupposed by the intended goal of Hobbes’s demonstration, namely, to ground the construction of a system of well-ordered egoism on the sole basis of the enlightened self-interest of any individual.’ Habermas 1996, p. 91-92, referring to Höffe 1987, p. 407.
replaced it by an explicit public understanding of a contract. Rousseau further developed the idea of a contrat social. He argued that the idea of a contract between individuals and the person who will reign over them as sovereign (common to the seventeenth century) should be replaced by the idea of a treaty of free individuals who mutually decide to form a community. This contract goes against absolutism and implies that the general will, manifested in rules, is identical to the wills of the subjects. According to this strategy, democracy refuses ‘to accept in principle any conception of the political good other than that generated by the people themselves’. Congruence of the collective and the individual will is ensured only if the individuals whose behavior it regulates create the social order. However, the commonly shared observation that individuals in society differ in terms of opinions about what constitutes the common good is often considered to weaken this ideal of a general will.

Notwithstanding the rich contribution to legitimacy theories, an isolated emphasis on consent for the democratic legitimacy of law can be criticized. On a more practical level, one can criticize consent theory for the fact that a direct conceptual link between consent and democracy can be questioned, as one can consent to monarchy just as easily. One could imagine that democracy and consent are linked because the participatory nature of democracy makes it appear as though people consent to the political process. However, it is hard to maintain that actions of legal subjects today can be understood as consent to the immense exercise of authority by current governments. Even if consent is given, it is doubtful that consent alone contributes significantly to democratic legitimacy. In this line, Raz argues that consent to a political authority is effective only if the authority satisfies an independent test of legitimacy.

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238 The condition that the laws should be made by the people, instead of by the crown or the elite, was assumed to be the best guarantee to realize a common interest. Rousseau inspired democratic theory in that he argued that the people function as the highest lawmaker. Lawmaking should be practiced by the entire people that formulates, almost spontaneously, the volonté générale, set by the raison humaine, in which private differences were not taken into account in the making of laws. The volonté générale was the sovereign. See Bertram 2012.
239 Kelsen 2007, p. 284.
240 Held 2006, p. 260. Locke and Rousseau’s ideas are often perceived as the basis of the view that legitimacy was to be linked to the will of the people, which were embraced by the American and French Revolutions. One of the central points of departure for the French revolutionaries was that laws should be made in the interest of the people. Although the guiding ideal for the French revolution is largely understood to be a democratic government, scholars have pointed towards the elitist characteristics of the ‘democratic’ reforms that came out as a result of that revolution. See Van Reijbrouck 2013. Van Reijbrouck explains that the monarch was indeed replaced, however not with a democratic government, but with a new elite.
242 See for a rejection of consent as necessary or sufficient ground of legitimacy, Dworkin 2011, chapt. 14. The idea of consent has several versions that are well elaborated by Raz 1995 p. 356. See for a concise presentation of the development of the idea of consent. Peter 2010.
244 Raz 1979, p. 355–369. See also Raz 1995, p. 215. Raz does allow that consent can have some impact on legitimacy. He believes that it can strengthen obligations to obey and that it can express a citizen’s trust for his government. Raz also thinks that there are limited cases in which consent can establish authority—cases where it is an ‘optional good’ for people to decide the matters in question themselves. The authority of the modern state does not fall into this category. See Raz 1989, p. 1183. Raz specifies the independent test (for the most part) by the normal justification thesis. See for an elaboration on Raz’s work in relation to legitimacy, Hershovitz 2003, p. 215.
Relying on consent as an exclusive means of participation can also be problematized because it seems to imply that power should be tamed by the consent of citizens. When the approval by legal subjects of the exercise of power is understood as a precondition for the democratic legitimacy of authority, one can say that in this classical view authority loses its independence because it becomes subject to the consent of legal subjects. Public empowerment in this sense means that the ruler is nothing more than the representative of the legal subjects or, to be more precise, the executor of the consent among the legal subjects. As stated above, such an approach to authority does not correspond with the reality of public authority, which is exercised by a select group of lawmakers. Besides, as mentioned briefly in the introduction to section 1.2, it would make the concept of legitimacy as such superfluous, as the need for legitimacy was primarily based on the necessity of legal subjects to trust the exercise of authority as they delegated the exercise of authority to others.

One often-suggested solution is the institutional aggregation of votes of individuals, after which the majority of votes decides what to do. To make decisions that are acceptable for a diverse group of individuals with diverse interests, such a decision-making process by majority rule offers a way out. Majority rule is considered neutral towards alternatives in decision-making and shows a commitment to expressing freedom and equality in the design of institutions and collective choices. However, there are also weaknesses attached to majority rule that can have severe effects on the democratic legitimacy of legislation. An obvious weakness is the danger of factions, of groups of individuals that form a power block, united by a common interest, that are adverse to the rights of other citizens. By pushing decisions through that are not shared by the remaining part of the community, these factions might negatively affect the ‘democraticness’ of consent through voting. Madison famously emphasizes this potential problem of consent and majority voting. His plea for a republic based on the representative system was seen as a means to ‘break and control the violence of faction’.

Indeed, in the current democratic political constellations, voting procedures for representatives can be understood as the most common manifestation of proactive participation. Also, the voting procedures in which these chosen representatives take part, which lead to decision-making concerning the establishment of specific laws, are a manifestation of proactive participation, albeit indirectly. Consent clearly emphasizes the importance of an actual say in decision-making procedures, whether that say is indirectly given by representatives, or directly by legal subjects when decisions (on laws) are established by, for example, referenda. We come back to the operationalized means of consent in chapter 2, section 2.2.

245 Madison 1966.
246 Representation prevents, Madison argues, to a certain extent, the dangerous effects of factions, as ‘it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established characters’. Madison further argues: ‘Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength hand to act in unison with each other’. Madison 1966.
For the different reasons stated above, the proactive account of participation, based on consent giving, should be complemented by the participation of legal subjects through deliberation and control.

1.3.2 Deliberation
To correct some of the weaknesses of an isolated approach to democratic legitimacy based on consent, a procedural dimension to the concept of consent is added: deliberation. Law and other exercises of political authority are perceived as legitimate to the extent that they have been agreed in a process of deliberative opinion- and will-formation.\(^{247}\) A lawmakership should equalize the opportunities for individuals actively to take part in deliberative practices, which take place outside and inside formal lawmaking processes.\(^ {248}\)

Deliberation refers to reason giving. The ideal of deliberative lawmaking is based on the thought that the content of the law should be determined by a collective rational endeavor.\(^{249}\) Deliberation, occurring both in the public sphere and in formal lawmaking, is considered to have epistemic value, improving the quality of information available for the participants of public deliberations and for the officials of lawmakers. To form a majority that is able and willing to consent to issues, individuals need to have at their disposal a public space to participate in discussions, to formulate terms, to express ideas and thoughts, to persuade others of the rationality of their proposal, and to exchange information.\(^{250}\)

Deliberation is based on the justifying principles that ‘an equal right to self-development can only be achieved in a participatory society, a society which fosters as a sense of political efficacy, nurtures a concern for collective problems and contributes to the formation of a knowledgeable citizenry capable of taking a sustained interest in the governing process’.\(^{251}\) Krisch demonstrates the complementary force of deliberations as a component of proactive participation based on consent.

‘A weakness of nondeliberative procedural accounts of legitimacy is the possibility that, by merely aggregating the stated preferences of voting parties, fair democratic procedures may lead to collective decisions that are incorrect or even abhorrent, according to any reasonable standard. (…) In the absence of deliberation, fair procedures might result in the tyranny of passionate majorities, themselves swayed by clever minorities. Deliberation is desirable, then, insofar as we generally favor informal and careful judgment over ill-informed and unreflective choices.’\(^ {252}\)

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\(^{247}\) Wheatley 2009, p. 229.
\(^{248}\) Again, there is no such a thing as a legal obligation to get involved. Individuals may decide that their interests are already well put forward by others. The fact that a democratic legitimate lawmaking process should provide opportunities does not equally mean that all individuals have the obligation to be part of a deliberative process. See Held 2006, p. 281: ‘Deliberative democracy presupposes, according to some of its leading advocates, that publicly upheld positions can meet the test that all significantly affected would assent to the, but it does not presuppose that all will or could necessarily engage in debate’ (see for example, Habermas 1996).
\(^{249}\) The condition of reasonableness is vital to recent accounts of deliberative democracy: ‘justification in terms of mutually acceptable reasons will be of no legitimating value if those being addressee deny at the outset the value of finding such reasons’. King 2003, p. 26.
\(^{250}\) Waldron 1999a, p. 92.
\(^{251}\) Held 2006, p. 262.
In other words, for the principles of equality and freedom to be respected, what is needed is a possibility to get one’s own political pronouncements across to the audience that one wants to reach. Enabling deliberations within a lawmaker process and outside a lawmaker process provides for these opportuniies. 253 Also in this account of participation, collective self-determination functions as the primary rationale: ‘citizens must think of themselves as authors of the law to which they are subject as addressees.’ 254 Many democracy theorists see well-developed institutional deliberative lawmaking procedures as the most important manifestation of democratic legitimacy. 255 Deliberation central to reaching consensus is transformative; it should be able to shape the beliefs and opinions of participants towards consensus. 256 No participant may be held back in his or her participation by a risk of force or deception. 257 Deliberations preceding the enactment of new rules should accord equal weight to the interests of all individuals within the jurisdictional community in a deliberative process, to be democratic. 258 As Benhabib puts it, ‘[[legitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of all about matters of common concern].’ 259

This not only refers a deliberative account of legitimacy to the need to create space for discussions and the exchange of ideas, but it also requires justification for the imposition of authoritative decisions by the lawmaker. We expect a democratic legislator to be successful in formulating political decisions, which avoid ‘primary bads’ (war, famine, economic or political collapse, epidemics, and genocide), for which reliable sources of information are needed. 260 The justification of the lawmaker must appeal to evidence and arguments acceptable to reasonable citizens. 261 The requirement that the preceding procedures can be justified ‘in terms of reasons acceptable to those burdened by exercises of political authority’ is considered to constrain the exercise of political authority. 262

253 Sadurski 2008, p. 86.
255 Scholars seem to have enormous faith in the power of deliberation for democracy. Held states that the ‘development of deliberative democratic public space is important not because they can be straightforwardly adopted or ‘imported’ into all countries. It is important because they recognize the need to break vicious circles of limited or non-participation while also acknowledging that the question of informed participation is a central matter to the future of democracy’. Held 2006, p. 279-280. Cohen states for example that ‘[w]herever important decisions, or developments are occurring - be it scientific, corporate, media, or educational establishments – public spaces involving criticism, articulation of alternatives, and counter powers must be provided for and protected. This […] is the sine qua non for trust and confidence in institutions to be maintainable and warranted.’ Cohen 1999, p. 216.
257 Solum 1988, p. 96.
259 Benhabib 1996b, p. 68.
261 Rawls states that the reasonableness of citizens depends on their desire to pursue their aims in ways that can be justified to other free and equal citizens. Rawls 1993, p. 48-62; King 2003, p. 26; Gutmann and Thompson 1996, ch 2. Something like the condition of reasonableness is vital to recent accounts of deliberative democracy: justification in terms of mutually acceptable reasons will be of no legitimating value if those being addressee deny at the outset the value of finding such reasons.
For adherents of deliberative democracy, the idea of democracy is tied not so much to the fate of government but rather to the discursive quality of collective decision-making. 263 Habermas attributes epistemic authority to the ‘communicative community’. 264 The foundational principle of democracy is considered to be the ‘force of the better argument’. 265 The quality of the lawmaking process relies on a careful structure of policy deliberation, on the making of arguments, followed by responses and rebuttals, on the checking of facts and on the reviewing of claims, in the hope and belief that a deliberative process ultimately leads to a thoughtful conclusion. Public influence is converted into communicative power only after it has passed through the filters of institutionalized procedures of democratic will-formation into legitimate lawmaking. ‘Not influence per se, but influence transformed into communicative power legitimates political decisions.’ 266 The use of deliberative techniques underwrites the idea of a legal order, which is based on an ongoing, circular process of deliberation, participation, decision-making, determination, protests, and proposals for laws; even as rejection of laws, amendments, and continuing discourse. The quest of self-interest and the realization of self-government through deliberative practices in formal lawmaking processes should therefore be complemented by the public use of reason through deliberation.

The necessary complementarity of deliberation to consent and control, (which is subject of the next subsection), becomes clear when exposing some of the weaknesses of deliberation as legitimizing tool. 267 There is a tension between the democratic ideal of deliberation and lawmaking in real life. There are primarily obstacles related to an equal representation of preferences. 268 First, deliberative arrangements tend to attract people who have the skills, motivations, time, and money to participate. Although all participants should be equally able to propose topics or to question the assigned topic of a discussion – in other words, to have an equal say in agenda-setting – deliberation seems to be vulnerable to political pressure of the more politically equipped. 269 It is questionable whether ‘the common good’, or the consensus that is created in the public sphere on what is supposed to be ‘the common good’, is really the product of a shared opinion.

In addition, it is questionable whether one can indicate a clear decision-making moment in deliberative practices. Deliberative democracy struggles with the fact that regardless of the sometimes time-consuming process of deliberation, a lawmaking authority always has the last say about the proposed rules. The gap between the outcome of deliberation and the authority to make binding rules could remain substantial. Koskenniemi stresses the lack of any legal criterion that will determine when consensus has been reached. ‘And even when it has been reached, the law will always possess resource for re-opening the debate, undoing the settlement, attaching the (“unjust”) hegemony of the mainstream.’ 270 Reaching
consensus is not an absolute ‘given’ in a democratic society. It is, also in respect of deliberative practices, difficult to imagine one political ruler as the executor of the joint decisions of citizens. 271 Just as one should constantly evaluate whether a political constellation can live up to the rationale of democratic legitimacy,272 the functioning and significance of deliberative practices should be under the constant scrutiny of democratic deliberation itself.273

1.3.3 Control
The ideal of proactive participation is mainly based on scholarly work developed in the nineteenth century that assumed a high degree of prior social cohesion and homogeneity as a necessary precondition for democratic constellations. However, one of the most pressing issues for democratic legitimation theory is to conceptualize the means of democratic legitimation in a context of increasing heterogeneity, conflict, and group difference, of religious, racial, linguistic, tribal, regional, cultural, or other forms.274 One of the ways out that is often presented is a complementation of constitutive, proactive forms of participation, striving for consensus or consent, by means of reflective forms of participation that enables the annulment or adjustment of a certain law.

In most lawmaking processes it is accepted that the exercise of authority is separated from the individual legal subjects, which constitutes a gap between the exercise of lawmaking authority and the will of its legal subjects.275 Therefore, any approach to freedom that builds on the ideal of self-rule requires complementation by an approach to freedom that focuses on control of the exercise of authority. The emphasis on control can be traced back to the work of Montesquieu. Although Montesquieu was explicitly not a democrat,276 his theory focuses on the need for separating different types of exercises of authority, which constitutes opportunities for checks and balances. To protect the freedom of legal subjects, the authority of the lawmaker needs to be checked and balanced by the authority of the executive and the adjudicative branch. Here, the importance of rules about rule making, the so-called secondary rules,277 becomes evident. A focus on control and counter-balance shifts

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271 One could argue that because the citizens themselves cannot agree, they need men or women who have the power to impose decisions. Heysse 2003, p. 111-113.
274 Pildes 2009.
275 In that perspective, it is noted that current conceptions of representative democracies reject a Rousseauian conception of democracy. See Cohler, Miller, and Stone 1989; Schumpeter 2003. Schumpeter criticizes the will of the sovereign construction and the groundless merging of the ‘will’ and the ‘interests’. A general will can only be constructed when it is based on a common interest. We already indicated the existing controversies in society that weakens the idea of a general will. Schumpeter 2003, p. 5-11.
276 On Montesquieu’s view, the virtue required by a functioning democracy is not natural. It requires ‘a constant preference of public to private interest’ (4.5); it ‘limits ambition to the sole desire, to the sole happiness, of doing greater services to our country than the rest of our fellow citizens’ (5.3); and it ‘is a self-renunciation, which is ever arduous and painful’. (4.5). See Bok 2014.
277 See Hart 1997. Hart argued that law is a system of rules. Hart divided the system of rules into primary rules that concern the rules of conduct, and secondary rules, that addressed officials to manage these rules of conduct. These secondary rules facilitate the adjudication based on primary rules, the making and revising of primary rules. A crucial element of Hart’s theory was his ‘rule of recognition’ thesis: a customary practice of the officials that
from depending on power as the result of the gathering and acting of virtuous citizens as the basis of political community towards highlighting the necessity to define and delimit the political domain.  

An emphasis on control accepts a continuous disagreement existing between individuals who are part of the same political community. Control accepts a certain amount of discretion of the public authority to impose restrictions on us, provided that individuals have means at their disposal to control the exercise of authority, and most importantly, it accepts the fact that the exercise of authority needs to be bound by ‘multiple and cross-cutting forms of legitimate power to guard against arbitrary use.’ Constitutive self-rule should therefore be mirrored and complemented by the reflective approach that emphasizes the idea that public authority, when violating the ideal of protecting the essential freedom of its people, must be halted.

To be of any importance to democratic legitimacy, control must be individualized, unconditioned, and efficacious. The opportunities of control must be shared equally amongst citizens; it must not be conditioned on the willingness of the government, and it must ensure that even unwelcome government intervention does not provide citizens with any evidence of an ‘alien will’ at work in their lives. Here it becomes clear that proactive participation strongly relies on control in order to be relevant for legal subjects to remain free from domination. There may be consent without control and control without consent. As Pettit explains, one may consent on the one side to a form of interference that one does not control. Once consent is given, one may have no means of calling off the arrangement to which one consented. At the limit – the well-known republican example – one may have consented to a slave contract that binds one indefinitely. On the other side, one may control a form of interference to which one never gave one’s consent.

Control, though understood as being a reflective form of participation, mainly to distinguish it from consent and deliberation as constitutive manifestations of self-rule, can be best understood as being the third part of the circular activity that occurs when one speaks of democratically legitimate lawmaking. Control, in this respect, comes closest to the previously mentioned opportunity to transform. It works from the premise that there should identify certain acts and decisions as sources of law, based on procedures of validity grounded in secondary rules.

278 As Barnard states: ‘Self-declared commitments by governments, even in democracies, cannot in themselves be banked upon to ensure their own accountability on a continuous basis or at all. Pointing out to governments their lapses and their attempts to get away with evasions or cover-ups will likely cause their embarrassment, as it may embarrass theorists of democracy for whom democratic governments, in embodying the collective will, can be fully trusted to honour their obligations. Upholding the oneness to governors and governed, they therefore dismiss civic watchfulness, together with its implied underlying distrust, as being plainly undemocratic, very much in contrast to Rousseau, on whom they profess to rely.’ See Barnard 2001, p. 6.

279 Wapner 2002a, p. 156. Wapner illustrates his point by referring to the fact that in the modern era, Hobbes Locke, Rousseau, and others continually reflected upon how to constitute and maintain legitimate, authoritative political power. Almost across the board, each suggested that the answers lie in creating some form of constitutional or institutional constraint.


281 This phrase is borrowed from Pettit.

282 Pettit 2012, p. 147-153. Pettit illustrates his emphasis on control with the following example: ‘Suppose one is born into a society where by common convention parents propose marriage partners for their children. While one goes along with the system without ever having consented to it one may still exercise a good deal of control over it. One may be in control to the extent that you can opt out of the arrangement altogether, or short in opting out, can continue to turn down proposals until one’s parents propose an acceptable partner’. Pettit 2012, 157.
always be an opportunity to alter the laws, as a correction of and restraint on the public authority. It is not only important that government acts in line with the wishes of the people, but also that the people can always contest governmental exercise of authority and, accordingly, have the means to change the way they are governed. Freedom requires that individuals, while bound by laws that interfere with their natural freedom, remain independent of the will of the authority that imposes the laws. When restrictions such as laws reflect the will of the lawmaking authority autonomously and are alienated from individuals’ will, we speak of domination. However, restrictions that interfere are not dominating when individuals control that lawmaking authority with terms and limits. A good example is a representative democratic system: although the people decide to delegate the decision-making power, this is a revocable grant of authority, subject to recovery by the people.

1.4 The distinctive relationship between democratic legitimacy, trust and distrust

Different aspects of participation have passed in review. These manifestations of participation fall into the cyclical distinction and balance between trust and distrust that is characteristic for democratic legitimacy. The fact that law gains democratic legitimacy because of the actual and equal opportunities for participation in the making of it, is based on trusting the political system in safeguarding the ‘democraticness’ of lawmaking processes. An underlying amount of trust in established government agencies in general is required. Especially in indirect lawmaking reducing proactive participation to voting for representatives requires a basic level of trust by legal subjects that the legislature is representative, is concerned with the common good, and that it takes shared norms and cultural values to orient its actions. Trust implies, apart from the special relationship of trust between legal subjects and government, a sacrifice of a constant opportunity to monitor. When one trusts someone else, one indeed forgoes the opportunity to influence decision-making directly, on the assumption that there are shared or convergent interests between legal subject and trustee.

Democratic legitimacy of law involves a rare feature of legitimacy: also feelings of distrust play a role in the acceptability of a law. The combinations of both distrust and trust in a conception of legitimacy may seem contradictory. One could conclude that the more that disagreement is visible and the more that one is aware of the illusion of one single sovereign legislator, the less one would be inclined to accept a law as democratically legitimate. However, the awareness of the very possibility of corrupting authority can be considered to be the main motivation for opting for a democratic system. A genuine distrust and fear of abuse of power explains a general trust in democracy as a ‘system’ that enables power to be controlled, limited, and distributed. From the beginning of democratic thought, the

284 Pettit refers in this respect to ‘electoral control’. See Pettit 2012.
286 Because, as Warren explains, when one is monitoring constantly, any division of labor is rendered useless. Warren 1999b, p. 328, referring to Mansbridge 1999, p. 351-353.
287 Zürn speaks about a paradox in this respect in his talk of March 2014 given at Amsterdam, ACIL and ACELG. We would argue that it is no paradox, but an inherent aspect of democracy that builds upon relationships of trust and distrust on different levels. Zürn 2014
288 The importance and dependence on trust in a democratic system is explained by Warren: “Thus, despite the fact that the conditions of trust are at their most problematic in politics, it is precisely because of the natality of
attractiveness of democracy emerged from the distrust of political and clerical authorities.\textsuperscript{289} It is precisely the institutional space democratic legitimate lawmaking offers for contestation and disagreement, \textsuperscript{290} for challenging the supposed relations of trust, while limiting the discretion of the public authority, and thus the potential harm caused by public authority, \textsuperscript{291} that makes a democratically legitimate system such an attractive and acceptable form of governing.\textsuperscript{292}

Democratic legitimacy requires a delicate balance of trust where matters are settled, and distrust as a fuel for monitoring decision-makers when they are not.\textsuperscript{293} To uphold or restore this delicate balance of trust and distrust, legislatures should be responsive to civic initiative and the engagement of collective actors in appropriate ways.\textsuperscript{294} Both trust and distrust in lawmakers presuppose public spaces in which the validity of resulting norms, but also the fairness of procedures themselves can be challenged, revised, redeemed, or reinforced through critique. When offering such spaces for critique and offering opportunities for revision, a normative theory of democratic legitimacy assumes that trust in the exercise of lawmaking authority can be maintained.\textsuperscript{295}

\textsuperscript{289} Warren refers to liberal innovations that were aimed at checking the discretionary powers implied in trust. Warren 1999a, p. 1, referring to Dunn 1988; Ely 1980.

\textsuperscript{290} Warren 1999b, p. 313.

\textsuperscript{291} Warren 1999a, p. 2.


\textsuperscript{293} Warren 1999c, p. 351-353.

\textsuperscript{294} Cohen 1999, p. 222-223.

\textsuperscript{295} Warren states that ‘[i]f justified trust could in some instances relieve the burdens of political decision-making for both individuals and institutions, then democratic decision-making in complex societies might become more robust’. Warren 1999a, p. 5.
**2 Democratic legitimacy – a call for a dual evaluation**

Chapter 1 spelled out some of the main features of democratic legitimacy. Democratic legitimacy is based on a conception of autonomy reflected in the many well-known credos such as ‘who is affected by the law should have a say in it’, or ‘government of the people, by the people, for the people’. In the case of lawmaking, however, one detects a strong division of labor in which instead of the participative ideal of ruling ‘by the people’, a specific group of persons deliberate about laws, and decide if, which, and when laws will be enacted. Although we explained in chapter 1 that the specific form of domination by law is not considered to affect the legal subject’s freedom when there are actual, equal, and continuous opportunities to participate, many questions remained unanswered, related to the concrete determination whether the exercise of legislative authority respects the underlying principles of democratic legitimacy. Chapter 2 discusses the necessary preconditions to enable legal subjects to remain free from domination instead of being ruled by authoritarian rulers. Besides, it discusses the operational aspects of participation in lawmaking. It argues that any assessment of the democratic legitimacy of law - as understood in chapter 1 – requires a dual evaluation: a twofold test.

Already, in the discussion on the balance between trust and distrust in chapter 1, the awareness emerged that trust in the basis of democratic considerations implies two levels of acceptability: first, trust in a particular administrative performance; and second, trust in ‘institutionalized political processes’ in general. The determination whether or not a law is democratically legitimate therefore involves two levels of analysis. This is what in this study is called the necessity of a dual evaluation for assessing the democratic legitimacy of law. Evidently, an assessment of the democratic legitimacy of a law implies an evaluation of the democratic operationalization of actual lawmaking processes, which in a broad sense refers to a more structural operationalization of the opportunities to participate such as by elections, and in a more narrow sense refers to a particular operationalization of specific opportunities to participate in specific lawmaking processes. The more narrow reading of operational aspects also refers to whether specific lawmakers have respected procedural democratic norms such as transparency, openness, responsiveness and accountability. Notwithstanding the fact that one single legislative decision can be made in a procedure that respects certain democratic norms, the recognition of the principles of democratic legitimacy – equality and freedom from domination – also requires that possibilities remain for legal subjects, after the enactment of a specific law, to democratically annul the decision to enact that law, to alter that decision, or even to decide collectively that it is better to adjust the procedures that have led to the decision, which are protected by institutional and social preconditions.

Therefore, an evaluation of the democratic legitimacy of a specific law is only relevant when one has assured oneself of the opportunity given by the overall political system to enact and revise laws in a democratically legitimate way. Discovering whether this is the case, requires an assessment of the democratic characteristics of the system in which the legislative process has taken place, the necessary preconditions. This is considered the
first evaluation. When assessing democratic legitimacy’s necessary preconditions, one evaluates the superior framework of reference for lawmaking. This framework contains rules about how laws are made, how governors are chosen, and how public participation can be achieved. Democratic legitimacy’s necessary preconditions both enables any democratic legitimation of the making of a specific rule, and prevents that legislation, notwithstanding the fact that it might individually have been democratically enacted, becoming authoritarian in itself.\(^{298}\) After the assessment of the preconditions, one moves to the second evaluation: the operationalization of democratic norms and practices in a specific lawmaking practice. It is important to recognize the distinctiveness of the two levels of evaluation, while acknowledging their reciprocity and mutual dependence.\(^{299}\)

Section 2.1 discusses the preliminary evaluation of democratic legitimacy’s necessary preconditions. It discusses what is necessary in order to have a basic institutional and social infrastructure for any democratic legitimation of law. Section 2.2 discusses the second level of evaluation, which refers to the operational aspects of democratic legitimacy. These aspects refer to the adherence to democratic, procedural norms during the specific lawmaking process. Additionally, they refer to the more institutionalized ways, in which, more generally, the legislative process is designed. Section 2.3 concludes with a brief exploration of democratic legitimacy’s critical potential.

2.1 The necessary preconditions for democratic legitimacy

In discussing the essential principles of democratic legitimacy, the focus of the previous chapter was on rather abstract and fundamental principles of democracy. In this chapter, we move towards the evaluation of the democratic legitimacy of a specific law. We start with democratic legitimacy’s necessary preconditions.\(^{300}\) The necessary infrastructure for democratic legitimacy consists of institutional and social preconditions.\(^{301}\)

Fulfillment of the necessary preconditions leads to the existence of a basic, minimalist infrastructure for realizing the democratic legitimation of law, which establishes a certain threshold. Above this threshold, governing systems might vary in the extent to which they

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\(^{298}\) See for an opposite view: Buchanan 2004. Buchanan makes a distinction between the ambition to achieve an ideal of democratic governance, and the quest for democratic legitimacy of entities, which wield political power. He finds it important to recall that the quest for democratic legitimacy has as its goal to formulate a conception of political power, not a conception of a genuine or ideal political community, in which political power is wielded by a group of people over themselves. Buchanan 2004, p. 236.

\(^{299}\) We discuss the particular tension related to democratically enacted rules that nevertheless are authoritarian in chapter 2, section 2.1.4.


\(^{301}\) These preconditions can be understood in line with, what Walker defines as ‘some kind of uncontroversial core of democratically mandated constitutional prerequisites to democracy’. Walker 2010, p. 219.

\(^{303}\) Our conception of democratic legitimacy has considerable overlap with conceptions of democratic systems, because of the fact that we consider preconditions necessary for a democratic legitimation, and that we find the evaluation of the congruence of a governing constellation with both institutional and social preconditions of prior relevance. Notwithstanding the overlap in basic principles, we focus selectively on the exercise of legislative authority. The emphasis on democratic legitimacy’s necessary preconditions is based on the republican account of democracy as elaborated by Bohman. Bohman speaks of a ‘democratic minimum’, ‘the minimum necessary for people to claim their freedom and equality effectively in the particular situation of potential domination that results from the democratic deficits of the (...) system’. Bohman 2005, p. 102. Bohman distinguishes two types of preconditions: institutional preconditions and social preconditions. See Bohman 2005, p. 101-116; Bohman 2007b, p. 267-276; Bohman 2007d, p. 65-89.
enrich this basic level of guarantee for participation, in how they give content to participation in practice. When, after evaluation of the governing system at large, it turns out that the threshold of institutional and social preconditions is reached, a further investigation into the actual exercise of lawmaking authority is required to assess the operationalization of the principle of an actual, equal and continuous opportunity to participate in the making of law.\footnote{Warren 2010, p. 47.} However, beneath this threshold, one can be assured that the ruling authority does not act in line with the essential principles of democratic legitimacy, even without looking into the specificities of an actual legislative process.

Sub-section 2.1.1 discusses the necessary institutional preconditions for democratic legitimacy. It demonstrates the postulation that democratic legitimacy presupposes the concept of legal form. Legal form enables a political system that offers all legal subjects an equal and actual opportunity to exercise their capacity to initiate, to deliberate, to decide on laws, and to revise laws.\footnote{As Krisch points out, “[r]evisability is commonly seen as a key element of democratic orders, and its limitation (for example through constitutional norms with higher thresholds for amendment) is often seen as democratically suspect.” Krisch 2010, p. 273, referring to Bellamy 2007.} It aims to demonstrate the importance of these minimal standards.\footnote{The discussion concerning institutional preconditions is an old one: the conditions a society need to achieve before a stable democracy could exist, is a traditional issue for modern theorists. Mazo summarizes: “The minimalistic standards, which can be termed Schumpeterian/Huntingtonian/Przeworskian associates democracy with elections, while a more maximal standard, as advanced by post-modern theorists including feminists and other advocates of minority rights, requires democracy also to encompass political, and ultimately group, equality. Mazo 2005, p. 1.} Sub-section 2.1.2 focuses on the necessary social preconditions for democratic legitimacy.\footnote{Although the social preconditions are addressed here, in the research we predominantly focus on the institutional preconditions, and remain therefore close to a constitutional reading of democracy.} Both types of preconditions are complementary to each other, which is explained in sub-section 2.1.3.

2.1.1 Institutional preconditions – a formal commitment to participation
The discussed core principles of democratic legitimacy, equality and freedom,\footnote{See chapter 1, section 1.2.2.} are highly unstable concepts.\footnote{Habermas 1977, p. 8.} As discussed in chapter 1, communication between legal subjects that demonstrates their power to act and speak\footnote{See chapter 1, section 1.2.1.} should be protected from any dominating distortions if one is striving for democratically legitimate laws. The question we are confronted with here is how a political constellation guarantees non-distorted communication and the opportunities for the exercise of political power by every legal subject equally.\footnote{It is specifically Habermas’s emphasis on the legal side of democratic legitimation that informs this section. Habermas’s theory of communicative power, deliberation and consensus are, although it obviously informed the discussion on democratic legitimacy, admittedly less central to our account. As Habermas offers a persuasive account of the relation between the philosophy of law and political theory, his work is often cited.}

In a democracy, a legal subject should have the guaranteed freedom to voice his or her opinions and to persuade others of the value of his or her opinions and to associate with them, but should also have the freedom to exert political impact on the final decisionmaking on law, so that a minority of today can become the majority of tomorrow.\footnote{Zoethout 1995, p. 301.} The core aim
of democratic legitimacy’s necessary institutional preconditions is to protect these different manifestations of freedom, which concerns not only the mere fact that political power is initiated but also guarantees that political power has a real (and enforceable) effect on the exercise of public authority. The acceptability of the exercise of public authority is not only based on the fact that the exercisers of public authority act in line with legal norms, which reminds us of the related concept of legality, but is based on the fact that they act in line with legal norms that protect our democratic values. These legal norms are considered to provide rights to legal subjects. On the one hand, one needs rights to enable individuals to participate equally in lawmaking. Political rights and judicial safeguards are considered a basic necessity in order for power to be translated into political power in a democratic way. On the other hand, one needs rights and judicial safeguards to fall back on when one is hindered in the exercise of the opportunity for equal participation in the making of law. One needs rights and judicial safeguards for warding off the possible problematic force of discretionary state authority.

The rights and judicial safeguards we speak of when discussing the necessary institutional preconditions themselves, and their function in enabling democratic legitimation, by principle, do not prescribe concrete, fixed, and substantive manifestations of participation, and they do not impose a certain type of democratic regime. Institutional preconditions leave the determinations of aims and organization of participation open for public discussion; such a participation in lawmaking can manifest itself directly and indirectly. The reason why institutional preconditions do not prescribe a specific form of participation is that, as discussed in chapter 1, the capacity to begin has a creative dimension: the capacity to initiate deliberation on democracy itself. Nevertheless, a political system should live up to the form of law to maintain its function as a political constellation in which laws can be democratically legitimized.

The form of law as a precondition for democratically legitimate law

The form of law is central to our conception of institutional preconditions and is indispensable to guard the principles of democratic legitimation. Although the relationship between freedom and law is a relatively modern phenomenon, the basic premise dates

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311 Cohen 1999, p. 222.
312 See chapter 1, section 1.2.
313 Colón-Ríos states that 'only a regime that provides an outlet for constituent power to manifest from time to time can ever come to enjoy democratic legitimacy'. Colón-Ríos 2012, p. ii. See also Bohman 2004a, p. 126.
314 Besson 2009b, p. 65 referring to Beitz 1983, p. 71. See also Bohman 2005, p. 102; Habermas 1977. Habermas expresses the need for institutional preconditions as follows: In societies organized around a state, political institutions, with reference to legal norms, ‘protect the susceptible structures of intersubjectivity against deformations if they are not themselves to deteriorate’. Habermas 1977, p. 8–9.
315 If a political foundational power would prescribe the content of a political regime, she would therefore destroy itself as democratic foundational power. However, the threat to do so is omnipresent.
316 Our conception of institutional preconditions follows Habermas, who states that ‘the principle of democracy can only appear as the heart of a system of rights’. Habermas 1996, p. 121.
317 As Weiler states ‘[i]t is to rules of law that we turn to define whether the practices of democracy have indeed been followed and, more generally, the Rule of Law, with its constraints on the arbitrary use of power, is considered an indispensable material element of modern democracy. An attempt to vindicate even verifiable expressions of popular will outside legally defined procedures is regarded by us as the rule of the mob, rather than democracy’. Weiler 2004, p. 549.
318 Skinner explains that only from the 17th century onwards political theory started to construe liberty as more than a privilege ‘allowed by the crown as a matter of grace’. Skinner 2003, p. 11.
back to the Digest of Roman law, which stated that ‘[i]f everyone in a civil association is either bond or free, than a civis or free subject must be someone who is not under the domination of someone else but is sui iuris, capable of acting in their own right’. In this understanding, the relation between freedom and rights not only serves the liberal aim to ensure that every individual can pursue his or her own goals, but it also aims to give content to active citizenship, which is instrumental to the enjoyment of such a freedom.

The statement that rights and judicial safeguards play a crucial role in democratic legitimacy of law, is generally embraced in democracy theory. Besides forms of discursive opinion and will formation, as discussed in chapter 1, freedom from domination requires decision-making procedures in accordance with political rights to enable the exercise of political autonomy. The basic premise of an institutional framework consisting of rights and judicial safeguards is that it both arranges and secures ‘the capacity to begin’: the initiation of meaningful political activity, including the (indirect) making of authoritative decisions. A sense of effective agency, which implies sharing of power, originates from collective deliberations and civic involvement. It is only by means of equal political participation, guaranteed by laws, that power can lead to democratic governing. There should be public resources both to enable legal subjects to act and speak in concert for public political purposes and to ensure them decisional status in lawmaking processes. Institutional preconditions in the form of rights provide these public resources that enable and guarantee public discussion and simultaneously offer real political significance for it.

The emphasis on the necessity of institutional preconditions emanates from the general distrust in public authority, as discussed in chapter 1. The form of law should guarantee for individuals any unwanted domination by a stronger party, be it the state or other groups. Institutional preconditions secure a public force field that assists in making individuals less vulnerable to domination. Just as human beings can be characterized by their genuine inclination to initiate power, and to collectively push for transformation, there is, when a political constellation is generated, also a general proclivity towards the unjust use of power.

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320 Our republican understanding of freedom both holds elements of ‘protective republicanism’, which primarily stresses ‘the instrumental value of political participation for the protection of citizens’ objectives and interests’, and ‘developmental republicanism, that emphasizes ‘the intrinsic value of participation for the enhancement of decision-making and the development of the citizenry’. Held 2006, p. 36-49.
323 See chapter 1, section 1.2.1.
324 Only when actors are able to associate to discuss and act do they together realize the potential of political power. Arendt 1958, p. 200.
325 Bohman 2004a, p. 126. The active engagement of citizens in the public realm needs to be translated into the exercise of effective political agency. Habermas 1996, p. 363.
326 Schumpeter states that democracy is, ‘that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote’. Schumpeter 1950, p. 250. See also Goossens 2003a, p. 13.
328 A critical note from Dahl should be added in this respect. Dahl could not find any proof in the available data that the Supreme Court of the United States protects minority rights. Shapiro underscores the importance of Dahl’s observation, concluding that ‘the heavy lifting is done by democracy, not constitutional courts. Authoritarian leaders ignore judges and courts with impunity, and adding courts to democracies has no appreciable effect on their protection of civic freedoms or minority rights. Yet curiously, we continue pressing for the creation of independent judiciaries to enforce bills of rights in new democracies’. Shapiro 2014.
Rights ensure that trust of legal subjects in the exercise of political authority is guaranteed insofar as ‘they provide individuals the opportunity to demand that violations of legitimate reciprocal expectations be sanctioned’.329

The constraint of abuse of power by institutional preconditions knows two different dimensions. The first dimension focuses on the most obvious abuse of power: authoritarian government, which does not respect the rule of law and the principle of self-rule of its people. In light of the government, the main premise of institutional preconditions is to legally limit abuse of the exercise of authority, by offering all legal subjects opportunities to participate in the exercise of authority. The legitimacy of law depends on observing these limitations. A legal system should ensure that such authoritarian practice is accountable, and, if necessary, can be corrected, to bring it back in line with democratic foundations through legal means. The idea of indispensable institutionalization to prevent domination of individuals is not new.330 The strong emphasis on the idea of an institutionalization of ‘power to the people’ in political theory is understandable in light of the fact that for most of history and in most political systems, the interests of most people have been ignored by the powerful or they have been treated as subjects for exploitation, misuse, or corruption. The focus on contracts, and specifically the focus on the social contract in eighteenth century philosophical thought, as briefly discussed in chapter 1, section 1.3.1, shows the assumed need for formalization of social commitments.331

The second dimension of domination that can be constrained by the form of law is somewhat more complicated. It is recalled that ‘[d]omination is a matter of who is entitled to offer interpretations of the public good’.332 Because in a democratic constellation the people themselves ‘rule’, whether or not through representatives, a constraint of authority might entail a constraint of certain decisions of the majority of the people themselves. Although the principle of majority ruling is pre-eminently a fundamental principle of democratic decision-making, the rationale of democratic legitimacy also requires protection from domination by that same majority. If there are groups of individuals that unwillingly form a fixed, constant minority, and therefore do not have any opportunity to rule, one can equally speak of an obstruction of their freedom from domination. Part of the acceptability of democratically enacted law is based on the belief that minorities should have a realistic chance of entering into majority-constituting coalitions in the future. The division between

330 Madison indicated the core of the commitment of democracy to law: ‘In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence of the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions’. Hamilton and Madison 1987, p. 320.
331 Rousseau and Kant both emphasized the relationship between human rights and popular sovereignty. Habermas explains: ‘Rousseau starts with the constitution of civic autonomy and produces a fortiori an internal relation between popular sovereignty and human rights. Because the sovereign will of the people can express itself only in the language of general and abstract laws, it has directly inscribed in it the right of each person to equal liberties, which Kant took as a morally grounded human rights and thus put ahead of political will-formation. In Rousseau, then, the exercise of political autonomy no longer stands under the proviso of innate rights. Rather, the normative content of human rights enter in to the very more of carrying out popular sovereignty. The united will of the citizens is bound, through the medium of general and abstract laws, to a legislative procedure that excludes per se all nongeneralizable interests and only admit regulations that guarantee equal liberties for all.’ Habermas 1996, p. 101.
332 Bohman 2007c, p. 100. See chapter 1, section 1.3.2.
majority and minority groups should remain fluid and changeable.333 When there are groups that constitute permanent minorities, majority rule fails to be an incentive for these minorities to accept the legitimacy of the system on democratic grounds, as their right to self-rule is constantly obstructed. The opportunities for constraint of these unwanted types of domination334 is protected by certain legal institutions, such as supermajority rules, limits on the power of legislative bodies, or a bill of rights.335

The reliance on these legal institutions originates from a strong belief in the interconnectedness between the notion of the rule of law and democratic law.336 The rule of law in part provides a minimal but indispensable standard for helping to determine the legitimate scope of state intervention in the sphere of individual rights.337 In the standard view, only norms that guarantee a minimum of certainty and determinacy within legal decision-making promote the principle of fair notice and contribute to achieving equality before the law. This is because these norms are general in character, relatively clear, public, prospective, and stable, and thereby helps guarantee control of power holders.338

Adherence to rule of law principles renders the task of interpreting and regulating individual rights normatively acceptable. The interpretation and delineation of the scope of individual rights by state officials require legal regulation: for example, minimal basic rules for registering demonstrations or publishing newspapers. If officials are allowed to legalize basic rights in accordance with inconsistent, ambiguous, open-ended, or retroactive norms, ‘excessive discretionary authority is likely to accrue to state authorities, and the sphere of individual liberty will suffer significant damage’.339 Institutional preconditions are therefore, in many democratic states, defined in a constitution, under which the values that enable a people to regulate government for its conformity to local terms of association and argument are reliably satisfied.340 The institutional character of legal preconditions and the unity and persistence necessary for rules to constitute a legal system are more than ‘honorific

333 If there are groups constituting ‘permanent minorities’, and when there is a single dominant cleavage within society, majority rule is of no use for today’s losers and the incentive for them to accept the legitimacy of the system does not arise, or must be found in features of the system other than in democratic majority rule. Sadurski 2008, p. 46.
334 Institutional features of the political system should prevent any domination from happening, including domination by majority. Sadurski 2008, p. 46.
335 Guanieri 2003, p. 223.
336 Marks 2003, p. 2. The notion of the ‘rule of law’ has however also been widely contested in the history of legal thought. See Bobbio 1987, p. 138-56; Neumann 1986.
337 The concept of the Rule of Law is this conception of the preconditions of democratic legitimacy understood in a way that is functional for democratic legitimacy. We do not engage in the Rule of Law characteristics apart from its inherent functions that do not specifically relate to democratic legitimacy. Our approach to Rule of Law in this respect corresponds to the French Rule of Law conception of Etat du Droit, as a means to vindicate fundamental rights through law. See Rosenfeld 2000, p. 1330-1334.
338 Marks 2003, p. 2. The notion of the ‘rule of law’ has however also been widely contested in the history of legal though. See Bobbio 1987, p. 138-56; Neumann 1986.
340 As Bobbio states, authority should be exercised ‘within limits derived from the constitutional recognition of the so-called ‘inviolable’ rights of the individual’. Bobbio 1987, p. 25.Although our emphasis on rights and judicial review is closely linked to the discussion on whether democracy as a way of governing requires a constitution, we do not further touch upon this in this research. For a scholarly opinion that constitutional norms do not exist unless they are in some way protected by a written document, see Rubenfeld 1998.
decoration’. Only when rights of individuals are anchored, and when appropriate safeguards (to be enforced by an independent judiciary) exist, can these rights actually be invoked to enforce participation in the formation and decision-making as to the type of law that will be enacted.

Here a tension between institutional safeguards and democracy reveals itself. Should not everything, including the rights that protect the principle of freedom, be subjected to the political power of the people to give them the opportunity to change, adjust, or abandon them? This tension concerns the limits of self-rule and directly involves judgments concerning the hierarchy of ideals in political constellations (a democratic ideal or a rule of law ideal). One can readily detect a difficulty in interpreting what issues are essentially related to political equality and justice that require the status of being excluded from democratic decision-making. The idea that protection of freedom might require a limitation of collective decision-making is obviously justifiable in some cases, but there should be an awareness of the fact that the exercise of excluding specific matters from democratic deliberation and decision-making, to protect the rule of law and democratic principles, constitutes an inherently slippery slope towards domination that requires constant public scrutiny. Notwithstanding the importance of fundamental discussions on what issues should remain unaffected by democratic scrutiny, this inherent tension to democracy theory does not affect the basic starting point of our conception of democratic legitimacy: when committed to the democratic legitimacy of law, a political constellation should offer every legal subject an actual, equal, and continuous opportunity to participate in lawmaking, including decision-making power, which is guaranteed by political rights and judicial safeguards.

Political rights and judicial safeguards
Political rights form the core of institutional preconditions. Habermas introduces four categories of political rights that protect the ‘basic rights that result from the politically autonomous elaboration of the right to the greatest equal individual liberties’. Firstly, there is the right to have the status of a member in a society under law, to be able to enjoy basic political rights. Here we are confronted with a fundamental and preliminary organizational issue of democracy, concerning the delineation of the political community.

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341 This term is borrowed from Waldron who clarifies political scientist attitudes towards formality of lawmaking processes such as parliamentary approval. Waldron 1999a, p. 29.
342 Barnard mentions in this regard that ‘democratic legitimacy demands liberal limitations, and that self-rule by the people therefore rests on self-limitation by their governments.’ Barnard 2001, p. 185.
343 Waldron well expresses the political tension: ‘Granted that there is nothing illogical in assigning disputes about the rights associated with democracy to a majoritarian procedure, what guarantee do we have that such rights would be respected? How can rights be secure if they are at the mercy of majority decision? How is respect for rights consistent with a process that appears to place no a priori limits on procedural outcomes? Do the conclusions to which we have been driven not leave everything up for grabs?’ Waldron 1999a, p. 303.
344 As Michelman states, the dilemma is ‘how law and rights can be both the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law’ Michelman 1988, p. 1505.
345 Nieuwenhuis discusses in this respect the existence and possible delineation of the ‘very essence’ or ‘core’ of a right. See Nieuwenhuis 2012.
347 Habermas 1996, p. 122-123.
Who is the demos, and who defines the boundaries of the demos? Without being able to take a conclusive stance on this complex issue, this study follows Arendt, who states that a political community is generated by the activity of collective political power itself and is not limited per se by cultural or nationalistic elements.

Secondly, these basic rights need to be actionable and guaranteed. Rights are required that ‘regulate the relationships among freely associated citizens, prior to any legally organized state authority from whose encroachments citizens would have to protect themselves’. In order for individuals to become creators of the laws that regulate them, there is a need of ‘basic rights to equal opportunities to participate in processes of opinion- and will formation in which citizens exercise their political autonomy and through which they generate legitimate law’. These basic political rights are linked with the existential capacity to speak and act, as discussed in chapter 1, section 1.2.1. They refer to the right for legal subjects to express an opinion or interests, the right to gather, and the right to co-decide on the laws that govern them. Legal subjects have different instruments to represent and express their opinions and interests, among others through a diversity of independent associations and movements. This familiar set of basic political rights consequently leads to other obligations of a political constellation, for example the guarantee that views can be widely disseminated so that ‘individuals have the means of informing themselves of how to advance their interests and convictions’.

The mere existence of political rights that protect individuals’ capacity to act and speak in concert for public political purposes, and to enable that their power can actually transform into political impact on the decision making on law is not enough. In order for rights to have more than a symbolic meaning, the rights bearers should be able to enforce these rights.

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348 See Archibugi and Held 1998.
349 The suitability of Arendt’s understanding of political power for our concept of democratic legitimacy is clear as that aims to be not inherently limited by nation-state boundaries. We do not consider ethnicity, nationality, religion or ideology as a precondition for forming a political community. We sympathize with the conviction of the Greek colonists that ‘wherever you go, you will be a polis’. The rationale of this verb covers the belief that everywhere new settlements can copy the same set-up of political associations. Arendt, with her focus on speech and act, deliberatively refrains from any suggestion that ethnic identity is a decisive factor for the formation of a political community. Being a citizen is in Arendts’ account, in that respect, a neutral identity. See d’Entreves 2008.

This is in line with Besson, Habermas and Buchanan. Besson states, with regard to the threshold of the existence of a community for democratic legitimacy to have a meaning beyond the border, that ‘all it takes often is some kind of ‘we-feeling’, a form of solidarity among different ‘stakeholders’. According to Habermas, today signs of political fragmentation betray the first breaches in this facade of the ‘nation’. Against traditional images of multicultural dialogue, Habermas proposes ‘the dynamic image of an ongoing construction of new models of belonging, new subcultures and lifestyles, a process kept in motion through intercultural contact and multiethnic connections’. Habermas 2001, p. 71-75. See Waldron 1995, p. 105. This strengthens a trend toward individualization and the emergence of ‘cosmopolitan identities’, already evident in the post-industrial societies. Habermas, Besson, and Buchanan would not agree on applying the same standard of democratic legitimacy to both national and international law. See for Buchanan’s position: Buchanan 2004, p. 253.

We will discuss the positions of Habermas and Besson in this respect in chapter 6, section 6.3.1.
350 Habermas 1996, p. 122-123.
351 Pettit speaks in this respect of ‘contestatory citizenship’, as one of the two different dimensions of democracy. Pettit 2012, p. 105-144.
352 As Habermas states with regard to legal institutionalization of various forms of communication and the implementation of democratic procedures: ‘These are meant to guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy. Rights of equal participation for each person thus result from a symmetrical juridification of the communicative freedom of all citizens’. Habermas 1996, p. 127. See also Christiano 1996, p. 85-86.
Along with the correlative membership rights, guaranteed legal remedies are required, which are instructive for understanding what the scope is of these rights. Individuals enforce their political rights by having a right to ‘fair access to public agencies and courts’.\textsuperscript{353} To secure democratic legitimation, there should be judicial overview ‘with the task of detecting violations and with the authority to overrule any other branch that commits them, including the legislature’.\textsuperscript{354} The judiciary may restrain domination by politicians and prevent them from acting outside the law. Specific procedural rules, for example concerning lifetime appointments or non-political methods of selecting judges, aim to ensure independence of the judiciary from legislators. The independence of judges in this respect is not understood to depoliticize judicial review, but is considered necessary to refrain the judiciary itself from forming a dominating actor.\textsuperscript{355} Judicial overview can constrain the power of majorities to protect the rights of minorities, but it is nevertheless perceived as a pro-democratic institution.\textsuperscript{356}

Rights and judicial overview are institutions that societies may harness to secure the essential principles of democracy: freedom from domination and equality.\textsuperscript{357} Therefore, as mentioned above, rights and judicial safeguards have an instrumental rather than an intrinsic meaning for democracy.\textsuperscript{358} There is a certain paradoxical complexity involved in an account of institutional preconditions. Rights are seen as a criterion for democratic legitimation but equally demand leaving the completion of the substance of these preconditions to the relevant political community.\textsuperscript{359} This paradox is represented by the observation that these preconditions should be ‘more or less’ static. The necessity of having political rights and judicial safeguards is static, as without them no democratic legitimation of law is possible. However, the individual substance of these institutional preconditions is to a certain extent dynamic. It depends for the interpretation and delineation of institutional preconditions on any democratically enacted legislature of a specific political constellation. The content of political rights cannot be understood to be absolute or pre-determined.\textsuperscript{360} It is up to the people themselves, whether or not they are represented by a political legislature, to construe and frame these basic rights.\textsuperscript{361}

\textsuperscript{353} Diamond 2003, p. 35.
\textsuperscript{354} Waldron 1999a, p. 212.
\textsuperscript{355} As Eisgruber states, ‘judicial power is justifiable because judges are pro-democratic representatives of the people, not because their professional expertise enables them to decide political questions in an apolitical way’. Eisgruber 2002-2003, p. 1733. The controversial question of how the protection of rights enforced by courts can be reconciled with democratic legitimacy is outside the limits of this research. However, it remains complicated to justify the role of judges as interpreters of the law, as ‘judicial constitutional convention is not equivalent — indeed, it is contrary – to actual democracy’. Michelman 1988, p. 1537.
\textsuperscript{356} Eisgruber 2002-2003, p. 1733. Pettit adheres this view. Other criticize this approach for being elitist, as when the resolution of political disagreements is done by judges, most probably favours individuals who are technically, and legally capable to pursue action through courts.
\textsuperscript{357} As Sunstein states, ‘[i]n my view, the central goal of a constitution is to create the preconditions for a well-functioning democratic order, one in which citizens are genuinely able to govern themselves.’ Sunstein 2001, p. 6.
\textsuperscript{358} The approach of Eisgruber is followed in this respect. Eisgruber 2002-2003, p. 1737.
\textsuperscript{359} As Waldron has made clear, rights ‘divide us in fierce and intractable controversies’ about their detailed application, about the nature of justice and the hierarchy between rights, about the consequences of calling something a right. See Waldron 1999a, p. 11-12, p. 209-313.
\textsuperscript{360} In the words of Waldron, we do not aim to ‘put that canon beyond the scope of ordinary political debate and revision’. Waldron 1999a, p. 212.
\textsuperscript{361} Habermas 1996, p. 125.
Notwithstanding this theoretical freedom for individuals to give content to these rights, the specific manifestation of participation as the right of citizens to take part in the government through periodic and free election is in Western democracies generally taken as the starting point for the operationalization of democratic principles.\textsuperscript{362} A democratic government often refers to a representative system of governing, consisting of different institutions such as the judiciary, the executive, and the legislature, which obtains legitimacy by the way it is democratically organized. However, institutional preconditions understood as basic political rights are not in principle conceptually intertwined with specific and familiar democratic manifestations such as, for example, elections.\textsuperscript{363} As mentioned earlier, political rights are understood in a broad, fundamental way, including, but not limited to, political rights such as freedom of speech, freedom of association, and freedom of the press.\textsuperscript{364}

The allowance of some dynamic elements into the more or less static touchstone of institutional preconditions is justified by the fact that the mere existence of these institutional preconditions does not free them from scrutiny. Institutional preconditions can also be usurped and used as an instrument of domination.\textsuperscript{365} The interpretation of these rights, notwithstanding their ‘basic’ procedural appearance and function, has many moral aspects.\textsuperscript{366} The actual performance of rights and judicial safeguards by courts needs constant inquiry to test whether they live up to their task: to protect people from authoritarian governance.\textsuperscript{367} They too must discharge their functions under the effective and equally shared control of individuals over how they perform.\textsuperscript{368}

2.1.2 Social preconditions – an informal commitment to participation

Social preconditions substantiate the framework that is set up by institutional preconditions. Social preconditions refer to the evaluation of the very possibility of initiating power by legal

\textsuperscript{362} See subsequent section 2.2 on the operational aspects of democratic legitimacy.

\textsuperscript{363} As Habermas states, ‘[i]n fact, when citizens interpret the system of rights in a manner congruent with their situation, they merely explicate the performative meaning of precisely the enterprise they took up as soon as they decided to legitimately regulate their common life through positive law. An enterprise of this sort presupposes no more than the concept of legal form and an intuitive understanding of the discourse principle.’ Habermas 1996, p. 128-129. See also Bohman 2005, p. 103.

\textsuperscript{364} Our account gives a minimal presentation of the rights needed, and stresses in the first place the need of political rights, without giving full closure of what these rights should entail. We follow Waldron who states that ‘a concern for individual rights may lie in the foundations of a theory, leaving it an open question what those foundations entail at the level of political or constitutional construction’. Waldron 1999a, p. 215. See also Besson 2009b, p. 65; Diamond 2003, p. 35.

\textsuperscript{365} A particular abuse of a fundamental right, could result in the prohibition of enjoying that same right. See for example the exploration of Nieuwenhuis on the prohibition to associations. See Nieuwenhuis 2015.

\textsuperscript{366} Waldron reminds us of the struggles for universal suffrage and democracy, by women, African American, workers. ‘They did not do them simply for the sake of a vote on interstitial issues of policy that had no compelling moral dimension. They fought for the franchise because they believed that controversies about the fundamental ordering of their society – factory and hours legislation, property rights, free speech, police powers, temperance, campaign reform – were controversies for them to sort out, respectfully and on a basis of equality, because they were the people who would be affected by the outcome.’ Waldron 1999a, p. 15-16. See also Walker 2010, p. 218-220.

\textsuperscript{367} In this way, the often-criticized trust of Pettit in a court-based system of constitutional checks and balances is somewhat circumvented, following Bellamy who focuses therefore primarily on political representation. See Bellamy 2007.

\textsuperscript{368} Pettit 2008, p. 5; Bohman 2005. As explained by Bohman, a capacity to initiate deliberation is ‘the achievement of a democratic arrangement sufficient for citizens to exercise their creative powers to reshape democracy according to the demands of justice’. Bohman 2005, p. 101.
subjects, for their gathering and acting together.\textsuperscript{369} They refer to the existence of a democratic culture in a political constellation,\textsuperscript{370} the way citizenship can be experienced, how public deliberations take place, and to what extent associations can be formed. Evidently, the determination of whether a specific political order has fulfilled the social preconditions of a well-functioning public sphere and a democratic culture is more difficult. When discussing the social precondition of a public sphere, we should bear in mind Dahl’s warning for democracy theory that ‘no actual system could be expected to satisfy the criteria perfectly, constellations could be judged more democratic or less, and to that extent [sic] better or worse, according [to] how nearly they meet the criteria’.\textsuperscript{371} Therefore this section limits itself to an exploration of the general characteristics of social preconditions. It focuses on the social precondition of a public sphere and the interrelated aspect of the existence of a civil society.

A public sphere

Political activity takes place in an infinite variety of public spaces of action, often referred to as the public sphere. The composition of the public sphere is inherently fluid and dynamic. As Habermas theorizes, the public sphere distinguishes itself ‘through a communication structure that refers neither to the functions nor to the contents of everyday communication but to the social space generated in communicative action’.\textsuperscript{372} The premise of a sphere devoid of pre-determined content is crucial, as it should function as a forum for the exchange of opinions and for opinion formation. The public sphere is constantly ‘filled’ with individuals who act and speak in concert with each other.\textsuperscript{373} Action can take place in town meetings, civil and voluntary organizations, recreational clubs, schools, workplaces, at public events and in street life, and so on. The specific characteristics of these activities differ, which is clear when one contrasts gatherings at bars, demonstrations, and meetings of workers’ councils, but they have in common that all could be considered to contribute to a public space for people to meet up and discuss political and social matters.\textsuperscript{374}

In order for a public sphere to function as a social precondition for the democratic legitimacy of law, it should offer legal subjects a space for free discursive contestation and debate, openness of access, and opportunities to voice their opinions equally.\textsuperscript{375} Legal subjects need such a public space to respond to the role of a citizen of a legal order in which they can actually and equally influence and impact upon decision-making. The publicity of the public sphere enables the formation of a ‘representative opinion’.\textsuperscript{376} A personal opinion

\textsuperscript{369} As explained in chapter 1, section 1.2.1, Arendt’s conception of power is followed in this respect.
\textsuperscript{370} As Waldron states: ‘As the fate of scores of ‘constitutions’ around the world shows, paper declarations are worth little if not accompanied by the appropriate political culture of liberty’. Waldron 1999a, p. 311.
\textsuperscript{371} Dahl 1979, p. 105.
\textsuperscript{372} Habermas 1996, p. 360.
\textsuperscript{373} This conception of public sphere is influenced by Arendt’s account of power.
\textsuperscript{374} d’Entreves 2008, referring to Arendt 1972, p. 143-155.
\textsuperscript{375} Pitkin summarizes this Aristotelian tradition regarding the relationship between the public sphere and the rationale of democratic legitimacy as follows; ‘[T]he distinctive promise of political freedom remains the possibility of genuine collective action, an entire community consciously and jointly sharing its policy, its way of life. (...) A family or other private association can inculcate principles of justice shared in a community, but only in public citizenship can we jointly take charge of an responsibility for those principles.’ Pitkin, 1981, p. 327, p. 344-345.
\textsuperscript{376} As Arendt states, ‘[p]olitical thought is representative. I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent
can only become a representative opinion when confronted with other perspectives, and when individuals have enriched their standpoints with those of others. Confrontation with the opinions of others enables the consideration of a specific issue from different standpoints. A well-functioning public space is pluralist by nature, offering a space to various types of groups and associations that pursue different, possibly contradictory interest. The collectivity and public nature of deliberations in a public sphere offers the possibility of persuasion, of forming the opinions of others.

Although the words we use to present the activities in the public sphere, such as dialogue, the exchange of opinions, transformation of ideas, and representative opinions, sound non-aggressive and mild, opposition and conflicts of opinion are fundamental elements in maintaining a well-functioning public sphere. Opposition is also a crucial element of lawmaking itself. The indeterminate character of law necessitates a dialogic, critical, transformative practice. Those situated not at the center but at the margins of society especially tend to use their political power to undertake political action to disrupt a commonly accepted determination of a legal rule. Michelman hereby emphasizes the role of opposition in our democratic ideal: ‘So the suggestion is that the pursuit of political freedom through law depends on “our” constant reach for inclusion of the other, of the hitherto excluded — which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups.’ The emphasis on public discussion of contentious opinions and the importance of taking these opinions into account in order to form a better opinion, or to reach a better conclusion, is in line with a classical version of pluralist democracy, in which political power is dispersed over numerous interest groups. A public sphere provides a forum for the expression and confrontation of these different views and interests in public debate.

Our understanding of social preconditions is conceptually limited to the existence of a public sphere to enable the initiation of political power. However, a public sphere can only be considered as a precondition for democratic legitimacy when it is ‘well-functioning’, when it provides an open space where legal subjects can make actual use of it for social action. One confirmation of such a ‘well-functioning’ public sphere is the existence of a vibrant civil society.

[380] When a legal subject interacts with others in deliberations it might lead others to ‘believe or vote or choose as he does’. Dworkin 2000, p. 191.
Civil society
In this sub-section we focus on the users of the public sphere, the actors of political power.\textsuperscript{384} Given the subject of our main object of inquiry, we focus specifically on the voluntary formation of individuals into non-governmental organizations. The different voluntary formations of individuals that together make use of the opportunities to publicly discuss and debate public matters are broadly described as civil society. Civil society exists out of a large plurality of independent groups initiating political power, mobilizing and empowering individuals to use the freedom to speak and act.\textsuperscript{385} Civil society is, just as the public sphere itself, inherently dynamic. It is a body of associational activity subject to constant transformations, which consists of well-known formalized voluntary associations, such as unions and political parties, and many informal networks, small collective initiatives, and more.\textsuperscript{386} The concept of ‘civil society’ covers all relatively free and independent social and political organizations, such as groups representing particular interests, research institutions, political groups, the media, churches, and academic institutions, including NGOs.

The emphasis on the position of civil society actors as manifestations of a public sphere can be traced back to an image of the political constellation as a ‘democratic triangle’,\textsuperscript{387} illustrating the position of civil society next to market and state apparatus. In simplified terms, the core task of the state within this triangle consists of organizing society by developing robust legislation that defines the rights and duties of citizens. The core task of the market consists of generating mutual competition and trade activity to provide material security and prosperity. The core task of civil society consists of the development of meaning and meaningful institutions, based on which legal subjects derive their individual and collective identity.\textsuperscript{388} The reliance on civil society as a separate democratic force is

\textsuperscript{384} Notwithstanding the fact that the existence of such actors is an important manifestation of democratic legitimacy, civil society itself cannot be understood as a precondition.

\textsuperscript{385} According to scholars such as Weber, Schumpeter, Moore, Skocpol, and Berger, the sphere outside the formal, parliamentary sphere is thought to provide a considerable autonomous peasantry that produces a middle class that remains firm towards the ruling authority and provide the recourses for independent groups. See Lipset 1994, p. 2, referring to Weber 1906; Schumpeter 1950; Skocpol 1979; Berger 1986; Berger 1992, p. 7-17. As Moore noted, ‘[n]o bourgeois, no democracy’. Moore 1966. p. 418.

\textsuperscript{386} Cohen emphasizes the importance of recognizing both dimensions: ‘civil society as a dynamic, innovative source for thematizing new concerns, articulating new projects, and generating new values and new collective identities; and civil society as institutionalized civic autonomy.’ Cohen 1999, p. 215.

\textsuperscript{387} Zijderveld 1997, pp. 11-24. State, market and civil society are therefore the constituent parts of the democratic triangle, and none of the three has in theory any primacy. On the contrary, ideal typical the key features of each element should be in perfect balance without any domination in order to secure the optimal functioning of their key features. Lavish state intervention might lead to undermining the free market and an erosion of the sense of mediating structures in society. Too many market might lead to a society in which ‘the law of the strongest’ becomes the standards, and in which mutual solidarity and solidarity should make room for a type of individualism that is carried to the extreme. Too many ‘civil society’ finally can lead to unconditionally group conformism, which is no place for individual initiative and where legislation is seen as an unnecessary infringement on internal community relations.

\textsuperscript{388} This understanding of civil society implies a separation between the different actors and their functions that does not correspond to the many quite intimate relationships that have existed between state and market, and between state and civil society since early times, at least in Continental Europe. Nonprofits have from early times on been involved in the public services. In addition, there is a long corporatist tradition, involving representative associations such as trade unions and employers’ associations in economic and social policymaking. It has not been uncommon to delegate major aspects of political decision-making and even supervision over implementation to such actors. Brandsen, Van de Donk and Putters 2005, p. 757, referring to Kooiman 2003.
illustrative for many different political ideals, such as the involvement of citizens in public affairs, the enlargement of social self-government at the expense of politics, limiting commercial influences, and the strengthening of community and tolerance. The opportunities of collectivity that are offered by civil society organizations are seen as a crucial aspect for balancing the authority to rule. The general idea is expressed by Lipset: ‘[i]f citizens do not belong to politically relevant groups, if they are atomized, the controllers of the central power apparatus will completely dominate the society’.

Also in the work of theorists on the relationship of civil society organizations with democratic legitimacy, traces of the two-facedness of democratic legitimacy are found: trust versus distrust, and self-rule versus control. While one group of theorists primarily focuses on privileging the private sphere to prevent unwanted state intervention and sees a crucial role for civil society actors functioning as a beacon between ‘the private’ and ‘the public’, other theorists specifically privilege the public, the collective enterprise, and theorize civil society actors as a means to engage in governmental activity by persons in their private capacity.

The importance of civil society for the well functioning of a public sphere can be traced back to cynicism and distrust towards the willingness of public authority to act in line with the wishes of its legal subjects. In some theories on the role of civil society, of which the work of Locke is exemplary, the importance of civil society lies in the capacity to protect the private sphere of citizens from state intervention and the persistent threat of governmental misuse of prerogatives. The main aim of the organization of individuals in voluntary groups is to protect individual property rights against the authority of the government. Although the emphasis of different theorists switches between an emphasis on self-rule through government rather than self-rule protected from governmental interference, the recurring central theme is the ways and means that individuals are enabled to organize a counterforce to state power.

Habermas’s emphasis on the requirement of ‘publicness’ can be read as an effort to steer a course between the two ends of privileging collectivity and privileging private interests. With his focus on gatherings of the ‘bourgeoisie’ that facilitated debates on political matters, Habermas was primarily inspired by the opportunities of the public sphere to create ‘as a matter of private initiative the sort of actors and community capable of effecting normative authority outside of or in contradistinction to public office’. A public sphere consisting of civil society actors enables individuals, whether united or not, to subject state policies and officials to the inspection of reason. However, the importance of public debate and public expression also refers to the capacities to participate proactively in the making of norms, as

390 Lipset, Trow, and Coleman 1956, p. 15.
391 The theoretical work on the connection between civil society and democratic legitimacy is inventoried by, among others, Woodward, Seligman, Pierik and Gordon. Their work is used for this introduction into the relationship between democracy theory and civil society.
392 Although Locke relied also on a conception of trust, that specific trust was meant to restrict the power of the government: Locke wrote that society turns power over to its governors, “whom society hath set over it self, with this express or tacit Trust, That it shall be imployed for their good, and the preservation of their Property.” Locke 1988, p. 381. See Pierik and Gordon 2010, p. 4 referring to Clarke 2000.
394 Habermas 1989, p. 70.
these practices develop a rational basis for law. The ideal of a balance between what governmental officials do and what citizens themselves undertake requires for its effectuation a strong civil society to inform and sustain democracy.

A focus on civil society actors can also be traced back to the ideal that these organizations activate and facilitate individuals in their personal development into political actors. Associational life can instigate the spread and internalization of democratic values. Associations are assumed to help establish and nurture a type of citizenship. Civil society actors facilitate individuals to internalize civic virtues, to deliberate and discuss, to initiate the creation of new norms related to the common good, to act in concert to achieve democratically enacted change, and to democratically decide on the formation of laws.

Trust in the exercise of public authority is based on the conviction that that exercise is eventually based on the collective, communicative political action of these individuals. The premise that all legal subjects equally partake in the exercise of public authority focuses on empowerment of these legal subjects, to enable bottom-up influence in political decision-making. In this reading, instead of warding off governmental intrusion, private associations should spend their time and energy on complementing the state enterprise to facilitate ‘a just and moral social and political life’.

The opportunity of participation in voluntary associations is often presented as the essential precondition of democracy. Putnam states, in line with Lipset who was quoted earlier, that ‘people don’t participate because they are not mobilized, and not mobilized they can never savor the fruits of participation’. Associational activity activates and facilitates a pluralist citizenry. It allows individuals to express their interests and demands to government even when they develop a minority view. Civil society, within the limits of an individual state, creates conditions for opinion forming which might lead to impact on democracy.

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396 Woodward 2010, p. 74, referring to Kaldor 2003a, p. 25-26. Woodward argues that Kant inspired Habermas. Kant focused on the individual and its moral autonomy that required the freedom to make public use of one’s reason. This would lead to a ‘community of ends’. Kant theorized a democratic constellation as a representative government, in the first place characterized by separation of powers, and checks and balances. He deliberately limited the representatives to the minimal numbers necessary, possibly to offer ‘considerable room, and perhaps obligation, for the responsible engagement of the public sphere by persons in their private capacity’. The position of Kant towards civil society is well introduced in Pierik and Gordon 2010, p. 5.

397 Charnovitz 2003, p. 46.


399 As Putnam state, they ‘instill in their member habits of cooperation and public spiritness, as well as the practical skill necessary to partake in public life’. Putnam 2000, p. 337.

400 This ‘more liberal’ connectedness between civil society and democratic legitimacy can also be traced back the work of as Gramsci, Tocqueville, Huntington, and Putnam.


402 As Seligman puts it; speaking principally with respect to Rousseau, this ‘idea is at the heart of the civic virtue tradition where a community of virtue is one where the social good is defined solely by the subjugation of the private self to the public realm.’ Seligman 1995, p. 204.

403 Hegel develops this perception of the role of civil society. Hegel elaborated on Kant’s theory, understanding freedom as allowing the realization of morality. Contrary to scholars as Locke and Hume, Hegel understood political commitments as the highest order, primarily pointed towards the prevention of war, superior to any private activity. Kaldor 2003a, p. 27.

404 Putnam 2000, p. 337. Institutional preconditions are considered as only one side of the equation.
decision-making processes and, in this way, builds harmony and hegemony.\textsuperscript{405} From this perspective, every governmental system requires a strong civil society to inform and sustain the democratic legitimacy of law.\textsuperscript{406}

2.1.3 Complementarity of social and institutional preconditions
Social and institutional preconditions reflect different sides of the basic infrastructure necessary for realizing the democratic legitimacy of law. Both preconditions are mutually dependent.\textsuperscript{407} On the one hand, institutional preconditions protect an equal and actual share in governance, which, in Dworkin’s words, focuses on ‘the difference he can make, just on his own, by voting for or choosing one decision rather than another’.\textsuperscript{408} On the other hand, social preconditions concern the provision of a public space for individuals to engage in political activity outside formal lawmaking. Such a space creates equal opportunities for legal subjects to form their opinions, to ‘place questions on the public agenda, and to express reasons for affirming one outcome rather than another’.\textsuperscript{409} A public sphere of democratic engagement is necessary to substantiate, and therefore complement, the formally ensured transformation of power into political impact on the decision-making on law. Notwithstanding the fact that in comparison with formal decision-making, informal social practices cannot have the same predictable impact on decision-making on law, their indirect political effects on the exercise of legislative authority can be considerable.\textsuperscript{410}

The way social and institutional preconditions are complementary already anticipates the more operational aspects of democratic legitimate law that will be further discussed in the subsequent section. The operational aspects of democratic legitimate law might differ per legal constellation. What they have in common though is that these operational aspects, such as democratic rules about elections and accountability, ensure that exercisers of public authority cannot escape the opinions of their legal subjects.\textsuperscript{411} Taking into account a plurality of opinions increases the formal deliberative practices and the consequential rationality of a decision on what the law should entail.\textsuperscript{412} Lawmakers gain their input for a law by the operation of institutionalized processes of law formation, such as in parliament, where

\textsuperscript{405} See for an overview, Keane 1988.
\textsuperscript{406} Charnovitz 2003, p. 46. In addition, Tocqueville argued that associations serve as a bulwark against the tyranny of the majority, and combat the political or moral indifference that facilitates despotism. See Tocqueville 2004, p. 218, 590. To quote Tocqueville, ‘[a] government, by itself, is equally incapable of refreshing the circulation of feelings and ideas among a great people, as it is of controlling every industrial undertaking’. Tocqueville 2004, vol II, chapter 5, 501-510.
\textsuperscript{407} One cannot reduce democracy to rights, majority rule, and elections. A huge amount of literature has sought to formulate missing dimensions of democracy. The notion ‘dimensions’ we borrowed from Eisgruber 2002-2003, p. 1723. Rosenfeld has argued that institutional preconditions should be valued for taking the first step towards democratic legitimation, while acknowledging that we should rethink means to accommodate pluralism. Rosenfeld 2000, p. 1351. See also Weiler 2004, p. 561.
\textsuperscript{408} Dworkin 2000, p. 191.
\textsuperscript{409} See Dahl 1989, p. 221.
\textsuperscript{410} Waldron 1999c, p. 354. Also Cohen states that ‘[a] civil culture of ‘generalized trust’ and social solidarity, peopled by citizens willing and able to cooperate in joint ventures, is equally an important precondition of system legitimacy’. Cohen 1999, p. 217.
\textsuperscript{411} Heyse 2003, p. 115. As Cohen states, ‘(...), discursively generated public opinion is meant to influence the debates within political and legal publics proper (legislatures and constitutional courts) and to bring under informal control the actions and decisions of rules and lawmakers (the principle of responsiveness), while remaining autonomous of censorship and manipulation by state officials’. Cohen 1999, p. 216.
\textsuperscript{412} See chapter 1, section 1.3.2.
organized interests are included in the lawmaking process through political parties. A lawmaking authority should also consider the perspectives put forward outside this formal scope.\textsuperscript{413} Besides, the output of the exercised legislative authority can count on the acceptance or resistance of legal subjects. As discussed, the role of opposition and conflict is part of the emancipatory power of legal subjects and goes back to the roots of democracy.\textsuperscript{414} Social preconditions create a space for competing perspectives on law to develop.\textsuperscript{415}

Vice versa, institutional preconditions complement social preconditions. Although power initiated in the public sphere creates itself spontaneously, it cannot on its own institutionalize its norms or orientations into law. The effect of legal subject’s capacity to act and speak in concert for public political purposes depends on the way their power is translated into democratic impact.\textsuperscript{416} To assure that exercisers of lawmaking authority act in line with democratic principles of freedom and equality, legal subjects should have rights and judicial safeguards to fall back on to ensure the translation of this power into decision-making power concerning the formulation and enactment of a specific law.\textsuperscript{417} Institutional preconditions, facilitated by operational rules and norms of procedure, assure that, as Dahl argues, each legal subject’s ‘judgment will be counted as equal in weight to the judgments of other citizens at the decisive stage of collective decision-making’, which is fundamental for any form of democratic legitimate law.\textsuperscript{418}

The circular interactions between the exercisers of public authority and legal subjects, guaranteed by political rights and judicial safeguards and a well-functioning public sphere, enable the translation from power and influence into political impact on the formation of a law. The complementarity of preconditions is committed to the democratic promise of effective participation in the deliberation and decision-making on a specific legal rule, which serves as a protection of the principle of freedom.\textsuperscript{419} Social preconditions, such as a democratic culture and a public sphere enable arenas of potentially transformative dialogue,\textsuperscript{420} and consequently self-emancipatory activity of individuals, which political impact of this activity is guaranteed by institutional preconditions.\textsuperscript{421}

2.2 The operational aspects of democratic legitimacy

As discussed in chapter 1, the exercise of public authority can be democratically legitimized when the political constellation in which the legislative activity occurs offers every subject an actual, equal, and continuous opportunity to participate in lawmaking that might lead to a political change in a specific law or even in the characteristics of a specific institutional

\textsuperscript{415} Esty 1998, p. 135.
\textsuperscript{416} Lipset 1994, p. 13.
\textsuperscript{417} Specifically deviating voices should be included, according to Young. ‘It is easy enough to have a harmonious and expeditious decision-making process if the dominant voices do not take seriously those opinions, analyses, perspectives, and arguments that they regard as extreme, dangerous to their interests, or overly contentious.’ Young 2002, p. 67.
\textsuperscript{418} Schumpeter 2003, p. 10.
\textsuperscript{420} See Dahl 1989, p. 221.
\textsuperscript{421} Michelman 1988, p. 1533, referring to Karst 1986.
\textsuperscript{422} Michelman 1988, p. 1531.
\textsuperscript{423} Hirsch remarks that a public sphere and civil society have flowered in many Western states precisely because of their interplay with a centralized system of state institutions. Hirsch 2003, p. 249.
order.\textsuperscript{422} As the previous section demonstrated, an evaluation of the democratic legitimacy of law requires first an evaluation of the institutional and social preconditions to determine whether in general any exercise of public authority can be democratically legitimized. If a system has successfully passed the first evaluation, one is assured that the exercise of authority can be more or less democratically legitimate, more or less in line with the essential principles of democratic legitimacy. To what extent it is democratically legitimate can be assessed in the second level of evaluation: that of a law’s democratic legitimacy’s operational aspects.\textsuperscript{423}

The two levels of evaluation of the way the essential principles of democratic legitimacy are operationalized differ in terms of abstraction. Whereas democratic legitimacy’s necessary preconditions require an evaluation of the characteristics of the overall political constellation in which laws are enacted, democratic legitimacy’s operational aspects requires an evaluation of the participatory characteristics of a specific legislative process. As discussed earlier, any evaluation of the democratic legitimacy of a particular rule is secondary to the evaluation of a governmental constellation with respect to the self-organization and the political emancipation of society. An evaluation of the democratic legitimacy of a particular rule presupposes a political constellation that offers its people an open society, a society that does not impede activism or critical reflection.\textsuperscript{424} Democratic legitimacy’s operational aspects therefore depend on democratic legitimacy’s necessary preconditions.

Notwithstanding the dependence on democratic legitimacy’s necessary preconditions, democratic legitimacy as such only has relevance for daily legislative practices when an evaluation of the exercise of authority succeeds in ‘showing how the authority of legislation could be linked practically to certain conditions of legislating the circumstances of modern life’.\textsuperscript{425} The reasoning that to be free from domination everyone should have equal, actual, and continuous opportunities to participate in lawmaking requires concrete, operational instruments.\textsuperscript{426} Democratic legitimacy’s operational aspects concern the practicalities of how political rights are enforced in lawmaking processes.\textsuperscript{427} A specific lawmaking process should facilitate proactive participation, deliberation, and control to ensure that the authority is exercised on the people’s terms.\textsuperscript{428} When looking into the operational aspects

\textsuperscript{422} The democratic legitimacy’s necessary preconditions have a creative and constitutive dimension: they enable the capacity to initiate deliberation on manifestations of democracy itself. In order to be able to apply the standard of democratic legitimacy, a regime must provide, ensure and guarantee a channel for constituent power to manifest once and again. See Colón-Ríos 2012.

\textsuperscript{423} Our procedural perspective on democratic legitimacy allows us to take as a starting point the particular features of the procedure through which the law came into being, based on the premise stated by Waldron, that ‘people who really care about justice and rights may nevertheless disagree about what they entail’. Waldron 1999a, p. 306. Because of the awareness of the empirical fact that any given political society is characterized by a plurality of value and belief systems, chapter 1 conceptualized democratic legitimacy in a procedural way.

\textsuperscript{424} See Lefort 1988.

\textsuperscript{425} Waldron 1999a, p. 33.

\textsuperscript{426} As indicated in the introduction, no comprehensive account of all means to democratic legitimation is given, though for illustrative reasons some might pass in review. With ‘means’ we refer, among others, to voting for legislatures, assembling, taking part in demonstrations, signing petitions, addressing representatives directly, participate actively and passively in political parties, participating in and donating money to cause- and interest groups. Instead we focus on three broad, general categories of operational translations of the main purpose of democratic legitimacy.

\textsuperscript{427} The qualification ‘deeper’ can be used here, because the level of democratic legitimacy’s operational aspects is relative. See Dahl 1979, p. 105.

\textsuperscript{428} Habermas 2001, p. 110.
of lawmaking, one assesses the different operational manifestations of participation, ranging from elections, recalls, referenda, majority voting, or different types and fora of deliberation and control. Democratic legitimacy’s operational aspects include procedural norms such as transparency, responsiveness, accountability, and inclusiveness. Contrary to the static evaluation of democratic legitimacy’s necessary preconditions, democratic legitimacy’s operational aspects can be approached as a matter of degree.

This section briefly reviews the characteristics of democratic legitimacy’s operational aspects. Section 2.2.1 sketches general characteristics of a domestic lawmaking process to show the different time frames in which the ideal of participation might be operationalized. Section 2.2.2 discusses some operational aspects of participation related to the three types of participation discussed in section 1.3 of chapter 1: consent, deliberation, and control. Section 2.2.3 briefly discusses some general principles that function as guidelines for lawmaking authorities to facilitate participation.

2.2.1 An introduction to general characteristics of lawmaking processes

Lawmaking is a public exercise of authority that concerns preparation, discussion, formulation, and finally decision-making which leads to the enactment of a rule that should guide the behavior of its subject.\footnote{The specification of the type of public authority, namely lawmaking, sets aside legitimacy issues concerning the public authority to enforce laws, and the public authority to use force more generally. The ambitions are therefore much more modest than traditional approaches to the problem of political obligation. These obligations include more in the way of duties of citizens. The scope of the thesis with its limitation to lawmaking is in line with Raz’s famous theory of authority. See for an overview of these other theories: Ehrenberg 2011, p. 884–894.} These processes incorporate both political processes and legal procedures; they include the discussion on, as well as the passing of, the law.\footnote{Noortmann and Ryngaert 2013, p. 198.}

To sketch some general characteristics of lawmaking processes, domestic lawmaking in representative democracies functions as a framework of reference.\footnote{The distinctive features of international lawmaking processes are introduced in chapter 3.} In general, most democracies organize primary lawmaking by representatives, which can be initiated by representatives or executives. Subordinate lawmaking is often delegated to the executives. In all these different lawmaking procedures and phases, plenary debates are organized in which different actors, including individuals, private actors, and civil society organizations get a chance to submit their views to the formal legislators. Many political constellations have laid down rules of parliamentary procedure and appreciate the informal norms that regulate these processes. Besides deliberating, persuading, and voting, they also entail making compromises, bargaining, coalition building, and lobbying. Strictly speaking, as long as a piece of legislation remains under the consideration of the legislature it is not considered law, though it may be broadly referred to as lawmaking.

Different opportunities for participation are integrated into lawmaking processes. How many opportunities there are to participate, the intensity of participation, and the types of participation depend on the institutional framework of a specific lawmaking process, which obviously differ per country, governance level, and legal rule. This section reshapes and reduces these empirical complexities of legislative procedures to a simplified sketch of lawmaking.\footnote{In that sense our presentation is close to Cox’s ‘legislative state of nature’ in which all members have equal rights to make proposals and plenary time is unregulated, in which no attention is given to possible instability of decisions, inaction, unequal distribution of agenda powers, consistently control access to the privileged agenda-} The purpose of this section is to illustrate the context of the inquiry into the
contours of democratic legitimacy’s operational aspects and manifestations. It has no instructive purpose, nor does it intend to draw a template for any legislative procedure.\textsuperscript{433}

In line with rule of law principles an adequate legal basis is required to empower the government to make binding regulation.\textsuperscript{434} Lawmaking refers to practices that ‘constitute a legislature and empower it to lay down the law and to subject the immemorial practices of primary morality to the rational procedure of deliberate change’.\textsuperscript{435} Often a constitutive document, which attributes legislative power to the legislature, contains rules about who is empowered to make laws, and according to what procedure. We generally speak of the ‘legislature’ when referring to the formally recognized actors involved in legislative processes.\textsuperscript{436} A legislature\textsuperscript{437} is a body of individuals forming a decision-making organization that has the power to pass, revoke, and revise laws. Lawmaking refers to practices that ‘constitute a legislature and empower it to lay down the law and to subject the immemorial practices of primary morality to the rational procedure of deliberate change’.\textsuperscript{435} Often a constitutive document, which attributes legislative power to the legislature, contains rules about who is empowered to make laws, and according to what procedure. We generally speak of the ‘legislature’ when referring to the formally recognized actors involved in legislative processes.\textsuperscript{436} A legislature\textsuperscript{437} is a body of individuals forming a decision-making organization that has the power to pass, revoke, and revise laws. A diversity of actors, from individual members and political parties, to committees and interest groups, is involved in legislative processes. However, formally, the term ‘legislature’ refers to one or more deliberative assemblies that discuss and vote upon bills. These assemblies are normally known as chambers or houses.\textsuperscript{438}

Representative democracies are characterized by the main principle that the parliament, consisting of representatives of the people, has the primacy to set rules, which means that the most important and impactful rules should be enacted by the parliament.\textsuperscript{439} Legislatures are in this respect considered the principal policy makers. In this capacity they observe and steer governing actions. Many governmental decisions, ranging from economic, environmental, and social regulation, to individual and collective rights,\textsuperscript{440} require legislative approval. Amending constitutions, thus altering the structure of government or the distribution of power among its officers; ratifying treaties; declarations of war or states of emergency initiated by executives; and approving appointments of high officials to executive, judicial, or independent offices: all these governmental acts can only achieve legal setting positions by political parties. Caray 2009. See Cox 2006. What one can say in general about lawmaking, without looking into individual characteristics of particular political constellations, is obviously limited. See for a discussion on the tensions of comparative research and legislation, Florijn 1993.

\textsuperscript{433} This research refrains from contemplating on the merits of borrowing legal concepts from one legal system to another. See for a skeptical view: Weiler and Trachtman 1996-1997, p. 355: ‘The dangers of ‘borrowing’ from one legal system to another are famous: the law of any polity is a construct embedded in a specific social and political culture and its transmutation to other polities is not easily achieved.’

\textsuperscript{434} The legality principle is mentioned in relation to democratic legitimacy in chapter 1, section 1.1.2.

\textsuperscript{435} Waldron 1999b, p. 20. We called this in chapter 1 the ‘transformative power’ of individuals.

\textsuperscript{436} We separate power of the legislative branch from the judicial branch that has formal power to interpret legislation, and from power of the executive branch that can act only within the powers and limits set by law, in line with the traditional rule of law framework. Suggestions for further reading on Rule of Law: Raz 2009; Tamanaha 2004; Przeworski and María Maravall 2003.

\textsuperscript{437} The most common names for national legislatures are ‘parliament’, ‘assembly’ or ‘congress’, although these terms have more specific meanings. Laver 2009.

\textsuperscript{438} Different political constellations know different numbers of ‘chambers’. A legislature with only one house is a unicameral legislature, while a bicameral legislature possesses two separate chambers, usually described as an ‘upper house’ and a ‘lower house’. These chambers exercise different tasks and have different powers. The selection of their members also differs. See for an introduction to bicameralism: Uhr 2009; Cutrone and McCarty 2009.

\textsuperscript{439} The primacy of the legislature is well expressed by Locke: ‘In all Cases, whilst the Government subsists, the Legislative is the Supream Power … and all other Powers in any Members or parts of het Society [are] derived from and subordinate to it.’ Locke 1988, 367-369, para 150.

\textsuperscript{440} Caray 2009.
force when approved by the legislature. Furthermore, legislatures normally have the exclusive authority to revise budgets.

The bulk of rule-making of an administrative nature, however, is enacted with lesser democratic legitimacy. Often the broad principles and outlines of a law are set out in statutes. These statutes delegate authority to the executive branch to introduce legislation that works out the details of the statutes. Delegated legislation can be revised easily compared to primary legislation. Legislatures therefore delegate issues that may need to be fine-tuned through experience. The executive authority makes rules to implement and administer the requirements set by primary legislation. These types of rules made by the executive power are called subordinate legislation.

Usually, the process whereby a ‘bill’ becomes an ‘act’ is prescribed in constitutional or administrative legislation. Once a social problem is identified, it can be decided that new or amended legislation is the proper response to solve it. Members of the legislature or officials who are part of the executive power often initiate a legislative procedure.441 If members of parliament pass a draft bill, it is often based on the right of initiative. Lawmaking entails different phases: an initiation phase, a preparation phase, a consultation phase, deliberation, enactment, publication, and the phase in which a rule enters into force.

Together with the proposal for a new act, an explanatory memorandum explaining the purpose of the proposed law can be filed. The bill can be placed in the hands of special committees that prepare the consideration of the bill in writing. The policy decisions concerning new laws are frequently complex. They may depend on technical information that can be marshalled and deciphered only by experts, or they may entail trade-offs among competing demands that interact in non-obvious ways. Notwithstanding the professionalization of representatives into policy-making specialists, legislatures also hold informational potential beyond the sum of the individual efforts of their members through the division and specialization of analytical labor.442 Legislatures are often set up to encourage division and specialization through a set of committees with policy-specific jurisdictions. These committees are charged with supporting the development and review of policy proposals in their domains, such as economics, foreign affairs, security, agriculture, labor, and so forth, and drawing on the expertise of their members and staff to make recommendations to the full assembly.

During these preparatory phases, civil society organizations and other interest groups are often allowed to react to the bill. The legislature or the executive may invite organizations to submit comments or may organize a public hearing in which organizations can give their reactions. Observations made by the relevant committees might instigate the government to allow further changes to the bill.

After committees have adequately prepared the bill, a plenary debate takes place, during which members of the legislature may propose amendments.443 A public hearing can take place in different rounds, in which members of parliament have the opportunity to question

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441 As part of the executive, officials of a ministry make a proposal at the request of a minister. The minister in question defends that proposal in the cabinet. If the Cabinet agrees to the submission, it can be required that the proposal is submitted to an external council that will assess the congruence of the proposal with the broader legal, constitutional, system. The opinion of the advisory body may be reason for the government to change something or to respond.

442 Caray 2009.

443 Plenary time is essential to passing legislation. See Cox 2009, under 2.
the bill, and the one who initiated the bill can defend it, whether a co-member of parliament or the minister. These discussions are often referred to as deliberations, of which the length of the speaking terms is determined by procedural rules. The legislature is expected to consider a diversity of standpoints. The ‘publicness’ of legislative deliberations is an important element to be able to subject these deliberations to monitoring by outside actors. By forcing debate into an open setting, legislatures can limit the admissible arguments on behalf of interests or policy positions to those that can be defended in public, and the represented are able to hold their representatives to account.  

At the end of the public hearing, after the debate has been completed, legislators vote upon the bill. Rules of procedure often provide for voting requirements that prescribe an absolute majority of votes, or in some cases a two-thirds majority vote, but may also require a supermajority in some cases. The final phase of legislative procedure concerns the legal status of an act, which is normally reached by a signature or some other token of consent by the head of state. After the approval of a new law, rule of law principles require publication of the law. The process of enactment is separate from commencement. A royal decree or a separate law normally regulates the entry into force of a law.

As stated and explained in the previous section, to be conducive to achieving any political transformation and to ‘become consolidated and embodied in political institutions which secure those very forms of life that are centered in reciprocal speech’, power should be able to flow back and forth from informal sites of deliberation occurring in the public sphere to formal sites of deliberation as discussed above, such as parliaments, and chambers for hearing. However, in practice, the democratic ideal of power sharing by the people equally is not very obvious in every legislative process. Daily legislative operations are characterized by routine procedures. Bureaucracies prepare laws and process applications, parliaments pass laws and budgets, party headquarters conduct election campaigns, and interest groups exert influence on administrations.

2.2.2 Operational aspects of participation

This section discusses some operational aspects of participation. We follow the three main categories of participation as spelled out in chapter 1: consent, deliberation and control. The operationalization of participation manifests itself in proactive ways, such as through voting for a representative in parliament; in continuous ways, such as through initiating debates

444 Caray 2009.
445 Procedural rules on voting differ per bill, and obviously per political constellation. Simple bills might be settled with a blank (final) report and can be directly (as formality) subject to voting. Having emphasized the bewildering variety of contemporary parliaments, extending to the name, size and functions of the legislatures, Norton pinpoints “one core-defining function” of all legislatures no matter how considerably they differ: ‘what such bodies have in common is that they are constitutionally designated institutions for giving assent to binding measures of public policy (…)”. Norton 1990, p. 1.
446 See Habermas 1977.
447 Habermas argues in commenting on Cohen’s formulation of a model of deliberative democracy, that deliberative democratic process should not be perceived as engaging an integrated people making decisions for the entire society. Habermas 1996, p. 304-307. Habermas is in that respect consistent with Arendt’s reading of political power. She argues that political power is actualized in all those cases where action is undertaken for communicative purposes, and where speech is employed to disclose our intentions and to articulate our motives to others. Habermas however is also critical to some elements of Arendt’s account of political power. Habermas criticizes Arendt’s rigid dichotomies ‘between public and private, state and economy, freedom and welfare, political-practical activity and production — rigid dichotomies which modern bourgeois society and the modern state, however, escape.’ Habermas 1977, p. 14.
and participating in discussions on policy matters outside and inside formal lawmaking processes; and in reflective ways, by holding legislators to account.

First, related to the proactive form of participation by consent, one can state that there are various different participatory mechanisms that operationalize consent by the governed. There are mechanisms that give legal subjects a direct voice in lawmaking, such as citizen initiatives, co-decision procedures, and referendums. There are obligatory or optional referendums, advisory or consulted referendums, and binding or non-binding referendums. Many states make use of direct participative mechanisms to correct the results of indirect participation, which brings us to the second and most dominant contemporary manifestation of the individual's approval of the exercise of public authority: the electoral system.

The primacy of the chosen legislator is an indirect manifestation of the normative ideal that the people should govern themselves. Notwithstanding the many possible different ways of enacting rules, and the possible critique on the division of labor, in most legislative settings the larger society has elected representatives to make the rules and decide what rules govern their behavior. The electing of representatives seems to value the abstract idea of a legislature as a microcosm of the political community at large. For domestic democratic systems, this ideal is translated geographically, when representatives are elected on a constituency basis, and ideologically, in terms of party-political affiliations. It is often thought important that legislatures also represent a country’s mix of gender, ethnic, and class identities. Those are choices about the appropriate ways to ensure the equal representation of interests and perspectives and to relate the egalitarian foundations of democracy to the specific framing of policy and legislative debates.

Elections have a double function: they enable participation in and control over the exercise of authority. In this respect, an elaboration on elections belongs to the current section on the ways that consent is operationalized, as well as to the subsequent subsection on the operationalization of control. With a vote, one expresses one’s individual political preference. In the case of aggregative procedure, the ‘one man one vote’ principle, it is

448 These forms of direct participation are often considered to politically empower individuals. There are different normative pleas for different direct participatory mechanisms. See Barber 1984; Norris 2001; Fountain 2001.
449 See for further reading Qvortrup 2002.
450 Why representative democracy is commonly seen as the most favorable manifestation of self-rule is an interesting topic that nevertheless falls out of the scope of this research. As discussed in the introduction, this research does not take a normative stance on the preferability of different manifestations of participation. See for a plea for representative democracy, Meuwissen 1975.
451 Waldron summarizes the underlying ideal or our electoral representative legislators as follows: ‘[T]he representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them.’ Waldron 1999b, p. 2.
452 See for a critique on electoral representative democracy, Van Reybrouck 2013.
453 In order to determine how consent giving should be facilitated, practically all states have opted for instituting electoral systems. According to Dahl, ‘[o]nly a handful of countries have failed to grant at least a ritualistic vote to their citizens and to hold at least nominal elections; even the most repressive dictators usually pay some lip service to day to the legitimate right of the people to participate in the government, that is, to participate in ‗governing‘ though not in public contestation.’ Elections ‗play a direct role in the establishment and maintenance of governmental legitimacy (…) because elections are the means by which a vital element of popular consent is expressed and implemented‘. Dahl 1971, p. 5. See also Gardner 1990-1991, p. 267.
assumed that taking into account every individual’s interests equally is assured. In that case, democratic legitimacy relates directly to ‘an expression of majority will, making legitimacy a function of electoral successes’. On the other hand, the attractiveness of voting systems is their clear-cut way of holding representatives to account. The electorate has the means to produce and to evict a government, through methods of acceptance and withdrawal of acceptance. To give credit to the principle of self-rule, the authority to make rules is not permanently transferred to state organs; this is regulated in different instruments of authority. Regular elections guarantee an evaluation of the exercise of authority and represent a constant renewal of legitimacy. Ideally, elections have a transformative impact. Representatives who are elected are bound by a limited term that ensures the opportunity for existential power to manifest itself at least once every four years. The fear of losing office may prevent governments acting beyond the wishes of the people.

Who will be elected, and how, are often considered to form the core of a democratic system: namely, in Schumpeterian terms, through the competition for leadership and the free competition for a free vote. Participation of the people in this regard is limited to deciding who will decide for you, who will represent you in decision-making. Electoral representative democracies are normally characterized by the existence of political parties. Political parties differ from many other political institutions by virtue of being, most often, created external to the constitutional order. The role of political representatives is in essence dual. First, the representative mobilizes the power that is granted to him or her to make decisions. The choices of the electorate determine which parties and their candidates win legislative office. In some cases a single party forms a majority; in other cases it requires multiple parties to do so. In either case, the final step is how that majority governs, in terms of realizing (or reflecting) the wishes of the public that elected it, to substantiate fundamental principle of democracy on which representative theory is based: each person

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454 See for an extensive elaboration of the relation between the principle of equality with majority voting, Sadurski 2008; Dworkin 2000. Dworkin has argued that one should make a distinction between the equality of impact and the equality of influence. Voting mechanisms confer an equality of impact to individuals or in the international legal order to states. The equality of impact, in Dworkin’s words, sees on ‘the difference he can make, just on his own, by voting for or choosing one decision rather than another’. The equality of influence, on the other hand, covers the possibility of one’s person to make a difference, not just by its own vote, but by leading others to ‘believe or vote or choose as he does’. Dworkin 2000, p.191.


456 Schumpeter 2003, p. 11.


458 However, elections ‘bear only a pragmatic connection to democracy, not a constitutive one’. The expression of agency takes many forms. Eisgruber 2002-2003, p. 1731. Eisgruber states that ‘elections are desirable institutions only insofar as they serve democratic goals, and, as we have already noticed, they will do so only imperfectly. That is not because voters are unintelligent, amoral, or in some other way incapable of governing themselves. The problem is that ‘voter’, like ‘juror’ or ‘legislator’ is a specific political office embedded in a network of political institutions. Like all such offices, it carries with it specific incentives’.

459 As Laver states, ‘if citizens want to change their government in a parliamentary government system then they do this by voting in parliamentary elections. Everything else about legislative politics in parliamentary government systems is ultimately an embellishment of this simple constitutional fact’. Laver 2009.

460 ‘The fear of losing office may be enough to prevent governments being completely carefree with power and money – after all, if the opposition were elected, that same power and money could be used against them’ Butler 2012, p. 86.

461 Schumpeter 2003, p. 11.

462 See Aldrich 2009.
ought to have (the possibility of) an equal say in the process of collective decision-making. Second, as part of the legislature, any representative is understood to represent the broader interests of society at large. In this respect political parties shape the beliefs and values of citizens and shape their electoral decisions.

There are many legal procedural norms that determine how participation in practice is manifested. Take for example legal norms concerning proportional representation, or other legal norms that regulate first-past-the-post elections, or norms that determine whether the executive-legislative relationship should be a ‘parliamentary’ or primarily based on ‘separated powers’. Also, the way law addresses the regulation, administration and financing of electoral systems and political parties influence the working of specific democratic systems. These norms strongly influence the practice and experience of the democratic legitimacy of law. In general, the necessary ‘thickness’ of participatory structures that characterize different lawmaking processes depends on the assumed impact of a rule on society. Most democratic constitutions prescribe majority rule by representatives for primary lawmaking activities. Often the most important decisions, such as changes in constitutions, require extraordinary majorities or several successive majorities. Amending a constitution normally involves ‘complex and laborious’ requirements, which are necessary to ensure a well-considered revisiting of fundamental norms worthy of protection by the constitution. However, a ministerial decision can be enacted by a relatively simple procedure. Laws apparently differ in what they require in terms of forms of proactive participation of legal subjects.

Second, in relation to deliberation, it is important to stress that the mere existence of opportunities for deliberation, as discussed in chapter 1 section 1.3.2, is not sufficient for the democratic legitimation of law. Whether or not deliberations are contributing to the democratic legitimacy of law depends in practice also on the way deliberations are operationalized. In general, there should be sufficient assurance that the procedures of the deliberation are neutral in relation to the different substantive viewpoints, in the sense that a procedure itself does not privilege any particular discussant or stance. A proper deliberation based on preferences defended in impartial terms requires that the lawmakers eliminate any barriers such as false or morally objectionable information. Besides, democratic legitimacy’s operational aspects depend on mechanisms that promote dialogue and debate. A commitment to deliberation includes, among the other things mentioned, the drafting of potential rules or policies with public notice and an opportunity for all interested parties to comment on the draft. Compliance with these requirements not only contributes to the legitimation of law from a procedural point of view, but also has instrumental value: when lawmaking authority takes into account procedural elements related to deliberation it increases the likelihood that substantive agreement among individuals will be reached.

As mentioned in section 2.1.2, a flow from power to lawmaking authority is enabled by the capacity of (groups of) legal subjects gathering in the informal, unspecialized public...
sphere to autonomously identify issues and concerns. These associations might bring those issues and concerns to wider public attention; they might propose solutions for them, and, by shifting public opinion, they influence the operations of the formal political system. This flow of power requires facilitation by procedural norms such as responsiveness, transparency, and inclusiveness, to get across the input of legal subjects. Deliberation in this respect does not prescribe the involvement of all legal subjects in the process of democratic will formation. Individuals may decide that their interests are already being well put forward by others. More than the number of participants in the deliberation, ‘it’s the public forum function, through which public control, criticism and debate become possible’.

Third, control derives practical meaning when, in response to expressions of control, corrections can be made to the law. Therefore it is vital that the lawmaking authority be responsive to the exerted control and willing to revise its policy. In a representative democracy there are traditionally three different levels of democratic control operationalized. The people control the parliament, the parliament controls the government, and the government controls the bureaucracy. The major means of control can be divided into external-formal mechanisms and external-informal processes. The former relates to legislative instruments, such as legislative committees and parliamentary questions, but also to executive means, such as controls exercised by political executives over public agencies, and judicial or quasi-judicial processes, such as administrative courts and ombudsmen. The latter refers to public hearings, interest groups, opinion polls, and media scrutiny.

How control is tailored depends on the nature and the purpose of a specific law. Besides, the quality of control depends on the political and administrative climate of a lawmaking authority. Beck proposes the following ordering of different types of control. First, there is direction control, when political objectives are being analyzed, replaced, or adjusted. Direction control is a consequence of the strong belief in the rights of the people to co-

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470 These norms will be briefly discussed in subsequent section 2.2.3.
471 The fact that a democratic legitimate lawmaking process should provide equal opportunities does not equally mean that all individuals have the obligation to be part of a deliberative process. See Dryzek 2001. See also Held 2006, p. 281: ‘Deliberative democracy presupposes, according to some of its leading advocates, that publicly upheld positions can meet the test that all significantly affected would assent to the, but it does not presuppose that all will or could necessarily engage in debate’ (see for example Habermas 1996)
474 The other, in this case less relevant, internal means of control mentioned by Haque are: 3. internal-formal means, including official rules, codes of conducts, official hierarchies, and performance reviews; and 4. internal-informal mechanisms, such as organizational culture, professional ethics, and peer pressure. Haque 2000, p. 606, see for further reading DeLeon 1998; Haque 1994; Heeks 1998.
475 When these conditions are fulfilled, control is elevated from a merely routine obligation to an instrument to make lawmaking more rational. The sociologist Beck calls this the cognitive function of control. Control knows also a social-integrative function. By enabling participation, the political authority diminishes the chance of opposition and protest actions against their lawmaking activities. Those who cannot relate to the actions of the lawmaking authority should be able to recognize the counter pressure from control with which they can identify. Control is effective when it can lead to sanctions, reconsiderations and consequences. When political authority is not controlled properly political apathy can occur, leading to a deteriorating relationship between the people and the political authority. Control is thus paramount to a democratic legitimate lawmaking authority. Beck 1987, p. 11-26.
legislate, whether through representatives or directly. It constitutes a so-called balance on the executive power. Beck complements direction control with the second type of control, which he calls legality control. Legality control provides a check on the policy activities on the basis of legal regulations and guidelines. Thirdly, Beck mentions success control. Success control takes place when the effectiveness of the law, policy, or instrument is controlled. Legality control and success control enable a check on executive power.476

The accountability norm is institutionalized to create a system of constant control of the people over the exercise of political authority.477 Each of the principals in the chain of delegation of an institution needs to control the exercise of the transferred powers. At the end of the line stand citizens who review the functioning of public authority and might sanction their political representatives by, for example, voting them out of office during the subsequent elections. As a result of the exercise of oversight, relevant information can be divulged.478 The public character of the account giving has the purpose to protect legal subjects against corruption, abuse of power, and other practices of inappropriate authoritative conduct. Public account-giving, therefore, is a necessary condition to uphold, guarantee, and operationalize any form of effective participation, by means of consent, deliberation, or control, as it provides to legal subjects the indispensable input for evaluating the performance of governance.479 Accountability is constituted by two elements: mechanisms of transparency, for delineating public political roles; and mechanisms of disempowerment, for imposing sanctions that annul certain political resources that enable an actor to perform public political functions.480

2.2.3 Procedural norms
In this section we briefly discuss the main procedural norms that facilitate the abovementioned forms of operationalizations of the principle of participation. These procedural norms bridge or adjust the gap between the governed and the governors.481 The norms, such as transparency, inclusiveness, and responsiveness that will briefly pass in review are all more or less interrelated, as they address the responsibility of the lawmaking authorities to comply with these norms as to enable effective participation of legal subjects.

Let us start with transparency. A lawmaking institution has an obligation to disseminate understanding widely so that ‘individuals have the means of informing themselves of how to advance their interests and convictions. (…) Hence, democratic institutions ought to be structured in such a way as to provide wide and roughly equal access to information relevant to democratic decision-making’.482 Citizens need information to make their vote well informed, to be able to control and contest governmental policies, to hold the executive

476 See Beck 1987.
477 Public accountability is seen as a conditio sine qua non for democratic governance. As Rossi states, ‘[t]he oversight and accountability rationale is paramount to the legitimacy of agency decisions.’ Rossi 1997, p. 182.
479 See Przeworski, Stokes, and Manin 1999. It is referred to as vertical accountability, based on hierarchic principles of Decey and Weber.
481 Aucoin and Heintzman 2000, p. 49-52.
482 Christiano 1996, p 85-86. One of the most reasonable related requirement for equal opportunity to participate is the equal access to information, as individuals should have the means to inform themselves in order to develop their opinions, which implies a very tall order for government, in that it should secure such an equal access. This claim is closely related on the equality of educational opportunity.
power accountable, and to take part in deliberations. As discussed in the previous section, the provision, sharing, and gaining of information is guaranteed in a democratic system by political rights that are part of the institutional preconditions of democratic legitimacy: by freedom of the press, freedom of assembly, and freedom of speech. However, the transparency norm mainly focuses on an open government, ensuring the transparency of official papers, proposals, and agendas, and could be perceived as a necessary condition for effective control, consent and deliberation.

Related to the procedural norms of transparency is the democratic obligation for lawmakers to be responsive to the different comments put forward by the different actors that participate in the lawmaking process. Lawmakers should listen to these actors to make participation in lawmaking effective in terms of political impact on the decision-making on law. That might be by assuring impact of individuals upon the agenda setting, including the capacity to initiate public deliberation about a chosen subject. A closely related procedural norm is the principle of inclusiveness. Inclusiveness can be seen as a quantitative aspect of the scope of participation. In principle, a lawmaking process is inclusive if the interests, opinions, and social perspectives of all those affected are represented in the decision-making process. This refers to the ‘fundamental question of identifying the proper constituency or demos concerning a specific issue’.

These procedural norms facilitate the earlier discussed central premise that a democratic society should remain open to change, to revisability. These norms can only be considered effective when coupled with the essential possibility of disempowerment when the lawmaking authority does not perform up to standards. The earlier mentioned instrument of accountability functions as a democratic norm that checks and addresses the level of responsiveness, transparency and inclusiveness of a lawmaking procedure. No less important is the preventive function of procedural norms. Public account-giving and transparency will discourage public officials from exploiting their delegated powers and will provide supervisors, whether interest groups, members of parliament, the media, or official controllers, with vital information for uncovering governmental neglect.

Any consideration of democratic legitimacy’s operational aspects requires a case-by-case evaluation of the different participation mechanisms of a lawmaking process. This case-by-case evaluation should take into account the formalized processes of lawmaking, the evaluation of the opportunities to voice concerns by legal subjects, the information provided

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483 Esty points out the universal value of deliberation, by comparing political theory with a scientific model. The value of a deliberative model is for both processes huge, with the importance of give-and-take as a path to superior results of time. Esty 2007, p. 524
484 Procedures enacted by the lawmakers that openly ‘promote the advancing of data, testing of theories, scrutiny of assumptions, review of policy results, and the refinement of thinking based on experience’ are equally to be prized. Sandholtz and Stone Sweet 2004, p. 247.
485 Esty 2007, p. 524.
486 Sadurski 2008, p. 87.
487 Sadurski 2008, p. 87.
489 Dahl 1979, p. 97. Being subject to the rules and decisions of the association is an essential characteristic of membership; it is sufficient to distinguish members from non-members in that respect.
491 Another function of public accountability, that is less relevant for our exploration of democratic legitimacy’s operational aspects, is to improve functioning of governmental actors by enabling individual or institutional learning, as it provides new insights not only for the affected that might use that information to steer government, but also for public officials themselves. Aucoin and Heintzman 2000, p. 52-54.
by the lawmakers for legal subjects necessary to form any opinion on the subject matter. When public hearings are organized, one should look into the general intensity of participation, whether it is limited to merely observing or can participants put issues on the legislative agenda, and into the actual follow-up of lawmakers after the inputs of legal subjects are collected. Besides, one should evaluate what means of holding the lawmakers to account the legal subjects have at their disposal. In short, an investigation of democratic legitimacy’s operational aspects requires an assessment, first, of the procedures and norms that are in place to regulate participation in a lawmaking process, and second, of the available instruments and channels that the legal subjects can use to allow their concerns and ideas to be heard.

2.3 Democratic legitimacy’s critical potential

The general characteristic of democratic legitimacy seems apparent: whether discussing its rather abstract principles, or its more concrete manifestations, democratic legitimacy enables legal subjects to critically assess the laws by which they are governed, its lawmaking authority, and even the organization of the political constellation they are part of. As discussed in chapter 1, the distinctive feature of legitimacy is that it refers to the relationship between legal subjects and law. Legitimacy is the result of an evaluation of law by its legal subjects that measures its acceptability. Legitimacy refers to an attitude of the legal subject towards a law and towards the exercise of lawmaking authority, in contrast to concepts such as normativity, validity, or content. As is argued, the extensive consequences of law for the lives of the legal subjects and accordingly, the broad power of the lawmakers that create these rules, require a critical evaluation of its legitimacy. One considers the binding nature of law acceptable because it has come into being through a democratically legitimate procedure, with respect for the right of individuals to have an equal say.492

The specific appreciation for democratic lawmaking procedures is based on the principle of self-rule, of equal opportunities to participate. This normative position is based on the conviction that we have legitimate interests in participating in political life, and consequently in participating in lawmaking. The conception of democratic legitimacy that is central to this research takes a proceduralist approach to democratic legitimacy, which is, in principle, indifferent to the content of the resulting law.493 A move away from content is justified by the distinctive characteristics of a legal system. Law inherently affects all legal subjects, as opposed to other social norms that rule a small group of subjects that behave in a way congruent with the social norm. Due to the existing plurality of opinions concerning the determination of what is just and what is not, justifications of law based on its content are controversial by nature.494 A procedural perspective on democratic legitimacy is based on

492 Waldron claims: ‘Once voted on in the legislature, [a law] is entitled to whatever respect this communitarian status confers on it, without regard to – indeed bracketing away from – the substantive merits of its content.’ Waldron 1999a, p. 102.

493 We deliberatively add ‘in principle’ as our procedural starting point has its own limitations, related to possible unwanted effects of democratically enacted laws that are inherently contradictory with our conception of justice. Waldron 1999a, p. 3-4.

494 Waldron 1999b, p. 23.
the assumption that democratic procedures are able to meet people’s respect for laws with which they may, sometimes substantively, disagree. 495

A democratic mode of lawmaking guarantees that its procedures offer opportunities for participation to everyone, which requires toleration and explication of radical and public contradiction. 496 This is to enhance the chances that, even if there is substantive disagreement in terms of morality with the proposed legal answers to societal ordering problems, individuals might accept the proposed answers when, during the process of law formation, democratic principles are respected. 497 As disagreement and conflict are inevitable elements of the existence of large groups of individuals with heterogeneous interests, lawmaking unavoidably produces losers as well as winners. Democratic legitimacy provides the argumentative force to persuade losers to continue to play the political game: as Miller puts it, ‘to work within the system rather than to overthrow it’. The merit of democracy as a system is that it offers prospects that the next turn ‘may produce a different outcome with different winners and losers.’ 498 It is, more fundamentally, the reasonable prospect of having a next opportunity to get involved in lawmaking that might result in a change in the course of political events. Although the content and effect of a single legal rule may be contrary to one’s interests, one can still find acquiescence in obeying that rule and accepting the ruling authority because one is aware that a democratic system allows for another time to ‘win’. 499

A basic test of whether a law is democratically legitimate is to assess whether legal subjects have a continuous say about both primary rules and secondary rules of procedure on how laws are enacted. A say in the formation of secondary rules is important as the practical implementation of the principles of democratic legitimacy also asks for constant re-evaluation. 500 When a majority of the people finds any process-specific democratic legitimation insufficient, institutional preconditions guarantee the opportunity to change these procedural rules of participation. 501 Such an awareness of the openness, revisability,
and fairness of the democratic system leads in general to trust in the political system, which makes possible a willingness to compromise one’s own stance in a specific case, notwithstanding one’s particular feeling of distrust in that case.  

If a regime does not offer sufficient means to institutionalize the power of individuals acting collectively, the power of the ruled could even lead to transformations at the level of organization of a political constellation itself.  

The possibility of a renewal of the democratic constellation is one of the most explicit manifestations of political power.  

The relationship between the different elements of democratic legitimacy is shown in the figure below.

![Figure 2 - Democratic legitimacy's dual evaluation](image-url)

502 Waldron explains the special authoritarian claim for obedience of law even if one disagrees with its substance: ‘The claims that law makes – on our attention, our respect and our compliance – are the claims of an existing (and developing) framework ordering our actions and interactions in circumstances in which we disagree with one another about how our actions and interactions should be ordered. I am not just referring to the disagreements (about alimony, accidents, overhanging boughs, etc.) that cause conflict among us and lead us to bring out competing claims to court for adjudication. I mean that law purports to adjudicate such conflicts (among its many other tasks) and claims authority for its adjudications on principles which are themselves controversial in society. And it does so in frank acknowledgement of that controversy about principle. That is why the peremptory tone of its claims upon us is not ‘Here’s a basis for dispute resolution which you should accept if you agree with it.’ It is rather: ‘Here’s a basis for dispute-resolution which you are to accept whether you agree with it or not.’ Waldron 1999a, p. 7.

503 These types of non-institutionally supported acts of political power aiming to transform are often called revolutions. Revolutions and popular uprisings are examples of actions that might be later determined as manifestations of ‘a capacity to begin’. The appreciation of and the classification of the result of a revolution is inherently a retrospective issue. Arendt 1958, p. 184; Skocpol 1979. See also Goldstone 1994; Sanderson 2005.

504 There are some basic exceptions, when democratic agency leads to an outcome that is incompatible with our constitutions and the principles of justice that are included in the constitutions. See for the classic tension between law-rule and self-rule, chapter 2, section 2.1.
Part I - Conclusions

As discussed in chapter 1, the collective term legitimacy refers to an evaluation of the attitude of legal subjects to the exercise of public authority. More specifically, it is about the acceptance by legal subjects of law. Their acceptance is understood to be beneficial, or generally understood to be essential for a well-functioning society, as the chances of compliance are considered higher when legal subjects accept the law. The account of democratic legitimacy central to our study, contrary to the sociological account of legitimacy, is based not on proved acceptance of law by legal subjects, but on a hypothetical acceptance by the ruled of the authority of the rule, or the rule-making institution. From a normative perspective, acceptability of law is considered necessary given the extensive consequences of law in the lives of legal subjects, and accordingly, the broad power of the lawmakers creating these rules. Such an emphasis on the legal subject’s attitude to law confirms the idea that there is a certain dependency of law on its legal subjects. When engaging in legitimacy quests, legal subjects are considered to remain in the driver’s seat; they are the ones that decide whether or not they can or should accept the authority by which they are ruled.

One of the dominant normative understandings of legitimacy is that law is acceptable when it is democratically enacted. One of the main reasons for this is that modern societies are characterized by a diversity of interests, and disagreements in people’s attempts to figure out what justice and the common good require. The foundation of democratic legitimacy rests on its ability to protect the individual’s freedom from domination in such a society characterized by the wide variety of opinions and values. One is considered free from domination when one has consented to law, and has the opportunity to participate equally in the creation of law. Laws are considered to interfere with legal subjects’ freedom only when the legal subjects are forced to be completely dependent on others’ will. When they enjoy guaranteed opportunities to participate in the making of the laws that govern them, legal subjects remain free from domination. In practice this means that all legal subjects should equally be able to exercise their capacity to initiate, deliberate, decide upon laws, and to revise laws.

Such a reference to self-rule might manifest itself in different ways. To sustain the protection of freedom from domination, manifestations of the opportunities for legal subjects to equally set the terms of their coexistence have been indicated in terms of proactive participation (consent) and reflective participation (control), in which deliberation, due to its dual nature (internal as part of formal decision-making processes and external as the activity of civil society), floats in between the two time-frames.

To live up to the promise of democratic legitimacy of law, there should, first, be the necessary preconditions in place. Necessary preconditions consist of institutional preconditions and social preconditions. Institutional preconditions refer to political rights and judicial safeguards. The importance of institutional preconditions for democratic legitimacy is based on a constant awareness that the concentrated power of leaders is inherently vulnerable to corruption, affecting the principle democratic starting point that the public should determine the law by which it is governed. Rights function to reduce vulnerabilities to exercises of public authority, by limiting its reach, and by enabling voluntaristic, solidaristic, and public modes of political action, through deliberation and association, for example. The difference between institutional preconditions in light of democratic legitimacy and institutional preconditions in light of validity, as discussed in
chapter 1 under section 1.1.2, is that in a democratic legitimacy reading it is not the rules themselves that limit the government from acts of domination, but the individuals making use of the rules that offer political rights that guarantee means to facilitate the indication of and objection to any abuses of power. Social preconditions should be in place to create a democratic culture, which is necessary to actually make use of the legal structure. To fulfill their right to actual and equal participation, legal subjects interact and participate in processes of discussion, argument, and reflection, and formulate opinions on the suitability of resolutions to common issues at hand.

The necessity of the institutional and social preconditions is based on the distinctive relationship between democratic legitimacy, trust and distrust. Democratic legitimacy might include feelings of trust in democratic institutions with feelings of distrust in a particular exercise of political authority. The distinctiveness of a democratic constellation is that these feelings of distrust can be perceived as the engine for supporting, for ‘trusting’, a democratic system, on two different grounds. First, feelings of distrust and acceptability of authority can exist simultaneously. Legal subjects that distrust a specific act of authority because they do not agree with the outcome of a democratic lawmaking process might simultaneously ‘trust’ the general governing system because they are aware that in another ‘round’ of exercise of authority they might be happier with the outcome of a democratic lawmaking procedure. Second, on a more fundamental level, distrust in political authority fuels the awareness of the need for democratically legitimate lawmaking in general. It is often assumed that corrupting governmental authority has less chance of surviving when every individual of the political community has the right to participate. A dispersed, plural, and equally distributed authority to make law is assumed to free individuals from domination. The reason for the sustainability of continuous alternations of trust and distrust lies in the existence of these social and institutional preconditions. Trust in the political constellation, although alternated with distrust, is secured by the existence of preconditions, protecting the initiation and exercise of political power necessary for citizens to exert political influence.

When explaining democratic legitimacy’s necessary preconditions, certain preconceptions of a political constellation come to the surface. The very necessity of legitimacy of law implies that the exercise of authority to make law is separated from its legal subjects. This indicates that even when the people do not, all together and directly, partake in the making of laws, the resulting laws can still be democratically legitimate. A democratically legitimate law, established by representatives of the people is therefore assumed possible. Evaluating the legitimacy of a ‘system’ of institutional and social preconditions implies a form of governing where a specific branch exercises public authority and has final decision-making power to set laws and determine the content of those rules, which nevertheless still respects the democratic premise of ‘governing by the people’.

Once institutional and social preconditions are met, a political constellation can be democratically legitimized. The degree of democratic legitimation of a specific rule depends on the operational aspects of actual lawmaking procedures, whether or not that specific lawmaking procedure has operationalized the modes of participation as discussed above: consent, deliberation, and control, and has lived up to democratic practices such as accountability, transparency, responsiveness, and inclusiveness. Democratic legitimacy’s operational aspects ensure that lawmaking powers by officials are exercised on the people’s terms. Searching for lawmaking constructions that have sufficient democratic legitimizing value is a continuous critical activity: one must constantly consider whether the assumption
that a certain actor or procedure contributes to the realization of democratic principles is still correct.

In sum, democratic legitimacy is presented as an evaluation tool that allows one to assess whether the exercise of public authority respects the power of legal subjects collectively to act and speak and decide on the laws that govern them, free from domination, enabled and guaranteed by institutional and social preconditions, operationalized by different means of participation, and facilitated by procedural norms such as transparency and responsiveness. The discussed dual evaluation, of both preconditions and the operationalizational aspects of democratic legitimacy, offers us an analytical tool to assess the NGO democratic legitimacy thesis.

The previous exploration on democratic legitimacy as such did not pay a lot of attention yet to the central actor of the NGO democratic legitimacy thesis: the NGO. The NGO as such has made its appearance in a few instances. With regard to the institutional preconditions, the relevance of the right to associate was mentioned. When discussing the social preconditions, the importance of a public sphere and a democratic culture enabling actors to gather, discuss, and deliberate was highlighted. NGOs were considered as an example of the collectivity of all the different types of associated actors, called civil society. Interpretations of theorists concerning the relationship between civil society and democratic legitimacy have passed in review, ranging from interpretations that focus on opportunities for control of governmental power through self-governing by civil society actors, to interpretations based on the collective and rational will-formation by civil society, and interpretations based on civil society’s ability to let individuals develop the virtues of citizenship in an organized context that different associations offer. In a very brief instance, while sketching some general characteristics of legislative processes, we referred to the participation in lawmaking of interest groups to gather additional views on proposed legislation. Against this backdrop, Part II moves to a description of the NGO democratic legitimacy thesis.
Part II

The NGO democratic legitimacy thesis
Part II – Preliminary remarks

Part II describes the NGO democratic legitimacy thesis. This Part is structured as follows. First, chapters 3 and 4 give insight into the context of the thesis. Chapter 3 introduces the growing criticism voiced by scholars against the lack of the democratic legitimacy of international law. It focuses on the traditional democratic legitimacy doctrine of international law, the perceived diversification of international lawmaker, which seems to obstruct a convincing reading of the traditional doctrine of democratic legitimacy, and discusses the scholarly work on the democratic deficits of international law. Chapter 4 explores the type of actor we are dealing with when studying the claim that NGOs contribute to the democratic legitimacy of international law. It focuses on the legal basis of their participation in international lawmaker, and discusses some characteristics of the de facto practice of NGO participation. Chapter 5 gives an overview of the various facets of the debate concerning the alleged democratically legitimizing contributions of NGOs. Light is shed on the main features of the NGO democratic legitimacy thesis. It highlights the arguments as to why NGOs are expected to contribute to the democratic legitimacy of international law. Those features that have been the subject of scholarly criticism are also discussed. Thereby, chapter 5 demonstrates the contentiousness of the claim. What will become clear is that the significance of the contribution of NGOs to the democratic legitimacy of international law is less indisputable than often presented. What will also become clear is that the way democratic legitimacy is conceptualized differs considerably between proponents and opponents of the thesis. Sometimes unbridgeable differences in scholarly conceptions of democratic legitimacy characterize the NGO democratic legitimacy debate. The often-implicit use of these different conceptions of democratic legitimacy has direct consequences for the validation of NGOs’ contribution to international law.
The democratic deficits of international law

NGOs are presented as a solution to the democratic deficits of international law. These deficits are primarily caused, as the narrative goes, by the waning autonomy of states and by some intrinsic deficits of state consent, due to, among other reasons, limited parliamentary scrutiny and democratic deficits among states. This chapter discusses the characteristics of international lawmaking and recalls the concerns associated with the democratic legitimacy of international law.

The discussions on the democratic legitimacy of international law in general, and on the contributions of NGOs to international lawmaking specifically, intensified after the end of the Cold War. Rapid developments, often categorized under the heading of globalization, leading to fragmented, diversified, and decentralized lawmaking processes, supposedly changed the traditional image of state-centric international law. The common narrative is that from the end of the Cold War onwards states ‘disaggregated’ and an intensification of cross-border ties started to take place beyond the configuration of states. Scholars began to reflect on the growing practice of state officials such as judges, civil servants, and ministers, but also of citizens, to seek connections with their foreign counterparts. Sabino Cassese in this respect expressed his appreciation of a striking comparison between international lawmaking and the paintings of Jackson Pollock made by one of his colleagues. This comparison is illustrative of the scholarly trend to be hesitant to speak of international lawmaking as part of a coherent unity. If indeed Jackson Pollock’s paintings form a representative image, international lawmaking is a grand, diffuse, multiform norm-creation mechanism. In the midst of pluralist perceptions of international law, the democratic legitimacy of the rules coming out of diffuse lawmaking processes started to become the central object of study.
This chapter explores the problems with the democratic legitimacy of international law that have instigated the NGO democratic legitimacy thesis. It describes the dominant scholarly concerns regarding the legitimacy of international law in general, and the effect of reflected changes in the types and volume of international lawmaking on the legitimacy of international law. The overarching proposition of scholars critical to the democratic deficits of international law is that the perspective of the individual, and his or her opportunities to participate in the making of the laws that govern him or her, should be brought back into discussions concerning the legitimacy of international law. The perspective that has informed many of these works is a participant-based understanding of international lawmaking. Such an approach focuses on ‘norm-generating processes rather than formal sources and the identification of subjects’. While discussing the main characteristics of state consent, and the criticism voiced against this ‘discredited conception of democratic legitimacy’, this chapter does not engage in the various practical and normative complications related to the concerns that have sparked the thesis, such as how, at what level, by whom, and in what form participation should take place yet. The technicalities and legal conditions of different international lawmaking practices are left aside, as well as issues concerning the normativity of law.

First, a brief outline will be given of some distinctive characteristics of international lawmaking as compared to domestic lawmaking, which functioned as the point of reference.

515 The subsequent presentation of international lawmaking and the democratic deficits of international law is not the result of the writer’s own study into the developments in international lawmaking and assessment of democratic deficits, but functions as a reflection on how scholars engaged in the NGO democratic legitimacy debate perceive developments in international lawmaking causing dilemmas related to the legitimacy of international law. See an article that challenges this dominant view of scholars that is reflected in this chapter: Hollis 2005, p. 137-174.

516 It is interesting to see that the sense of urgency when scholars present the idea that we are ‘now’ at an unprecedented moment in history where problems are evermore transboundary, was already leading in academic discussions on international law dating from the 1950s. See for example MacDougal’s statement: ‘[i]n a world shrinking at an ever-accelerating rate because of a relentlessly expanding, uniformity-imposing technology,…’ MacDougal 1952, p. 24-57.

517 The shared concerns seem to be based on the difficulties in formally pinpointing international law and authority and its addressees. As a result of the difficulties to ‘formally certify the existence of subjects’, which troubles the static model of subjecthood for the apprehension of international lawmaking, specifically the group of legal scholars associated with the New Haven School and International Legal Process felt attracted to focus primarily on the dynamic concept of participants in international lawmaking. D’Aspremont 2011d, p. 2. See generally for literature that assesses non-state actor participation in international lawmaking: MacDougal and Reisman 1980, p. 249; Reisman 2007. D’Aspremont 2011d, p. 28.

518 These problems will be discussed in chapter 6, section 6.2 and 6.3.

519 For general studies on international lawmaking see Wolfrum and Röben 2005; Boyle and Chinkin 2007.

520 The possible consequences of the following characterizations of multiplying diversity of actors and diversity of international lawmaking products on the authority and normativity of law are acknowledged. As Aspremont points out: ‘For if the policy-oriented schools understand the ‘authoritative’ character of the process so broadly, then international law comes to be indiscriminately encapsulating of any decision made by any international decision maker and generates a lot of uncertainty’. D’Aspremont 2013, p. 21, referring to D’Amato 1985, p. 1293, 1302. We do not consider, as Franck has done, that the question of normativity of international law is already solved. Franck 1995, p. 6. However, as explained in chapter 1, a legitimacy perspective does not address the justification of the status of law itself, but concerns the attitude of legal subject towards the exercise of authority. Notwithstanding the focus on legitimacy, which saves us to a certain extent from indulging into the complex theoretical discussion concerning the normative status of international rules qua law, we cannot completely disregard the status of international law. In certain instances we will briefly touch upon this issue.
in chapter 2. Second, the traditional approach to the democratic legitimacy of international law is explained, which is based on the consent of states. Third, two more recent developments in international lawmaking are discussed, which, in different ways, are supposed to challenge the traditional approach to the democratic legitimacy of international law. Fourth, the scholarly critique that state consent is a discredited instrument in democratically legitimizing international law is explored.

3.1 Distinctive features of international lawmaking

International lawmaking offers no unified face. Its fragmented character, characterized by the diversity in international legal regimes, their fluctuating interdependency, and the lack of hierarchical relationships and uniform patterns, complicates attempts to systemize the international legal order. The fact that many international norms are created in decentralized, mixed, and highly specialized structures invokes challenging democratic legitimacy issues, and requires an adjusted understanding of object and subject of democratic legitimacy claims compared to domestic lawmaking.

The most impactful characteristic that distinguishes international lawmaking from domestic lawmaking in respect to understanding the democratic legitimacy of international law is its horizontality. The international legal order, although not entirely voluntaristic, remains highly dependent on the will of states to support its existence. International lawmaking is traditionally defined and constrained by factors such as state sovereignty, and the related consent of states. Norms of international law are said to be determined by what states consent to (treaties) and what their behavior and beliefs indicate (custom).

522 Weiler has inspired this approach. He suggests a geological approach consisting of different ‘strata’ that characterize different types of international lawmaking. Weiler 2004, p. 547-562.

523 See Cassese 2013.

524 See also Esty 1996; Esty 1998, p. 130.

525 Horizontality, in this respect, means that the subjects of the law are also considered to be the makers of the law. See Allott 1998.

526 See section 3.4.1.

527 Wheatly states, '[s]overeignty was, and remains, a question of status: the right to be recognised as an independent political unit, enjoying the rights and privileges that follow recognition, including the right to contract in international law and freedom of internal political self-determination'. Wheatly 2010, p. 126, referring to Chayes and Chayes 1995, p. 27. Slaughter states that: ‘Westphalian sovereignty is the right to be left alone, to exclude, to be free from any external meddling or interference’. Slaughter 2004b, p. 283-284.

528 Lister describes the still important role of consent in a large part of international law. See Lister 2011.

529 Some legal scholars therefore limit the scope of the notion ‘international legislation’ for the adoption of norms that directly bind states and are made by states. The International Criminal Tribunal for the Former Yugoslavia (ICTY) confirms this understanding, noted in the Tadić Case. International Criminal Tribunal for the former Yugoslavia, IT-94-1-T, Oct. 2, 1995 (Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)) that ‘[t]here is ... no legislature, in the technical sense of the term, in the United Nations system ... That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects’ (para. 43). Although the ICTY made reference to binding decisions of the UN Security Council (United Nations, Security Council) under Chapter VII United Nations Charter (ibid para. 44), it did not appear to
In this traditional reading, states are both lawmakers and lawtakers.\footnote{531} The merge of legal objects and subjects differs from the way lawmaking is perceived domestically; a few, prescribing the behavior of all, centrally make domestic law. Due to the lack of a supranational, supreme coordinator and enforcer,\footnote{532} the authority of international law remains dependent on the actions of the legal subjects themselves. The authority of law coincides with governmental authority to enforce law. Internationally, the enforcement of international law depends on \textit{ad hoc} political acts of states. Common ‘rule of law’ characteristics of domestic law, as briefly touched upon in chapter 2, based on conceptions that a law must establish obligations of a general and abstract nature, for an open-ended variety of addressees over time, and that law must be backed up by at least the possibility of real coercive enforcement.\footnote{533} do not find an easy translation into international lawmaking.\footnote{534}

In addition, the distinction of legal norms from other norms, which is in domestic contexts often based on constitutional provisions, is for international law ‘a complex and contested issue’.\footnote{535} Secondary rules concerning the (identification of) processes of lawmaking – and thus the identification of legal norms produced by such processes – are less settled at the international level. Some generally applicable secondary rules are laid down in treaties, such as in the Vienna Convention on the Law of Treaties.\footnote{536} The Statute of the International Court of Justice is usually considered as providing an authoritative list of the sources of international law: custom, general principles of law as recognized by civilized nations, judicial decisions, opinions of the most highly qualified publicists of various nations, and treaties.\footnote{537} However, procedures of lawmaking and decision-making differ per legislative

\footnote{531} The general classic assumption that states are the sole law-makers and takers that has influenced international legal scholarship for many decades, is often considered unpersuasive, as we will discuss in section 3.4.. However, no formal international lawmaking powers have been bestowed upon other actors than states and ‘states always retain the final word’. D’Aspremont 2010, p. 178. See also D’Aspremont 2008a, p. 1075-1093.

\footnote{532} Schrijver mentions in this respect the ‘distinctly observable trend towards nonconfrontation which places more emphasis on ‘carrots’ than ‘sticks’’, when discussing current international practices of monitoring and compliance with international treaty obligations by states. Schrijver 2011, p. 19.

\footnote{533} The fact that a legislative act should concern an abstract-general application of the rule differentiated UNSC, Resolutions 1373, S/RES/1373, Sept. 28, 2001 (Threats to international peace and security caused by terrorist acts), and UNSC, Resolution 1540, S/RES/1540, April 28, 2004 (Non-proliferation of weapons of mass destruction), respectively, that states for the first time used the term international legislation.

\footnote{534} See for further reading and an analytical overview of the dynamics of international rule of law: Zürn, Nollkaemper and Peerenboom 2012.

\footnote{535} Boyle and Chinkin 2007, p. vii.

\footnote{536} see Vienna Convention on the Law of Treaties, May 23, 1969, U.N.T.S. no. 18232. One has to note here that the VCLT does not tell us anything as to what qualifies as a treaty.

\footnote{537} The sources of international law are included in Article 38 Statute of the International Court of Justice, functioning as a guide for the International Court of Justice to decide what international law to apply. See for further reading, D’Aspremont 2011e. As D’ Aspremont states, ‘... among those scholars who abide by such a source-based approach to lawmaking, there has not been a consensus on the exact sources – the pedigree inherent in each of them – that ought to be recognized as the main cognitive tool to capture international lawmaking’. D’Aspremont 2013, p. 18. Scholars have not been able to agree on a definitive list of what sources
context, which also manifests itself in the large variety of ways in which decisions are taken.\textsuperscript{538} International legal norms can bind subjects universally, or not, and to varying degrees.\textsuperscript{539} There is no formally established hierarchy among legal sources\textsuperscript{540} or various legal areas.\textsuperscript{541} The lack of a central lawmaker, acting in accordance with secondary rules,\textsuperscript{542} consequentially requires an \textit{ad hoc} reflection on the large variety of questions related to the validity of resulting international norms.\textsuperscript{543} Another related characteristic feature of international lawmaking is the fact that a collectivity such as a state can make law. Such a conception of a legislative actor being a collectivity entails in itself dissociation from the dominant domestic conception of democratic legitimacy that individuals, ‘either directly qua citizens or indirectly qua officials’, are considered to be the lawmakers.\textsuperscript{544}

### 3.2 Traditional doctrine of the democratic legitimacy of international law

Drawing on the – necessary cursory – account of international law given in the previous section, the following paragraphs sketch the contours of the related doctrine of the legitimacy of international law. Notwithstanding our focus in chapter 2 on democratic legitimacy in a domestic lawmaking context, legitimacy is generally considered important in an international lawmaking context as well, as ‘[w]herever and whenever public power is exercised, there arises the challenge of its explanation and justification’.\textsuperscript{545} The traditional view of the legitimacy of international law is consent-based.\textsuperscript{546} As said, in a traditional
conception of international lawmaking, the will of states is considered the main driver for
the formation of international law. State consent parallels the common perception of
individual consent: \textsuperscript{547} ‘if you and I consent to a certain arrangement as to how we shall treat
each other, then surely that arrangement is legitimate’. \textsuperscript{548} Through renunciation of or
withdrawal by a state from the relevant obligation, the autonomy of states, and therefore
the legitimacy of the respective international law, are protected and confirmed. \textsuperscript{549} Franck
summarized the characteristics of the traditional understanding of international legitimacy
in the subsequent four indicators: (i) states are sovereign and equal; (ii) a state’s sovereignty
can be restricted only by consent; (iii) consent binds; and (iv) states, in joining the
international community, are bound by the ground rules of that community. \textsuperscript{550}

The type of consent varies according to different sources of international law. For
instance, the legitimacy of treaty law is assured by the explicit, written consent of states that
is given when they sign and ratify a treaty. Although currently representing a marginal
scholarly view, in theory one might also base customary international law upon voluntary
acts of states, which they undertake in awareness of its implications for the possible
development of customary international law. \textsuperscript{551} The creation of customary international law
is in this reading identified as a tacit agreement by states, the legitimacy of which is
considered guaranteed by a kind of implicit consent inferred from the behavior and beliefs
of states. \textsuperscript{552} The mainstream scholarly work on custom understands state consent no longer
as the explicit driver but as still playing an important role.

A state-based conception of international law does not necessarily reject a certain
pluralization of actors that are engaged in international lawmaking. Other actors, such as
international organizations, private companies, NGOs, and individuals can have impact on
international lawmaking as well. \textsuperscript{553} However, a shifted locus of lawmaking activities does not
affect the general premise of state consent that the actors that exercise authority, namely
states, remain the same. In this capacity states can formally delegate lawmaking authority
to actors other than states, such as to international organizations. Unlike states, which
automatically hold the greatest range of rights and obligations under international law, these
international organizations derive their international rights and duties from particular
international legal instruments, created by states. \textsuperscript{554} The legitimacy of international law
generated by international organizations is assured by the fact that these organizations are
created and sustained by state consent. \textsuperscript{555} Explicit state consent to law or to the delegation

\textsuperscript{547} See chapter 1, section 1.3.1.
\textsuperscript{548} Buchanan 2010, p. 91.
\textsuperscript{549} Wolfrum 2008, p. 9.
\textsuperscript{550} Franck 1997, p. 29.
\textsuperscript{551} In practice, this view does not stand up to scrutiny, according to Buchanan. Customary international law norms
apply to states that did not exist at the time of their emergence, even if they object to them, yet surely their
objecting to them is pretty good evidence that they are not now consenting to them. To say that such states have
consented to the process by which customary international law norms emerge is equally unconvincing, given the
inability of weaker states to opt out of the process or to do so without excessive costs. Buchanan 2010, p. 92.
\textsuperscript{552} See for an attempt to modernize this consensual conception of customary international law, Orakhelashvili
\textsuperscript{553} See Klabbers 2009, p. 14.
\textsuperscript{554} http://www.britannica.com/EBchecked/topic/291011/international-law/233502/Other-sources#toc233503
(last visited January 2016).
\textsuperscript{555} See D’Aspremont and De Brabandere 2010. The exercise of International Organization’s lawmaking authority
should derive from a consensual basis, in line with the in dubio mitius principle. Alvarez explains this principle as
of lawmaking authority is considered to enable international cooperation and at the same time, to protect the sovereignty of states.\textsuperscript{556} If one formally interprets the text of the constituting instruments of these international organizations, states have not relinquished their external and general lawmaking powers.\textsuperscript{557} Formally, the constituent documents of international organizations prescribe which organ may take what legal acts, according to which decision-making procedures, and state the grounds for invalidity of those legal acts.\textsuperscript{558} Any norm-setting processes by international organizations are explicitly provided for in the underlying treaty.\textsuperscript{560}  

### 3.2.1 The precondition of democratic states

For state consent to carry normative weight in international law, effective national democratic institutions are considered to be an elementary precondition.\textsuperscript{561} Because of their internal democratic structure and procedures, states are considered to represent their citizens in international lawmaking.\textsuperscript{562} This is labeled the ‘democratic norm thesis’.\textsuperscript{563} The democratic norm thesis relies on a conception of an indirect democratic legitimation of international law by state consent, which is most obvious when considering the alleged ‘one should not assume that states have ceded sovereign powers unless this fact is evident from the text of the treaties that purport to cede such powers’. Alvarez 2010, p. 120. As a result, International Organizations cannot be presumed to have conferred ‘external’ lawmaking powers. Such external lawmaking powers must be granted in an IO’s constitutive instrument or must have some other explicit treaty basis.

\textsuperscript{556} International cooperation is based on the idea of a society of sovereign states, which functions as ‘the supreme normative principle’ of the political organization of humankind. Held 2006, p. 301, referring to Bull 1977, p. 140 ff.

\textsuperscript{557} Since international organizations are not given explicit power to adopt resolutions and decisions regarding the behavior of all states (and not just members) and since they are rarely accorded options to coercively enforce any of the rules that they adopt, it follows from the classical view that international institutional law can hardly be considered law. Alvarez summarizes: states have the sovereign prerogative to make law. Besides, all legislative powers of international organizations, and of organs within them, originate from treaty. Consequently, any effects felt by states result from a treaty obligation. International Organization’s lawmaking is derived from a consensual basis, in line with the \textit{in dubio mitius} principle. The differentiated powers of international organizations are based on the enumerated powers explicitly given to each of these bodies under the respective international organizations charters. Alvarez 2006, p. 121.

\textsuperscript{558} As Szasz indicates: ‘It is generally accepted that IGOs [intergovernmental organizations] in general, and those of the UN system in particular, do not have any inherent legislative authority; that is, they cannot create international norms that are directly binding on states generally or even just on their members—though they can take certain decisions binding on their members vis-à-vis the organization (e.g., the assessment of contributions).’ Szasz 1997, p. 58.

\textsuperscript{559} Klabbers 2005a, p. 202-205.

\textsuperscript{560} As Higgins reminds us, ‘it is of course, beyond all doubt, that the drafters of the Charter deliberately declined to give the General Assembly legislative authority. In other than budgetary matters, the resolutions of the General Assembly are recommendatory and not directly binding: see the wording of articles 10, 11, 12, 13 and 14.’ Higgins 1994, p. 24.

\textsuperscript{561} Buchanan 2004, p. 144. As we will discuss in chapter 6, section 6.3, it is highly questionable if state consent can actually be linked to any democratic legitimation of international law. And indeed, it is not evident to see how state consent rhymes with the conception of democratic legitimacy as formulated in chapter 1 and 2. At this stage of the research, we nevertheless do not look into this issue, as we consider it a basic assumption upon which a large part of the critique on international law’s legitimacy is based.

\textsuperscript{562} Peters, Koechlin, Förster, and Zinkernagel 2009, p. 513. See also Wheatley who states: ‘The democratic legitimacy of the Westphalian system of international law is provided by the sovereign equality of members, the nature of diplomatic conversations, and by the fact that consent to legal norms, and ongoing participation in international regimes, constitute an expression of democratic self-determination.’ Wheatley, 2007, p. 1.

democratic legitimation of treaties. First, the executive power of a state agrees with an international arrangement. Second, the relevant national parliament approves the actions taken by the executive power. Democratic state consent strongly relies on an institutionalized system of parliamentary democracy, which is based on representation, elections, and majority voting. Through democratic elections the continuing consent and democratic scrutiny of the peoples of states is allegedly assured. Through the act of voting for a particular candidate, voters ‘authorize’ certain agents to pursue a particular range of actions, including actions related to foreign affairs. Suffrage makes it possible to vote their representative agents out of office when they do not act in accordance with the voter’s expectations.

State sovereignty is in this reading equated with popular sovereignty. Consistent with the nineteenth century democracy paradigm, democratic legitimacy assumes congruence between the state, the people, and the territory. The state, in this reading, is subjected only to the legal rules and procedures formulated and enacted by its own lawmaking authorities, within its own territory. This conception of democratic legitimacy of international law relies on the exercise of international public authority being based on a ‘closed’ system, as Macdonald calls it. The relevant ‘public’ has actively constructed public authority to provide a collective political framework for the pursuit of a shared democratic public interest.

States are considered to maintain sufficient direct or indirect control over international lawmaking. Non-state governance is considered an inappropriate subject for democratic theory. The lack of sovereignty of international organizations makes them intrinsically undemocratic, and simultaneously frees them of the obligation to take into account democratic legitimacy requirements.

3.2.2 International efforts to support nation-state democratization
The scholarly trust in the democratically legitimizing effect of state consent might be related to the widespread optimism triggered by the democratization process witnessed after 1989. At that time, a rising number of states joined the older democracies in their pledge to electoral democracies. Indeed, for the sake of the argument made here, it is

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564 Democratic government is in this perception based on the peoples’ right to self-determination accompanied by individual rights such as freedom of speech, freedom of the press, and freedom of assembly. The will of the people shall be expressed in ‘free and fair’ elections. Pippan 2012, p. 206-207 referring to Franck 1992, p. 63-69.
565 As discussed in chapter 2, elections are widely considered to be a mechanism for delivering legitimate representative agency. See Bodansky 1999, p. 609; Macdonald 2008, p. 168.
566 The strategy of matching international lawmaking and state-based democratic practices is grounded in the normative perspective on ‘state sovereignty as a paradigm’. Von Bogdandy 2004, p. 896-899.
568 This assumption is associated at a deep level with the social contract tradition, as well as with republican strands of democratic thought. Macdonald 2008, p. 24.
569 De Burca 2007-2008, p. 225, p. 238. As McGrew argues, nonstate governance is ‘devoid of any central authority or rule of law; dominated by great powers and power struggles; riven by entrenched hostilities and insecurities; and permeated by irreconcilable cultural particularities and civilizational differences’. McGrew 1997a, p. 233.
570 From this perspective, ‘there are no people subjected to international organizations, for they do not exercise anything like sovereign powers’. D’Aspremont and Brabandere 2010, p. 105.
571 The desire for domestic democratization can be paralleled to a broader tendency to perceive international lawmaking as the advent of a new world order based on generally accepted community values. See Marks 2011, p. 507-524; D’Aspremont 2011c, p. 549-570.
noteworthy that the scholarly attention suddenly paid to democratisation processes was nourished by the traditional kinship between democratic legitimacy and state consent, for the more states that were to become democratic, the more legitimate would international lawmaking become. Opportunities for a ‘voice’ or public participation in some fashion or other were seen as essential for the democratic legitimacy of domestic government.\textsuperscript{573} Parliaments were considered to be guardians of liberty and representatives of a plurality of interests, sentiments, and ideas, and allegedly epitomized the break with absolutism.\textsuperscript{574} Dahl confirms in this respect that “in fact one of the most striking changes during this century has been the virtual disappearance of an outright denial of the legitimacy of popular participation in government”.\textsuperscript{575}

The assumingly shared ideas of states on democracy as the preferable governing structure were echoed by and translated into international political practice by international organizations.\textsuperscript{576} International institutions, in Europe and elsewhere, reacted quickly to the abovementioned revolutionary events and the new era of democracy that they promised to evoke.\textsuperscript{577} The ideal of state-based democracy gradually became a norm of international law, “applicable to all and implemented through global standards”,\textsuperscript{578} in which human rights, the rule of law, and democracy are interlinked and considered to be mutually reinforcing.\textsuperscript{579} International organizations started to encourage the strengthening and development of national democratic governance.\textsuperscript{580}

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\textsuperscript{573} Raustiala and Victor 1998, p. 659, 633. The more or less existing consensus at that time concerning the characteristics of democracy is famously expressed by Fukuyama. See Fukuyama 1992, p. 133 et seq.

\textsuperscript{574} In representation and decision-making by majority, - supposedly central elements of democratic lawmaking -, the quantity seems to be the essence of the concept of democratic lawmaking. Not the content of the rule, that might evaluate whether the rules are in accordance with a transcendental ‘reason’, but the numbers determine the public interest. The law gets its authority from the wishes and the insights of concrete persons, which are imposed when there is a majority formed. Popelier 2001, p. 55.

\textsuperscript{575} Dahl 1971, p. 5. The openness towards democracy as a norm for government is in sharp contrast to the period of time before the break-up of the Soviet Union and the fall of the wall in Berlin. From these moments onwards, an increasing number of states embraced the political model of democracy as a necessity in a world of growing interdependence. Von Bogdandy 2004, p. 889; McGrew 1997a, p. 244; McGrew 2002. This practice is in line with the school of thought called liberal internationalism. Liberal internationalism has its origins in the thinking of enlightenment philosophers. Given their faith in progress and human rationality, liberal-internationalists argue that creating a peaceful and democratic world order is far from a utopian project. See for further reading on liberal internationalism, Burley 1992, p. 1907-1996.

\textsuperscript{576} Fox and Roth 2000, p. 2.

\textsuperscript{577} Pippan 2012, p. 203.

\textsuperscript{578} Pippan 2012, p. 206.


\textsuperscript{580} See Article 21 of the UNGA, Resolution 217A(III), A/810, Dec. 10, 1948 (Universal Declaration of Human Rights); Article 25 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, U.N.T.S. no. 14668; Article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, CETS No. 005; Article 23 of the American Convention on Human Rights, Nov. 22, 1969, and Article 13 of African Charter on Human and Peoples’ Rights, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. This move to a commitment to democracy in international law is identified by Crawford as a move ‘(...) which a generation or even a decade ago would have been regarded as political or extra-legal’ and, more importantly, which is ‘(...) entering into the justification of legal decision-making in a new way’. Crawford 1994, p. 14.
democratic governance can be explained by the fact that a range of emerging international norms, unrelated to democratization, has come to rely upon implementation through domestic democratic processes for their legitimacy.\textsuperscript{581}

The democratic norm thesis, as discussed in the previous sub-section, is translated into global standards.\textsuperscript{582} Both the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{583} and the International Covenant on Economic, Social and Cultural Rights (ICESCR),\textsuperscript{584} as well as key regional human rights instruments, explicitly employ the vision of a ‘democratic society’ as a normative standard to control the reasons under which certain rights may be restricted.\textsuperscript{585} Among others there is the right to political participation, which is laid down in statements of the ICCPR Human Rights Committee,\textsuperscript{586} and the UN General Assembly.\textsuperscript{587} Article 21 of the 1948 Universal Declaration of Human Rights (UDHR) clearly sets out the normative desirability of a democratic norm of elections.\textsuperscript{588} By the early 1990s, the ICCPR and the ICESCR were ratified by more than two-thirds of all states. The Human Rights Committee stressed the importance of political participation in its general comment on Article 25 of the ICCPR.\textsuperscript{589} The UN and other intergovernmental organizations started monitoring electoral processes in many nations across the globe. At this specific level intensive cooperation developed between UN agencies and NGOs, as they together created permanent electoral assistance divisions. The resolution of 1999 of the UN Commission on Human Rights (UNCHR) again highlights ‘the large body of international law and instruments

\textsuperscript{581} Buchanan mentions four justifications for international efforts to support domestic democratization, ranging from the protection of human rights, equality among states, and democratic peace theory. The fourth justification, as discussed here, is most relevant for this study. See Buchanan 2004, p. 142-145.

\textsuperscript{582} See for an overview Pippan 2012, p. 204, referring to Fox and Roth 2000, and Burchill 2006.


\textsuperscript{585} Pippan 2012, p. 212. See arts 14(1), 21, 22(2) ICCPR; arts. 4, 8(1) ICESCR; arts 15, 16, 22, 32 of American Convention on Human Rights, Nov. 22, 1969; arts. 6(1), 8(2), 9(2), 10(2), 11(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, CETS No. 005.


\textsuperscript{587} See, e.g. UNGA Resolution 45/150, A/RES/45/150 Dec. 18, 1990 (Enhancing the effectiveness of the principle of periodic and genuine elections).

\textsuperscript{588} See article 21 of the 1948 Universal declaration of Human Rights (UDHR).(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures UNGA, Resolution 217A(III), A/810, Dec. 10, 1948 (Universal Declaration of Human Rights).

\textsuperscript{589} Art. 25 ICCPR: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country. Art. 25 ‘lies at the core of democratic government based on the consent of the people and in conformity with the Principles of the Covenant’. See Human Rights Committee of the United Nations 1996, 167 para 1. Franck concludes that Article 25 of the ICCPR ‘also begins to approximate prevailing practice and thus may be said to be stating what is becoming a customary legal norm applicable to all’. Franck 1992, p. 64.
which confirm the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society. Notwithstanding the primary focus on representative democracy, from this period of time onwards practically all international actors engaged in the promotion of democracy within states have supported the idea that democratic governance entails more than the holding of periodic and free elections. The General Assembly called on states to take action in a range of other areas as well (including human rights, the rule of law, civil society participation, good governance, sustainable development, and social cohesion) to signal its support for a broad approach to democracy, comprising both procedural and substantive elements. In addition, the 2005 World Summit provided evidence of the international community’s general preference for a non-exclusive and dynamic understanding of democracy. However, the specific manifestation of participation as the right of citizens to take part in the government of their country through periodic and free elections still takes a prominent place. The General Assembly periodically adopts specific resolutions that regularly reaffirm the central message embodied in Article 21 of the UDHR. The ICCPR expressly affirms the right to political participation in Article 25, a provision widely seen as

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592 Franck speaks in this respect even of the development of a ‘right to democracy’, claiming that ‘international law protects the right of people, anywhere, to a legitimate political process, which is one in which the people are given an opportunity to participate in their national process of value formation and decision-making’. See Pippan 2012, p. 221, referring to Franck 1994, 82.
593 The participating heads of state and government explicitly recognize democracy as a ‘universal value’ but also add that ‘while democracies share common features, there is no single model of democracy’. Pippan 2012, p. 211, referring to UNGA, Resolution 60/1, A/RES/60/1, Dec. 16, 2005 (World Summit Outcome), para 135.
595 Art 21 UNGA, Resolution 217A(III), A/810, Dec. 10, 1948 (Universal Declaration of Human Rights): ‘(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’ The latest resolutions are UNGA, Resolution 66/163, A/RES/66/163, Dec. 19, 2011 (Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization); UNGA, Resolution 64/155, A/RES/64/155, Dec. 18, 2009 (Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization); UNGA, Resolution 62/150, A/RES/62/150, Dec. 18, 2007 (Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization); and UNGA, Resolution 60/162, A/RES/60/162, Dec. 16, 2005 (Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization).
the sequel of Article 21 of the UDHR,\(^{596}\) which is supported by the one hundred and sixty-seven states that have become parties to the ICCPR.\(^{597}\)

One clearly sees the consistent support of international organizations for the democratization of states. This development of the ‘democratic norm’ seems to strengthen the normative justification of state consent as a means to democratically legitimize international law.

3.2.3 International lawmaking covered by state consent

There is a large body of international law that satisfies the traditional doctrine of legitimacy based on state consent. Let us start with the most classic form of international law: the terms of cooperation agreed upon between states that are predominantly documented in bilateral agreements and sealed with a treaty.\(^{598}\) When making use of the form of bilateral conferences, state representatives negotiate and set agreements that embody legal transactions that create or change subjective rights and obligations of states.\(^{599}\) Some treaties go beyond an executory type of contract and create longer-term obligations.\(^{600}\) As the character of these treaties is primarily contractual, terminated upon completion of the transaction, the traditional democratic legitimacy doctrine based on state consent matches this type of international lawmaking dominant at that time.

From the early-twentieth century onwards, international lawmaking has been considered to diversify in the forms and actors involved. Slowly, multilateral treaty-making gained in popularity. As the activity of international lawmaking expanded to multiple states working together in the formulation of international legal solutions, the contractual character of law is considered to have slowly developed into a more communal one.\(^{601}\) The increase in multilateral treaty-making can be seen as a prelude to more institutionalized forms of international cooperation. As a result of the Paris Peace Conference in 1919, the League of Nations was founded. Its principal assignment was to preserve and, if necessary to restore world peace.\(^{602}\) The instruments to achieve this were collective security and disarmament, and settling international disputes through negotiation and arbitration.\(^{603}\) From then, one witnessed a move to the codification of international law.

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596 Pippan 2012, note 69, p. 217
597 International Covenant on Civil and Political Rights, Dec. 19, 1966, U.N.T.S. no. 14668, chapter IV. Notwithstanding the high number of signatory states, it can be doubted if a global standard of a democratic norm for the political organization of states has truly developed. Election monitoring by international observers is carried out only upon request and explicit domestic consent by the country concerned.
598 Weiler 2004, p. 549.
599 Danilenko 1993, p. 46.
600 Examples are US Friendship, Commerce and Navigation Treaties, Free Trade Area Agreements, or Bilateral Investments Treaties.
601 How to explain the activities of international organizations was a much disputed issue. The ‘discussions largely centred upon whether this was merely an expression of inter-subjective agreement, or whether such organs actually expressed a higher, ‘community’ (or supra-state) will distinct from those states’. Collins 2011, p. 314, referring to Rapisardi-Mirabelli 1925, p. 345-391; Brölmann 2007, p. 55-56.
602 Tomuschat 1995, p. 77.
604 Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and
In 1924, the League of Nations adopted a codification project that resulted in a Conference for the Codification of International Law in 1930.604

After the end of the World War II, the United Nations replaced the League.605 The UN inherited a number of agencies and organizations founded by the League but also re-established international organizations, such as the International Court of Justice (ICJ).606 Set up in 1945 by the UN Charter, the Court began its work in 1946 as the successor to the Permanent Court of International Justice.607 The consensual view on international lawmaking that characterized this period of time was already reflected in the 1920 Statute of the Permanent Court of International Justice, and is preserved in Article 38(1) of the 1946 Statute of the International Court of Justice.

Over time, states have increasingly delegated much of international lawmaking activity to international organizations. In the postwar era one finds increasing activity in multilateral lawmaking treaties, ranging from treaties that cover the law of the sea to human rights treaties. It became common practice to prepare and discuss new international norms under the auspices of international organizations.608 General multilateral inter-state lawmaking processes often started to involve other actors than states. While drafting and discussing treaties in the setting of international organizations, general principles of law in and the long run, customary law, developed.609

The UN specifically, gradually started to present itself as the legislator of the international legal order. It convened and prepared the ground for conferences in which conventions were adopted. To this category, for instance, belong the Geneva Conventions on Maritime Law of 1958, the Vienna Conventions on Diplomatic and Consular Relations of 1961 and 1963, and the Vienna Convention on the Law of Treaties, adopted in 1969. Alternatively, the General Assembly of the UN, without convening an extraneous conference, ‘adopted’ conventions such as the Genocide Convention in 1948. The UN Charter imposes on the General Assembly the duty to ‘initiate studies and make recommendations … encouraging the progressive development of international law and its codification’.610 Consequently, the International
Law Commission (ILC), a subsidiary organ of the General Assembly, has spurred the creation of many new treaties. Treaty-making efforts often blend codification and progressive development. The UN is considered to create customary law through the actions of its organs.611

In addition, international organizations have implied lawmaking powers relating to their internal matters.612 These internal rules, intended to ensure the proper functioning of the organization itself, include rules governing the international personality of the organization, the conditions of tenure of the secretariat, and the privileges and immunities of the organization, its agents, and the representatives to it, as well as those procedural rules that the organization needs to fulfill its assigned functions.613 Constitutions of international organizations normally explicitly authorize the main types of internal lawmaking.614 Beyond such explicit authorizations, international organizations possess implied powers to adopt the rules necessary for their effective functioning.615

A scholarly receptivity arises for interpreting norms such as recommendations, declarations, and the like as legislative activities, particularly those emanating from the General Assembly of the UN.616 In this way, scholars imputed legal force to the type of instruments that, according to the constituent documents from which they formally derive their authority, are non-binding. Some legal scholars have argued that a certain form of ‘constitutionalization’ of the international legal order characterized this period of time.617 The development of the UN and the European Union (EU) into international organizations that accommodate sub-organizations whose objectively articulated goals are independent of the goals of its member states, was considered a sign of such constitutionalization process. Besides, the fact that their goals transcend specifically transactional interests, and are in the overall interest of having an orderly or just international community, is understood

612 See Brunnée 2010.
613 Alvarez 2006, p. 121.
614 Alvarez 2006, p. 110. For example, the UN General Assembly can take legally binding actions within the “internal” sphere derive from its power, shared with the Council, to admit, suspend or expel members (Articles 4–6). It is empowered to approve the budget of the organization and the financial and budgetary arrangements with specialized agencies (Art. 17 (1) and (3)), it can deny a vote in the GA to those who fail to pay their dues (Article 19). It can also adopt its own rules of procedure (Art. 21) and establish necessary subsidiary organs (Art. 22). The GA can also establish subsidiary organs as it deems necessary (Articles 22 and 29).
615 The International Civil Aviation Organization (ICAO) is a typical example of a technocratic body, whose legislative powers are quite broad. See Convention on Civil Aviation, April 4, 1947, 15 U.N.T.S. no. 295. Apart from the usual conferred powers with respect to internal law, the ICAO has the capacity to serve as a venue for multilateral treaty-making and to settle aviation disputes between members. The lawmaking aspects of ICAO that have drawn the most attention derive from the ICAO Council’s ability to promulgate standards and recommended practices without going through a formal treaty process or amending the constituent instrument of the organization. See Alvarez 2006, p. 120, for an outline of examples of lawmaking institutions and their legal frameworks.
616 Klabbers 2005a, p. 206, referring to Elias 1972, p. 51. Klabbers mentions that in radical versions of this ‘legislation theory’, the General Assembly is sometimes even explicitly compared to an international parliament, which as such can simply create binding rules of law by majority.
to contribute to the constitutionalization of international law.\footnote{Koskenniemi critically argued that under the heading of ‘constitutionalization’, there are hegemonic biases underlying generally stated missions and universal values by states and international organizations. See for a relativizing critique on Koskenniemi: Dupuy 2005, p 131-137.} UN law started to generate norms applicable to a wider range of actors than the actors traditionally involved in transactional lawmaking.\footnote{According to Alvarez, UN lawmaking adheres to four organizational patterns of lawmaking: (1) treaty making conferences by international organizations; (2) expert treaty making bodies; (3) managerial forms of treaty making; or (4) what Alvarez has called, institutional mechanisms for ‘treaty making with strings attached’. Alvarez 2002, p. 220-226.} Furthermore, customary law revived itself into the so-called new sources of international law.\footnote{Weiler 2004, p. 549.}

The increased lawmaking activities of international organizations created an important shift in power. With the proliferation of international organizations, the diversity of actors involved in international lawmaking expanded substantially. Not only states determined what actors are involved, but also so did the relevant hosting international organizations.\footnote{Weiler 2004, p. 549.} As a result, the institutional structure of international lawmaking is often perceived as consisting of treaties, customary law, and global governance institutions with multiple lawmakers.\footnote{See for a general overview on international lawmaking, Boyle and Chinkin 2007; Petersen 2007, p. 275-310. These three types of lawmaking might overlap. For example, scholars recognize the codification of international law through lawmaking treaties as international legislative acts. As indicated in the introduction, the status of these codifications is not as clear-cut as presented. Lefkowitz 2010, p. 199, referring to Hart 1961, p. 230.} Notwithstanding the strong diversification in lawmaking procedures and forums as indicated above, state consent is still considered to cover these lawmaking practices.

## 3.3 Developments in international lawmaking outside the scope of state consent

As indicated in the introduction to this chapter, the traditional model of international lawmaking – and hence the traditional consent-based understanding of legitimacy – has come to weather strong criticisms in the last three decades. Scholars criticize state consent as a discredited conception of democratic legitimacy,\footnote{The term ‘discredited conception of legitimacy’ is borrowed from Buchanan and Keohane. Buchanan and Keohane 2006, p. 405-437.} and urge the definition of other ways to legitimize international law.\footnote{In line with Moore, in this research we ‘assume, without examining the evidence, the veracity of the often repeated argument that there is an increasing need for transnational and supranational institutions in the new global context’. Moore 2006, p. 21. Whether or not that should lead to an assessment of international law’s democratic legitimacy is contested. See Agnè 2006, p. 438.}\footnote{See for further reading on pluralism in international law, Nollkaemper 2011. Nollkaemper offers a good analytical tool to understand the different understandings and constructions of international pluralism that are often lumped together. He contrasts ‘internal pluralism’, which recognizes ‘the divide between national and international legal orders and the diversity between autonomous legal orders’, that is ‘remains normatively confined by rules of international law’, with ‘external pluralism’, which relates to ‘the diversity between legal systems [that] is not actually limited by rules of international law’. Nollkaemper 2011, p. 2-3.} Such criticisms are mostly empirical as they pertain to recent new pluralist developments in international lawmaking that supposedly fall outside the scope of state consent.\footnote{See for further reading on pluralism in international law, Nollkaemper 2011. Nollkaemper offers a good analytical tool to understand the different understandings and constructions of international pluralism that are often lumped together. He contrasts ‘internal pluralism’, which recognizes ‘the divide between national and international legal orders and the diversity between autonomous legal orders’, that is ‘remains normatively confined by rules of international law’, with ‘external pluralism’, which relates to ‘the diversity between legal systems [that] is not actually limited by rules of international law’. Nollkaemper 2011, p. 2-3.} This section briefly highlights these new developments that nurtured the scholarly concerns regarding the democratic legitimacy of international law. A brief exploration of the way these developments are discussed by scholars will help put the
critiques on international law’s democratic legitimacy, as will be discussed in the next section, into perspective.

This section discusses these lawmaking practices that are often categorized under the umbrella term ‘globalization’: lawmaking practices that further expanded the lawmaking power of international organizations into so-called ‘regulatory power’, and lawmaking practices that are understood to have been increasingly informalized, in terms of actors, processes, and outcome. First, a few words on the scholarly attention paid to globalization. From the mid-1980s, international lawmaking has been increasingly presented as being influenced by the fact that the world became more interdependent in complex ways, in respect of ecology, communications, cultures, language, politics, diseases, and so on. These developments are often grouped under the heading ‘globalization’. New spheres of normativity emerged, characterized by Giddens as ‘the identification of worldwide social relations, which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa’. Although globalization originally had a strong economic connotation related to the emergence of global markets, most legal scholars frame international lawmaking as influenced by globalization to indicate various arrangements of global ‘contraction’ and ‘de-bordering’, as Von Bogdandy calls it. The ‘globalized’ international legal order entails empires, spheres of influence, alliances, coalitions, religious diasporas, networks, trade routes, migration flows, and social movements. It includes special groupings of powers, such as the UN, the Organization of the Petroleum Exporting Countries (OPEC), NGOs, the EU, the Group of Seven (G7), and the Group of Eight (G8). All these sub-worlds, geographic locations, actors, and connections cut across any simple vertical hierarchy and overlap and interact with each other in complex ways.

Although the debate on globalization goes far beyond the discussion on international lawmaking, it has some significant bearing on it. As far as the creation of international law is concerned, the debate on globalization originated in some factual developments that had the potential to change the way one understands international lawmaking. For instance, factual shifts of competences from the national to the international level were witnessed. Global themes such as climate control, trade, nuclear proliferation, global justice, water scarcity, looting of art, and world poverty, to name but a few, were the subjects of norm-setting in fragmented legal regimes, organized by different international organizations and platforms. The contemporary practice of international lawmaking has grown diffuse, with many different actors contributing to lawmaking at many different levels and in many different capacities. International scholars have referred to different descriptive notions in their efforts to make sense of international lawmaking: deformalization, fragmentation, and differentiation.
The first sub-section focuses on the increasingly authoritative powers of international organizations, leading to so-called regulatory practices with managerial characteristics. The second sub-section focuses on informal lawmaking, of which informality both refers to the process as to the product of lawmaking. Related to the latter, the emergence of an extensive reliance on soft law, because international actors favor the use of norms which underpin the legal principles and rules without being law themselves, indicates a higher degree of informality in global governance structures. The traditional sources of international law – state-to-state law such as treaties, customary law, and general principles – seem to be complemented by developments related to informal lawmaking and regulation. Evidently, these developments overlap significantly.

3.3.1 Regulatory autonomy of international organizations

Towards the end of the twentieth century, the emergence of an international regulatory practice and issues associated with what was traditionally considered as ‘low politics’ seemed to dominate the imagination of international scholars engaged in studies on the legitimacy of international lawmaking.

Regulation as a concept is often intertwined with the work of international administrative agencies delegated to them by states. The high compliance pull of decisions of international bodies such as the UN, the World Trade Organization (WTO), the International Monetary Fund (IMF), and the European Union (EU), due to their legally binding nature or their economic superiority, is considered illustrative of the regulatory characteristics of international lawmaking. Some regulatory acts of international organizations are even considered to be legislative in character. These acts do not purport to regulate a specific single case, but provide for a general rule that applies to an unlimited number of cases within a given situation – a concrete-general application of the rules – or even to a potentially unlimited number of situations – an abstract-general application of the rules. The use of
Framework conventions is exemplary. Framework conventions offer an institutional foundation for further political and scientific cooperation, which result in regulatory measures. Annexes regulate technical details, which can be amended by majority votes of the parties when new scientific findings or a performance review ask for reconsideration. These regulatory practices are characterized by a strong reliance on experts.

International organizations are considered to have grown out of the function of a mere instrument of the state into a more autonomous power. Though formally constituted by international agreement, many international organizations operate in ways that exceed the scope of the consent of state parties. They act in accordance with their own internal principles, procedures, and political agendas. Organizations like the World Bank, the IMF, and the UN have been highly politicized, preoccupied with central questions of the management and allocation of rules and resources, and have a considerable influence over the lives of individuals. These organizations are at the center of continual conflict over control of policy. Take for example the administration of territories by international organizations in the framework of which individuals are subjected to their exercise of authority. These regulatory activities restrict the discretion allocated to states to intervene, particularly in the field of economic and social policies. Consequently, the capacities of the state to regulate social developments in congruence with the wishes of their constituency are allegedly reduced.

Depending on how strictly the legal framework is perceived, some regulatory activities of international organizations are understood as de facto lawmaking power. The General Assembly is illustrative in this respect. The General Assembly drafts, approves, and recommends international instruments for multilateral agreement. Evidently it still relies strongly on the support of states for its direct effect and implementation of its rules. However, some regulatory norms have a profound effect on the lives of individuals.

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642 Boyle and Chinkin 2007, p. 22. See for examples of framework conventions, Brunnée 2010, under C, b. (no 10)
643 Warning 2009, p. 47.
645 Wheatley 2010, p. 273. See also Barnett and Finnemore who states that ‘[t]hey are political actors in their own right’. Barnett and Finnemore 2004, p. 12.
646 See Wessel 2006.
651 The General Assembly is often considered as de facto closest to a central international legislator, probably because of the fact that it is the only organ in the United Nations that offers all member states equal representation. The importance and impact of General Assembly has been acknowledged already in 1981, see Joyner 1981, p. 445-478. Joyner quotes the late Judge Alvarez, that already in 1951 argued that ‘the [General] Assembly of the United Nations is tending to become an actual legislative power. In order that it may actually become such a power, all that is needed is that governments and public opinion should give it support.’ International Court of Justice, May 28, 1951. (Reservations to the convention on the prevention and punishment of the crime of genocide), Dissenting opinion of Judge Alvarez, p. 53.
652 The international legal order consists, besides treaties, of a diffuse set of norms without clear hierarchy. As Boyle already stated in 1985, notwithstanding their ‘soft’ appearance, some of these norms are much more influential on the day to day actions of states and individuals, than the old conceptual model of ‘hard and legal rules’ would have us imagined. Boyle 1985, p. 340.
the national regulatory system, and should be accepted by states even if they contradict national law or policies.\footnote{Krajewski 2008, p. 3, point 12.}

A broadening of the notion of international lawmaking to regulatory lawmaking contributes to a general scholarly ambiguity regarding the clear passage from non-law to law.\footnote{As, according to Lowe, types of regulatory rule-making do not ‘in itself lead to fundamentally new legal principles and institutions’, he argues that ‘[r]ule-making of this kind is closer to the bureaucratic implementation of policy than to lawmaking’. Lowe 2000, p. 212.} The resolution is an example of a norm that is considered part of that grey area. Resolutions of international organizations, although formally not legally binding, are considered as a first step in the process of law creation, being evidence of the developing trends of customary law.\footnote{However, as Higgins emphasizes, ‘[r]esolutions cannot be a substitute for ascertaining custom; this task will continue to require that other evidenced in General Assembly resolutions.’ Higgins 1994, p. 28, referring to Kerwin 1983, p. 885-886.} Resolutions of the UN Security Council merit separate treatment in this respect.\footnote{The Security Council differs fundamentally from other international norm-setting bodies. The UN Security Council is a body with a limited membership of 15 states that can adopt decisions that bind all 191 Member States of the UN. See Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. XVI, (Art. 23). What is more, in the decision-making, the votes of the five permanent members of the Security Council play a special role, enabling them to veto decisions (Art. 27 (3)).} The UN Charter specifically authorizes binding decision-making by the UN Security Council.\footnote{Arts 25, 39 and 48 of Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. XVI.} Until recently, such decisions were clearly not legislative in nature as they narrowly focused on specific circumstances or states. However, making use of its powers allocated under Chapter VII of the UN Charter, the Security Council has acted in at least two cases as an international legislator, against terrorism and against the proliferation of weapons of mass destruction, respectively. In UNSC Resolutions 1373,\footnote{UNSC, Resolutions 1373, S/RES/1373, Sept. 28, 2001 (Threats to international peace and security caused by terrorist acts). The Council unanimously adopted Resolution 1373 shortly after 11 September 2001.} 1540,\footnote{UNSC, Resolution 1540, S/RES/1540, April 28, 2004 (Non-proliferation of weapons of mass destruction).} and 2178,\footnote{UNSC, Resolution 2178, S/RES/2178, Sept. 24, 2014 (Threats to international peace and security caused by terrorist acts).} the Security Council imposed extensive requirements upon states. Scholars have questioned the extent to which these practices are congruent with the normative rationale behind state consent, which strongly relies on the autonomy of states to decide by what law they want to be bound.\footnote{The critique on state consent will be discussed in subsequent section 3.4.} As these extensive regulatory powers are no longer considered justified by consent, these developments seem to deprive state consent of its legitimizing virtues. Consequently, this has generated a huge scholarly debate on possible reforms for the Security Council.\footnote{See for an introduction to the reform debate on he Security Council, Schriijer 2007.}

3.3.2 Informal lawmaking

Besides the shift in power from states to regulatory activities employed by international organizations, in the last couple of decades legal scholars increasingly notice a decline in the hierarchical relations between states and other internationally active actors, and a move towards more synergetic relationships between public and private actors.\footnote{Peters, Koechlin, Förster, and Zinkernagel 2009, p. 504. See Yearbook of International Organizations 2009-10.} Treaty-making, the formation of customary law, and regulatory processes by international organizations are
alternated with more informal lawmaking processes, which often occur beyond the control of domestic democratic institutions and processes. Informal lawmaking, in terms of process, has always existed in the form of agreements in simplified forms. However, notwithstanding the informality of the procedure, the products of these processes are strictly speaking ‘formal’ treaties. Informal lawmaking, as discussed here, is characterized not only by informality in process, but also by informality in the actors, and informality in terms of output. The focus is on standards and soft norms, designed to control or govern conduct by creating, limiting, or constraining a right, a duty, or a responsibility. Krisch dubbed this type of informal exercise of international authority, characterized by a multiplicity of different actors, as ‘liquid authority’, because the actors, the process, and the product are difficult to pinpoint.

A rapid growth in the intensity of participation in international lawmaking of private organizations, including civil society groups, business associations, and other actors that often engage in advocacy or service provision, is witnessed. Some scholars frame the relationships between private actors, international organizations, and states in the new constellations as partnerships. Central to these new understandings of international lawmaking is that the type of influence of national governments, including legislature and courts, on the shaping of international law in general or international law decisions in particular, is considered to be changed. In addition, the impact of these standards and the process, characterized by intense forms of consensus-seeking, is considered to fall outside traditional international law. Informal norm-setting practices move away from global international law administered by international organizations with universal or near-universal membership to discrete and fragmented regional sub-systems.

In this relatively new practice, the UN system is considered to be just one of the many sites of power. Abbott and Snidal recapitulate these developments as a gradual shift made between state-centric lawmaking to member-centric lawmaking, from centralized steering...
to limited centralization, with a resulting shift from mandatory rules to recommendations.\textsuperscript{675} Some legal scholars notice a statal preference of cooperation outside the framework of international law.\textsuperscript{676} Some even argue that ‘international law lost its privileged place as the primary conceptual framework for understanding the cross-border development of norms’.\textsuperscript{677} Informal lawmaking is considered increasingly to ‘supersede’ formal international lawmaking in terms of quantity and quality, while formal lawmaking is ‘stagnating’.\textsuperscript{678} Although it is difficult to empirically find proof for the reasons why an increase in alternative forms of lawmaking gains in popularity,\textsuperscript{679} a reason for the inclination towards informal lawmaking might be found in the way informal lawmaking offers a smooth and convenient alternative for pursuing certain common aims of international public and private actors.\textsuperscript{680}

As a reaction to these new forms of norm-setting, scholarly focus shifts from the formal attribution of authority to the current mixed forms of cooperation that exercise international public authority.\textsuperscript{681} Informal lawmaking is another of these phenomena, which has caused scholars to revisit their traditional consent-based understanding of democratic legitimacy. The impact of these phenomena on the debate on democratic legitimacy is the subject of the next section.

3.4 State consent - a discredited conception of democratic legitimacy

These described developments have led scholars to question the normative persuasiveness of the traditional democratic legitimacy doctrine based on state consent. The observation of dilemmas concerning the democratic legitimacy of international law relies on a certain assessment of the international legal order that is inherently normatively laden.\textsuperscript{682} For example, international lawmaking forums are often argued to be in danger of becoming sites

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\textsuperscript{675} Abbott and Snidal see one constant factor in these shifts in types of international lawmaking: their inclination to bureaucratic expertise. Abbott, and Snidal 2009, p. 535, table 3.\textsuperscript{676} Benvenisti claims that ‘[g]overnments that initiate coordination efforts across national boundaries, consciously avoid making any claims about international law, and do not use treaties as the means for coordinating their activities.’ Benvenisti 2006, p. 2. See also Krisch 2014.\textsuperscript{677} Berman 2005, p. 556.\textsuperscript{678} Pauwelyn, Wessel and Wouters 2014, p. 1.\textsuperscript{679} Empirical difficulties associated with explaining the increase in diversified actors, processes and law-types, are probably the reason why Abbott, Green and Keohane refrained from empirical research and focused on theory building. The puzzle of why private international organizations significantly grow while international organizations’s growth decreases, motivates Abbott, Green and Keohane look at this dynamic through the glasses of organizational ecology. Different characteristics of the two types of organization create different strategies. Being flexible by nature, private international organizations can respond to and compete in the increasing density of international organizations, while international organizations cannot change strategy easily due to their dependence of state actors for their relatively costly maintenance, which turns them into inflexible organizations. Abbott, Green and Keohane 2013.\textsuperscript{680} Happold 2012, p. 2-3. Pauwelyn, Wessel and Wouters offer three possible explanations. First, it could be the case that states have developed new policy preferences due to certain saturation with the existing treaties. Second, possibly ‘deep societal changes’, and third, an ‘increasingly complex knowledge society’ might have instigated ‘a transition towards an increasingly diverse network society’. Pauwelyn, Wessel and Wouters 2014, p. 6.\textsuperscript{681} The international public authority (IPA) approach is founded in the Heidelberg research project, See Von Bogdandy, Dann, and Goldmann 2008, p. 1375, 1387.\textsuperscript{682} See for example, Barnett and Finnemore’s work: They call the current weak foundations of international organizations ‘undemocratic liberalism’ in global governance. Barnett and Finnemore 2004, p. 172.
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for the exercise of dominating power. Therefore, the results of international lawmaking are supposed to ‘undemocratically’ govern us, compromising democratic values such as freedom and equality. It is, often implicitly, assumed that ‘since power relations do not stop at national borders, democratic principles must not be allowed to stop there either’. Public international law is considered authoritative, sufficiently similar to state regulation, such as to require democratic legitimation. In finding responses to the democratic deficits of international law, academics concentrate on theorizing ‘how democracy can “catch up” to our globalizing economy’.

As the subsequent elaboration on the scholarly critique will demonstrate, practically all of the objections to the traditional approach to the democratic legitimacy of international law based on state consent boil down to the lack of, and flaws in, the representation of individuals. The first and foremost flaw of the legitimizing force of state consent is that it relies, apart from the assumption that at the national level the legitimacy chain works adequately, on the assumption that all states are democratically organized, which is evidently not the case. However, also for the citizens of a democratically organized state, scholars question whether their input into international lawmaking, ostensibly secured by the consent of their state, is sufficient to be able to speak of the democratic legitimation of international law.

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683 See Goldsmith and Posner 2003, p. 449; and Krisch, who explains the paradoxical tendency of international law to be both instrumental and resistant to the pursuit of power: Krisch 2005, p. 370. Here we take for granted the assumption that the activity of international lawmaking, how dispersed and multi-polar that activity may be, implies exercise of public authority that governs us. It does not imply that international law replaces the states, in any of these regards.

684 Chapter 5, section 5.3 will show that not all scholars taking part in the debate concerning NGOs democratic role in international lawmaking share these assumptions. There are reasons to reject efforts to extend democracy to transnational and global spheres. Christiano for example argues that democratic authority, even if it were possible, can be expected to be undercut in global and transnational cases, due to the problems of persistent minorities and some forms of majority tyranny, and the missing of a foundational element in the justification of democracy: ‘the requirement that people have a roughly equal stake in the groups in which they have an equal say’. Christiano 2005, p. 81. There are two different things at stake here however. One can on the one hand argue that, in line with the sketched assumption, we should strive for democratizing international lawmaking, and on the other hand one can simultaneously be skeptical about the prospects for a legitimate form of global or transnational democracy.

685 See Marks 2000, p. 113. See also Held 1995; Habermas 2001; Christiano 2008, p. 231-259; Besson 2011a, p. 11-12. Christiano, followed by Besson, specifically focuses, besides on the need for democratic legitimacy, on the fact that fair decision making with respect to the equality of states and their interests should be a central aim of improving international lawmaking.

686 Marks 2001, p. 66.


688 This phrase is borrowed from Scheuerman. Scheuerman 2008, p. 134. Examples of such academic efforts are Steffek, Kissling, and Nanz, 2007; Bexell, Tallberg and Uhlin 2010, p. 81; Scholte 2002, p. 281.

689 As will be discussed, parliamentary democracy, although considered the main building block of democracy and the basis for legitimizing law, both domestically, and internationally through state consent, faces some challenges. Voters’ turnout is decreasing worldwide. Elections are vulnerable for corruption; outcomes are contested and have led to major recount operations. Also after the elections, formation procedures prove difficult in a variety of democratic countries, including but not limited to Australia, Belgium and the Netherlands.

This section discusses two main sources of objection why scholars question the traditional doctrine of the democratic legitimacy of international law. Firstly, a group of scholars challenge the normative persuasiveness of state consent against the backdrop of the empirical developments in international lawyemaking as discussed in section 3.3. It is argued that states’ autonomy is waning, which allegedly constitutes gaps in the representation of individuals. Secondly, scholars point towards the conceptual deficits in the system of indirect democratic legitimation. These deficits are primarily caused by marginal parliamentary scrutiny of international lawyemaking, which allegedly constitutes an attenuated representation, but also caused by the existing horizontal obstructions produced by dominating power constructions between states, which causes unequal representation of individuals. This section concludes with the observation that all critiques on state consent directly or indirectly plead for bringing the individual back into the discussion on international law’s legitimacy.

3.4.1 The waning autonomy of states
As long as international law is made exclusively by states, state consent as a legitimizing instrument seems to be more or less unproblematic. However, due to the recent developments in international lawyemaking as described in the previous section, an image of international lawyemaking based on the voluntaristic acts of states is broadly considered to be obsolete.

International legal regimes provided with quasi-legislative competences allegedly constitute a challenge to the legitimizing effects of state consent based on what an international legal regime was initially constituted. The original consent to international law, given by states, and in cases of democratic states approved by parliaments, covers and authorizes specific and static obligations, rather than the regulatory and informal developments in current international lawyemaking. Flexible lawyemaking processes, of which international environmental law often functions as an example, to a certain extent escape state consent. The international environmental treaties might mandate a meeting of state parties to progressively develop norms within their frameworks. This is motivated by the conviction that the required consensus decision-making by states has demonstrated to be uneffective in addressing international environmental problems, such as for example climate change. Therefore, states have negotiated and adopted more flexible rules that are

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691 To name just a few: Alston 1997, p. 435; Berman 2007, p. 301; Boyle and Chinkin 2007; Stirk 2012, p. 641-660.
692 The interpretation of these changes obviously depends on the perspective of scholars involved. See for an overview and categorization of different conceptual perspectives on the making of international law, D’Aspremont 2013.
694 Alvarez stated however, that the cases are rare one can truly speak of international governance, to be compared with national governance. Alvarez 2007, p. 184.
697 For example, the Montréal protocol on Substances that Deplete the Ozone Layer provides that controls on such substances may be tightened by a qualified majority vote, art. 2, paragraph 9. Another example is the Meeting of State Parties of the Convention on the Law of the Sea, Dec. 10, 1982, U.N.T.S. no. 31363.
698 Consensus decision making seems to be less plausible where states have very different interests, where the costs may be extremely high, and where the regime may have to change very rapidly as scientific understanding of the problem progresses. Bodansky 1999, p. 607.
designed to be developed progressively, for example through additional instruments to treaties that do not require parliamentary consent.

The many lawmaking activities occurring in informal settings of international bureaucracy networks are considered to further aggravate the lack of parliamentary control of activities beyond exclusive national jurisdiction. It is questionable to what extent parliaments, which are in a democratic reading of state consent the ultimate source of legitimacy for all executive measures, are actually involved in legitimizing these international processes. Due to the informality and lack of transparency, parliamentary oversight of administrative activities in international settings is obstructed. In addition, current informal negotiating forums that characterize regulatory networks are considered to effectuate a ‘deep transformation in the conduct of public affairs’. States are considered to function as a moderator instead of the final lawmakers in these regulatory networks, which are conglomerates of more or less independent actors and groups. In these pluralistic acts of informal cooperation between private actors and states, states do not automatically have the final say. This changing power position of states in these informal settings is considered to weaken the normative force of state consent.

Another factor that supposedly obstructs the normative force of state consent is the fact that the effects of the exercise of international public authority do not bind exclusively the sovereign state in the traditional sense, but also individuals directly. They might bind even states that have not consented to some lawmaking activities, which is the case with third party effects of treaties and limitations on persistent objections to customary law. Besides, a considerable part of the norms concerning international society arises in the public sphere beyond states, outside constitutionally controlled conditions.

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699 For example, Steward and Ratton Sanchez Badin mention in respect to the difficulties of parliamentary control on informal procedures ‘the persistence in the WTO of the GATT ‘club’ model of decision making through confidential diplomatic negotiations among members’. Steward and Ratton Sanchez Badin 2011, p. 556, 560.


701 Warning 2009, p. 203.


703 These informal and formal regulatory practices are often incorporated in scholarly explorations of international lawmaking because of the fact that these non-binding norm settings have a potential impact on the development of international law. Cassese and Weiler 1988, p. 173. See Stephan 2011, under II, The Privatization of International Law, pp. 1593-1618.


705 See in this respect for a plea to reimagine the doctrine of sources by focusing on authority: Hollis 2005.

706 International norms might directly impose obligations or confer rights on individuals. An example is the international norm prohibiting piracy. It prohibits piracy by obligating individuals, not states, to refrain from this delict. Other examples are the rules concerning blockade and contraband of war. The sanction directly provided for by general international law is confiscation of the vessel and the cargo. The sanction is directed against the property of private individuals. Subject is the commander of all vessels. Carriage of contraband international law sanction is confiscation of the cargo of the vessel and is directed to individual. See Art 2 of the International Convention for the Protection of Submarine Telegraph Cables, March 14, 1844. Covenant of the League of Nations, April 28, 1919.


708 An early example concerns the rights of women. In 1928, after women’s groups journeyed to the sixth Pan-American Conference, the governments agreed to hold a plenary session to hear the women’s representatives, and accepted their proposal to create the Inter-American Commission of Women. In addition, NGOs advanced language on human rights for the UN Charter and then aided the diplomats drafting the Universal Declaration of Human Rights. Advocacy by NGOs and indigenous groups has been similarly instrumental in achieving new international protections for indigenous peoples. Moreover, networks of NGOs worked to inspire negotiations for
examples of de facto exercise of international lawmaking authority imply a claim to authority.\footnote{Besson 2009a, p. 345, note 9, referring to Raz 1986, p. 65; Raz 2006 p. 1005–1006. One can see that such a de facto approach towards the exercise of public authority is highly fragmented with regard to its impact. Habermas proposes in that respect a distinction between the ‘domain-specific networks that coordinate the decisions of independent collective actors at the level of expert committees, on the one hand, and a central negotiation system that performs political tasks beyond merely managing interdependencies on the other’. Habermas 2008, p. 446.}

These different claims to international authority weaken a conception of state consent that interprets sovereignty as an illimitable and indivisible form of public power, translated by the consent of states, democratically approved by a national parliament. As these multipartite lawmaking processes do not engage all states or only states, but nevertheless affect the legal subjects, even of non-participating states, state consent does not cover the existing gaps in representation.\footnote{Kumm 2004, p. 910–911. Kumm refers to Art. 27 of the Vienna Convention of the Law of Treaties. Vienna Convention on the Law of Treaties, May 23, 1969, U.N.T.S. no. 18232. For earlier jurisprudence with regard to international law more generally. See also Permanent Court of International Justice, PCIJ Ser. A/B44, Feb. 4, 1932, (Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory), at p. 24: ‘It should . . . be observed that . . . a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law . . . .’} Held explicitly clarifies this position:

‘There is a fundamental difference between, on the one hand, select military and naval operations which have an impact on certain towns, rural centers and territories, or the development of particular trade routes connecting a number of geographically dispersed cities and, on the other hand, an international order involving the emergence of a global economic system which stretches beyond the control of any single state (even dominant states); the expansion of networks of transnational relations and communications over which particular states have limited influence; the enormous growth in international organizations and regimes which can limit the scope for action of the most powerful states; and the development of a global military order, and the build-up of global security challenges (terrorism and “war on terrorism” in the current period), which can alter the range of politics available to governments and their citizens.’\footnote{Held 2006, p. 292.}

While the possibilities of different actors to cooperate internationally are increasing, the abilities of states to unilaterally intervene decrease.\footnote{It must be noted that a pluralization of subjects involved in international lawmaking should not be automatically understood as affecting the dominance of state actors. As D’Aspremont notes, ‘Whatever its origin, the pluralization of the exercise of public authority at the international level can also be construed as a reinforcement of state’s power, for it allows states to be even more present and influential, even in areas traditionally adverse to it and without being subject to accountability mechanisms’. D’Aspremont 2011d, p. 4-5, referring to Clapham 2006, p. 5-6, and Peters, Koechlin, Förster and Fenner Zinkernagel 2005, p. 496-497.} A state’s volition does not seem to encompass all international legislative activities.\footnote{See Meyer 2009, p. 4-5; Bolton 2000.} Although states remain sovereign in that
they are entitled to rule over a bound territory, their autonomy, the actual power the state possesses to articulate and achieve policy goals, should be evaluated critically and independently.\footnote{Held 2006, p. 295. According to Macdonald, not only states but also private actors and International Organizations are assumed to exercise public power. Public power in this respect refers to ‘those forms of power that are the legitimate subject of democratic control’. Macdonald 2010, p. 19, 21. Macdonald stretches traditional conceptions of both relevant actors involved in international lawmaking as well as conceptions of international lawmaking: ‘In order to relate the constraining impact of global norms to the exercise of public power, we must take the further step of linking the operation of norms to the actions of particular political actors. (…) I propose that any political agent can be said to exercise political power if it plays some prominent and influential role in the processes and production and maintenance of autonomy constraining regulative norms. (…) (I)t is thus the asymmetry in the roles of different social agents in generating regulative norms that enables us to say that one agent exercises power over others through this norm-building process.’ Macdonald 2008, p. 64. However, the relationship between power and authority is contested. The interpretation of the fact that international organizations change what other people do, as public authority of the International Organization, confuses authority with influence. Hershovitz 2003, p. 203-205.} The weakened state autonomy in setting the terms of international law consequently affects the normative persuasiveness of state consent as an instrument to democratically legitimize international law.\footnote{Benvenisti 2006, p. 26. See also the overview offered by Von Bogdandy: Von Bogdandy 2004, p. 891-893. sub A: Globalization as a Threat to National Self-determination. Von Bogdandy indicates three different rationales that characterizes the scholarly concerns regarding the effects of international law on domestic democracy: Globalization as Americanization, Globalization as Capitalist Strategy, and Globalization as the Weakening of State Institutions.} The erosion of the autonomy of the state causes limited opportunities for domestic representative bodies to influence the content of international law and therefore limits the reach of democracy.\footnote{Zürn 2004, p. 280.}

These contemporary developments are considered one of the drivers for scholars to criticize the traditional doctrine of the democratic legitimacy of international law.\footnote{Dryzek 1999, p. 30.} The discussed developments in international lawmaking that are often categorized under the umbrella term ‘globalization’ are understood to ‘put democracy at stake’ due to the waning autonomy of states.\footnote{Krut 1997, p. 6. See for an overview on the scholarly conceptions on the relationship between globalization and democracy concerns: Von Bogdandy 2004.} Scholars are concerned about the lack of accountability mechanisms at a global level, and call for democratization of international governance.\footnote{Zürn 2004, p. 280.} It is considered pressing to research the extent to which the concept of democratic legitimation can follow the migration of issues, problems, strategies, and solutions that are characteristic of globalization. Scholars see a need for new political platforms through which exchange of ideas and dialogue could occur.\footnote{Manent 1997, p. 92-102.}

3.4.2 Deficient representation by state consent

Besides the external effects of recent developments in international lawmaking on the functioning of state consent that lead to gaps in representation by state consent, there are also scholars that question the intrinsic normative power of the doctrine of democratic legitimation by state consent.\footnote{Weiler 2004, p. 556.} On two different levels, scholars critically assess the normative weaknesses of the state consent model. On the one hand, the representation by states of their people is attenuated, due to the complex vertical relationship between the
people, democratic institutions, and state representatives. On the other hand, issues occur at the level of interaction between different states internationally, causing an unequal representation of the different peoples.

**Weak representation - deficits in indirect democratic legitimation**

Even when a state is democratically organized, and lawmaking is exclusively carried out by states, the connection between people and international lawmaking processes is considered to be too mediated to be effective.722 Chains of delegation between citizens and agents of global governance are argued to be too attenuated.723 In Marks’ terms, state consent offers only a ‘low intensity democracy’.724 According to Wheatley, it is hardly tenable that the democratic legitimacy of international law can be upheld by the engagement of citizens of democratic states in a process of opinion formation at the domestic level, with the expectation that the settled opinion will be accurately reflected and acted upon in a global setting.725 The regular control that citizens can exercise based on elections, and through their representatives in parliament is considered to be insufficient to effectively exercise control over international authority.726 The representation of citizens by states through state consent is considered flawed due to the limited parliamentary scrutiny over the position of states in international lawmaking.727 Whereas parliamentary scrutiny had already led to concerns in relation to informal lawmaking and framework conventions that enable flexible law formation by international organizations, these critiques point towards more fundamental concerns. Even when states are considered the dominant actors in international lawmaking, the institutions of global governance are considered to usurp domestic democratic institutions’ decision-making powers.728 Some scholars even speak of a ‘post parliamentarian’ order, in which parliaments only take a decorative position in a pluralist play of governance at a multiplicity of levels.729

Firstly, a general objection to state consent is that the state itself is not an easy object of democratic scrutiny. The organization of the state is more and more disaggregated, which severely complicates parliamentary control.730 The modern state, with its sectoral and sometimes territorial division of labor, provides administrative bodies with the resources and autonomy to communicate and collaborate with their foreign counterparts.731 Practically every department of a state is involved in some manner in the handling of international agreements.

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722 Wolfrum 2008, p. 16.
723 Wolfrum 2008, p. 11.
724 Marks 2000, p. 2.
725 Wheatley 2010, p. 275.
726 Marks and Clapham 2005, p. 64-65.
727 Besselink addresses a concrete example of the obstructions to parliamentary oversight and scrutiny on the conclusion of treaties, in his report on the Dutch constitutional situation in which some international treaty provisions, when they deviate from the constitution, require super majority voting procedures for their implementation in the domestic context, irrespective of their substantive impact domestically, whereas the delegation of powers to some international organizations, which can have extensive consequences for the autonomy of a state and thus its citizens, requires, in practice, only the weaker form of scrutiny based on normal majority voting procedures. See Besselink 2003.
728 Bernstein 2004, p. 145.
730 We borrowed this notion of Slaughter. Slaughter 2004a, p. 12.
731 Slaughter highlights in this respect ‘the need for a disaggregated model of the state, replacing the fiction of a unitary actor with a conception of distinct governmental institutions acting quasi-autonomously in the international system’. Slaughter 1997, p. 183.
questions of foreign affairs, and maintains direct contact with the corresponding departments of other governments. In terms of democratic scrutiny, this practice might lead to problems, as for only foreign affairs and defense departments are officially charged with the protection of the interests of the state as a political unit. Other departments of government are formally primarily concerned with the everyday affairs of men and women in society. Any international cooperation under the auspices of these departments might escape scrutiny by the parliament. The involvement of different departments and administrative organs in international lawmaking leads to a reinforcement of the executive power of the state to the detriment of the power of the parliament. In addition, the theoretical unity of the state cannot be upheld in international practice because of the fact that in some international organizations voting power is not based on the concept of states as the irreducible unit, but upon the extent of the interest of the people in the various countries in the subject matter dealt with by the organization. A well-known example is the International Labour Organization, where from the beginning representation was given to different economic groups within each nation. In that respect some scholars plead for thinking about states acting beyond the nation-state ‘the way we think about domestic government – as aggregations of distinct institutions with separate roles and capacities’, and this will ‘provide a lens that allows us to see a new international landscape.’

Secondly, a reading of democratic legitimacy of international law through state consent is based on the assumption that the domestic electorate has a choice. The concept of consent is based on the possibilities of people to be rational actors who decide to be bound by law, to steer their actions. Even if the electorate has had influence over the choice of its representatives, based on their views on foreign policy, it has scarcely any influence on the content of international legislation. Besides, when executive representatives of a state have signed a treaty, notwithstanding the fact that these representative might not be reelected, the commitment to that treaty often remains unaffected. As a certain amount of continuity is often considered of importance for foreign policy, it is unlikely that a change of government will lead to a revision or withdrawal of previous signed international agreements.

However, the role of the domestic legislature is also considered marginal in the preparatory processes of treaties, when treaties are not yet signed. Intergovernmental or multilateral negotiations result in a final agreement for which consent must be sought at the

732 Dunn 1941, p. 16.
734 Art 3, art 7 Constitution of the International Labour Organization, April 1, 1919.
735 Slaughter 2004a, p. 13.
737 See chapter 1, section 1.3.1.
national level. The choice of the electorate is narrowed down to approving or rejecting the international agreement.\textsuperscript{741} During an international lawmaking process, before signing and ratifying a treaty, hardly any room is left for parliamentarians to suggest alternatives regarding the content of the proposed agreement. Reisman illustrates this common impasse of the delegation chain with the conclusion of the Treaty on the Law of the Sea and the relationship between the executive power of the United States and its parliament. The negotiators, delegated by the executive power at the UN conferences, saw no other option than to compromise some domestic interests that were part of their instructions by the parliament, in favor of securing other domestic interests. Notwithstanding the fact that the signing of a treaty requires ratification back at the nation-state, the package had already been formulated, and the political space left for national representatives was to say yes or no.\textsuperscript{742}

Third, some scholars are fundamentally critical of the operation of state consent as a legitimizing instrument. This is not so much because of the possible flaws in the democratic delegation chain through state consent, but because of the flaws in representative parliamentary democracy in general. It is argued that even if national parliaments have room to influence and monitor the executive power regarding external affairs, parliamentary systems are considered to be subject to many forces other than just the voice and the vote of the people.\textsuperscript{743} Referring to the voice and vote of the people assumes that voters give a clear mandate to their representatives. Notwithstanding the fact that those mandates are based on election programs and campaigns of political parties, which are most of the time not consistent, specific, and clear as to what parliament will put on the agenda and often silent on international legal ambitions, the political issues of the day often require adjustments to earlier developed agendas. Moreover, scholars critically point towards the increasing social distance between the ordinary voters and professional parliamentarians.\textsuperscript{744} As is argued, many citizens lack resources, knowledge or motivation to behave like active political citizens.\textsuperscript{745} As Wapner concludes, the state is not considered simply a reflection of citizen concerns, but rather an institution with its own institutional and bureaucratic imperatives, and the expression of these imperatives, likewise, compromises democratic accountability.\textsuperscript{746}

Unequal representation - democratic deficits among states

The second main category of criticism towards the intrinsic malfunctioning of state consent as an instrument to democratically legitimate international law concerns the democracy deficits among states. According to the democratic state consent doctrine, the democratic legitimacy of international organizations is assumed to be connected with the equal representation and participation of all its member states.\textsuperscript{747} An equal vote for all individual states is supposed to ensure the equality of all individuals.\textsuperscript{748} All individuals are equally

\textsuperscript{742} Reisman 1987, p. 141.
\textsuperscript{743} Held mentions in this regard the ‘institutional dependence on the imperatives of private capital accumulation’.
\textsuperscript{744} Bekkers and Edwards 2007, p. 49-50.
\textsuperscript{745} Wapner 2002a, p. 199 referring to Scharschneider 1960, Soss 1999.
\textsuperscript{746} Wapner 2002a, p. 199.
\textsuperscript{747} Krajewski 2008, p. 3, point 10. See Franck’s four requirements of international legitimacy as mentioned in the introduction of section 3.2.
\textsuperscript{748} Macdonald 2008, p. 121.
represented as long as their state represents their interests, ensured by the division of the
global population into states. When relying on domestic aggregative mechanisms to protect
the equality of individuals, the final result of the second aggregative process that takes place
during voting procedures in international lawmaking processes consisting of all states (being
representatives of their peoples) is assumed to be in accordance with the hypothetical result
of an aggregative process in which all individuals directly participate.

Scholars are critical of the assumption that state consent guarantees any equal
consideration of citizens. They point towards the quite obvious flaw in this reasoning, in the
fact that constituencies of the respective member states are not groups of individuals of
equal size. Individual equality in this sense is far from being approximated.749 Moreover, the
relationship between nationality, state consent, and equality is questioned. As Macdonald
states, ‘[t]he designation of nationality as the only, or even as the principal, social interest in
which each individual “partakes” is becoming increasingly obsolete and implausible in our
globalizing world’.750 Besides the obvious individual inequality as a consequence of the ‘one
state one vote’ rule, scholars are specifically critical towards the representativeness of states
with regard to their minorities. An example of the indigenous peoples explains this
complexity. Although the different indigenous peoples might form close to one-fifth of the
world population when grouped together, following the current two-stage aggregation
model of state consent these national minorities will scarcely get a voice, which, due to an
aggregative model in which only the state can vote as one unity, ‘permanently marginalizes
their interests from global representative decision-making’.751

The problem of ‘questionable voluntariness’, as Buchanan calls it, is considered to
construct another inequality in the representation of citizens by states. International
lawmaking practices are characterized by power plays, which negatively affect the abilities
of weaker states to influence international legislative practices.752 States, most of the time,
face pressure from other states that undermines the voluntariness of their consent.753 Some
states have such a weak position in international negotiations that notwithstanding the fact
that their position is democratically legitimized internally; it might become overruled by
more powerful states. During negotiations of bilateral agreements, powerful states can
impose treaties upon less powerful states not only leaving them with little or no margins of
negotiation, but with even less concern for their internal democratic scrutiny.754 Multilateral
lawmaking reflects the same power dynamics between states. The state that is designated
as the ‘state of registry’ has a dominant position in determining and selecting with what
states it wants to associate itself. Such unilateral acts of the state of registry demonstrate
the impact of power relationships as they have direct effect on the possibilities of other
states to ratify the relevant treaty.755 International lawmaking is often perceived as ‘deeply

751 Macdonald 2008, p. 130.
752 See also Pinto who questions the underlying rationale of state consent based on the full and effective
participation by all states. Pinto 2014.
753 Buchanan 2010, p. 91. As Szasz notes: ‘Governments, especially the smaller ones, frequently complain that
they are unable to keep up with the plethora of treaty-making activities, that is, they cannot supply sufficient
representatives and experts to all the meetings and cannot properly review the many treaty proposals pending at
754 Weiler 2004, p. 556.
inegalitarian, [which] activities are primarily responsive to the interests and concerns of the world’s most powerful states.\textsuperscript{756}

The situation in respect of international law originating from international organizations is illustrative. Görg and Hirsch argue that political decision-making and the administrative structures at the international level remain underdeveloped and fragmented, mostly because they are entwined with the contradictory interests of national states.\textsuperscript{757} No matter how democratic existing domestic political arrangements might be, those arrangements cannot ensure the accountability of international lawmakers to citizens. In sum, international lawmakers shapes national options, but still eludes national control.\textsuperscript{758} Consequently, territorially rooted mechanisms of democratic legitimacy are considered insufficient to effectively confer democratic legitimacy on international law.\textsuperscript{759}

3.4.3 A plea for bringing the individual back in

The previous objections to the persuasiveness of state consent, although grounded in different rationales, all point towards one main concern: the traditional doctrine of democratic legitimacy of international law does not sufficiently take into account the position of the individual towards international law. The changes that international law has brought about in the traditional democratic relationship between state, law, and society,\textsuperscript{760} are considered to require a reconsideration of ways to establish the democratic legitimacy of international law.\textsuperscript{761} The once strong belief in national democratization as an indirect response to the democratic legitimacy deficits of international law seems to have normative flaws. Scholars insist that reflecting on the democratic legitimacy of international law should recognize the current pluralized nature of international lawmaking,\textsuperscript{762} in which the ‘publicness’ of international lawmaking authority is dependent on its impact on individuals instead of on territorial boundaries.\textsuperscript{763} In such a reflection on the legitimacy of international law, according to many, the perspective of the individual should play a central role. Scholars increasingly focus on ways that one can establish mechanisms for individuals to democratically legitimize the exercise of international authority.

The focus on the individual seems obvious, as democratic legitimacy entails in se a consideration of individual interests: it requires that there is a relationship between the preferences of the individual and the final exercise of authority.\textsuperscript{764} However, in contrast with the exploration of the democratic legitimacy of lawmaking in Part I, where the individual was discussed as the central point of gravity, section 3.2 concerning the doctrine of state consent demonstrated that the individual in international lawmaking remains largely out of sight.

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\textsuperscript{756} Christiano 2006a, p. 94.  
\textsuperscript{757} Görg and Hirsch 1998, p. 587.  
\textsuperscript{758} Marks 2000, p. 84.  
\textsuperscript{759} As De Beus stated, international lawmaking ‘suffers from failing and missing modes of democratic mobilization, delegation, contest, deliberation, choice and accountability’. De Beus 2001, p. 285; Kennedy 1999, p. 52.  
\textsuperscript{760} Hirsch 2003, p. 242.  
\textsuperscript{761} Held 2006, p. 283. The choice to reconsider democratic legitimacy beyond nation-state borders often means that a recontextualization of that concept is assumed necessary. See Marks 2000, p. 103. As Habermas mentions, ‘we will only be able to meet the challenges of globalizations in a reasonable manner if the post-national constellation can successfully develop new forms for the democratic self-steering of society.’ Habermas 2001, p. 88.  
\textsuperscript{762} Boyle and Chinkin 2007, p. 97.  
\textsuperscript{763} See for an academic debate on international authority: Von Bogdandy, Dann and Goldmann 2008.  
\textsuperscript{764} Held 2006.
This is not surprising given the fact that this doctrine builds on the idea that international lawmaking is principally based on the categorization of individuals as the object, but not as the legal subject, or as creators of international law. States in the capacity of primary lawmaker are considered to act as the proxy of individuals. Individuals have the opportunity to be indirectly heard, mediated by states.\footnote{Article 38 of the Statute of the ICJ offers the only formal leeway for individuals to influence lawmaking. It states that ‘the teachings of the most highly qualified publicists of the various nations’ are a ‘subsidiary means for the determination’ of legal rules for the ICJ. This provision is assuming insufficient: it does not capture well the actual impact individuals have (and should have) on the formation of law, according to its critics. Individuals bring forward cases, they lobby, demonstrate, protest, and form political organizations, at the international level as well as at the domestic level.\footnote{Benvenisti 2014, p. 20.}} As a result of the formal centrality of states in international lawmaking, from a positivist perspective ‘individuals are extremely handicapped in international law from the procedural point of view’, as Higgins points out.\footnote{See chapter 1, section 1.2.2.} They are not only handicapped in terms of participation, but also in terms of control, thereby affecting the other basic premise of democratic thought that domination by ‘the strong’ must be restrained.\footnote{Higgins 1994, p. 51.} The strong in these studies are as broad as international lawmakers in general.\footnote{To quote Higgins, international law is ‘a continuing process of authoritative decisions’. ‘Law, far from being authority battling against power, is the interlocking of authority with power. […] International law is not the vindication of authority over power. […] It is decision-making by authorized decision-makers, when authority and power coincide.’ Higgins 2004, p. 1-15. Scholars have, however, not always reached agreement about who constitutes ‘the strong’. Held 2006, p. 265.} According to Bodansky, especially for non- or substate actors, the principle of state consent may have little legitimizing effect.\footnote{Scholte 2001, p. 12.} Scholte fears that ‘on the whole, current arrangements to regulate global communications, global ecology, global markets, global money and finance, global organizations, and global production rest – at best – on the thinnest consent of the affected publics’, as he observes that ‘[i]n each area of global policy popular participation, consultation, transparency and accountability are generally weak’.\footnote{Dunn 1941, p. 14.} In sum, the traditional conception of state-centric international lawmaking underestimates the actual role some individuals play in the making of international law, and equally overestimates states’ abilities to function as a representative of all individuals.

The plea for bringing back the individual into the discussion on the legitimacy of international law is based on the conviction that not only is state autonomy waning, which disturbs the pledge that states act in accordance with what their constituency wants, but
also that the effects of international law reach further than only to states that have consented to the relevant international norms. As briefly mentioned in section 3.4.1, international law has more and more significant direct implications for non- or substate actors (who have not consented to it directly), rather than just for the relations among states.\textsuperscript{774} International law affects international organizations created by states, and, increasingly, individuals.\textsuperscript{775} Now that the reach of international law transcends statal cooperation, scholars plead for possibilities for individuals to participate directly in the making of the law.\textsuperscript{776}

The shift in the debate on the democratic legitimacy of international law to the role of individuals herein serves an intrinsic purpose: ‘to respect the rights of individuals to have an opportunity (…) to provide input on matters that shape their lives’.\textsuperscript{777} Efforts of scholars to find ways to strengthen the democratic legitimacy of international law are based on the conviction that ‘citizens, wherever they are located in the world, [should] have voice, input and political representation in international affairs, in parallel with and independently of their own governments’.\textsuperscript{778} As they argue, law, including international law, should be a product of those that are affected by it.

There are growing calls to make international institutions more directly representative of individuals, more accountable to individuals both as individuals and as members of non-state groups that are important for their well being and in some cases, their identities.\textsuperscript{779}

\textsuperscript{774} A well-known example of such a significant direct effect on individuals is the ‘Targeted Sanctions’ regime adopted by the UNSC, Resolution 1267, S/RES/1267, Oct. 15, 1999 (On the situation in Afghanistan), which froze the assets of individuals suspected of financing global terrorism. After much criticism the SC offered a process of delisting, allowing indirect petitions through an Ombudsman. See UNSC, Resolution 1730, S/RES/1730, Dec. 19, 2006 (Sanctions); UNSC, Resolution 1822, S/RES/1822, June 30, 2008 (Threats to international peace and security caused by terrorist acts); UNSC, Resolution 1989, S/RES/1989 (2011), June 17, 2011 (Threats to international peace and security caused by terrorist acts). The European Court of Justice in the Kadi Case criticized this construction for not respecting the right to defence, in particularly the right to be heard. See Joined Cases of the European Court of Justice, C-402/05P & C-415/05P, Sept. 3, 2008 (Kadi & Al Barakaat v. Council of the European Union).

\textsuperscript{775} Some international organizations have been given the competence to bind individuals directly, the most prominent being the European Union (EU). In all other instances, the general rule is that international organizations have no power to address individuals, and that legal instruments adopted by them are not directly applicable in national legal orders. An indirect effect of legal acts on individuals can be achieved by establishing international criminal tribunals, as they apply international law to individuals. Some resolutions can subject individuals for sanctions, such as the Security Council resolutions imposing travel bans and the freezing of assets for persons included on a list. See UNSC, Resolution 1672, S/RES/1672, April 25, 2006 (On the situation concerning Sudan). A specific form of direct effect of resolutions occurs where international organizations perform the international administration of territories. In these cases, subsidiary organs of international organizations exercise, as the case may be, functions of national government See UNSC, Resolution 1244, S/RES/1244, June 10, 1999 (On the situation relating Kosovo); UNSC, Resolution 1272, S/RES/1272, Oct. 25, 1999 (East Timor). See for further reading: Alvarez 2006, p. 111.

\textsuperscript{776} One of the most forthright proponents is Téson. He draws on the Kantian tradition of republic liberalism to argue that the individual should be the normative unit in international law and that the international legitimacy and sovereignty of states is merely derivative of the confidence of their citizens. According to Téson, this confidence is the outcome of a state’s full respect for universal human rights and is republican democratic processes which ensures just representation of its people. Tesón 1992, p. 53-102. The normative claims that individuals should be considered as subjects of international law however touch upon a complex range of theoretical and doctrinal issue of individuals as subjects of international law, which fall outside the scope of this study.

\textsuperscript{777} Benvenisti 2014, p. 13.

\textsuperscript{778} Archibugi and Held 1995, p. 13.

\textsuperscript{779} Buchanan 2004, p. 315.
These academic calls for more direct democratic legitimacy are accompanied by claims of transnational publics that only feel committed to support the results of lawmaking processes on the condition that they become more involved in the lawmaking process. As a justification for this scholarly urge to democratize international lawmaking, some international legal scholars argue that the efforts to pursue global democracy cannot be postponed until every nation-state has embraced democracy, if only for the reason that national democracy is constrained by the undemocratic character of the international political-economic domain itself. Besides, as discussed, the democratic state consent doctrine is criticized for being insufficiently concerned with the rights and interests of individuals, even when all states are democracies.

A focus on the individual in democratically legitimizing international law is often considered beneficial for different reasons. An instrumental argument put forward for including individuals in international lawmaking is based on the ‘compliance pull’. Although states are the main actors in international law, the state should be understood as the aggregate of individuals, and thus it is ultimately up to the individual to comply with the law. The question is then whether the fact that democratic links between international lawmaking and the individual are weak or non-existent creates a problem with regard to compliance with international law. Lindblom mentions in this regard the risk that the democratic deficits of international law are or become one component in an erosion of people’s faith and engagement in traditional political processes. Back in 1941, Dunn had already warned the community of international legal scholars of the effects of their narrow perception of legal actors in the international community.

‘International law, we are told, is a law between states, and individuals have no rights and no personality there under. In my view, this particular legal fossil is highly misleading and in large degree false, and its continued hold on the minds of many people explains in part why international law is held in such ill repute by laymen today.’

Besides, a state-centered conception of international lawmaking might negatively affect not only the estrangement of individuals of international political processes but also affect the quality of the resulting international laws. It is assumed that decisions taken on the basis of an inclusive, deliberative process are of a better quality than decisions taken by a more limited and partly unrepresentative group of people without any process of external consultation.

These scholarly and civil pleas for more opportunities to participate are mirrored by an increasing awareness of international organizations of the urge to justify their lawmaking processes and to develop reform strategies to do so. At the end of the twentieth century a growing number of international organizations commit themselves in text and in practice.

783 See Dunn 1941.
784 We have familiarized ourselves with this argument in chapter 1, section 1.3.2, made in the context of deliberation. See also Teubner 1989, p. 733.
to democratically legitimize their exerted authority. Officials from international organizations use the analytical terms of democracy to refer to various features of ‘open government’. The most common features mentioned are accountability and transparency.\textsuperscript{787} In some fields of international law the emphasis on ‘open government’ is readily noticeable, for example in international efforts concerning the rights of indigenous people,\textsuperscript{788} the environment,\textsuperscript{789} and official corruption. In these international legal regimes one strives for the highest degree of popular participation in formulating future plans, policies, and strategies.\textsuperscript{790} The IMF and the World Bank have responded to challenges regarding their democratic legitimacy, particularly where there have been clear policy failures.\textsuperscript{791} In addition, the Commission on Global Governance has recommended that on one occasion each year, the UN should organize a Forum of Civil Society that can formulate recommendations for the General Assembly.\textsuperscript{792}

The scholarly debate concerning the democratic legitimacy of international law intertwines with discussions on the intensifying role of NGOs in international lawmaking. It is assumed that the increasing participation of NGOs in international lawmaking leads to an increasing democratic legitimacy of international law. Before the NGO democratic legitimacy thesis as such is described and assessed, the next chapter explains the legal and political basis of NGO participation in international lawmaking.

\textsuperscript{787} Bodansky 1999, p. 613; Fox and Roth 2000, p. 8. See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, U.N.T.S. no. 37770. Article 1 provides that in order to protect the right of every person to live in a healthy environment ‘each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.’ See for further reading on these administrative requirements the school of Global Administrative Law.

\textsuperscript{788} See Keck and Sikkink 1998; Charnovitz 2006, p. 352.


\textsuperscript{790} In the realization of public engagement, NGOs are assumed to play an essential role, as will be discussed in subsequent chapter 4 and 5. Exemplary for this practice is the growing numbers of international conferences, which are open to NGO participation. Examples are; Population Conference in Cairo, 1994; Women’s Conference in Beijing, 1995; Conference on Human Habitats in Copenhagen, 1996.

\textsuperscript{791} De Burca 2007-2008, p. 225.

\textsuperscript{792} Commission on Global Governance 1995, p. 258-60.
4 NGOs participating in international lawmaking

This chapter describes the practice of NGO participation in international lawmaking. Obviously, NGOs participation in international lawmaking is not a new phenomenon. Instead, it has a rich history. Notwithstanding the common practice of NGOs participating in international lawmaking processes, ranging from conferences to specific committees, the legal status basis for what they do is not clear-cut. The lack of a central international supreme legislator whose laws affect all individuals equally, as discussed earlier, also impacts upon the position of NGOs in international lawmaking. Different international legal regimes take different approaches towards the opportunity for, the intensity, and the desirability of NGO participation in international lawmaking. In some instances NGOs are allowed to make oral contributions, while in other situations their contributions are limited to written contributions, subjected to restrictions such as length, relevance, and distribution.

This chapter describes NGOs' participation in international lawmaking de jure and de facto. De facto participation arises because some developments and innovations in the practice of the engagement of states and international organizations with NGOs have not been translated into changes in the rules of NGO participation in international lawmaking. This chapter is not exhaustive. It offers an introduction to the practice of NGO participation in international lawmaking, in general and in UN lawmaking specifically, and briefly discusses the existing different governmental perceptions on the participation of NGOs in international lawmaking.

Section 4.1 discusses and explains what is understood by ‘NGOs’. Section 4.2 presents a brief historical overview of NGO participation in international lawmaking. Section 4.3 describes the legal framework for NGOs to participate in international lawmaking. First, the legal status of NGOs in international law is discussed. Second, the arrangements that offer NGOs consultative status are explained. Third, NGOs' status at international lawmaking conferences is explored. Fourth, the status of NGOs in specialized agencies and other international organizations is briefly discussed. Section 4.4 addresses the informal arrangements of NGO participation in international lawmaking. Section 4.5 discusses the discretion of power holders concerning NGO participation in international lawmaking.

4.1 Terminology

NGOs form a heterogenous object of study, organized in different ways and set up with different aims and functions. According to Bakker and Vierucci, “it is extremely difficult (possibly not workable) to find common features making it possible to mould all these elements into one definition”. International law does not offer an authoritative definition of an NGO. The International Law Dictionary defines an NGO as a ‘private international organization that serves as a mechanism for cooperation among private national groups in

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793 See for an elaborate presentation of NGOs' legal position in international law, Lindblom 2005a, and Woodward 2010.
794 The awareness of the variety of organizations in terms of content, organization, and field of activity of organizations that fall under the umbrella term ‘NGO’ has led to many different classification efforts of NGOs by orientation or by level of cooperation, including, but not limited to: INGOs (International Non Governmental Organization), BINGOs (Business Friendly NGO), QUANGRO (quasi-autonomous non-governmental organizations).
795 Bakker and Vierucci 2008, p. 17.
international affairs’. The Encyclopedia of Public International Law classifies NGOs as private organizations ‘not established by a government or by intergovernmental agreement, and which are capable of playing a role in international affairs by virtue of their activities’. Willetts offers a more inclusive definition: ‘An NGO is any non-profit making, non-violent, organized group of people who are not seeking government office’. Hirsch attaches a political characteristic to NGOs, defining an as ‘any formally private organization, which is active in politics at a national or international level’, and which demonstrates the following characteristics: it is a non-profit organization, engaged in advocacy, and not standing for its own material interest. An NGO is organizationally and financially independent of the state and commercial enterprises and has professional competence and permanence as an organization. Perhaps Josselin and Wallace have developed the most elaborate definition of NGOs. It includes organizations that are mainly or completely independent from central government funding and control, stemming from civil society, or from the economic market, or from political impulses beyond state control and direction. Their conception of NGOs is inherently transnational, as they define NGOs as functioning, or participating in networks that extend across the boundaries of two or more states, linking political systems, economies, and societies. Just as Hirsch, Josselin and Wallace attribute NGOs a political function, as they are assumed to make an effort to affect political outcomes.

It is remarkable that NGOs are often characterized as pursuing shared values, concerns, and purposes, which are, in contrast to the origins of NGOs, often of a public nature. NGOs allegedly engage both their supporters and their constituency by their concerns that have a public benefit purpose. Generally they are in some way formally registered by the state and adopt non-violent approaches to their work. Notwithstanding the actual plurality that is veiled by the single notion ‘NGO’, this study holds on to a general description. For this general description, the common similarities in ‘form’, namely an associational type of organization by people to gain influence in international lawmaking, has been taken as a starting point. An NGO is perceived as a collective of individuals who have voluntarily formed an organization, not for profit, independent from governments. With the term NGO, this research does not make a distinction between internationally active NGOs and nationally active NGOs. The type of NGO that is object of inquiry tries to exercise influence

796 Bledsoe and Boczek 1987, p. 77.
797 Rechenberg 1986, p. 276.
798 Willetts 1996, p. 5. Willetts makes a division between international and national NGOs as an international NGO has a less restrictive definition. ‘It can be any non-violent, organized group of individuals or organizations from more than one country.’
799 Hirsch 2003, p. 239.
800 Josselin and Wallace 2001, p. 3-4.
804 The reason that this study refrains from a substantive connotation of NGOs is that it can be straightforwardly admitted that not all NGOs are substantially commendable, if one looks at organizations such as Ku kux clan, mafia, terrorists, who are definitely not governmental. See Kamminga 2005, p. 110.
805 In this respect we do not follow contemporary jargon, in which the term NGO is used to describe organizations involved only in national affairs in contrast to INGOs that are supposed to operate internationally. Charnovitz 1996, p. 186.
on international lawmaking processes, so that new standards are established or old standards are changed. Revolt groups that want to take over governments and profit-seeking entities are excluded.  

4.2 Historical observations on NGO participation

From the early twentieth century, the League of Nations opened its arms to involvement of NGOs. For these first historical observations, we extensively rely on the unique historical studies on NGO participations in international lawmaking of Charnovitz. When multilateral conferences increased in number, simultaneously the modalities of participation of NGOs expanded. Between 1872 and 1914, twenty-six law-related NGOs were created, many of them specifically aimed at influencing the content of international law through engaging in the preparation of international legislation. An NGO that can be considered a frontrunner, the Institut de Droit International, founded in 1873, has turned out to be an influential private actor for the development of international law. The Institut de Droit International presented the idea to establish a court of arbitration and prepared several significant treaties. Furthermore, the International Law Association (ILA), which promotes the codification of international law, has been actively engaging in international lawmaking more than a century.

The Paris Peace Conference of 1919 is considered one of the early milestones for NGOs’ participation in international lawmaking. Non-governmental peace groups sent representatives to the Conference to press their views on many international law related issues. Other NGOs initiated parallel conferences themselves and succeeded in handing over copies of their resolutions to the official peace delegates. Among others, the Woman’s International League for Peace and Freedom (WILPF) recommended improvements to the draft Covenant of the League of Nations, proposing that treaties should be ratified only after approval of an elected legislative body, which is interesting in light of our democratic legitimacy discussion in chapter 3.

At that time, the interaction between international organizations and NGOs can best be described as cooperative. According to Charnovitz, both parties felt that they partook in the same ‘international movement’, without the domination of one over the other. The open attitude of the League is reflected in the recommendation of the League Council in 1921 to widely interpret Article 24 of the League of Nations Covenant. Article 24 created an opportunity for the League to support ‘non-public’ and ‘semi-public’ international

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807 Although profit seeking groups are excluded, we consider associations of businesses, religious organizations, charities, foundations, and research organizations part of the broad term NGOs.
808 Charnovitz 2006, p. 4-5, referring to the Secretariat who began publishing a Handbook of International Organizations in 1921, *League of Nations, Handbook of International Organizations 9* (1921), and stated: ‘the League of Nations should follow closely and should encourage every international movement (…)’.  
811 Charnovitz 1996, p. 194 referring to Garner, 1925, p. 655-656; Ralston 1929, p. 139.  
organizations. Two years later, however, the Council reconsidered this broad interpretation of Article 24 and decided not to apply it to NGOs. In the same period, the League published the Handbook of International Organizations in which public, semi-public, and private organizations, without a commercial objective, were included. In contrast to the practice of NGO involvement previously, where state officials functioned as intermediaries to bring the views of NGOs to the fore, now individuals, not connected to states, were also allowed to participate.

During the decade of 1935-1944, during which international cooperation increased, the call for NGO input diminished. Charnovitz found an explanation for this shift in the fact that the activities and tasks of the League became more familiar to officials. The officials themselves had gained more experience, which created certain independence for the expertise of organizations outside the League. The invitations for NGOs were limited to specific NGOs with great technical know-how. In addition, heightened world tensions, the increasing numbers of NGOs, and the growing bureaucratization of the League Secretariat might have contributed to this shift towards a less receptive attitude of international organizations and states to NGOs.

From 1947 on, the tide turned again. The successor to the League of Nations, the United Nations, frequently invited NGOs to participate in its lawmaking. Key to the contextualization of the NGO democratic legitimacy thesis is that due to the codification efforts of states, NGOs received more opportunities to weigh in on issues. During the period 1950-1971, NGO activity at the UN started to flourish. The General Assembly of the United Nations convened the International Law Commission to encourage the progressive development of international law and its codifications, and the involvement

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816 League of Nations Covenant, see Charnovitz 1996, p. 220 referring to Pickard 1995, p. 576-78. The article addressed League relationship with IGOs, and stated that all international bureaus already established by general treaties would be placed under the direction of League if the parties to such treaties consented. Art 24: ‘There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaus and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League. In all matters of international interest which are regulated by general conventions but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable. The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.’ See http://avalon.law.yale.edu/20th_century/leagcov.asp (last visited January 2016).

817 Charnovitz 2003, p. 71.

818 An example is the International Radio Conference in Cairo, 1938, during which only a few NGOs were allowed to participate. Charnovitz 1996, p. 246.

819 We here take the perspective of the ‘legislator’ in understanding the various ebs and flows of NGO receptiveness. However, Krut suggests that also NGOs have known, before the increase of involvement characteristic for this stratum of progressive development, ‘decades of antipathy towards the UN’. Krut 1997, p. 16.

820 Paul 2012, p. 64-82.

821 The codification of the Law of the Sea in the Convention on the Law of the Sea, Dec. 10, 1982, U.N.T.S. no. 31363, which was previously only been governed by customary law, gives a strong example of the increasing opportunities for NGOs to influence the lawmaking process. See Rastiala 2012, p. 153.

822 This happened mainly with regards to human rights issues. The UN Commission on Human Rights accepts comments by NGOs from 1964. See Willetts 1996; Sybesma-Knol 1981, p. 309.

823 Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. XVI, under Article 13, paragraph 1, the General Assembly is required to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification.” As a means for the discharge of these
of NGOs became formalized. According to the system introduced in 1950 under Article 71 of the UN Charter, NGOs can apply for accreditation with the Economic and Social Council (ECOSOC) of the United Nations. Article 71 calls for an accredited NGO to ‘represent a substantial proportion of the organized persons within the particular fields in which it operates’. However, the general eagerness of states to maintain a monopoly on lawmaking prevented non-state actors from becoming fully involved in the international lawmaking process.

NGO participation in international governance intensified in the early 1970s. NGOs grew in number, size, and diversity, set up under the umbrella of the Conference of NGOs in Consultative Relationship with the United Nations (CONGO). The UN Department of Public Information (DPI) began to accredit nationally based NGOs, enabling the inclusion of more and different voices, including those from the global south. General Assembly Resolution 13 (I) established the DPI in 1946, to promote global awareness and understanding of the work of the United Nations. NGOs’ impact increased; the contribution of NGOs was recognized primarily in the body of human rights law and environmental law.

The UN Conference on the Human Environment, held in Stockholm in 1972, is often cited as a milestone in the history of NGO participation in international lawmaking. From that moment on, in many parts of the UN, be it in the General Assembly or in convening international conferences, NGOs were expressly appreciated as legitimate contributors to global governance, as ‘integral to the United Nations’. The General Assembly included NGOs in the work of its committees, primarily in the First Committee on disarmament and the Third Committee on human rights issues. In addition, the General Assembly adopted

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824 See Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. XVI, art 71: ‘The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.’
825 Alkoby 2003, p. 28.
826 Paul 2012, p. 64. See generally for information on Conference of NGOs in consultative relationship with the United Nations http://www.ngocongo.org/
827 DPI undertakes this goal through radio, television, print, the Internet, video-conferencing and other media tools. The DPI helps over 1,300 NGOs with strong information programmes on issues of concern to the United Nations to gain access and disseminate information about the UN http://outreach.un.org/ngorelations/about-us/(last visited January 2016).
828 See for further reading on NGOs and their activities in light of Human Rights; Glasius 2007; Welch jr. 2001; Dupuy and Vierucci 2008; Korey 1999. See for further reading on NGOs activities in light of environmental matters: Chayes and Chayes 1995, p. 250-70; Tarlock 1992; Alger 2002; Bowman 1999, p. 298; Community Development Foundation 1972. NGOs play a decisive role in stimulating environmental treaties. As Dunoff states, ‘(…) NGOs have been the driving force on a variety of issues, including the development and implementation of debt-for-nature swaps, the decision to ban international trade in ivory, the campaign to reform the environmental policies of the multilateral development banks, and resolution of the tuna-dolphin controversy’. Dunoff 1998, p. 455.
831 Willetts 2000, p. 196, referring to UNGA, Resolution 104 (S-I), A/RES/104(S-I), May 5, 1947 (Hearing for the Jewish Agency for Palestine), and UNGA, Resolution 105 (S-I), A/RES/105(S-I), May 7, 1947 (Hearing for the Arab Higher Committee), provided for ‘the First Committee to grant a hearing’ to the Jewish Agency for Palestine and the Arab Higher Committee, respectively. Willetts points to the fact that ‘[f]rom the original codification of the
a practice of organizing ‘interactive hearings’ with member states, NGOs, civil society organizations, and the private sector before major UN events.833 NGOs’ presence has been particularly evident in the specialized conferences, which increased in scope and number during the early 1990s. Examples are the UN Conference on Environment and Development in Rio de Janeiro in 1992 and the Fifth World Conference on Women in Beijing in 1995. Although NGOs have played an innovative and transformational role in international lawmaking practically from the start of international law development, in the last three decades the number of civil society organizations has increased at an unprecedented pace.834

However, sympathy for NGO participation in international lawmaking seems to have weakened in recent decades. Several developments are understood to have instigated a general reluctance of (international) governmental actors towards NGO participation in international lawmaking. First, one can note a tendency, which started around the turn of the twentieth century, to be more receptive towards corporate actors. In 2000, UN Secretary-General Annan presented the new ‘Global Compact’, a program that aims to facilitate the participation of corporations into the UN system, to attract their support, and to invite their cooperation to develop corporate social responsibility programs.835 This instigated the presentation of a new paradigm called the ‘multi stakeholder dialogue’ by the Cardoso Panel, appointed by Annan to reflect on the relations between the UN and NGOs.836 The Cardoso Report presented the UN as a forum for discussion instead of decision-making, offering opportunities for states, parliaments, and primarily the private sector to participate. This development is argued to be contrary to the interests of NGOs.837 Although sympathy for corporations has not necessarily come at the expense of sympathy for NGOs, these multinational corporate actors often have, due to their size and the impact of their decisions on society, a better bargaining position than many NGOs. Second, which became clear particularly after the attacks of September 11, 2001 and the consequential increased tensions in world politics,838 one can see a general inclination of states becoming less tolerant of civil society actors, and consequently seeking to retain a tight grip on UN

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833 International Law Association 2012, p. 12. However, NGOs do not possess official status with the General Assembly, and very few have observer status. Exceptions are sui generis entities, such as the Holy See, Sovereign Military Order of Malta, ICRC and International Federation of Red Cross and Red Crescent Societies. Woodward 2010, p. 20.
837 Paul 2012, p. 75.
838 See for an exploration and explanation of this new development: Howell, Ishkanian, Obadare, Seckinelgin, and Glasius 2008, p. 82-93. As also Paul confirms, from September 11 onwards, ‘[g]overnments adopted repressive and security-oriented tactics that set aside human rights protections and reflected a siege mentality’. Paul 2012, p. 77.
lawmaking processes. In response to the decrease in receptiveness towards NGO participation in international lawmaking, and in response to the World Economic Forum, held in Davos, a group of leading NGOs initiated the organization of an alternative forum for NGO gathering, the World Social Forum, where NGOs come together to formulate international policy from more social perspectives instead of the criticized neoliberal perspectives often acclaimed by dominating states.

4.3 Legal frameworks for NGO participation in international lawmaking

Due to the lack of formal international lawmaking powers, NGOs cannot affect, from a positivist point of view, the traditional premise that states retain the final word in international lawmaking. However, the many legal documents that regulate NGOs’ institutional participation have caused scholars, such as Lindblom, to consider that NGOs have ‘at least a legitimate expectation’ to a ‘general right to participate in international legal discourse’.

This section discusses the so-called political opportunity structure of NGOs in international lawmaking. It explains what legal and institutional means to participate in international lawmaking NGOs enjoy. The relevant legal rules on the participation of NGOs in policy-making and decision-making of international organizations can be divided into two categories. First, there are the rules that provide a legal basis for the participation of NGOs in international lawmaking in general. Second, there are the specific rules on the accreditation of NGOs by these organizations, i.e. the rules that ensure that only NGOs which ‘add value’ to the policy deliberation and decision-making processes ‘enjoy’ specific forms of participation and associated rights. Section 4.3.1 starts with the former category concerning legal status. It discusses the extent to which we can speak of NGOs’ status under international law. Next, section 4.3.2 assesses if, and to what extent, NGOs’ participation

839 Paul 2012, p. 65; Howell, Ishkanian, Obadare, Seckinelgin and Glasius 2008, p. 90: ‘The various anti-terror laws and anti-money laundering regulations that have been passed since 11 September have been intended to enhance national security and to provide greater oversight over funds collected and distributed by civil society organizations. The general querying of civil society and the passage of anti-terror legislation is creating a chill factor which leads to self-censorship among civil society organizations and greater conservatism, regulation, and oversight from donors.’


842 Lindblom 2005a, p. 526. Willets in this respect states that ‘the provisions of the NGO statute can now be regarded as part of customary international law’. Willets 2000, p. 205.

843 We understand, in line with Tarrow’s definition, a political opportunity structure to be a ‘consistent – but not necessarily formal or permanent – dimensions of the political struggle that encourage people to engage in contentious politics’. Tarrow 1998, p. 19-20. As Meyer states, ‘[t]he key recognition in the political opportunity perspective is that activists’ prospects for advancing particular claims, mobilizing supporters, and affecting influence are context-dependent’. Meyer 2004, p. 126.

844 The ILA committee on non-state actors (NSAs) distinguishes five different institutional expressions of participative actions related to NGOs: the acknowledgment of IOs of the possibility of interaction with non-state actors, the opportunities to share information, the intergovernmental conferences by non-state actors, formal participation in decision-making and drafting processes, the informal influence of non-state actors on lawmaking. International Law Association 2012, p. 7-19.

845 Van den Bossche 2007, p. 137.

846 The focus is not on NGO involvement in judicial proceedings, nor does this section look into the question to what specific types or sources of international law NGOs make contributions. Although not part of this study, we understand the standing of individuals and NGOs before judicial bodies as a possible instigation to judges to
in international lawmaking has resonance in official documents. It focuses on the consultative relationship between the UN and NGOs, characterized by its basis in Article 71 of the UN Charter and the ECOSOC rules on accreditation.

4.3.1 International legal personality?
The endeavor to understand the contribution of NGO participation to international legal processes would, from a legal perspective, logically start with a presentation of the rights and obligations of NGOs. Contemplating the question of whether NGOs have rights and obligations under international law leads us to the issue of international legal personality. International legal personality is a precondition for concluding treaties, the right to send and receive legations, and the right to bring claims.

Whether or not non-state actors have legal personality ‘depends on the international community’s recognition of the contracting parties as international legal subjects that carry out work of value to it and are capable of making arrangements governed by international law.’ The Vienna Convention on the Law of Treaties does not specifically refer to NGOs’ involvement. NGOs are ‘neither original nor “derivative” subjects of international law’. They are, according to Leroux, ‘foreigners’ in international law, ‘in the sense that they were created in the framework of another legal order’.

Under a restrictive conception of the subjects of international law, no international legal personality for NGOs is established. States decide whether or not, and to what extent, international legal personality will be conferred on other international actors. The ILA concluded in this respect that ‘while states have conferred “a large measure” of legal personality, or our preferred term, legal engagement in some sort of lawmaking. See D’Aspremont 2010, p. 179; See for an overview: International Law Association 2012; See also Hernández 2011; Acquaviva 2011, p. 186-203.; De Brabandere 2011; Lindblom 2005b, p. 300-366. The ILA committee on non-state actors takes up the question of NGOs contribution to specific sources of international law. See International Law Association 2010; International Law Association 2012. In the conventional scheme of sources listed in art. 38 Statute of the international Court of Justice the contribution of non-state actors is recognized with respect to the subsidiary sources of law: the writings of publicists. Boyle and Chinkin 2007, p. 41.

See Lindblom 2005a, for an extensive discussion on the legal arrangements for NGOs in international law and the last subsection of this introduction on methodology of this study.


The question whether or not NGOs enjoy legal personality and the importance of this question remains largely out of the scope and interest of American legal scholars. See Bachand 2011, p. 97-98. See for a plea for according legal personality to non-state actors: Zarei and Safari 2015, p. 233-253.

Under the classical, static view on international law, only states are considered to have the status of a ‘subject’ of international law in the legal sense. See for an elaboration on subject-based approaches to international law, D’Aspremont 2013, p. 13.
“status,” on IGOs and similar institutions, they have done so only sparingly in respect of NSAs’.\(^{855}\) It is interesting to note that in 1923 the Institut de Droit International prepared a draft treaty on the juridical status of NGOs. It defined associations as non-profit private groups having an international purpose and permitting membership from different countries.\(^{856}\) The draft treaty created an opportunity for central international registration of these associations, after which the NGO was to enjoy the rights of incorporation in any of the party states. At that time, and still today, no government has seized the opportunity to adhere to the convention.\(^{857}\) However, there seems to exist a certain consensus that bodies such as the International Committee of the Red Cross (ICRC) should be considered international persons, whether or not they conform to the criteria set out in the plethora of different scholarly definitions of international personality.\(^{858}\) Besides, the International Court of Justice commented in 1949 that ‘the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights and their nature depends upon the needs of the community’.\(^{859}\) Scholars, among others Willetts, argue that these changes in UN resolutions and UN practice ‘are so extensive that the international NGOs recognized by ECOSOC may be considered to have acquired a legal personality, transforming NGOs into [a] third category of subjects in international law, alongside states and intergovernmental organizations’.\(^{860}\)

Nowithstanding the academic debate on the international legal personality of NGOs and the mentioned effort of the Institut de Droit International in 1923, international efforts to protect NGOs’ legal personality focused exclusively on domestic law.\(^{861}\) In that respect, international rules aim to contribute to the ideal of a free civil society by obliging states to

\(^{855}\) NSA is the abbreviation for nonstate actor, which includes NGOs. See ILA report The Hague Conference 2010 referring to Alvarez 2005. Note that the term ‘a large measure’ used by the ICJ in Reparation is not entirely convincing and has been rightly criticised in literature. White 2005, p. 31-32; Rechenberg 1997. See for a dissenting opinion: Ben-Ari 2014, p. 13. Ben Ari states that “[t]he essence of “status” short of personality remains, however, peculiar and blurred”.

\(^{856}\) Institut de Droit International 1923, art 2, pp. 385-393.

\(^{857}\) Charnovitz 1996, p. 189. An exception to the lack of codification is the European Convention on the Recognition of the Legal Personality of International NGOs, April 24, 1986, CETS No. 124. Although this convention does codify NGOs legal personality, it is limited in scope. Staberock 2011, under 7, 8, and 9. See for a historical perspective on specifically the debate on international legal personality: Ben-Ari 2014.

\(^{858}\) This is the case at least in French legal scholarship, as Leroux points out. Leroux 2011, p. 87. A partial international legal personality is recognized with regard to the special status of the International Committee of the Red Cross. The ICRC is an example of an NGO who gained direct rights and obligations by the Geneva Conventions of 1949. The ICRC remains though formally a private association under Swiss law. See for further reading on the unique status of the ICRC, Gazzini 2009. Leroux questions however the insistence on the international legal personality of the ICRC, and states that it ‘derives less from the nature of rights it enjoys under the Geneva Conventions and more from the actual importance and aura surrounding the ICRC on the international stage’. Leroux 2011, p. 89. See also Zarei and Safari 2015, p. 234 referring to Nijman 2010, p. 5.

\(^{859}\) International Court of Justice, ICJ Rep. 178, April 11, 1949 (Reparation for Injuries Suffered in the Service of the United Nations). Klabbers argues that legal personality is ‘by no means a threshold which must be crossed before an entity can participate in international legal relations; instead, once an entity participates, it may be unsefully described as having a degree of international legal personality’. Klabbers 2005a, p. 58.


\(^{861}\) Although it has been debated by academics for long whether this system should be replaced by an international system of registration and control over NGOs, Ben-Ari argues that this has not been an attractive option, both from the vantage points of states (losing control) nor from the vantage point of NGOs (restricting the freedom of action they enjoy when controlled by national legislation). Ben-Ari 2014, p. 15. See also Staberock 2011, under 7, 8, and 9.
respect the free exercise of rights. For example, Articles 2, 14, 19, 21, 22, and 25 of the ICCPR protect access to remedies and access to information rights, freedom of association, assembly, and expression, as well as freedom of thought, conscience, and religion, and guarantee rights to participate in the public life of a state. In addition, the Declaration on the Right and Responsibility of Individuals Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms recognizes in international law the importance and legitimacy of human rights activity, and the need to protect it along with those who carry it out.

Although NGOs in general lack international legal personality and one could argue that, in that respect, they operate in a certain legal vacuum, international legal materials expressly discuss NGOs’ rights of participation in lawmaking in many instances. The relevance of NGOs for the international legal order is recognized in court rulings, resolutions, and other treaty provisions. Again, especially in the fields of human rights and the environment, NGOs are active participants and are recognized as such. Probably because of the consensus on NGOs’ lack of international legal personality to enter into legal arrangements, the scholarly debates concerning NGOs’ involvement in international lawmaking tend to focus on a broader concept of the ‘legal status’ of NGOs.

4.3.2 Consultative relationship between the UN and NGOs

The awarding by international organizations of consultative status to NGOs comes closest to the conferral of legal personality upon NGOs. NGOs’ consultative status refers to provisions and practices which explicitly take account of NGOs or which can be used by these

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862 At the time of writing, the issue of protecting the domestic legal framework of NGOs is pressing. Currently, Russia is further restricting opportunities for NGO to get funded by international actors. See generally Crotty, Hall, and Ljubownikow 2014, p. 1253-1269; International Center for Non-Profit Law 2009.
864 UNGA, Resolution 53/144, A/RES/53/144, March 8, 1999 (Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms). It aims to protect the right to be protected; the right to freedom of assembly, and of association; the right to develop and discuss new human rights ideas and to advocate for their acceptance; the right to criticise government bodies and agencies and to make proposals to improve their functioning; the right to provide legal assistance or other advice and assistance in defence of human rights; the right to unhindered access to and communication with non-governmental and intergovernmental organisations, and international bodies; the right to access resources for the purpose of protecting human rights, including the receipt of funds from abroad. See ‘Human Rights Defenders: Protecting the Right to Defend Human Rights’, Fact Sheet No. 29, Office of the United Nations High Commissioner for Human Rights. http://www.ohchr.org/Documents/Publications/FactSheet29en.pdf (last visited January 2016)
866 See for further reading on Human Rights and NGOs, Welch Jr 2001; Dupuy and Vierucci 2008; Korey, 1999. See for further reading on environmental law and NGO involvement; Raustiala 1997a; Raustiala 1997b; Bernstein 2004, p. 148-51; Spiro 2007; Charnovitz 1997, p. 183. Although international environmental law is often mentioned as the school example of NGO involvement, one should not forget that NGO input remains merely consultative, and some more recent environmental organizations have abandoned expanded participation, challenging the leading accounts of civil society’s role. Abbott and Gartner 2012, p. 3.
867 Ben-Ari 2014, p. 13. As Ben-Ari states, ‘some claim that if an NGO is granted consultative status by an IGO, it simultaneously acquires “a certain international legal status, albeit not that of an subject of international law”, referring to Rechenberg 1997, p. 617.
organizations to act in the international legal context. Any conferral of consultative status belongs to the internal law of international organizations, and its reach is therefore limited to the international organization that has awarded it.

As mentioned in the introduction, different international legal regimes have developed different legal frameworks for NGO participation. In particular the UN, the EU, and the World Health Organization (WHO) have developed well-defined and elaborate substantive accreditation rules for NGOs. This section primarily focuses on the UN system. As discussed in section 4.2, the UN has a rich tradition of bringing together non-governmental actors and governments. From the perspective of the NGO, the choice of the UN as ‘venue’ is not surprising. The UN offers, by comparison, a considerably welcoming political opportunity for NGO participation. In light of its decentralized structure, the UN offers NGOs many access points and thus a viable alternative to domestic policy arenas. The principal entry point for NGOs involved in economic and social development is consultative status with the UN Economic and Social Council.

Article 71

Article 71 is the only formal reference in the UN Charter to NGOs. Article 71 allows ECOSOC to ‘make suitable arrangements for consultation with Non-Governmental Organizations which are concerned with matters within its competence’. With the incorporation of Article 71, the drafters standardized the arrangements that had been used by the League of Nations for a considerable time. Not everyone viewed Article 71 as beneficial for NGOs. Although most of the NGO participation under the League had occurred with regard to economic or social issues, there had also been involvement by NGOs in mandates and disarmament issues. However, Article 71 did not go beyond ECOSOC. Indeed, Pickard viewed Article 71 as a ‘so-far-and-no-further obstacle to any continuance of the pragmatic but close IO-NGO

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868 The sources used in these legal surveys have primarily the status of resolutions and policy documents. The legal status of these documents have been often topic of disagreement, and subjected to the discussion about soft and hard law. See for literature suggestions for further reading on soft law, Chapter 3, section 3.3.
869 Kammenga 2007, p. 184; See also Vabulas 2013, p. 191-192.
870 Collins 2011, p. 312. In line with the ILA committee on NSAs, we use the notion of participation, which is not a legal notion. International Law Association 2012, p. 2-3. According to the ILA, participation ‘denotes a dynamic of actors (in our case non-state actors) taking part in deliberative processes, and in so doing possibly influencing the formation of international rules’. The ILA refers to the works of the ‘New Haven School’. See e.g., McDougal 1952, p. 133; Lasswell and McDougal 1992. Authors who do not necessarily share all the opinions of the New Haven School, but nevertheless continue to emphasize a process-based, dynamic conception of international law now also use the term participation. See e.g., Higgins 1994; D’Aspremont 2011a, p. 2-3. See also Ben-Ari 2014, p. 60.
871 See Martens 2005 for an exploration of the relationship between NGOs and the UN.
872 From the early 1980s the Council of Europe became involved in the considerations of NGOs legal status, which turned the discussion on the legal status of NGOs into a regional matter leading to the European Convention on the Recognition of the Legal Personality of International NGOs, April 24, 1986, CETS No. 124. Its de facto juridical value is limited, but the convention gives relevant insights in the attempt to regulate international NGOs. See Ben-Ari 2014, p. 25-31.
873 Baumgartner and Jones 1991, p. 1050.
874 The working relationship of NGOs with the UN is more institutionalized than for example the relationship of NGOs with the WTO and the WB. Ahmed 2010-2011, p. 839.
partnership developed under the League. In 1950, Article 71 called for an accredited NGO to 'represent a substantial proportion of the organized persons within the particular field in which it operates'. The failure of the UN Charter to outline a significant international role for the NGO community has been seen by several scholars as 'a consequence of its liberal-realist pact'. Otto argues that the scheme of Article 71 constructs the main identification of individuals as associated with their membership in a national polity, as opposed to a membership in international polity. Article 71 nevertheless forms the legal basis of NGO participation in UN lawmaking procedures that is further elaborated in the ECOSOC consultative arrangements.

ECOSOC rules
ECOSOC Resolution 1996/31 formally governs the consultative relationship of NGOs with the UN and its subsidiary bodies, such as the UN substantive commissions on Human Rights, on the Status of Women, on Sustainable Development, and on Science and Technology for Development, among others. ECOSOC accreditation is the only official route to gaining access to UN deliberations. Resolution 1996/31 allows NGOs with consultative status access to public meetings. It is important to note that this status does not provide an opportunity for NGOs to be part of the informal meetings that are organized before, during, or after public meetings.

Resolution 1996/31 outlines the eligibility requirements for consultative status, the rights and obligations of NGOs with consultative status, procedures for withdrawal or suspension of consultative status, the role and functions of the ECOSOC Committee on NGOs, and the responsibilities of the UN Secretariat in supporting the consultative relationship. Resolution 1996/31 is the product of two earlier versions of 1950 and 1968. Since 1950 there had not been major changes in the text. However, the review of 1996 has had some consequences.

Resolution 1996/31 officially recognizes the right of NGOs to participate in UN General Assembly sessions. Furthermore, it also allows national NGOs to apply for special status or a place on the roster. Four issues guided the review of the consultative status of NGOs: concerns about the Western domination of NGOs, the extent of government influence on NGO activities, the expanding number of NGOs, and their persistent criticisms of governments violating human rights. In the hope of overcoming these concerns, new provisions enabling the suspension or withdrawal of consultative status were added into the previous arrangements. Additionally, strict financial procedures were set out, requiring

878 Charter of the United Nations, Chapter X, art 71: 'The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.' See Willetts 2001.
879 Otto 1996a, p. 129.
880 This considerably obstructs the opportunities for NGOs to influence international lawmaker, as much of the diplomatic negotiations on future policies and laws take place exactly during these secluded informal meetings. Van den Bossche 2007, p. 140.
882 Willetts 2000, p. 192.
883 Paul 2012, p. 63-64.
NGOs to declare the sources of their funds and fully account for any financial or other support received by governments.885

Resolution 1996/31 sets out some general requirements for consultative relationships between the UN and NGOs. The organization must not have been established by intergovernmental agreement. The aims and purposes of the NGO must be in conformity with the spirit, purposes, and principles of the UN Charter (para. 2). The NGO must also have recognized standing within its field of competence (para. 9). Besides the requirement to have an established headquarters with an executive officer and a democratically adopted constitution (para. 10), the NGO must have the authority to speak for its members (para. 11) and a representative and accountable inner structure (para. 12). The basic resources of an NGO must be derived from either national affiliates or from individual members (para. 13). As explicitly stated:

‘decisions regarding arrangements for consultation should be guided by the principle that they are made, on the one hand for the purpose of enabling the Council or one of its subsidiary bodies to secure expert information or advise from NGOs having special competence in the relevant subjects, and on the other hand, to enable international, regional, sub-regional and national NGOs that represent important elements of public opinion to express their views’.886

ECOSOC distinguishes three categories for NGO status. ‘General Status’ is allocated to NGOs that are concerned with most of ECOSOC’s activities. They must show their sustained contributions to the achievements of UN objectives and be broadly representative of major segments of the population in a large number of countries.887 ‘Special Status’ is reserved for NGOs that are concerned with a few fields covered by ECOSOC and that are recognized internationally within these fields.888 The third category, ‘Roster Status’, is for NGOs of which ECOSOC, or its NGO Committee, believes it can contribute constructively to UN bodies, but only on an irregular basis.889

The ECOSOC rules, which are often considered as a model for the NGO accreditation procedure, explicitly require that there is congruence between the contribution of the NGO and the objectives of the UN.890 Another crucial feature is that the accreditation procedures deny voting rights to NGOs.891 Accreditation entails only a conditional allowance for the accredited NGOs to be invited. Whenever they wish, states can convene in private and informal sessions apart from NGOs.892 In addition, if a specified number of states objects to the participation of a certain NGO, its admission can be withdrawn. Since the adoption of the first set of formal rules on NGOs’ participation in 1946, the tasks of considering

886 ECOSOC, Resolution 1996/31, para. 20.
887 ECOSOC, Resolution 1996/31, para. 22.
888 ECOSOC, Resolution 1996/31, para. 23.
890 ECOSOC, Resolution 1996/31, para. 2.
891 Exceptions are ISO, and ILO. See for an example of a lawmaking conference the ICC rules of the Assembly of the State Parties, rules 93 and 95.
892 Raustiala argues that one should keep in mind that ‘NGOs often serve the interests of government is one reason -and I would argue the most important one - that NGOs have become so pervasive in contemporary treaty processes’. Raustiala 2011, p. 164.
applications from NGOs, supervising their activity, and proposing the adoptions of the consequential measures to the ECOSOC have been entrusted to a specific committee on NGOs, composed of nineteen states. Given its composition, it is not surprising that in a number of cases the Committee has appeared to be led more by political than technical considerations. Proposals for the denial or withdrawal of the status to a given NGO have been advanced by the states directly affected by the NGO’s activity.893 In practice, the need for governmental backing for NGOs to influence agenda setting and norm-making effectively sets limits on NGOs’ independence.894 In many situations the political effect of an NGO is individually moderated. The ECOSOC rules clearly state that ‘[t]he arrangements should not be such as to overburden the Council or transform it from a body for coordination of policy and action, as contemplated in the Charter, into a general forum for discussion’.895

The relationship between NGOs and other UN agencies
As stated, the ECOSOC rules only cover procedures for participation by NGOs in the ECOSOC and at UN conferences. Other parts of the UN system are the subject of separate procedures.896 In line with the ECOSOC rules, many subsidiary bodies and a number of specialized agencies of the UN, such as the UN Children’s Fund (UNICEF), have established consultative relations with NGOs.897 For example, the UN Peacebuilding Commission (UNPBC), a subsidiary advisory body of both the Security Council and the General Assembly, has devised consultative arrangements with both profit- and non-profit-making ‘civil society’ entities.898 These UN agencies, programs, funds, and other bodies operate on the basis of their own accreditation programs in cooperation with the General Assembly.899 Also in these specialized UN agencies, the international institutional possibilities for NGOs to influence international lawmaking are restricted. NGOs cannot enforce any participation rights in decision-making. NGOs cannot vote. If they have any at all, NGOs have a limited ‘voice’, as their contribution in most cases is not allowed to exceed two pages of text.900

Without going into the details of the different procedures of all UN agencies, it suffices to say that most of them know a constituent document that explicitly provides a legal basis

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894 Joachim 2003, p. 259.
895 ECOSOC, Resolution 1996/31, para. 19.
896 Art. 71 does not apply to other UN organizations or specialized agencies than ECOSOC, but it serves nevertheless as an illustrative model. See Willetts 2000, p. 198.
899 Woodward 2010, p. 17.
900 ECOSOC, Resolution 1996/31, principle 30 and 31, (d) ‘A written statement submitted by an organization in general consultative status will be circulated in full if it does not exceed 2,000 words. Where a statement is in excess of 2,000 words, the organizations shall submit a summary, which will be circulated or shall supply sufficient copies of the full text in the working languages for distribution. A statement will also be circulated in full, however, upon a specific request of the Council or its Committee on Non-Governmental Organizations’, (e) ‘A written statement submitted by an organization in special consultative status or on the Roster will be circulated in full if it does not exceed 500 words. Where a statement is in excess of 500 words, the organization shall submit a summary, which will be circulated; such statements will be circulated in full, however, upon a specific request of the Council or its Committee on Non-Governmental Organizations’.
for NGO participation in the policy deliberation and decision-making processes. In some cases these organizations expand their constituent documents with a specific guideline for NGO participation. The UN Educational, Scientific and Cultural Organization (UNESCO), for example, has paid particular attention to the statutory framework for integrating non-governmental agencies into the UNESCO system since 1995, when new directives concerning UNESCO’s partnership with NGOs were introduced.\(^{901}\) The UN Environmental Program (UNEP), created by the UN General Assembly, has an inclusive system of decision-making by networks from the local level to the global. It uses its policy-making mandate to review and coordinate environmental issues to create ‘soft’ law.\(^ {902}\) Two other UN institutions with joint state and non-state actor decision-making are the UN Permanent Forum on Indigenous Issues (UNPFII) and the UN Programme on HIV/AIDS (UNAIDS).\(^ {903}\) In 2000, ECOSOC established the UNPFII, a subsidiary advisory body to give indigenous peoples a greater voice within the UN system.\(^ {904}\) For the first time, a formal advisory role was attributed to a specific sector of civil society, consisting of indigenous peoples’ organizations, national human rights institutions, and academic institutions, on an equal footing with governmental experts.\(^ {905}\) UNAIDS functions as an inter-agency body that was set up to oversee all AIDS activities in the UN system, with five NGOs being ‘invited to take part in the work of the Programma Coordinating Boards’.\(^ {906}\) A UN inter-agency program, the UN Non-Governmental Liaison Service (NGLS), is responsible for disseminating information on UN policies, concerns, and activities to NGOs.\(^ {907}\)

### 4.3.3 NGOs’ participation in UN conferences

Arguably the most far-reaching component of the UN-NGO relationship is the possibility for NGOs to participate in intergovernmental conferences. Apart from the opportunities for NGOs with ECOSOC consultative status to attend UN conferences,\(^ {908}\) NGOs can gain access through the Secretariat by application for accreditation to a conference, summit, or other UN-organized event.\(^ {909}\) Before 1970, the ECOSOC arrangements were considered to be the primary entrance point for NGOs. Only NGOs that were invited by the Secretariat were

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902 UNGA, Resolution 2997(XXVII), A/RES/2997(XXVII), Dec. 15, 1972 (Institutional and financial arrangements for international environmental co-operation). The UNGA resolution granting its mandate constitutes an implicit legal basis for involving NGOs in its activities.

903 International Law Association 2012, p. 17.


908 See Ben-Ari 2013, para. 1.5. See ECOSOC, Resolution 1996/31, art. 42: “Non-governmental organizations in general consultative status, special consultative status and on the Roster, that express their wish to attend the relevant international conferences convened by the United Nations and the meetings of the preparatory bodies of the said conferences shall as a rule be accredited for participation. Other non-governmental organizations wishing to be accredited may apply to the secretariat of the conference for this purpose.”

allowed to apply for attendance at UN conferences. However, since the mid-1980s, NGOs have enjoyed increasingly more opportunities to influence lawmaking at conferences than by accreditation based on ECOSOC. Since then, all NGOs recognized by ECOSOC have had an automatic right to register, and other interested NGOs have also been able to apply.910

One of the highest peaks of NGO participation was the open accreditation process of the 1992 UN Conference on Environment and Development (UNCED), which formally recognized the participation of some 1,500 NGOs.911 The resulting Rio Declaration and Agenda 21, containing a plan for sustainable development, spelled out a continuing significant role for NGOs, whether they are regional, national, local, or specialized.912 This is most clearly seen in the work of the Commission on Sustainable Development, under the support of ECOSOC, in promoting Agenda 21.913 As a result of the Rio process and its aftermath, the international community has seemed to take a more inclusive approach to the involvement of civil society in developing and implementing international environmental law.914

Agenda 21 notes that one of the fundamental preconditions for the achievement of sustainable development is broad public participation in decision-making.915 In the European Commission’s report Agenda 21 – The First Five Years: Implementation of Agenda 21 in the European Community,916 produced for the UN General Assembly Special Session, and in the Overall Review and Appraisal of the Implementation of Agenda 21 in 1997,917 a crucial role was envisaged for NGOs. The Commission’s goal was to ‘[s]trengthen and deepen cooperation at all levels of government and society so that Agenda 21 can be fully implemented within our lifetime’.918 To assist this, the European Commission advocated the strengthening of the participation of groups that are affected by policies and projects in light of Agenda 21.919 The UN Conference on Environment and Development (UNCED) also gave a prominent role to NGOs and other key actors of broader civil society in the guise of ‘major

913 The CSD was established by a resolution of the UN General Assembly, in response to a request by the UNCED. UNGA, Resolution 47/191, A/RES/47/191, Jan. 29, 1993 (Institutional arrangements to follow up the United Nations Conference on Environment and Development). It is tasked with progressing sustainable development, adding flesh to the bones of Agenda 21 and is made up of fifty-three government representatives elected by ECOSOC.
914 As Willetts states: ‘After the first of these, the Earth Summit in Rio de Janeiro, there was a widespread feeling in the environmental movement that the ECOSOC procedures were bureaucratic, the idea of consultative status was patronizing, and the established NGOs were unrepresentative of grassroots popular opinion’. Willetts 2000, p. 194-195. The suggestions of NGOs for the draft Habitat Agenda was interpreted as the first official recognition of NGOs contributions to a negotiating process. Willetts refers to Connections, Newsletter of the U.N Environment and Development U.K. Committee, August-October 1996, for a brief assessment by Felix Dodds of his participation in Habitat II; UN Doc. A/CONF.65/INF.8 for the NGO composite tekst.
groups[^920] in its proposal for sustainable development. The UN General Assembly passed a resolution recognizing and encouraging their efforts.[^921]

Since UNCED, recognition of the need for NGO participation in global, as well as national affairs has been consistently reaffirmed by subsequent UN World Conferences. Willets mentions in this respect Habitat II, where NGOs were allowed to sit with governments and table amendments to the texts, even leading to the constitution of Committee II, where representatives of local authorities, businesses, foundations, NGOs, academics, parliamentarians, and UN secretariats gave presentations, which were considered an integral part of the official proceedings.[^922] In order to prepare for major conferences, international ‘Preparatory Committees’ were established that generally met several times during the three years before a global conference took place. These Preparatory Committees offered an open process that enabled NGOs to contribute actively in the formation of conference results.[^923]

With reference to the participation of NGOs in international organization conferences, the 1995 Fourth World Conference on Women (FWCW) is often cited as one of the largest UN conferences. In addition to the 400 participating NGOs with accreditation, there were almost 2,500 other NGOs accredited to the conference. The conference resulted in the Declaration and Platform for Action, in which the participation of women’s groups, networks, and NGOs is identified as critical to the implementation of the conference’s commitments.[^924] The Secretary-General’s approach to the review was absolute concerning the importance of placing it in the broad context of the developing relationship between the UN system and civil society. The Secretary-General suggested that the main purpose of the review was to ‘ensure an environment that encourages a strengthened relationship between the UN and institutions of civil society and promotes principles that support civil contributions to global governance’.[^925]

Notwithstanding the lack of explicit conferral of authority to convene conferences, the UN General Assembly (UNGA) has also organized many conferences.[^926] The UNGA-initiated conferences and Special Sessions have informally extended the processes and practices of ECOSOC-initiated conferences by permitting participation by NGOs pursuant to the ECOSOC legislation.[^927] Although only by invitation, it is common practice for NGOs to take part in its Special Sessions, particularly when undertaking review of a major conference (the so-called ‘Plus 5’, ‘Plus 10’ etc sessions).[^928]

[^920]: According to section 3 of Agenda 21, major groups comprise: women, children, and youth, indigenous people, NGOs, workers and trade unions, business and industry, the scientific and technological community, farmers and local authorities. See United Nations 1993.

[^921]: UNGA, Resolution 50/113, A/RES/50/113, Feb. 16, 1996 (Special session for the purpose of an overall review and appraisal of the implementation of Agenda 21).


[^923]: Paul 2012, p. 66.

[^924]: Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing Declaration and Platform for Action 20. NGOs are identified throughout the Platform for Action as playing a role in achieving the strategic objectives identified. para 62. See for a study on the role of the women’s movement in the development of international law: Chinkin 2001.


However, as indicated in section 4.2, at the beginning of the twenty-first century the receptive climate towards NGO involvement changed. The tradition of organizing major world conferences ended in around 2002.929 UN conferences would be more irregular, less ambitious, and the tradition of preparatory commissions would be marginalized. Instead of offering NGOs a forum for participation, NGOs’ influence was curbed.930

4.3.4 NGOs’ status in other international organizations
While there is no general right to observer status, and some treaties continue to exclude NGOs, many agreements now presume admission of NGOs to international lawmaking.931 Besides UN specialized agencies and ECOSOC, the Council of Europe, the Organization of American States, and other international organizations have developed accreditation rules for NGOs to be able to get involved. In most cases there is a specific treaty entitlement that lays down the legal constructions and opportunities for NGOs to participate. Where NGOs were active participants in the treaty negotiations, they are likely to have sought provision for their own inclusion in subsequent processes, as was the case with Article 71 of the UN Charter. However, even without treaty provisions, there is undeniably a growing practice towards, and growing expectation of, NGO participation.932 The more frequent the presence of NGOs, and the larger their numbers at multilateral lawmaking processes, the more scholars are concerned with the question of whether these practices lead to ‘a right to participation’ for NGOs.933

Some international lawmaking arenas offer opportunities for joint decision-making by public and private actors. The most cited cases in this respect are the International Labour Organization (ILO) and the World Commission on Dams. The ILO takes a special position towards non-state actors. At the ILO, NGOs, representing workers and employers, enjoy an equal status with governments, including voting rights. Employers’ and workers’ associations are considered constitutional partners. Although states sign and ratify the resulting agreements, NGOs are integrated into the decision-making structure through the ILO Governing Body and the International Labour Conference.934

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929 The last major conferences that took place in 2002 were the Financing for Development Summit in Monterrey, 2002, the second World Summit on Aging in Madrid, 2002, and the World Summit on Sustainable Development in Johannesburg, 2002.
930 Paul 2012, p. 70. Also Willetts indicates that in relation to the discussions about NGO participation in sessions of the General Assembly around the end of 1998, ‘it appeared as if the long campaign for a permanent NGO presence in the General Assembly had lost all its momentum’. Willetts 2000, p. 203.
931 See 1973 CITES Convention, article 11 (7) and the Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, U.N.T.S. no. 26164, article 6 (5) are the two principle provisions and are repeated in many later treaties. Raustiala states that ‘[a]ny contemporary UN-sponsored treaty negotiation or conference routinely includes a sizable, sometimes enormous, NGO component’. Raustiala 2011, p. 156.
932 Boyle and Chinkin 2007, p. 55. See 1973 CITES Convention, article 11 (7) and the Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, U.N.T.S. no. 26164, article 6 (5) are the two principle provisions and are repeated in many later treaties. Raustiala states that ‘[a]ny contemporary UN-sponsored treaty negotiation or conference routinely includes a sizable, sometimes enormous, NGO component’. Raustiala 2011, p. 156.
933 Boyle and Chinkin 2007, p. 57.
934 Arts. 3 and 7, Constitution of the International Labour Organization, April 1, 1919. Each Member State has 2 non-governmental delegates representing the “employers and the workpeople of each of the Members”. (Ibid., art. 3(3)) States’ members are obligated to nominate non-governmental delegates and advisers chosen in agreement with the most representative industrial organizations (Ibid., art. 3(5)). Each delegate is entitled to vote (Ibid., art. 4(1)); there must be non-governmental delegates on the Governing Body, 14 representing employers and 14 representing workers (Ibid., art. 7(1)).
Dams is one of the rare examples in which states, the World Bank, multi-national enterprises, and NGOs were considered to be negotiating partners with equal status and voting rights. This practice is in sharp contrast to, for example, the restricted approach towards NGOs of the World Bank and the IMF. They have no or very basic accreditation rules and no formally established procedures of accreditation. The procedures for NGO involvement and accreditation of NGOs vary among international organizations. Most interaction between international lawmakers and NGOs is limited to sharing information. Comparable to the UN and its specialized agencies, programs, and most funds, many international organizations, such as the WTO, the International Atomic Energy Agency (IAEA), and the International Sea-Bed Authority (ISA), have established arrangements for sharing information with NGOs.

Also, regional organizations such as the African Union, the African Commission on Human and Peoples’ Rights, the Association of Southern Asian Nations, the EU, and the Council of Europe have arranged possibilities for NGOs to become involved in deliberation. In comparison with the UN, the case of the EU is especially interesting as it treats the role of NGOs in legal issues more extensively. The most far-reaching regional legal document with regard to NGO participation in international lawmaking is the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters. This convention entitles a ‘qualified’ NGO to participate as an

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935 Woodward 2010, p. 29. Woodward mentions a couple of these upcoming partnerships in which co-regulation is applied: The Kimberley Process Certification Scheme to stem the flow of conflict diamonds, Voluntary Principles on Security and Human Rights, and the Extractive Industry Transparency Initiative (EITI).
940 Charter of the Association of Southeast Asian Nations, Nov. 20, 2007, annex 2, has listed various types of non-state actors it engages with. See ASEAN, April 3, 2006, Jakarta ASEAN Secretariat (Guidelines on ASEAN’s relations with Civil Society Organizations). See Collins 2008, p. 313-331; Hsien-Li 2011.
942 The convention is adopted 25 June 1998 in the Danish city Århus and entered into force on 30 October 2003. The European Community signed the Convention and, since its coming into force, has had to adjust European Union law to comply with its three pillars of principles. The access to environmental information pillar of the Convention was addressed in CoU and EP Directive 2003/4/EC, O.J. (L41/26), Jan. 28, 2003 (on public access to environmental information and repealing Council Directive 90/313/EEC). This directive states that the public should be provided with wider and easier access to environmental information. For example, local authorities will be required to respond to requests from the public for information within two months and will also be required to make information available in a wider range of formats. The access to justice in environmental matters pillar has been addressed through a proposal for a directive. This will provide the right to recourse to administrative or judicial procedures to dispute acts and omissions violating the provisions of environmental law. EP and CoU proposal for directive, COM/2003/0624 final - COD 2003/0246, Oct. 24, 2003. (Proposal for a directive of the European Parliament and of the Council on access to justice in environmental matters). The third pillar of the Convention, that relating to public participation, was addressed in CoU and EP Directive 2003/35/EC, O.J. (L156/17), May 26, 2003 (proposing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC). This Directive seeks to strengthen the public participation.
observer at a meeting of the parties. The Aarhus Convention imposes on parties and public authorities obligations regarding access to information and public participation and access to justice both at the national and regional level. The motivation for this receptive legal framework is that sustainable development can be achieved only through the participation of all stakeholders. The participation of NGOs, however, can also be blocked by an objection based on at least one-third of the parties present.

The Council of Europe has developed ‘The Participatory Status for International Non-Governmental Organizations’, adopted in 2003 by the Committee of Ministers at the 861st Meeting of Ministers’ Deputies. Also, the Council of Europe has enacted the Fundamental Principles on the Status of NGOs in Europe. Member states are not legally bound by the Fundamental Principles. They only ‘recommend the implementation of a number of principles which should shape relevant legislation and practice’. The rules were adopted after a long period of consideration, and were supported by almost fifty states. It is interesting to note that the Fundamental Principles state with regard to NGOs’ internal structure, contrary to the requirements set by ECOSOC, that this is ‘entirely a matter for the NGO itself’. There is no requirement of internal democracy and NGOs do not need to be membership-based.

4.4 Informal recognition of NGO participation in international lawmaking

In the light of the practice reported in the previous sections, it seems reasonable to claim that that NGOs’ formal opportunities to participate are rather limited, especially in terms of their procedural rights. That being said, formal participatory rights are not the end of the story. According to some NGOs, formal accreditation means in practice that NGOs are provided with permanent or temporary badges that allow access to open meetings and, in particular, to corridors and other informal venues. These ‘informal’ privileges are seen as important tools for advocacy and public relations with governmental delegates and international organization officials, which can lead to effective change in international law.

provisions of both the EIA and the integrated pollution prevention and control (IPPC) systems in the European Member States and requires the laws and administrative provisions necessary to comply with this Directive to be implemented by 25 June 2005. See for further reading: Davies 2002; Lindblom 2005a; Hartley and Wood 2005.


See for further reading on EU regulation concerning NGOs EU regulation: Breen 2011, p. 947-991.

See Rebasti 2008.
In this section, light is shed on the informal recognition by states and international organizations of NGOs’ de facto participation in international lawmaking.

From the Stockholm Conference in 1972 onwards, participation of NGOs in international lawmaking has become common practice. The politically receptive climate of international organizations triggered social movements that transformed into well-organized international non-governmental organizations. A large part of their cross-border activities remained focused on the development and promotion of international human rights norms. This practice fuelled the debate on the ability and the right of non-state actors to make and re-make the content of international law. More and more international organizations came to consider the involvement of civil society actors as recommendable, and expressed the intention to organize ‘inclusive’ lawmaking processes. In 1998, for example, UN Secretary-General Kofi Annan, speaking at the commemoration of the Universal Declaration of Human Rights, explicitly stressed the impact of NGOs on the UN. Even in the context of the Security Council, which can be considered as one of the least inclusive organs of the UN, NGOs partake in specific gatherings. For a long time, any involvement of NGOs in the work of the Security Council was considered unthinkable. However, in 1992 the Venezuelan Ambassador Arria initiated a reform of these exclusive practices of the Security Council. The ‘Arria-formula meetings’, which established an informal practice to engage NGOs in meetings, were not laid down in the UN Charter or the Security Council’s provisional rules of procedure. When Security Council members consider it beneficial for their work to have an exchange of views with civil society actors, one or more of its members have the possibility to invite them. The other Security Council members maintain the right to block such an invitation.

State officials started to deliberately invite NGOs, arguing that they play an important role in representing aspects of global public opinion, which could be seen as a reaction to the increasingly critical views on the internal legitimacy of international organizations. For example, in the view of the government of the United Kingdom, NGOs ‘represent large segments of public opinion throughout the world’. The government of the Federal Republic of Germany commented that NGOs ‘can be regarded as a kind of spokesman [sic] for those who, due to political situations, cannot raise their voice in the UN’. Axworthy, the former Minister of Foreign Affairs of Canada, stated that ‘one can no longer relegate NGOs to simple advisory or advocacy roles in this process. They are now part of the way

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954 Harding and Lim 1999, p. 2.
956 Annan 1998: ‘Before the founding of the United Nations, NGOs led the charge in the adoption of some of the Declaration’s forerunners. The Geneva Convention of 1864, multilateral labour conventions adopted in 1906, and the International Slavery Convention of 1926; all stemmed from the work of NGOs who infused the international community with a spirit of reform.’
957 See generally, Paul 2004.
958 Under Article 30 of the Charter, however, the Council is the master of its own procedure and has the latitude to determine its own practices. See Security Council of the United Nations 2002.
959 Staberock 2011, under 14.
960 See chapter 3, section 3.4.
962 See Pei-Heng 1981.
decisions have to be made. They have been the voice saying that government belongs to the people, and must respond to the people’s hopes, demands and ideals’.963

International organizations began to become conscious of the fact that they make laws that impose burdens on states as well as on non-state actors, and that the absence of non-state actors from the formative process of law could lead to a legitimacy deficit.964 The World Bank, for example, increasingly recognized that ‘NGOs and civic movements are on the rise, assuming an ever-larger role in articulating people’s aspirations and pressuring governments to respond’.965 In the European Union’s Commission’s White Paper on Governance,966 the EU emphasized that it is important for the legitimacy of the policy (process), to ‘ensure wide participation throughout the policy chain - from conception to implementation’, to give opportunities for NGOs to give input into policy-making. 967 In addition, influential international media, such as The Economist,968 supported the influence of global civil society actors, especially in light of its successful campaign to find sufficient support for a ban on land mines, which preceded the Land Mine Convention of 1997.969

In 2003, Cardoso established a panel of eminent persons to review the relationship between the United Nations and civil society, resulting in a report that came out in 2004. This report stated that global governance ‘is no longer the sole domain of Governments’ and the ‘influence of non-State actors is enhancing democracy and reshaping multilateralism’ 970 As mentioned in the introduction, the Panel of Eminent Persons on UN-Civil Society Relations, the UN Secretary-General, and the UN General Assembly all supported increased access for NGOs to the UN and its agencies and their greater participation in international lawmaking.971 This statement was underlined by the report ‘We the Peoples: Civil Society; the United Nations and Global Governance’.972 The Commission on Global Governance actively advocated NGO involvement: ‘[I]n their wide variety they bring expertise, commitment, and grassroots perceptions that should be mobilized in the interests of better

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963 Anderson 2000, p. 111, referring to Axworthy, ‘Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs to the Oslo NGO forum on Banning Anti-Personnel Landmines, DFAIT (Canada) Statement, Oslo 10 September 1997.

964 Ryngaert 2010, p. 12. In 2001, a liability convention was negotiated and adopted by the IMO. An inclusive and comprehensive approach to technical matters of all kinds affecting international shipping and related legal matters is made an important pillar of IMO. The Convention covers an Organization Strategic Plan 2008-2013, in which was stated that the IMO should actively engage the various stakeholders in the shipping field, including NGOs. Under the heading ‘enhancing the status and effectiveness of IMO’ IMO Assembly, Resolution A. 989(25) (Agenda item 7a)), Nov. 20, 2007 (Strategic plan for the organization (for the six-year period 2008-2013)).


968 The Economist, Curbing horror, Efforts to rid the world of landmines are just beginning to pay off. http://www.economist.com/node/800849.


governance.’973 The UNCED Secretary-General Maurice Strong argued that NGOs could ‘enrich and enhance the deliberations of the conference and its preparatory process’.974 He called for ‘a concerted attempt to enlarge the constituency of the concerned’ and said that NGOs provide a ‘direct linkage (...) with citizens and with the whole deeper, longer-term task of creating more public awareness’. NGOs are supposed to function as representatives, because NGOs ‘bring to the United Nations the views of people and groups throughout the world’.975 Former UN Secretary-General Annan stated that the UN ‘derives its mandate to work with civil society from the Charter itself and its opening words “we the peoples”’.976 According to Annan, ‘a partnership with civil society is not an option, it is a necessity’.977 Former UN Secretary-General Boutros Boutros-Ghali similarly told a conference of NGOs that they were ‘a basic form of popular representation in the present-day world’, and consequently that ‘[t]heir participation in international relations is, in a way, a guarantee of the political legitimacy of those international organizations’.978 These quotes show in the first place the basic trust that international governmental institutions have in the merits of taking NGOs on board. But even more so, they appear to show the need for international governmental agencies to render proof of their democratic legitimacy.

This is obviously understood as a plea by governmental actors for more cooperation with NGOs. Various rationales seem to instigate support for the participation of NGOs in international lawmaking processes. The Background Paper for the Cardoso Report stated, for example, that participation of NGOs in policy- and lawmaking processes of international organizations enhances the quality of decision-making. Other advantages mentioned are the increased sense of ownership towards the result and the enhanced accountability and transparency of the policy- and lawmaking processes. NGO involvement also brings in a variety of views and experiences.979 NGOs are invited to pluralize voices, lawmakers aim at achieving a a ‘just, balanced, effective and genuine involvement of non-governmental organizations from all regions and areas of the world’.980 In a survey carried out by Collingwood and Logister, members of NGOs stated that ‘because we work with parliamentarians and trade unions that have huge memberships, we are reinforcing the quality of the representative system.’ 981 Besides an increase in the legitimacy of international organizations,982 partnerships seem to confer a new kind of legitimacy on NGOs themselves.983

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974 Susskind 1994, p. 47.
975 The quotations for Strong are drawn from Community Development Foundation 1972.
978 See Boutros-Ghali 1994.
981 Collingwood and Logister 2007, p. 40.
982 Vabulas argues that international organizations try to respond to two critiques: first that international organizations should become more transparent in their decision-making processes and second, that international organizations should be more accountable to the changing power distribution of world politics. Vabulas 2011, p. 5.
983 Wheatley argues that ‘many NGOs also emphasize that they gain political legitimacy via partnership with bodies that are formally democratic or representative’. Wheatley 2010, p. 83.
The Cardoso Panel’s recommendations, however, had little impact on the 2005 debates on formal UN reforms, and NGOs were excluded from the 2005 World Summit and most of the preparatory processes.\(^\text{984}\) The continuing bias between the informal good intentions of states and international organizations to listen to civil society actors and the lack of willingness to formally adapt the UN into a more receptive organization is considered as another "low point in relations between the UN and civil society."\(^\text{985}\) The notes of the Secretary-General in the report resulting from the 2005 World Summit are exemplary. Although the notes pleaded that "today partnerships are an integral part of the work of much of the [UN] system", and stated that "world leaders’ welcome contributions from ‘the private sector and civil society, including [NGOs], in the promotion and implementation of development programmes',\(^\text{986}\) one should note that no actual recommendations of the Cardoso Panel were upheld.\(^\text{987}\)

In 2008, Steffek, Kissling, and Nanz published their studies in which they measured the influence of civil society in European and global governance. Their results provided evidence of an increasingly formalized participation of NGOs in international and regional organizations. These studies showed that newly established organizations or regimes generally granted NGO status, and the majority of international organizations had significantly enriched and intensified the rights accorded to non-state actors over the past fifteen years. Moreover, there was an increasing willingness of international organizations to turn to NGO participation to confront the external criticism of their perceived missing legitimacy. Civil society was being consulted more and more through web-based mechanisms. Steffek, Kissling, and Nanz concluded that in many regards, ‘NGOs [have] become increasingly pertinent as interlocutors between an international organization and the public at large’.\(^\text{988}\)

4.5 The discretion of power holders concerning NGO participation

Overall, although with ups and downs, we have seen in practice a general trend of increasing NGO involvement. The receptiveness of states and international organizations towards NGOs has varied from legal regime to legal regime. Forms of NGO participation are essentially *ad hoc*, according to a number of factors, including the nature of the issue under consideration and the particular combination of participating states.\(^\text{989}\) Greater NGO participation is primarily accepted during the deliberative, preparatory phases of international lawmaking.\(^\text{990}\)

History has shown two distinctive stages of NGO involvement. In the first stage, NGOs developed their ideas on specific legal issues outside the walls of the international organizations. Issue-oriented NGOs had already emerged at the end of the eighteenth

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985 Martens 2006, p. 5.

986 UNGA, Draft Resolution 60/L.1, A/RES/60/L.1, Sept. 20, 2005 (Draft resolution referred to the High-level Plenary Meeting of the General Assembly by the General Assembly at its fifty-ninth session 2005 World Summit Outcome).


989 Susskind 1994, p. 29.

990 Macdonald 2008, p. 67-68.
century and became international by 1850. \(^{991}\) When they had thoroughly thought their position through, they presented their ideas for consideration to the relevant international organization. \(^{992}\) By the end of the nineteenth century, proposals by NGOs for international legislation were regularly taken into account. From its early days, the League of Nations was open to NGOs’ input, which was often channeled through official state delegates. However, just before World War II, when international political tensions were already running high, the attitude towards NGOs became less receptive. After the Cold War, there was greater flexibility in terms of lawmaking participants. This period was a prelude to the second stage, in which NGOs worked interactively with the officials of international organizations and governments. The involvement of NGOs became, politically, an undeniable fact: wherever international law was being prepared, there were NGOs trying to influence the process. In recent decades NGOs’ involvement in international lawmaking has become more intense and more explicit, and has taken on new forms and functions. \(^{993}\)

The enactment of Article 71 of the UN Charter can be seen as a reflection of the ambition of intergovernmental organizations to involve NGOs in their work. However, as we saw above, this regulation of the participation of NGOs has also restricted their room for influence. Article 71 states that ‘[t]he Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.’ Thus the states’ motivations for NGOs being consulted are the concern of the NGO, rather than its membership or representativeness. \(^{994}\) One can read into the last part of paragraph 20 of Resolution 1996/31 \(^{995}\) an indirect notion regarding the possible democratic character of NGO participation. The fact that ECOSOC mentions the requirement of representation is quite unique, compared to other arrangements for NGO participations in specific lawmaking regimes.

Notwithstanding the lack of formal rights to participate, many statements of UN officials have explicitly supported the involvement of NGOs in international law and policy-making, most of the time using democracy-related terminology such as representation and inclusiveness. The Rio Declaration on Environment and Development identified major groups as vital factors and constituencies of civil society, which are crucial to the success of Agenda 21. \(^{996}\) Its policy formulation in Principle 10 of the Rio Declaration on Environment and Development, affirmed that ‘[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level’, \(^{997}\) and set out the three elements of public participation, namely access to environmental information, an opportunity to participate in

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\(^{991}\) See for an extensive historical overview on NGO participation, Charnovitz 2006.

\(^{992}\) Charnovitz 1996, p. 245, referring in note 588 to [additions are Charnovitz’s] Vinacke 1934, (Observing that States are led to organization for a specific purpose only after opinion has been ripened through the activities of private bodies) See Zimmern 1939, p. 35 (observing that NGOs ripen issues for international consideration).

\(^{993}\) Hirsch 2003, p. 238.

\(^{994}\) Charnovitz 2006, p. 3.

\(^{995}\) As explicitly stated in paragraph 20 of ECOSOC, Resolution 1996/31, E/RES/1996/31, July 25, 1996 (Consultative relationship between the United Nations and non-governmental organizations), ‘decisions regarding arrangements for consultation should be guided by the principle that they are made, on the one hand for the purpose of enabling the Council or one of its subsidiary bodies to secure expert information or advise from NGOs having special competence in the relevant subjects, and on the other hand, to enable international, regional, sub-regional and national NGOs that represent important elements of public opinion to express their views’.

\(^{996}\) See United Nations 1993, section III.

decision-making, and effective access to judicial and administrative proceedings, including redress and remedy.998 The Platform of Action of the 1994 International Conference on Population and Development (ICPD) dedicated a whole chapter aiming to intensify the partnership between governments and NGOs, which it described as ‘essential ... to assist in the formulation, implementation, monitoring, and evaluation of population and development objectives and activities’.999 In a similar vein, the Program of Action adopted by the 1995 World Summit for Social Development (WSSD) also placed emphasis on the involvement of civil society. Its involvement is considered indispensable for its effective implementation and particular support must be directed towards the development of community organizations and NGOs among disadvantaged and vulnerable people.1000 NGOs are considered to ‘bring to the United Nations the views of people and groups throughout the world’.1001

Although one can find strong indications in the statements and reports of several UN agencies of the importance of NGOs in representing parts of the international community, we should keep in mind that the legal framework for NGOs’ participation is generally very restricted. Besides the general praise of the significance of NGOs for international law development, there have also been critical notes made on the increasing involvement of NGOs. A quote from Mike Moore, former Prime Minister of New Zealand and Director General of the World Trade Organization from 1999-2002, illustrates the ongoing skepticism of NGO involvement:

‘All the UN agency heads meet once a year under the chairmanship of Kofi Annan... at one meeting, an agency head shocked me by stating: “We are in a post-parliamentary, post-democratic age; Nation-States can’t function anymore, politicians are despised and people can’t even be bothered to vote anymore.” He went on to assert that the future of governance was with international organizations in partnership with NGOs representing civil society, bypassing politicians. And of course many NGOs subscribe to and push this theory; it gives them power, status and resources.’1002

States have been largely unwilling to permit non-state actors to take a formal part in lawmaking decisions.1003 Provisions in treaty texts affirm the autonomy of states in this respect by dismissing NGO voting rights. Once states decide not to consider its suggestions, alterations, or additions to the international norms that are the subject of discussion, the NGO is out of the game.1004 Unambiguous procedural guidelines for NGOs’ participation are scarce.1005 Accreditation mechanisms of different international lawmaking regimes vary

1001 See Community Development Foundation 1972. The quotations for Morse and Secretary-General of UNCHE Maurice Strong are drawn from this report. October 1972 meeting in New York by Undersecretary-General for Political and General Assembly Affairs Bradford Morse
1002 Johns 2003a, p. 6.
1003 Boyle and Chinkin 2007, p. 56.
1004 Breton-Le Goff notes that “…their capacity of action and their influence depend on the states whether to negotiate and approve international instruments”. G. Breton-Le Goff 2011, p. 249.
1005 Raustiala 1997a, p. 728.
immensely. Former UN Secretary-General Kofi Annan has stated in this respect that, ‘[d]espite a substantial body of practice, nongovernmental organizations wishing to attend and participate in United Nations Conferences and meetings often encounter uneven standards and confusing procedures’.

Besides, there is a subtle bias in the United Nation’s language and treatment of NGOs that favors NGOs with a governmental connection. The UN definition of an NGO presupposes connections to governments. Although phrased as if all it takes to be ‘non-governmental’ for UN purposes is that the organization was not ‘established by a governmental entity or intergovernmental agreement’, on closer reading the admission of NGOs is restricted to groups of citizens. This does not prevent some organizations with an officially recognized status as an NGO still having their objectives and members designated by governmental authorities. In addition, more explicitly, the discretion of power holders concerning NGO involvement is visible in the provisions setting out that states retain power to block the accreditation of specific NGOs, although they meet the requirements as stated in the accreditation procedure. According to Willetts, back in the days when Article 71 of the UN Charter was drafted, the term ‘consultative status . . . was deliberately chosen to indicate a secondary role – being available to give advice [sic] but not being part of the decisionmaking process’. Two barriers to NGOs gaining access to international lawmaking are characteristic of the biased attitude of states towards NGOs: namely the politicization of the accreditation process and the lack of due process against decisions of the NGO Committee.

Another sign of the discretion of power holders is found in Principle 2 of Resolution 1996/31 that guides ECOSOC accreditation, which states that ‘[t]he aims and purposes of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations’. Principle 2 restricts the accreditation of NGOs to actors that are willing to cooperate, on governmental terms, rather than to form a stance independently on the policy to be developed. Especially at some agencies, such as for example the World Bank

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1007 See Sternberg 2010.


1009 ECOSOC, Resolution 1996/31, E/RES/1996/31, July 25, 1996 (Consultative relationship between the United Nations and non-governmental organizations), para. 15: ‘The granting, suspension and withdrawal of consultative status, as well as the interpretation of norms and decisions relating to this matter, are the prerogative of Member States exercised through the Economic and Social Council and its Committee on Non-Governmental Organizations. A non-governmental organization applying for general or special consultative status or a listing on the Roster shall have the opportunity to respond to any objections being raised in the Committee before the Committee takes its decision.’ Notwithstanding this formal opportunity of states to do so, Willetts indicates that ‘very few NGOs have actually met the criteria for recognition and then been rejected by ECOSOC’. Willetts 2000, p. 193, referring to the NGO committee that in 1997, 164 applications, of which it rejected 10, of which only one rejection was controversial and the remaining 9 organizations were clearly acting against the rules. UN Doc. E/1997/90, 3 July 1997.

1010 Willetts 2000, p. 191.

1011 Staberock 2011, under 11.

and the IMF, criteria for NGOs’ participation focus solely on the alignment of a given NGO’s mission with that of the regulator.\footnote{1013} This functionalist approach to NGO participation is reflected in the Cardoso Report on the UN and Civil Society.\footnote{1014}

Although often referring to NGO participation in international lawmaking as the establishment of partnerships between NGOs and other relevant ‘stakeholders’ such as international organizations and states,\footnote{1015} this connotation of a mutually equitable relationship in which all parties share the same type of power does not easily match the restricted legal frameworks for NGO participation and practice. While states can vote and negotiate, NGOs are restricted to observing and speaking.\footnote{1016} NGOs cannot directly exercise influence on texts for inclusion in a resolution, declaration, or convention, and nor can they ‘table their own written texts for governments to discuss.’\footnote{1017} The overview of historical observations, legal frameworks and statements emphasized that ‘states retain a tight grip on the formal lawmaking processes’.\footnote{1018}

This overview also demonstrated that participation in international organizations is, and has long been, an important tool for securing and extending NGOs’ influence on the formation of international law.\footnote{1019} In light of the broadly shared concerns about the democratic deficits of international law, as discussed in chapter 3, the appeal of NGOs is in their alleged capacity to connect ‘global citizenry’ with international lawmaking.\footnote{1020} The academic debate concerning NGOs is the central subject of investigation of the subsequent chapter. However, the claim that the participation of NGOs contributes to the democratic legitimacy of international law is not purely academic. As touched upon in section 4.4, mainly at the end of the twentieth century, both international organizations and states considered NGOs as representative of ‘embryonic institutional structures that could define a different form of global governance, a model in which citizen action occurs both at local and global levels’.\footnote{1021} This idea was explicitly confirmed in the report of the independent Commission on Global Governance, published in 1995, which examined the relationship between the waning position of the state and the occurrence of global civil society:

‘Non-governmental organizations are a basic form of popular representation in the present-day world. Their participation in international relations is, in a way, a guarantee

\begin{footnotes}
\footnotetext{1013}{Brakman Reiser and Kelly 2011, p. 1067.}
\footnotetext{1014}{Willetts 2006, p. 313 referring to UN Doc. A/58/817; headings from Section VII and tekst from Proposal 19 and par. 65, introducing Proposal 6.}
\footnotetext{1015}{See Commission on Human Rights, UN OHCHR, Resolution 2005/69, E/CN.4/RES/2005/69, April 20, 2005 (Human rights and transnational corporations and other business enterprises), p. 2. The Commission on Human Rights identified the following non-exhaustive list of stakeholders; ‘States, the Global Compact, international and regional organizations such as the International Labour Organization, the United Nations Conference on Trade and Development, the United Nations Environment Programme and the Organization for Economic Co-operation and Development, transnational corporations and other business enterprises, and civil society; including employers’ organizations, worker’s organizations, indigenous and other affected communities and non-governmental organizations’.}
\footnotetext{1016}{Börzel and Risse 2005, p. 199-201.}
\footnotetext{1017}{Willetts 2000, p. 206-207, referring to one critical exception in Habitat II which he discusses at p. 194-196, and 204-205.}
\footnotetext{1018}{Boyle and Chinkin 2007, p. 88-89. See also Raustiala 2011; See chapter 4, section 4.1.}
\footnotetext{1019}{Livingston 1992, p. 313; Joachim 2003, p. 248-249.}
\footnotetext{1020}{Peters 2009b, p. 220.}
\footnotetext{1021}{Krut 1997, p. 16.}
\end{footnotes}
of the political legitimacy of those international organizations. It is therefore not surprising that in a short space of time we have witnessed the emergence of many new non-governmental organizations.\textsuperscript{1022}

\textsuperscript{1022} Boutros-Ghali 1995.
5 The NGO democratic legitimacy debate

This chapter provides an overview of the types of arguments put forward by scholars in order to build or criticize the thesis that the participation of NGOs in international lawmaking contributes to the democratic legitimacy of international law. We do not intend to survey exhaustively the literature on the NGO democratic legitimacy thesis. It comes without saying that the cited writings of critics have led to counter reactions by scholars who are more open to a democratic legitimizing role for NGOs, and vice versa, and that therefore inevitably we only provide a snapshot of the ongoing debate. The aim of this chapter is to outline the arguments that are used to justify or refute NGO participation in international lawmaking while using the analytical terms of democratic legitimacy. The intention is not to evaluate the ‘correctness’ of the arguments, but simply to report them. Evaluation thereof will be the object of Part III.

The literature concerning NGOs and democratic legitimacy and their participation in international lawmaking is eclectic and shifts from points of attention and approaches. The following sections show some of the core arguments made. Section 5.1 discusses in general the assumed contributions of NGOs to the democratic legitimacy: NGOs bring about voices, knowledge and social engagement. Section 5.2 discusses the alleged contributions of NGOs from a procedural perspective; NGOs arguably strengthen deliberative processes and control. While the NGO democratic legitimacy thesis was increasingly embraced in the 1990s, a decade later, around the turn of the twentieth century, there was an increase in critical scholarly work that contested it. Section 5.3 reviews the most fundamental counterarguments that dispute the main assumption of the thesis, namely that democratic legitimacy as an evaluation tool for assessing the exercise of international lawmaking authority is possible. These critics base their argumentation from three different starting points. Some scholars argue that international democracy is impossible; others that international democracy is redundant; and still others that the political engagement of NGOs in international lawmaking is undesirable. Section 5.4 presents the arguments that focus on more general limitations of the thesis, based on substantive and procedural obstructions for NGO participation at international lawmaking forums. Section 5.5 describes the large body of scholarly critical work that does not focus on the political opportunity structure for NGO participation as such, but on the characteristics of NGOs’ internal legitimacy. Section 5.6 concludes with the observation that when reviewing the possible role of NGOs in international lawmaking, scholars base their assessment on a tacit set of definitional concepts that lack uniformity. Especially their conceptions of democratic legitimacy considerably differs, resulting in a situation in which both camps do not seem to be engaged in a constructive debate on the same conceptual level. A taxonomy is offered that might explain the different conceptions of democratic legitimacy that seem to guide the debate.

5.1 Assumed contributions of NGOs

The starting point of the NGO democratic legitimacy thesis is political.\textsuperscript{1023} Widespread enthusiasm for NGO participation in international lawmaking is closely related to the

\textsuperscript{1023} Due to the political characteristics of the thesis, this chapter takes an interdisciplinary perspective. See for a recent book with a predominantly legal approach towards NGOs involvement in international lawmaking: Woodward 2010; Lindblom 2005a.
The perception that the ideal of participatory democracy is worth pursuing.\textsuperscript{1024} The focus on civil society as a means to democratically legitimize law is based on a long tradition in democratic thought. As mentioned in Part I, in many accounts of democracy theory democratic legitimacy depends on the degree of development and differentiation of a civil society consisting of independent private organizations – associations, alliances, media, socio-political initiatives, and social movements.\textsuperscript{1025} However, the emphasis of scholars on the merits of including actors other than states in international lawmaking points towards a new focus of legitimate international lawmaking compared to the traditional doctrine of state consent:\textsuperscript{1026} scholars focus inclusive discussion and debate in which individuals have an opportunity to express their views on international law.\textsuperscript{1027}

The scholarly debate on the contribution of NGOs to the democratic legitimacy of international law is characterized by the use of general and broad terms, without going into details of the specifics of their participation, of which the contribution to democratic legitimacy is often implicitly assumed, rather than explicitly explained. Lindblom, for example, states that ‘the regulated participation of NGOs as informants and partners of dialogue in intergovernmental fora is a phenomenon that is healthy for the overall functioning of international law’.\textsuperscript{1028} Young notes that NGOs play a vital role in promoting political dialogue in developing government policy,\textsuperscript{1029} which could lead to an increase of democratically legitimate lawmaking. McGrew argues that the democratization of the world order and global governance not only promises ‘a means to reclaim and regenerate the ethic of self-governance, which is at the heart of democratic politics, but also to harness the democratic energies of those progressive social forces which increasingly operate across, below and above the nation-state’.\textsuperscript{1030} Also, Peters describes the benefits of the participation of NGOs in general terms, which, according to Peters, relates to ‘non-state democratization’.\textsuperscript{1031} Görg and Hirsch argue that in the face of the tendency of ‘global society towards fragmentation’, NGOs have to a certain extent become a stand-in for democracy.\textsuperscript{1032} Cameron, Lawson, and Tomlin argue that the emergence of global civil society holds the promise of transforming international organizations through innovation and experimentation, anchoring them in world opinion, and therefore making them more democratically legitimate.\textsuperscript{1033} Scholte’s explanation of the general rationale of the NGO democratic legitimacy thesis is a good illustration of this scholarly tendency to allude to broad and general terminology:

\textsuperscript{1024} Ochoa 2008, p. 6. In this chapter, participation refers to participating in official lawmaking processes, participating in informal debates or discourses with regard to proposals of international law, or participating in social movements who strives for change in a current legal system.
\textsuperscript{1025} See chapter 2, section 2.1.2.
\textsuperscript{1026} See chapter 3, section 3.2.
\textsuperscript{1027} See chapter 3, section 3.4.3. De Búrca dubs this approach the ‘democracy striving’ approach. De Búrca 2007-2008.
\textsuperscript{1028} Lindblom 2005a, p. 35.
\textsuperscript{1029} See Young 2000.
\textsuperscript{1030} McGrew 1999, p. 5.
\textsuperscript{1031} Peters 2009a, p. 332.
\textsuperscript{1032} Görg and Hirsch 1998, p. 605.
\textsuperscript{1033} Cameron, Lawson, and Tomlin 1998, p. 13.
‘Most people have accepted most policies towards global relations with passivity, ignorance and resignation. Yet if civil society offers stakeholders civic education, opportunities to speak, and chances to debate options, then people can begin to feel that they “own” global politics and positively endorse its outputs. Such legitimacy not only renders governance more democratic; it also tends to make policies more viable.’

Another distinct feature of the discourse on the NGO democratic legitimacy thesis is that there is no single, shared narrative that explains the significance of NGOs for the democratic legitimacy of international law. Scholarly perspectives on international law seem to largely influence the way in which a role is granted to NGOs as democratic legitimizers. More radical democratic thinkers argue that an international civil society already exists, and only needs to be taken into account by international authoritarian bodies. Constitutionalists, however, primarily understand the potential of NGOs in a top-down way, believing that a system consisting of participatory rules will enable and facilitate an international community to come into being. Basic rights of participation of those affected by international lawmaking, including non-state actors, are considered to constitute a society and guarantee the enduring legitimacy of any international obligation that is imposed.

This section distillates, from the variety of scholarly focal points, three general contributions of NGOs to the democratic legitimacy of international law that are often acknowledged in academic writing: a voice, knowledge, and social engagement. In the different justifications of the NGO democratic legitimacy thesis one can detect a shifting focus between two spheres of NGO involvement in international lawmaking: ‘non-institutional’ and ‘institutional’. Institutional involvement refers to the participation of NGOs based on accreditation mechanisms, as discussed in chapter 4, section 4.3. Non-institutional involvement refers to the activities of NGOs in spheres outside international organizations and institutionalized forums, closely related to the conception of civil society as sketched in chapter 2, section 2.1.2.

5.1.1 A voice
As mentioned in several instances, the NGO is expected to give a voice to individuals or groups of individuals that do not get a chance to participate in the making of international law. The ‘representation claim’, as we call it, refers to the institutionalized involvement of NGOs through the accreditation mechanisms of international organizations. From a procedural point of view, the accreditation of NGOs allows affected interests to be voiced at international forums. The claim of being the legitimate representatives of the peoples of the world before international organizations was endorsed by Kofi Annan and the Secretariat. The Secretary-General has stated that ‘more effective engagement with NGOs also increases the likelihood that United Nations decisions will be better understood and supported by a broad and diverse public’. Secretary-General 2004, under 4.
of international governing structures. NGOs are often specifically inclined to influence political processes at international organizations when they are confronted with a lack of democratic responsiveness in domestic lawmaking processes.

NGOs are recognized as a vital link between the local and the global. Groups or individuals who are concerned about transboundary issues and who want to pass on information to international organizations, such as testimonials and analyses, use NGOs and their abilities to address issues at international forums. NGOs allegedly articulate and bring into political play interests that are otherwise allegedly unrepresented or underrepresented. It is not only the simple multiplication of voices, but also the increased diversity in the voices represented by NGOs that is valuable for international law’s democratic legitimacy. According to Gælle Bréon-Le Goff, NGOs in particular bring ‘non-state’ values into the international system. In this view, states are considered to be imperfect representatives of public opinion as they disregard these minority viewpoints. NGO involvement in these accounts meets the shortcomings of states by giving a platform to otherwise neglected voices. NGOs are considered especially sensitive to outcast voices. Nerfin, for example, describes the third sector as helping people to assert their won power, by making efforts to listen to those who are never or rarely heard, rather than seeking governmental or economic power.

NGOs function pre-eminently as a connection between international lawmakers and the ‘outside’ world. Being privately organized and connected to a large network and constituency, NGOs are understood to play a crucial role in opening up informal communications for international organizations. NGOs are able to pick up messages from demonstrations and protests and translate them into policy proposals so that officials can take them into account. By contributing the views of civil society, they are considered to confer badly needed legitimacy on the international system. According to Esty, NGOs offer the promise of serving as ‘connective tissue’ that will help to bridge the gap between the decision-makers of international organizations and the constituents, which they are meant to serve, thereby ensuring that the exerted authority of the relevant international

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1039 Already in 1920, Dewey points out the fact that voluntary associations ‘do not coincide with political boundaries’. ‘They are transnational because their interests are worldwide.’ Dewey 1920, p. 205. See chapter 3, section 3.4.

1040 According to Esty, demanding NGOs to exert influence only at the national level is considered to basically deprive NGOs of their transnational essence. See Esty 1998, p. 141.


1042 Breton-Le Goff argues that although not necessary exclusive, the interests of peoples have assumingly a diverging foundation than the interests of states. See Breton-Le Goff 2011.

1043 As the public choice literature demonstrates, a position that is in the minority across many jurisdictions may, in fact, enjoy a plurality of support at a higher level of aggregation in voting. Often, in discussions on the representations of minority views NGOs are linked up with indigenous people. See for a critical assessment on the opportunities for participation of indigenous groups: Enzamaria Tramontana 2012, p. 173-192.

1044 Most of the time informal ways of getting attention for issues of public concern, do not have the chance to be heard, possible because they ‘threaten powerful interests or because they particularly concern a marginalized or minority group’, Young 2000, p. 67.


1046 Nerfin 1986, p. 54-57. Lawmaking processes, when NGOs are included, are assumed to provide safeguards for protecting minorities. Bekkers and Edwards 2007, p. 51; See Dahl 1956.

1047 Kamminga 2005, p. 110.
organization is perceived as responsive and fair.\textsuperscript{1048} Within a favorable ‘political opportunity structure’,\textsuperscript{1049} it is stated, a pluralist model of interests also contributes to the openness of the agenda of international lawmaking, thereby opening up formal communications for the wider public, which in turn contributes to the equal opportunities of affected peoples to get involved.

NGOs’ institutional participation is framed as a specific instruction to the international legislator; lawmaking processes should be inclusive.\textsuperscript{1050} In the radical, direct sense of the instruction of inclusion, it requires the inclusion of every single person affected by the law.\textsuperscript{1051} In a more moderate version that is often adhered by the scholars engaged in the debate on NGOs participation in international lawmaking inclusion relates to a type of multi-perspectivism and fair decision-making.\textsuperscript{1052} According to Marks, it is inherent to NGOs to strive towards greater inclusion, which justifies their activities with regard to the making of international law.\textsuperscript{1053} Interestingly, Marks emphasizes the reciprocity attached to the principle of inclusion: NGOs only contribute to inclusive lawmaking when they themselves live up to the principle of inclusion.\textsuperscript{1054}

Equality as a democratic norm for lawmaking is the underlying ambition of strengthening the procedural norm of inclusion in international lawmaking processes.\textsuperscript{1055} Presenting NGOs as participating actors that are beneficial to inclusive international lawmaking, implies a representative claim. Macdonald, as one of the few scholars who offers a detailed conception of NGOs’ contribution to representation, argues that while interpreting NGOs as representatives, we should loosen our classical conception of representation.\textsuperscript{1056} With regard to the question of who is and who should be represented, Macdonald distinguishes two types of represented people. The classical represented group is the group of individuals subjected to the same agent of public power in one unilateral decision-making process. This group of individuals forms the ‘jurisdiction’. The agent of public power consequently bears full responsibility for its decisions. All individual interests subject to its public power must somehow be democratically represented: they form the jurisdicalional community.\textsuperscript{1057}

\textsuperscript{1048} Esty 1998, p. 126.  
\textsuperscript{1049} See Kriesi 1996.  
\textsuperscript{1050} Young 2000, p. 121-122.  
\textsuperscript{1051} Schaffer 2012, p. 322.  
\textsuperscript{1052} See Besson 2011a, in which Besson refers to Christiano’s observation that fair decision-making is the highest achievable at the international level. Christiano 2011, p. 69.  
\textsuperscript{1053} Marks 2000, p. 113.  
\textsuperscript{1054} Marks 2000, p. 113-114. Marks states that NGOs can live up to this expectation of inclusiveness by continuously striving to be part of large networks.  
\textsuperscript{1055} See chapter 1, section 1.2.2 on equality, and chapter 2, section 2.2.3 on procedural norms facilitating the operation of democratic legitimacy.  
\textsuperscript{1056} Peruzzotti 2010, p. 162-163. However, Macdonald states that ‘once we recognize that democratic equality requires inclusion of all individuals not only in a formal voting process but also in the process of agenda setting, the egalitarian advantage conferred upon electoral mechanisms by the formal equality of voting is greatly diminished’. Macdonald 2008, p. 220. Especially in the context of the equality principle is argued that without the usual electoral mechanisms, such as elections and accountable through elections, NGOs themselves disregard the equality principle in their representation. Macdonald 2008, p. 218. Macdonald alleges against this point that NGOs are able to show their representative legitimacy despite the lack of elections. Although in theory one can argue that each decision-makers should represent all within the jurisdictional community, this does not correspond with current international lawmaking practices in which each agent is primary responsible for representing a different group of individuals with different types of social interests. Macdonald 2008, p. 99-100.  
\textsuperscript{1057} Macdonald 2008, p. 99.
‘constituency’, on the other hand, is composed of individuals who ‘share the same representative agent within some public decision-making processes’.\footnote{Macdonald 2008, p. 97.} In decision-making processes, the decisions are not taken by one single public power but in collaboration with others, which distributes the power among them. International lawmaking is characterized by a same plurality of public powers.\footnote{Macdonald 2008, p. 99.} As public power is dispersed, so can the responsibility to represent the various individuals and social interests, according to Macdonald.\footnote{Macdonald 2008, p. 99.}

We understand Macdonald’s representation by NGOs as an additional means to the political representation of jurisdictions by states. The inclusion of all stakeholders remains an essential element of the democratic relevance of consultation. However, Macdonald’s theory shifts from an emphasis on numbers to an emphasis on interests when she states that ‘[t]here must always be consultation that provides equal representation to all conflicting interests within the jurisdictional community.’\footnote{Macdonald 2008, p. 182.} Macdonald argues that ‘once we recognize that democratic equality requires inclusion of all individuals not only in a formal voting process but also in the process of agenda setting, the egalitarian advantage conferred upon electoral mechanisms by the formal equality of voting is greatly diminished’.\footnote{Macdonald 2008, p. 220.} To prove a representative relationship between NGOs and constituencies, Macdonald mirrors the normative functions of elections by comparable instruments, ‘that is, inclusion of stakeholders in the negotiation and imposition of a mandate, and public affirmation of the responsibilities of representatives – can be achieved in other ways’.\footnote{Macdonald 2008, p. 181.}

According to Macdonald, NGOs should be organized in such a way that they can offer participatory mechanisms through which individuals can express preferences and deliver instructions.

In Macdonald’s reading, just as with electoral representatives, NGOs should be receptive to the signals of their constituency.\footnote{Macdonald 2008, p. 183.} The funding on which NGOs rely is seen as one of the key resources for NGOs to influence international lawmaking, besides trust and reputation. Funding is considered to be a type of mandate that provides a constant check on whether the NGO is still acting in conformity with the wishes of its constituency.\footnote{Macdonald 2008, p. 210-215.} The nature of the decision-making context in which an NGO wields its public power determines the range of interests that it may be obliged to represent in any given instance.\footnote{Macdonald 2008, p. 100.} In the multilateral international lawmaking processes an NGO can take responsibility for the representation of only some of the interests subject to the resulting laws. According to Macdonald’s approach, the collaborative character of international lawmaking justifies the representation of only certain interest-based constituencies.

\footnote{Macdonald 2008, p. 97.}
\footnote{Macdonald 2008, p. 99.}
\footnote{Macdonald 2008, p. 99.} This seems to be in line with an older view on representation, expressed by Thorbecke, in which representation is not coupled to the exercise of rights that actually accrue to the people as a whole, and not to reveal the opinion of the public, but a type of co-governing, through the ‘dignified members of the state society’. Such arguments fit a limited importance of the ballot box. Many are not represented by groups that they have appointed, but by representatives that watch over their interests. Witteveen 1996, p. 236.
\footnote{Macdonald 2008, p. 182.}
\footnote{Macdonald 2008, p. 99.}
\footnote{Macdonald 2008, p. 220.}
\footnote{Macdonald 2008, p. 181.}
\footnote{Macdonald 2008, p. 183.}
\footnote{Macdonald 2008, p. 210-215.}
\footnote{Macdonald 2008, p. 100.}
In the light of the critique on the functioning of the current indirect democratic legitimacy mechanisms, some international legal scholars have explored the possibilities of direct democracy. The plea of international constitutionalist Peters specifically focuses on direct democracy through citizens. Peters states that when appropriate, practical considerations give good reason for a call for additional direct democratic participation of citizens in global governance without the intervention of states. According to Peters, NGOs play a crucial role in mediating the participation of citizens in the international legal order. Peters construes three arguments. First, global direct democracy, partly stimulated through the involvement of NGOs, can positively change the current power imbalance between states. Second, citizens living under non-democratic national regimes nevertheless get the chance to participate. Third, an intensified and direct participation of citizens and NGOs in international legal and political processes would potentially be accompanied by more global deliberation, which would in turn contribute to a less fragmented, and thus fuller, assessment of problems and solutions. According to Peters, the best strategy for strengthening the democratic legitimacy of international law is a formal integration of NGOs into the international legal process, through accreditation, participatory status, and voice.

In sum, the promise of representation by NGOs is based on NGOs’ capacity to articulate people’s aspirations. The involvement of NGOs is expected to channel citizens’ interests into the relevant policy process. It is assumed that NGOs in particular are able to address issues in the appropriate language for both lawmakers and lawtakers, due to their position that is independent from state agencies and the fact that they originate from civil voluntary action. NGO participation in international lawmaking is interpreted under the angle of political representation, with a specific focus on the representation of voices of the ‘outcast’. NGOs not only emphasize marginalized peoples’ voices, but also highlight issues to lawmaking institutions that are otherwise scarcely given any attention.

5.1.2 Knowledge
Other scholars focus on the contribution of NGOs to the knowledge base of both the international organizations and the governmental officials that take part in the lawmaking processes. The contributions of NGOs to the knowledge base of international organizations and society at large correspond with one of the criterions Dahl developed for procedural democracy: the criterion of enlightened understanding. Dahl explains this criterion as follows: ‘In order to express his or her preferences accurately, each citizen ought to have adequate and equal opportunities for discovering and validating, in the time

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1067 See chapter 3, section 3.4.2.
1068 Peters hesitates however to link the mere presence of NGOs to a direct deepening of deliberative democracy and insists that the right to be present at a meeting of an International Organization and the consequent rights to observe, notice and comment are not in itself enough to establish democracy. These rights do not allow any individual to hinder a final decision of the formal law- en policy makers. Again, the debate what the contribution of NGOs is worth without the guarantee that they influence the final decision-making is central.
permitted by the need for a decision, what his or her preferences are on the matter to be decided.\textsuperscript{1073}

According to Raustiala, the involvement of NGOs in international lawmaking and the consequential plurality of input ‘provides a check on exaggeration, obfuscation, and poor logic and data’.\textsuperscript{1074} In the words of Willets, ‘few politicians, bureaucrats or diplomats would dare argue with the considered conclusions of a professional scientific NGO on the scientific aspects of a policy problem’.\textsuperscript{1075} NGOs provide a mechanism for filtering information and pooling resources.\textsuperscript{1076} Esty argues, with regard to the practices of the WTO, that often the ability of an international organization to produce good policy outcomes depends on having its deliberations enriched through information from outside the political realms, because it provides the needed multiplicity of perspectives for a well-functioning deliberation. The fact that NGOs bring in competing perspectives and information is valued in this respect.\textsuperscript{1077} Deliberations prior to the enactment of legal standards depend for their quality and success rate on the level of knowledge available to the lawmaking participants.\textsuperscript{1078}

NGOs’ contribution to the knowledge base of international agencies and states is found to be essential for lawmaking processes,\textsuperscript{1079} especially for those characterized by highly technocratic and specialized issues.\textsuperscript{1080} Engagement between NGOs and international organizations is assumed to promote rational debate. The expertise of NGOs in this manifestation is encapsulated in formal accreditation,\textsuperscript{1081} with the main aim of achieving greater rationality in international lawmaking.\textsuperscript{1082} Because of their diversity and distinctiveness with regard to states and international organizations, NGOs offer heterarchical structures that ‘produce superior forms of inquiry, to the extent that there are a variety of networks deliberating about the best available solutions according to a variety of standards of rationality’.\textsuperscript{1083} Primarily, environmental lawmaking is seen as an exemplary form of ‘good practice’ in terms of NGO participation.\textsuperscript{1084} Bowman offers an example of NGOs’ contribution to the knowledge base in environmental lawmaking:

1073 Dahl 1979, p. 105. Besides the criterion of enlightened understanding he suggests the criterion of political equality, effective participation and control of the agenda for a proper understanding of procedural democracy.
1074 Raustiala 2011, p. 164.
1075 Willetts 1996, p. 44.
1076 Rossi 1997, p. 194, referring to Seidenfeld 1992, p. 1530 (Defending interest groups ‘because they consolidate people with common private interests and backgrounds and streamline the input that the government receives but ensure that the interests of diverse parties are represented.’)
1078 See chapter 1, section 1.3.2, where we explain the relationship between knowledge and deliberation, relying on Habermas’ deliberation theory.
1080 NGOs are recognized as an important actor in the political arena from an epistemic point of view. The participation of the international scientific community, which is organized in NGOs, is perceived very valuable by, among others, French 1994, p. 598; Hirsch 2003, p. 250.
1082 See for a collection of essays that explore the relationships between democratic legitimacy, deliberation, and rationality, Bohman and Regh 1997; Peter 2009, chapter 6 and 7.
1084 The different actors in the environmental legal field are a good example that finds itself already at the cutting edge of international legal developments. Wirth stated that ‘environment may very well be a paradigm that prefigures the development of the larger body of international law well into the twenty first century’. Wirth 1994, p. 802; Wani 1991.
'The role of [NGOs] has proved to be of vital importance. Not only have they regularly pressed for the adoption of agreements (...) they have frequently shown a willingness to undertake much of the preliminary drafting work necessary to make such projects a reality. Insofar as these agreements, once concluded, have required to be sustained by technical resources and expertise, NGOs have been prominent in the provision of such support.'\textsuperscript{1085}

Furthermore, allowing NGOs to participate in lawmaking processes purportedly has a spillover effect upon the knowledge base of concerned individuals who are part of their broader network of contacts outside the political realm of international organizations. NGOs allegedly enhance the flow of information in global governance in two ways. They report information about domestic politics to the world beyond a nation’s borders and, in the reverse direction, they take global concerns and perspectives to the national and local levels. As a result, the public understanding of the work of a specific international organization is broadened. NGOs allegedly have the capacity to pass on knowledge, information, and expertise that assist individuals and communities to contribute to democratization and the growth of a healthy civil society.\textsuperscript{1086} They often make use of the technology now available to spread their information throughout the world.

Besides the procedural merits of the spread of relevant information by NGOs, some scholars focus on those NGOs that have made it their mission to enhance the education system in many countries. NGOs prepare handbooks and information kits, produce audio-visual presentations, organize workshops, circulate newsletters, supply information to and attract the attention of the mass media, maintain websites on the Internet, and develop curricular materials for schools and institutions of higher education.\textsuperscript{1087} Interrelated are the efforts of some NGOs to circulate information specifically focused on democracy and democratization at both the national and international levels in order to enlarge the knowledge base of citizens concerning international and national democratic deficits, the possibilities of global democracy, and the importance of transparency and accountability.\textsuperscript{1088} Their advocacy on democracy as a value worth pursuing and their efforts to enlighten citizens on their opportunities to participate are understood to contribute to the democratic legitimacy of international law. This line of argumentation will be taken up again in the discussion of NGOs’ participation in international lawmaking as a contribution to social engagement.

The arguments related to NGOs’ contribution to the knowledge base of international lawmaking primarily value the effects of the input of NGOs on the output of the legislative processes. Instead of the earlier focus on the strengthening of political participation, which

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\textsuperscript{1085} See Bowman 1999, p. 298.
\textsuperscript{1087} Scholte 2001, p. 17.
\textsuperscript{1088} See for example the mission statement of One World Trust, an NGO that is dedicated to accountability. See their mission statement: ‘The One World Trust is an independent charity that conducts research, develops recommendations and advocates for reform to make policy and decision-making processes in global governance more accountable to the people they affect now and in the future, and to ensure that international laws are strengthened and applied equally to all.’ http://oneworldtrust.org/about-us (last visited January 2016). Rajagopal lists in his book the most prominent democracy promoting NGOs. Rajagopal 2003, p. 154. See also Woodward 2010, p. 88, referring to Roelofs 2003, p. 180.
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is related to a procedural right belonging to everybody individually, in this reading NGOs’ involvement is assumed to contribute to the democratic legitimacy of international law, by strengthening the rationality of legislative procedures and by improving the deliberative quality of decision-making.1089

5.1.3 Social engagement

NGOs’ mobilization of social engagement can be considered to be the third contribution to the democratic legitimacy of international law that is generally assigned to NGOs.1090 The emphasis on NGOs and social engagement can be explained by the tendency of proponents of the NGO democratic legitimacy thesis to criticize the over-emphasis on the criteria of free elections and policy that is in accord with the wishes of the majority in democracy discourses.1091 More importantly, it is stated that the free and transparent flow of information about the policy-making process should be discussed in the public sphere. As French states, ‘just as national policy makers cannot be considered in isolation from public pressure, so international policymaking increasingly cannot be considered in isolation from an organized and influential citizenry’.1092 NGOs are supposed to contribute to the democratic legitimacy of international law in terms of facilitating and organizing contestation and deliberation in the public sphere.1093

The focus is on the activities of NGOs that take place outside formal international lawmaking with the aim to influence international law, such as through demonstrations, petitions, information sharing, and the organizations of congresses or other types of gatherings.1094 Chapter 2 demonstrated the complementarity of the democratic legitimacy of social preconditions, consisting of a democratic culture and a public sphere, and institutional preconditions. A democratic culture was perceived as necessary to give substance to institutional preconditions for the democratic legitimacy of law.1095 That democratic culture was, among other things, driven by a strong civil society. Most of the scholarly writing on the NGO democratic legitimacy thesis reproduces the premise that democracy needs a dynamic and independent civil society.1096

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1089 Buchstein and Jörges 2007, p. 186. Section 5.2 further explains the relation between the NGO democratic legitimacy thesis and deliberation.
1090 See Kaldor, Anheier, and Glasius 2003. This proposition is part of a more general idea that NGO participation in international lawmaking strengthens the international legal regime by promoting international civil society, which is emerging into international legal and political theory. See Cullen and Morrow 2001, p. 29. Whether or not there truly exists a global public sphere is an interesting topic for debate, and although touched upon, not explored substantively here. See more reading on the global public sphere: Bryde 2005, p. 118; Archibugi 2004; Chandler 2007, p. 283-299; Castells 2008, p. 78-93; Calhoun 2002, p. 147-171.
1091 See chapter 3, section 3.4.
1093 See section 5.2 for a further presentation of these two procedural merits of NGO participation in international law making. See also Kaldor, Anheier, and Glasius 2003. Whether or not there truly exists a global public sphere is an interesting topic for debate, and although touched upon, not explored substantively, due to limits of scope. For more reading concerning the (in)existence of the global public sphere: Bryde 2005, p. 118; Chandler 2007, p. 283-298; Castells 2008, p. 78-93; Calhoun 2002, p. 147-171.
1094 The ideal of an effective civil society outside governmental spheres originates from Tocquevillian theories concerning civic voluntarism. Skocpol notices in American context the same tendency to adhere the ideal of an active civil society. See Skocpol 1997, p. 455-479.
1095 See chapter 2, section 2.1.2.
1096 See Woodward 2010, p. 73. These studies are inspired by academics as De Tocqueville, Huntington, Putnam and others from the modernizations and political developments schools of thought on democracy. See chapter 2, section 2.1.2.
should, just like states, foster a healthy civil society, and be effective and capable of balancing all the different demands of the various interest groups.\textsuperscript{1097}

In the emphasis on NGOs’ role in facilitating social engagement, NGOs are understood as cultural actors that formulate public discourse outside the institutional realm of international lawmaking.\textsuperscript{1098} The abilities of NGOs to trigger the debate,\textsuperscript{1099} to spread information, to mobilize individuals, and to contest states when they are not acting in congruence with international policy are highlighted.\textsuperscript{1100} In addition, protests instigated by NGOs may contribute to democratic legitimacy by holding the lawmakers accountable.\textsuperscript{1101} NGOs’ abilities to pass on knowledge, information, and expertise, in this reading, are not perceived in the first place as rationalizing international lawmaking in order to have better deliberative practices, but as a contribution to the growth of a healthy civil society, which is considered a critical element of the success of democratic policies.\textsuperscript{1102} NGOs provide a space for the expression of discontent and the pursuit of change when existing governance arrangements are regarded as illegitimate.\textsuperscript{1103}

In this reading, NGOs facilitate the creation of a functioning public, of new kinds of political organizations and political solidarities, both across and within states.\textsuperscript{1104} NGOs are assumed to have an impact on world politics by changing the behavior of individuals, business, and society at large.\textsuperscript{1105} Giddens argues that although each individual NGO may have limited political power, collectively they represent “modes of radical engagement having a pervasive importance in modern social life”.\textsuperscript{1106} NGOs take up the role of a community builder aiming to allow social capital to flourish,\textsuperscript{1107} which has spillover effects upon a well-functioning democracy at all levels of government.\textsuperscript{1108} NGOs further the bonds of trust and norms of reciprocity that are considered to facilitate social interaction.\textsuperscript{1109} The activities of NGOs in international organizations are assumed to create a snowball effect in terms of civic engagement, which is considered proven by the massive growth in

\textsuperscript{1097} Mercer 2002, p. 7.

\textsuperscript{1098} The ideal of an effective civil society outside governmental spheres originates from Tocquevillian theories concerning civic voluntarism. Skocpol notices in American context the following tendency: “Contemporary calls for a return to civic voluntarism come in the context of conservative crusades to dismantle an allegedly huge and overwhelming federal government. Many of those making such arguments presume that there was some golden era in America’s past when local civic voluntarism solved the country’s problems apart from – actually instead of – extralocal government and politics.” See Skocpol 1997, p. 455-479.

\textsuperscript{1099} Christiano 1996, p. 247.

\textsuperscript{1100} Scholte 2001, p. 17; Giddens 1990, p. 158-161.


\textsuperscript{1102} Fisher 1997, p. 444, referring to Fowler 1991, Frantz 1987, Hyden 1998. In the section with regard to the principle of participation, more attention is paid to the presented relationship between civil society and NGOs.

\textsuperscript{1103} Scholte 2001, p. 18. He shows the capacity of NGOs with regard to concerted civic opposition to the OECD-sponsored Multilateral Agreement on Investment, The Millennium Round of WTO talks, and countless IMF/World Bank programs.

\textsuperscript{1104} Gog and Hirsch 1998, p. 599.

\textsuperscript{1105} Wapner 1995, p. 311, 337. Wapner presents the thesis that civil power is the forging of voluntary and customary practices into mechanisms that govern public affairs.

\textsuperscript{1106} Giddens 1990, p. 158-161.

\textsuperscript{1107} Putnam, famous for his theories of social capital has defined social capital as follows: “Whereas physical capital refers to physical objects and human capital refers to properties of individuals, social capital refers to connections among individuals – social networks and the norms of reciprocity and trustworthiness that arise from them.” Putnam 2000, p. 19.

\textsuperscript{1108} Peters 2009a, p. 337.

membership of international NGOs and transnational social movements such as Greenpeace, Amnesty International, the women’s movement, and the environmental movement. It is argued that NGOs, independently from states, create new transnational social spaces.1111

NGOs are seen as the international equivalent of what, within a domestic society, social and political theorists have called ‘civil society’. Civil society stands for political association and public action not encompassed by the state or the economy.1112 Bratton was one of the first writers who advocated that NGOs are significant bolsters of civil society by virtue of their participatory and democratic approach.1114 The phrase ‘bolsters for civil society’ has proved to be an attractive starting point for academic writing on the contributions of NGOs to the democratic legitimacy of international law. NGOs are supposed to be part of, create, and fuel these new transnational social spaces.1115

Global civil society is perceived both as an emerging reality and an emerging concept.1116 The conception of global civil society extends to the formally organized and registered ‘NGO’. Anheier, Kaldor, and Glasius state that ‘global civil society is the sphere of ideas, values, institutions, organizations, networks, and individuals located between the family, the state, and the market, operating beyond the confines of national societies, polities, and economies’.1117 Scholte adds that ‘veritable civil society activities pursue neither public office (so excluding political parties) nor pecuniary gain (so excluding firms and commercial mass media)’.1118 The idea of a global civil society has roots in cosmopolitan thinking. One’s sense of self is assumed to be global, in addition to one’s national identity. In his ‘seven assumptions for Cosmopolitan Democracy’, Archibugi states that ‘globalization engenders new social movements engaged with issues that affect other individuals and communities, even when these are geographically and culturally very distant from their own political community’.1119 Individuals are believed to be capable of understanding each other through interaction and political conversation, also on the global level.1120 Global civil society is perceived as transnational democratically organized associations that give voice to transnational common interests.1121

Civil society consisting of social movements, such as the environmental, women’s, and peace movements, are considered to be driving forces of change, by challenging the authority of states and international agencies as well as orthodox definitions of the ‘political’.

1111 Lindblom 2005a, p. 17.
1113 Dryzek 1999, p. 44.
1115 Lindblom 2005a, p. 17.
1120 This belief is based on the normative urge to find alternatives to the predominant neoliberal vision. See Boas and Gans-Morse 2009, p. 137-161. However, one of the latest changes in thinking about global civil society seems to be ‘a neocorporatist understanding of CSOs as ‘partners’ with State governments, IGOs and the private business sector’. Woodward 2010, p. 103.
Global civil society is explained as a new transnational energy striving towards global democracy. Through a politics of resistance and empowerment, these new social movements are understood to play a crucial role in global democratization similar to the role of the old social movements, such as organized labor, in the struggle for national democracy. Anheier notes that 'the case for civic engagement is largely an argument based on the positive and often indirect outcomes of associationalism and public participation'. NGOs are allegedly an indication of an extensive reorganization of international life that at the same time affirms both local and transnational emancipatory identities. Otto speaks of 'a new dynamic of embryonic participatory democracy to the global community and to the shaping of international law'. The strength of the emergent international social movements indicates that it is possible to build a socially just global society on diverse and multinational identities. Otto further affirms that 'the tenacious activity of NGOs in the international sphere, despite rigid institutional barriers, reflect the power that people have as citizens'.

Boaventura de Sousa Santos and César Rodríguez-Garavito dub the influence of non-state actors on international law as the emergence of 'subaltern cosmopolitan legality'. Santos and Rodríguez-Garavito list cases in which the most deprived people in the world were able to participate in international law creation. With these cases they attempt to illustrate that 'lawmaking from below' and globalization can go hand in hand. NGOs are considered to play a key role in empowering these groups at a local level. The difference with the contribution of NGOs sketched in terms of representation, in which NGOs also contributed to 'letting the marginalized people be heard', is that in the representative role NGOs are actively engaged in lawmaking in the name of these marginalized groups of individuals, while in the 'social engagement' category of arguments, NGOs facilitate the emancipation of marginalized people. NGOs are believed to support the political action of marginalized groups from a local level up, so that those groups can become strong enough to claim their equal share in lawmaking processes themselves. As a result, this political action whether it occurs at a local, national, or regional level, is considered to have spillover effects for international democracy.

Keck and Sikkink developed the notion of Transnational Advocacy Networks (TAN). The ‘TAN theory’, with regard to the democratic validation of NGO involvement, focuses on the ability of NGOs to empower people to be democratically active. Keck and Sikkink argue that TANs use the processes of persuasion and socialization in international organizations to change the preferences of domestic political

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1122 Social movements combined to stand up for human rights and environmental issues are perceived to create a global civil society. Cohen and Arato 1992; Seligman 1992.
1124 Anheier 2009, p. 1086.
1125 Otto states that 'the growth of international civil society is both reflected and bolstered by the groundswell of NGO participation in international conferences'. Otto 1996a, p. 120.
1127 Otto 1996a, p. 127. Otto further states that ‘the international order is understood as dependent on local empowerment, similar to the sustainable development paradigm’. Otto 1996a, p. 137.
1128 Boaventura de Sousa Santos and César Rodríguez-Garavito 2005, p. 6.
1130 Peters 2009a, p. 337.
1131 See Keck and Sikkink 1998.
actors. Their theory explains what motivates NGOs to engage in international politics, by focusing on bottom-up processes.\textsuperscript{1132}

NGOs are perceived as a decentralized phenomenon that encourages norm-setting enacted in private, social, economic, and cultural arenas, in addition to formal political arenas. This is in line with what is expected from civil society in national democracies: civil society is active in deliberation outside the state apparatus.\textsuperscript{1133} This reading corresponds with 'a social movement perspective [that] emphasizes the importance of extra institutional forms of mobilization for the success or failure of institutional forms'.\textsuperscript{1134} In this contribution to the democratic legitimacy of international law, NGOs are apolitical par excellence, and depend for possible influence on the political framework, on political actors, for translating their spontaneous or 'communicative power'\textsuperscript{1135} into political impact on decision-making. NGOs function, in this reading, as indirect legitimizers of international lawmaking, because they are assumed to foster the public sphere, which is a necessary social precondition for democratic lawmaking.\textsuperscript{1136} In contrast, the arguments relating to NGOs’ alleged contributions to giving a voice to ‘the otherwise not heard’ and to the knowledge base of international lawmaking, as discussed in section 5.1.1 and 5.2.2, focus on the democratic merits of NGOs when involved in institutionalized settings. The primary focus is on the political side of civil society: the identification of collective problems and the influencing of political processes.\textsuperscript{1137} NGOs’ representative contribution is specifically focused on the capabilities of civil society to contribute to translating public opinion into a legal rule. One can in this respect distinguish public will formation from the arguments related to NGOs’ capacity to strengthen social engagement.\textsuperscript{1138}

5.2 NGOs’ merits from a procedural perspective

These three general accounts of NGOs’ alleged contributions to the democratic legitimacy of international law have specific procedural manifestations: NGOs’ participation in international lawmaking allegedly improves deliberations in, and control over, international lawmaking.

\textsuperscript{1132} Vabulas 2011, p. 4-5
\textsuperscript{1134} Kothari 1984, p. 216-224.
\textsuperscript{1135} Habermas, McCarthy, 1977, p. 3-24.
\textsuperscript{1136} As Bohman states, ‘[s]uch public spheres are particularly important for creating conditions of communication that enable the exercise of public influence of diverse and dispersed institutional structures.’ Bohman 2005, p. 115.
\textsuperscript{1137} Dekker 2002, p. 19.
\textsuperscript{1138} Social engagement arguments indicate the, in social networks captured, competence to work together outside formal lawmaking processes. The phase in which an issue has been identified as a possible subject for lawmaking takes place mainly outside established institutions, whereas the phase in which problems are framed into international legal standards proceeds in more exclusive and institutionalized settings such as expert group meetings, conferences or dialogue meetings. It is acknowledged that this distinction between inside and outside international lawmaking processes is complicated in the practice of international lawmaking. Activities often transcend from non-institutionalized to institutionalized settings, depending on the phase of NGOs campaigning activities.
5.2.1 Deliberation
As discussed in section 5.1.2, NGOs are thought to ensure the development of a ‘more rational and democratic society’. As discussed in section 5.1.3, besides their involvement in international organizations, NGOs help constitute a vibrant public sphere with sufficient diversity of groups and opinions to generate public deliberation about different interests in society. This section further explains the more procedural expectation of scholars that NGOs’ contribution strengthens deliberative lawmaking practices. NGOs’ institutionalized involvement is considered to offer a variety of perspectives, methodologies, and proposals in international lawmaking processes. While NGOs are mostly kept on the sidelines when the final definition and adaptation of legal texts occurs, they are active participants in prior preparatory deliberations. NGOs furnish information, offer expertise, vocalize interests, and often act as opposition. All these activities of NGOs are supposed to improve the quality of preparatory debates and legislative texts.

Dryzek is one of the main proponents of a focus on deliberative practices for democratically legitimizing international law. In his account, Dryzek focuses on international discourse, which is explained as a ‘shared set of assumptions and capabilities embedded in language that enables its adherents to assemble bits of sensory information that come their way into coherent wholes’. Behavior of individuals is coordinated by these discourses, which turn into social as well as personal sources of order. Dryzek uses the analytical terms of hardware and software to show the importance of discourse for the international legal order, and to show its relationship to formal rules within an institutional framework. Formal rules constitute the hardware, and the discourses constitute the software. Dryzek argues that due to the fact that in the international legal order an adequate set of formal rules has not yet been established, the institutional software of discourse is even more important. He states that although ‘many observers of the international system lament the absence of institutional hardware, (...) it may turn out that its absence can be turned to good democratic use, especially if institutional software is less resistant to democratizations than its hardware’. Due to the lack of democratic institutional hardware, Dryzek argues that the balance of discourse in the international legal order is more critical. Participation is seen as a crucial means for promoting the public oriented character of international governance, which inherently means something else in an international context than in the context of electoral mechanisms of democracy at the domestic level.

1141 See chapter 5.
1143 Dryzek 1999, p. 34.
1144 Dryzek 1999, p. 45. Dryzek argues that some discourses are better than other, and unlike Foucault he rejects the idea that every coordinative function of a discourse leads to oppression, and needs to be rebelled against. Rather than to discard a discourse when discovered, people are able to adjust a discourse in the margin or to change direction and the terms of a discourse. This is done by the use of the communicative power of civil society, which is according to Dryzek ‘the real power of transnational civil society’.
1145 Dryzek speaks of institutional hardware and institutional software. As his approach of institutional software differs with our presentation of the institutional preconditions to democratic legitimacy, as explained in chapter 2, section 2.1.1, for reasons of clarity we have omitted these adjectives here.
1146 Dryzek 1999, p. 34-35.
1147 Dryzek 1999, p. 37.
Deliberative perspectives on global democracy show some affinity with the radical communitarian approach. Radical thinking is reluctant to prescribe substantive constitutional or institutional blueprints for a more democratic world order, as these blueprints represent the centralized, modern top-down statist approach to political life that radical thinking rejects. An influential proponent is Burnheim, with his ‘normative theory of demarchy’.\footnote{Burnheim 1985.} Answers to the existing democratic deficits are found in (critical) social movements, such as the environmental, women’s, and peace movements, which challenge the authority of states and international agencies as well as orthodox definitions of the ‘political’. Central to such a theory is ‘the principle that democratic governance should be organized along functional (e.g. trade, health, environment) as opposed to territorial lines, and that such functional authorities should be directly accountable to the communities and citizens whose interests are directly affected by their actions’.\footnote{McGrew 2000, p. 411. An example of such a traditional movements is organized labor groups.}

A commitment to deliberation is reflected in the adoption of a practice of deliberation. This includes, among the other things mentioned, the drafting of potential rules or policies with public ‘notice’ and an opportunity for all interested parties to ‘comment’ on the draft.\footnote{Esty 2006, p. 1527-1534.} Moreover, lawmakers should be responsive to the comments put forward.\footnote{Esty 2007, p. 524.} Illustrative in this regard is the work of Corell and Betsill, who developed a list of indicators to assess NGO influence in the deliberations of environmental lawmaking processes. The indicators show what is perceived to be necessary to facilitate NGOs’ contribution to international lawmaking: being present at the negotiations; providing written information supporting a particular position (e.g. research reports); providing verbal information supporting a particular position (through statements); providing specific advice to government delegations through direct interaction; having the opportunity to define the environmental issue under negotiation; the opportunity to shape the negotiation agenda; and the ability to ensure that certain texts supporting a particular position are incorporated in the convention.\footnote{Corell and Betsill 2001, p. 90.}

The diversity of the NGOs involved, in respect of their inner structures, forms of action, goal setting, and resources, allegedly plays an important role in their systemic potential for contributing to deliberations constitutive for international law. The variety of perspectives increases the chances of succeeding in a rational exchange of arguments, in reaching compromises and consensus. It is argued that with the contributions of NGOs, lawmaking discussions are more critical and creative than when the sole participants are states. In addition, in positing that openings for dissent are as necessary to a deliberative process as securing consent, NGOs are allegedly ideally suited for challenging the positions taken in the debates concerning international lawmaking, and thus for dissent to be heard.\footnote{Scholte 2001, p. 17.} NGO voices complement and contradict each other, thereby contributing to pluralist international deliberations.

NGOs’ intrinsically narrow focus is one of the presented ways in which NGOs can improve deliberation. In contrast to public actors such as states, which are obliged to take into account all aspects of the common interest, NGOs explicitly take a position, and often support this position by research of experts. NGOs offer input based on in-depth

\footnotesize{1149 Burnheim 1985.}
\footnotesize{1150 McGrew 2000, p. 411. An example of such a traditional movements is organized labor groups.}
\footnotesize{1151 Esty 2006, p. 1527-1534.}
\footnotesize{1152 Esty 2007, p. 524.}
\footnotesize{1153 Corell and Betsill 2001, p. 90.}
\footnotesize{1154 Scholte 2001, p. 17.}
information, which with clear definition and presentation facilitates not only a rational exchange of arguments for nation-state delegates or officials working in international organizations, but also facilitates the engagement of individuals in international politics. NGOs’ narrow focus provides individuals with well-defined information, which is considered necessary for any effective participation in a public debate concerning the issues at stake. An explicit position taken by NGOs provides opportunities for others to respond to these positions, whether by supporting or challenging the presented views.

New policy agenda advocates argue that NGOs offer access to discourse over specific international norm setting, but they also argue that NGOs are to some extent the discourse. One of the most salient characteristics of NGOs is their capacity to question and change discourse to develop new international rules and principles. An often-cited example is the ‘Washington consensus’. When new principles regarding market-friendly policies were generally implemented both for advanced and emerging economies, NGOs, together with scholars, politicians, the media, and international organizations like the IMF and the World Bank, engaged in vibrant, often clashing, public discussions. In the same vein, scholars often refer to the many ecological and human rights lawmaking processes in which NGOs have been actively involved in order to shape and change international law. Based on these efforts, Gaelle Breton-Le Goff concludes that NGOs slowly bring about social change, provided that international law is perceived as the product of the values of states and of international society. Optimistic expectations with regard to NGOs’ ability to democratically legitimize international law have been boosted in the past decades by the successful challenges NGOs have made to formerly strong states in Eastern Europe and Latin America. These developments fit with the idea that interpretive communities create law

1155 Mertus 1999, p. 540.
1156 See Broad 2004, p. 130-133. In 1990, economist John Williamsen called the core policy strategy of USA, and international financial institutions the ‘Washington consensus’. See Williamson 1990. This policy, which was based on primarily three pillars: liberalization, privatization and deregulation, has come under attack of a large body of international, transnational and local civil society. Discomfort with the so-called ‘neo-liberal paradigm’ led in the 1970s to protests of groups of indigenous people against World Bank projects. These projects were based on a new policy-based lending instrument called ‘structural adjustment loans’ that mandated that countries advance deregulation, privatization and liberalization. From 1987 onwards, NGOs gathered in North South meetings, parallel to meetings of the IMF and the World Bank. In 1994, the World Trade Organization was set up by leading countries, with strong powers to implement the Washington consensus policy, meeting strong resistance by NGOs around the world. These civil society activities became publicly known during the ‘Battle of Seattle, in November 1999 when 60,000 activists protested on the streets of Seattle during a major meeting of the WTO. Starting in 2001, the annual ‘World Social Forum’ was set up where these forces moved on to the offensive to demonstrate their ability to meet en masse in the South and focus on alternatives to demonstrate that ‘another world is possible’.
1157 NGOs, among others, have advocated qualitative assessment of poverty, and promoted schemes of debt reduction in the South.
1158 Breton-Le Goff 2011, p. 260, footnote 49 referring to states values such as autonomy, independence, integrity, sovereignty; the values of the international society are considered to be legality, order, stability, predictability, peace, social and economical advancement and human rights; some of the values promoted by NGOs are: humanism and primacy of the individual, liability and accountability, sustainability, social justice, lawfulness, and peace. See also Henkin 1994; Horton Smith 1980, p. 249-258.
1159 Fisher 1997, p. 444. The opposite argument is however stated by Petras. ‘Sociologist James Petras paints a darker picture of the effects of some contemporary Third World social movements. He elucidates how mass opposition to Latin American neoliberal economic reconstruction in the 1980s prompted the US and Europan governments and the World Bank to finance and promote parallel, false ‘grassroots’ organizations ‘from below’, which they called ‘NGOs’, indirect competition with genuine socio-political movements. ‘Petras asserts ‘[t]here is
and give law meaning through their own narratives and precepts unfolding their own discourse and deliberations.

The unfolding of this international discourse by NGOs and other civil society actors has strong benefits, as is argued, from the Internet. Communications on the Internet have created robust communities of informed activists who are unbound by hierarchy or territory.\textsuperscript{1160} As Gordenker and Weiss note, ‘[e]lectronic means have literally made it possible to ignore borders and to create the kinds of communities based on common values and objectives that were almost the exclusive prerogative of nationalism.’\textsuperscript{1161} The belief in the capacity of NGOs to affect the terms of discourse and change is captured by Dryzek: ‘One does not need an army, control over governmental bureaucracies, massive wealth or even large numbers of activists to be effective . . . One does however need a certain minimum of conventional political resources: money, personnel, access to the media and credibility.’\textsuperscript{1162} Although related to environmental politics, Dryzek’s remarks are exemplary in stating that compared to the sphere of states and their interactions, civil society is a realm of ‘relatively unconstrained communication’. NGOs are assumed to be independent because of their limited diplomatic conventionalities, the absence of responsibilities for the common interest, and their independence from the wishes of large business investors or the vagaries of the financial markets.\textsuperscript{1163}

The fact that NGOs are independent of the aforementioned obstructions purportedly makes them excellent messengers, a quality which is indispensable for changing a discourse. Steffek, Kissling, and Nanz argue that only NGOs are able to address issues, for example relating to genetically modified organisms, in the appropriate language and, thus, function as an important intermediary, channeling citizens’ interests into the respective policy process.\textsuperscript{1164} In addition, Young notes that NGOs particularly master the art of storytelling, which is one of the crucial elements, besides argumentation, of a well-functioning deliberation.\textsuperscript{1165} According to Young, the general normative functions of narratives in political communication refer to teaching and learning. Inclusive democratic communication assumes that all participants have something to teach the public about the society in which they dwell together, and its problems.\textsuperscript{1166}

5.2.2 Control

Closely related to the arguments that focus on the capacity of NGOs to contribute to deliberative practices and to change discourse is the contribution of NGOs to control.\textsuperscript{1167}

\textsuperscript{1160}Mertus 1999, p. 548.
\textsuperscript{1161}Gordenker and Weiss 1995, p. 357, 365.
\textsuperscript{1162}Dryzek 1999, p. 46.
\textsuperscript{1163}It is evident that especially the independence of NGOs is largely questioned. See chapter 5, section 5.4 for the presented limitations of this reading of NGOs.
\textsuperscript{1164}Steffek, Kissling, Nanz 2008, p. 209.
\textsuperscript{1165}‘Story telling is often an important means by which members of such collectives identify one another, and identify the basis of their affinity. The narrative exchanges give reflective voice to situated experiences and help affinity groupings give an account of their individual identities in relation to their social positioning and their affinities with others.’ Young 2000, p. 73. Young’s argument builds on the work of Lara 1998, chapters 1-5.
\textsuperscript{1166}Young 2000, p. 77.
\textsuperscript{1167}See chapter 1, section 1.3.3.
NGOs are expected to compensate for the lack of procedural rules and review mechanisms of the exerted authority of the relevant organization. NGOs are assumed to improve the accountability of international organizations and states, and to push for transparency. The hopes and expectations are that NGOs, such as business forums, community organizations, faith-based groups, labor unions, think tanks, and other civil society associations might bring greater public control to global governance.\textsuperscript{1168} In the same line, King states:

'We might hope that, at the global scale, networks of committed activists, journalists, and academics, such as those examined by Margeret Keck and Kathryn Sikkink, will eventually bring about a degree of diversity and openness across existing political boundaries, working across borders to challenge unresponsive governments, trying to make them more accountable to a range of suppressed values and interests by ensuring that these voices finds some sort of public hearing.'\textsuperscript{1169}

Again, NGOs are assumed to act as a surrogate for what is in a democratic states context understood as the ‘public’ or ‘counter publics’. Although oppositional influence does not, so the critique goes, by itself make a regime democratic, because counter publics do not rule,\textsuperscript{1170} it is considered undeniably to contribute to the democratic legitimacy of international law.

As we have seen, democratically legitimate lawmaking is not only about the abilities of individuals to have their voices heard and translated into new law proposals. A great deal of the circularity of democratic participation is based on the possibilities to control lawmaking activities and, when needed, to criticize the chosen path taken by lawmakers.\textsuperscript{1171} Scholars engaged in the NGO democratic legitimacy thesis argue that individuals and societies should, and supposedly are increasingly able to, reflect upon and chart their own course into the future, also at the international level.\textsuperscript{1172} The first and foremost justification of the NGO democratic legitimacy thesis in relation to control is the capacity of NGOs to make the international lawmaking processes more accountable to the public.\textsuperscript{1173} Cameron, Lawson, and Tomlin illustrate this statement with reference to the lawmaking processes of the Ottawa Landmine Convention.\textsuperscript{1174}

'The Ottawa process democratized foreign policy within the framework of existing representative institutions by using a partnership with civil society to expose policy to

\textsuperscript{1168} See Scholte 2004.
\textsuperscript{1169} King 2003, p. 35.
\textsuperscript{1170} See Bohman 2007a, p. 63.
\textsuperscript{1171} See chapter 1, section 1.3.3.
\textsuperscript{1172} Dryzek 1999, p. 37.
\textsuperscript{1173} See for literature evaluating NGOs as contributors democratic values such as transparency, accountability an representative legitimacy, Bäckstrand 2006, p. 467-498; Bexell, Tallberg and Uhlin 2010, p. 81-101; Sánchez-Salgado 2010, p. 507 - 77; Scholte 2004, p. 211 - 33.
\textsuperscript{1174} Cameron, Lawson, and Tomlin 1998, p. 13. International law scholars, international activists, diplomats and international organization personnel regarded the establishment of the Ottawa Convention Banning Landmines as a defining, democratizing change in the way international law is made. By bringing NGOs into the diplomatic and international lawmaking process, many believed that the Ottawa Convention represented both a democratization of, and a new source of legitimacy for, international law, in part because it was presumably made ‘from below’. Anderson 2000, p. 91.
the test of publicity. (...) The public diplomacy practiced in the Ottawa Process compelled policy-makers to provide public reasons for their actions and exposed them to criticism from civil society by bringing an NGO coalition into the policy process, both as domestic partners and international allies.'

This approach concerns the power of NGOs to facilitate and activate criticism of, and actions against, governmental acts of states and international organizations. They succeed in facilitating and activating criticism primarily by generating public awareness and pushing for more transparency and accountability.

According to Putnam, the contribution by NGOs to control in international lawmaking is a multi-level game. Firstly, NGOs can push national governments to take certain positions in negotiations at the supranational level. They strive to lobby for specific topics to be included, and aim to convince state actors of the necessity of inclusion. At a nation-state level it is common practice for interest groups to appeal to the voters and to mobilize people to take part in opposition activities, sometimes even in forms of civil disobedience. Secondly, NGOs allegedly have established some major milestones in checking international authority as well. NGOs pushed for specialized international conferences and even organize counter conferences and international summits in order to mobilize protest that might lead to alternative norm-setting. The pressure of NGOs on international lawmaking authorities to substantively change their positions is frequently presented as the quality of NGOs to control international authority. Scholte attempts to demonstrate NGOs' alleged contribution to control by pointing out the pressure of NGOs and their participation in independent policy evaluation mechanisms for the World Bank and the IMF. These international organizations have been challenged by NGOs to take more responsibility for their actions and policies. Görg and Hirsch mention in this respect the concept of 'opposing power' with regard to the possible democratic merits of NGOs. The strategy of the concept of opposing power pertains to the mobilization of criticism of, and actions against, decisions taken by states and international organizations by, for example, generating public awareness of problems.

NGOs allegedly play a role in policy monitoring and reviewing. A part of their self-imposed task is to check the legality of international lawmaking; whether the particular lawmaking authority is acting in line with its constitutive documents and stated policy positions. In addition, NGOs assist those who suffer the consequences of international law in seeking redress.

Another asset of NGOs that contributes to control is the fact that they are allegedly capable of detecting and criticizing exclusive practices, which is considered to be one of the weak points of international lawmaking in general. Young distinguishes two recurring forms of exclusions: external exclusion and internal exclusion. External exclusion arises out of...
practices in which some participants dominate the process and deny other participants actual access to a lawmaking process.1183 The inherent Northern bias of international governance, which might lead to external exclusion of ‘Southern’ NGOs, is an example. Noortman argues that the growing number of NGOs in developing countries and the awareness of international lawmakers of cultural differences might help to redress the geographical imbalance.1184 Internal forms of exclusion arise when participants are allowed to enter the lawmaking processes but their opportunities to contribute substantively to the debate are rendered impossible: for example, when dominant participants define the terms of a discourse, based on assumptions that are not shared by others. Another form of internal exclusion is the use of a particular way of phrasing that is incomprehensible for others who are not familiar with the relevant discourse.1185 Young imputes to NGOs the task to expose these forms of exclusions, and to challenge the legitimacy of lawmaking practices based on exclusions.1186 These NGOs change the current exclusive lawmaking practices into more inclusive lawmaking processes that will eventually result in fuller participatory democracy.1187

The detection of exclusionary practices primarily relies on transparency, but also positively affects transparency. Through political pressure, NGOs bring lawmaking activities into the open, which is, as discussed in chapter 2, section 2.2.3, a procedural norm that enables a well-functioning deliberative and inclusive lawmaking process. According to Scholte, NGOs challenge the currently popular official rhetoric of ‘transparency’ by asking critical questions about what is made transparent at what time, in what forms, through what channels, at whose decision, for what purpose, and in whose interest.1188 The activities of NGOs pushing for transparency encourage a wider public to proceed in public scrutiny activities. Often citizens are not aware of who is taking what decisions in global governance, from what options, on what grounds, with what expected results, and with what resources to support implementation. A vital condition for NGOs to contribute to control is that they operate independently from governmental institutions.1189 To what extent NGOs depend on both governments and international organizations is for many scholars a starting point in determining whether NGOs contribute to the democratic legitimacy of international law.1190

In the first section, the main arguments in support of the NGO democratic legitimacy thesis as found in contemporary literature have been reviewed. This section first categorized the arguments of proponents into three recurring democratic contributions related to a voice, knowledge, and social engagement. These three manifestations contribute, in procedural terms, to deliberation and control. The arguments predominantly rely on the

1183 Young 2000, p. 52
1184 See Noortmann and Ryngaert 2010. The critique that NGOs still stem merely from western countries can be overcome through supporting the involvement of a wide diversity of NGOs. The South has seen the greatest growth in NGOs However, besides this ‘quick fix’ of subsidizing non-western NGOs one can argue that the origin of NGOs is not decisive in evaluating their democratic potential. As mentioned earlier, maybe especially their intrinsic ‘transnational’ character provides opportunities for the representation of interests that are not covered by states.
1185 Young 2000, p. 53.
1186 Young 2000, p. 55.
1187 Scholte 2001, p. 17.
1189 Some scholars dismiss the possibility of this ideal immediately, stating that NGOs have a ‘symbiotic relationship’ with states. See Raustiala 2011, p. 152.
one hand, on the democratizing effect of global civil society, and on the other hand, on the belief that NGOs’ involvement in international lawmaking is an expression of the principle of self-rule. It will not come as a surprise that the arguments in favor of NGOs’ contribution to the democratic legitimacy thesis – which have been accounted here – have been contested. As Higgins states, as “[t]o some, these radical phenomena represent the democratization of international law. To others it is both a degradation of the technical work of international lawyers in the face of pressure groups and a side-stepping of existing international law requirements and procedures”. 1191 It is the object of the next sections to review such criticisms.

5.3 Disputing the submission of international law to democratic legitimacy

The NGO democratic legitimacy thesis is considered by scholars to be naïve and overly optimistic towards the impact NGOs can have on the democratic deficits of international law.1192 More fundamentally, a considerable number of critics are of the opinion that the application of democratic legitimacy as a standard should be limited to the political spectrum of the state. Democracy, a people, and a state are considered to be conceptually intertwined.1193 Democracy materializes in this reading as the political association in which the state is central, similar to nationalism, sovereignty, and territory. Consent of states is perceived as a clear indicator for knowing that international lawmaking processes are based on the will of the affected people.1194 Scholars therefore conceptually disagree with the rise and relevance of the thesis in the first place.1195 The objectivity of signaling the causes of scholarly attempts to rethink international law’s democratic legitimacy is questioned.1196 The justification for this perspective has many different aspects. The following sub-sections briefly describe two distinct roots of the arguments. First, some scholars argue that the international legal order cannot be democratic. This argument refers to the impossibility of international democratic legitimacy in se. Second, scholars argue that even if one could apply the standard of democratic legitimacy to assess international law, international law does not require international democratic legitimacy. In other words, international democratic legitimacy is considered to be superfluous. As a consequence of these nation-state based perceptions of democratic legitimacy, critics even consider the political

1192 Perez for example calls the claim that NGO involvement substitutes democratic legitimacy a ‘universalistic dream’. Perez 2003, p. 42.
1193 Van Ham 2002, p. 156. Some see a common language as basic condition for democratic governance. Kymlicka insists that linguistic/territorial political associations are the primary forum for democratic participation, rather than higher-level political associations that cut across linguistic lines, because democratic politics is essentially “politics in the vernacular”. Kymlicka 1999, p. 121.
1194 Manent argues for example that democratic legitimacy is inherently linked to consent. Manent 1997, p. 92-102.
1195 See chapter 3 on the reasons for the rise of the NGO democratic legitimacy thesis.
1196 As Karlsson analyzes, “[t]hose who believe that globalization poses fundamental and serious challenges to democracy (in theory as in practice) try to come up with a response to what they perceive as an imminent and pressing problem. That might give the impression that although theorists may quarrel about the proper solutions, they all agree that the problem is important and deserve our attention. But the consensus we register in the debate may simply conceal the fact that most people who dissent have moved on to write about things they find more interesting, important and challenging.” Karlsson 2008, p. 13.
involvement of NGOs as a disruption of the functioning of nation-state democracies, which is explained by the ‘second bite of the apple’ thesis.1197

5.3.1 The impossibility of international democratic legitimacy

Some critics of the NGO democratic legitimacy thesis consider normative values, central to many traditions of modern democratic thought, 1198 such as the need for active citizens, equal participation in decision-making, and a virtuous community, as irreconcilable with current international affairs. The reasoning of Dahl is exemplary. He argues that international organizations simply cannot be democratic because there is no demos at the international level, due to the lack of homogeneous culture or a people constituting a polity or defining a common public good. Furthermore, popular control over international decision-making is impossible. Dahl argues that also for a domestic democracy, foreign policy decisions are made by political elites without much input from, or accountability to, the majority of the citizens. In Dahl’s opinion, an enlarged international demos will diminish citizens’ capacity to influence policy-making even more. 1199 Democratic legitimacy is suggested to require a democratic system: a ‘democracy’. 

Hirsch and Görg continue this line of reasoning when they argue ‘for what is the meaning of “democracy” if there exist neither a people, in the democratic-constitutional legal sense, nor general elections or active and legitimate political parties, nor a parliament and organs of representation, nor a central state equipped with a monopoly of coercion?’1200 They consider these manifestations of democracy vital for an understanding of democratic legitimacy, and observe that they only exist in the context of the nation-state. McGrew states that if one accepts that state sovereignty is no longer indivisible but shared with international agencies, then states no longer have absolute control over their national territories, that political boundaries are increasingly porous, and that ‘the core principles of democratic liberty – that is self-governance, the demos, consent, representation, and popular sovereignty – are made distinctly problematic’.1201 These conceptual difficulties raise the questions of the extent to which the requirement of the ‘expression of the will of the people’, common to most academic discussions on democratic legitimacy, makes sense in the international legal order, and the extent to which democratic features can be transported into the international legal order.1202

One can parallel this perspective, which is evidently critical to the transplantation of democratic legitimacy to the political level of the international legal order, with the ‘political conception’, as Nagel calls it, of that other ideal that is often pleaded for internationally: justice. Central to the ‘political conception’ of justice is the idea that ‘without the enabling condition of sovereignty to confer stability on just institutions, individuals however morally motivated can only fall back on a pure aspiration for justice that has no practical expression, apart from the willingness to support just institutions should they become possible’.1203 The political conception confers upon the state, with its monopoly of force, the function of

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1197 Raustiala 2012, p. 170, 171; Bhagwati 2001, p. 29; Bolton 2000, p. 217. The ‘second bite of the apple thesis’ is discussed in section 5.3.3.
1198 See Held 2006.
1202 De Jong and Stoter 2009, p. 311.
establishing a unique institutional relationship between its citizens. This specific relationship between citizens and the state exclusively gives the value of democratic legitimacy its application. From this viewpoint, democracy is not considered to be a pre-institutional value, but rather an indication of a relationship of fellow citizens that is not shared with the rest of humanity. The link between sovereignty and its people is in this perspective decisive. The existence of sovereign state power entails exceptional demands and exceptional obligations, which cannot be applied to any institution other than the state.1204 Dworkin articulates it this way:

‘A political community that exercises dominion over its own citizens, and demands from them allegiance and obedience to its laws, must take up an impartial, objective attitude toward them all, and each of its citizens must vote, and its officials must enact laws and form governmental policies, with that responsibility in mind. Equal concern (...) is the special and indispensable virtue of sovereigns’.1205

Analogous to the discussion on the possibility of applying the standard of justice outside the boundaries of the nation-state, one could interpret this critical perspective on the thesis as a manifestation of the belief that the requirement of democracy is not applicable to the world as a whole, unless the world is governed by a unified sovereign power.1206

5.3.2 The redundancy of international democratic legitimacy
The second argument for justifying the limitation of the concept of democratic legitimacy to the nation-state level does not focus on the impossibility of democratic legitimacy due to the lack of a demos or a sovereign, but reasons that what is established at the international level does not require any democratic legitimation. According to this view, international ways of norm-setting, policy-making, or exercises of influence do not qualify as the kind of exercise of authority for which democratic legitimacy is needed.1207

Scholars who have identified problems with the democratic legitimacy of international law often contextualize international law in a very broad way. Leydet has formulated an interesting paradoxical situation in this respect, while referring to the work of Brunkhorst. As with many other scholars involved in the legitimacy debate, Brunkhorst includes in his conception of international law international agreements, statutes of international organizations, international organizations themselves, standards set by private, non-governmental organizations, and decisions and resolutions taken at international summits or by the UN. In the first place, by formulating international law in such a broad way, referring to a ‘vast, multifarious and pervasive body of law’ that obviously exceeds the boundaries of the traditional doctrine of state consent, one strengthens the plea for the urgency to reconsider the democratic legitimacy of international law.

However, as discussed in Part I, the very justification of using democratic legitimacy as a tool to evaluate the acceptability of the exercise of public authority is related to the interfering and dominating characteristics of law, being binding and coercive upon its subjects. Critics argue that the status of many of the ‘softer’ forms of international law often included in such a broad conception of international law cannot be automatically assumed

1204 Nagel 2005, p. 130.
1205 Dworkin 2000, p. 6.
1206 Nagel 2005, p. 121.
to require the same strong evaluation test as national law. Critical scholars question the need to democratically legitimize all these types of international norms, as the status and impact of international law is in many cases contested. Besides, in a broad conception of international law, the scholarly conception of international democratic legitimacy relies on the ‘affectedness’ of individuals by international legal instruments. As Leydet argues, this approach diminishes the feasibility of democratically legitimizing international law, as one cannot expect that the ‘totality of addressees’ of global norms will ever be able to exercise its democratic rights.\textsuperscript{1208} The discussions concerning the redundancy of evaluating the democratic legitimacy of international law touch upon dialogue on the validity and normativity of international law, which is a different theoretical but underlying contested issue.

The inherently disparate institutional design of international organizations and divergent conduct of peoples on different territorial levels, according to this approach, require a different kind of leading practical principle than is applied at the institutional design of a state.\textsuperscript{1209} Besides the recognition of the need for a different institutional design, some adherents of the traditional democratic legitimacy doctrine question the relevance of approaching global legal interactions as a political institution. Anderson, for example, asks himself ‘to what extent an economically integrating world requires a politically integrated planet’.\textsuperscript{1210}

The traditional approach to states as primary lawmakers insists on the application of different principles to different types of entities. This is in line with Rawls’ reasoning, which states that ‘the correct regulative principle for a thing depends on the nature of that thing’.\textsuperscript{1211} While these scholars might underline the importance of democratic legitimacy, their conception of democratic legitimacy is inseparably related to the type of exercise of public authority that are exclusively found at the domestic level.\textsuperscript{1212} Just as the exercise of private power is not subjected to the same constitutional and legal standards as the exercise of public power, decision-making beyond the state should not be assessed by the standards of democratic legitimacy.\textsuperscript{1213} Only state authority, with its claim to a monopoly of coercive force, is an appropriate subject for political theory. Only state authority lends itself to an analysis in terms of democracy and democratic legitimacy,\textsuperscript{1214} as the sovereign state defines and delimits the people on whose behalf representatives act, and to whom they are accountable.\textsuperscript{1215}

In sum, whereas the first approach considered any application of democratic legitimacy to assess the acceptability of international law impossible, given the lack of conditions at the international legal order such as a demos and sovereign power, the second approach considered any application not necessary, given the weaker type of governing that characterizes international law compared to domestic law.

\textsuperscript{1208} Leydet 2006, pp. 799–807.
\textsuperscript{1210} Anderson 2011, p. 841.
\textsuperscript{1211} Rawls 1999, p. 25.
\textsuperscript{1212} This clash can be compared with ‘particularism and universalism’ in legal theory, set out by Bogdandy and Dellavalle. See Bogdandy and Dellavalle 2008.
\textsuperscript{1213} De Búrca 2007-2008, p. 230.
\textsuperscript{1215} The concept of sovereignty brings forth a strong theoretical debate, or in Koskenniemi’s words, ‘[t]he grammar of sovereignty produces a fully contextualized normativity’. Koskenniemi 2006a, p. 584.
5.3.3 The undesirability of NGOs’ political engagement at the international level

An ambivalent approach towards the NGO democratic legitimacy thesis seems to go hand in hand with a basic trust in state-based institutions with regard to safeguarding the democratic legitimacy of the exercise of lawmakership, and is simultaneously accompanied by a certain distrust towards the participation of NGOs in international lawmakership. NGO advocacy is often criticized as the ‘second bite of the apple’ thesis. The participation of NGOs internationally is considered detrimental to the democratic legitimacy of international law because it influences the state-based negotiations, which might affect and change the position of that state, including its consent to international law, while there are no opportunities for citizens of these states to correct, react to, or counterbalance NGOs’ input that is internationally effectuated.\textsuperscript{1216} Bolton argues, for example, that NGOs’ ‘detachment from governments’ is troubling for democracies because civil society ‘provides a second opportunity for intrastate advocates to reargue their positions, thus advantaging them over their opponents who are unwilling or unable to reargue their cases in international fora’.\textsuperscript{1217} The negative result of NGO involvement at the international level, according to Anderson, is that by refusing to conform to the results of a democratic process with a state and instead pursuing contrary results internationally, NGOs ‘seek to undermine the processes of democracy within democratic states’.\textsuperscript{1218}

For many critics it is far from clear whether there is a democratic imperative in giving individuals opportunities to participate in global governance.\textsuperscript{1219} In this light, NGOs are seen as promoters of particular interests instead of the common interest, although both might naturally coincide, turning them into biased participants in international lawmakership. As Johns argues, ‘they are good at voicing opinion, not at resolving the myriad claims that present to government’.\textsuperscript{1220} According to Johns, ‘[t]hese groups can do good work, but those with an illiberal bent can capture them. Unlike political parties, they do not need to compromise to gain a majority of public vote. NGOs sell participation, not settlements of competing interests’.\textsuperscript{1221} The question at stake here is if and how different sorts of democratically legitimizing forces can be combined.\textsuperscript{1222}

5.4 General limitations of the NGO democratic legitimacy thesis

The NGO democratic legitimacy thesis has been criticized on other grounds, apart from the fundamental issue regarding the right level of applying democratic legitimacy. Many critical notes on the NGO democratic legitimacy thesis represent an adverse reaction to the so-called fascination with the ‘innate goodness’ of NGOs.\textsuperscript{1223} In general one can state that critical scholars are hesitant to assume the genuineness of NGO involvement in international

\textsuperscript{1216} Especially states argue that the taking part of NGOs in international organizations should not be perceived as democratic because NGOs have plenty of opportunities to search for influence through their own governments. In 2003, the Capital Research Center Foundation Watch published an article on ‘NGO accountability’ by Huberty and Riggs who state that many NGOs are ‘using their power to undermine individual freedom (…) [b]y promoting new international arrangements that are indifferent to the U.S. Constitution’. Huberty and Riggs 2003.

\textsuperscript{1217} Bolton 2000, p. 217.

\textsuperscript{1218} Anderson 2001, p. 383.

\textsuperscript{1219} Charnovitz 2003, p. 46.

\textsuperscript{1220} Johns 2003a, p. 14.

\textsuperscript{1221} Johns 2003a, p. 14.

\textsuperscript{1222} Bekkers, Dijkstra, Edwards, and Fenger 2007, p. 5. See also Wheatley 2012, p. 170-173.

\textsuperscript{1223} Young 1994, p. 47.
lawmaking, based on reservations towards international organizations’ intentions and NGOs’ legitimacy. As an ordering matter, the following sub-sections make a distinction between the assumed substantive limitations of the thesis and the assumed procedural limitations.

5.4.1 Substantive criticisms
Although the institutional involvement of NGOs in legislative practices is argued to have possible benefits from a pluralist perspective, more skeptical scholars retort that the opportunity for NGOs to provide for ‘otherwise unheard voices’ depends heavily on the precondition that international organizations (including states) function as a neutral mediator of all presented interests. Besides, to appreciate NGOs as empowering and engaging actors of civil society, an account of what international civil society entails is necessary. These two types of substantive criticisms will be discussed here.

Questionable motivations of international organizations to allow for NGO participation
Scholars are hesitant to trust the willingness of international organizations to function as a neutral mediator. They fear that NGOs are invited by international organizations only to provide ‘window dressing’. The hesitation of scholars with regard to the input of NGOs and their emphasis on the fundamental follow-up question of how international organizations maintain neutrality should be understood in light of the extensive literature concerning the biases of existing power structures and interest group constellations which, for instance, have successfully blocked issues from reaching the institutional agenda that are considered unfitting by authoritative decision-makers. Scholars doubt whether it is the true purpose of international organizations to enrich their debates by the diversification and contestation that NGOs are assumed to offer. Allowing NGO participation is understood as merely a strategic move to strengthen the credentials of international lawmaking by the relevant international organization and to justify pre-rationalized decisions. Scholars are weary of the ‘unholy alliance between IOs and international NGOs who have a common interest in more lawmaking’ rather than having a common interest in more democratic legitimacy of international law.

Anderson and Rieff argue that NGO participation in the lawmaking activities of international organizations ‘is best understood as [an] intertwined quest for legitimacy both by the NGOs said to make up global civil society and by public international organizations such as the UN’. Their idea is that actors legitimize the other ‘in a system that is not only

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1225 Charnovitz notices that ‘the pursuit of individual interests by NGOs leaves open the question of how to reconcile competing interests’. Charnovitz 2006, p. 372. Charnovitz refers to Roscoe Pound, who noted in a paper presented to the 1939 annual meeting of the American Society of International Law, the rise of associations and institutions, and identified a need for ‘a theory of interests’ to assist in recognition, classification, comparison, and valuing ‘competing interests’. Pound has suggested that one should consider to develop a law governing international relations, which deals effectively with the claims, demands, and desires being asserted. Pound 1939, p. 18.
1226 Window dressing means looking for ways of improving appearances or creating a falsely favorable impression.
1227 Bekkers and Edwards 2007, p. 52.
1228 The distinction between communicative and strategic actions is discussed in Habermas 2006, p. 25.
1230 Anderson and Rieff 2005, p. 2.
undemocratic but also ultimately incapable of becoming democratic’.

Anderson fears that legitimation by NGOs for lawmaking in international organizations is not more than a ‘circular act of “auto-legitimation”, each to the other’. The UN is in constant search for political instruments to strengthen its legitimacy, to uphold the status of independent global governance. Inviting NGOs to the table does not lead to the openness of the system that proponents of the NGO democratic legitimacy thesis strive for, but instead it allegedly leads to a ‘closed legitimation-circle between global civil society and international organizations’. NGOs in their turn see in the formal accreditation by international organizations proof of their importance and status, which is allegedly a strategic move to acquire more financial donors.

Otto mentions in this regard the Fourth World Conference on Women. Other scholars present this conference as a textbook example of a great democratic achievement for NGO participation. Otto is skeptical about the actual results of the involvement of NGOs and criticizes the final governmental and non-governmental platforms for action as being ‘shallow and even regressive’. Mertus advocates a substantive empowerment of transnational civil society, which she contrasts with the actual present practices of NGO involvement, so that they can ‘do democracy differently’. Also, Mercer and Steffek, Nanz and Kissling fear that international organizations use NGOs’ involvement primarily as an instrument to confer the badly needed legitimacy to them. Mercer expresses her worries that NGOs cannot alter this practice as, due to their involvement in international organizations, NGOs seem to support and legitimize international policies rather than question them.

Steffek, Nanz, and Kissling state that the implication of NGO involvement could be that NGOs, as a means of gaining admission to officialdom, adopt a position assigned to them by international organization bureaucracies that are in fact in search of legitimacy for their governance activities. They emphasize that participatory practices do not automatically lead to real political dialogue. This is understood to form the motivation for some NGOs to voice their dissent and campaign in other political forums, including in the media and on the street, by all means outside the setting of international organizations.

While wondering ‘who needs article 71 [of the UN Charter]’, Noortmann equally suggests that formalization of NGO involvement might have responded to the needs of international organizations more than to the aims of NGOs to democratically legitimize international law. Noortmann argues that accreditation procedures in se are in contrast to the basic raison d’être of NGOs: that is, to provide an independent opposition to governmental power and therefore to help establish a system of checks and balances at the international level. Besides, the current screening and accreditation mechanisms of

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1231 Anderson and Rieff 2005, p. 2.
1232 Anderson 2011, p. 846.
1234 Anderson 2011, p. 884.
1235 Boyle and Chinkin 2007, p. 45.
1237 See Mertus 1998. Mertus states that ‘conference organizers invite local activists from places like Serbia to end an air of authenticity to a predetermined outcome; while international audiences listen politely to their foreign guests, they rarely process what they hear in a way that alters their original plans’. Mertus 1999, p. 542.
1240 Noortmann 2004, p. 118.
international organizations are considered to be in tension with the basic democratic principle of equality.\textsuperscript{1241}

The indeterminacy of global civil society

The validity of the NGO democratic legitimacy thesis, based on the argument that NGOs further social engagement and contribute to the formation of an international civil society, is highly questioned not in the least because of the awareness that the meaning of international civil society is ‘deeply ambiguous’.\textsuperscript{1242} Grand and Keohane, for example, state that ‘there is no juridical public on a global level’ and ‘no sociological global public’, and that ‘a genuine global public comparable to publics in well-established democracies does not exist’.\textsuperscript{1243} The robustness of international civil society as a concept is critically assessed, in light of the implosion in terms of scholarly attention towards global civil society since September 11, 2001.\textsuperscript{1244} Anderson and Rieff argue that ‘[t]hese transnational NGOs are properly called “global civil society” and not merely “advocacy NGOs” for the fundamental reason that they are perceived, on the standard account, to speak for the people of the world’.\textsuperscript{1245} A false analogy is allegedly made between ‘civil society’ and ‘global civil society’ and between a settled domestic democratic society (in which civil society is a part of the fabric of domestic society) and an ‘international society’ or, if one likes, ‘international community’.\textsuperscript{1246}

‘Civil society institutions that are part of the social fabric of a settled domestic democratic society are able to play the role of single-minded advocates – organizations with an axe to grind and a social mission to accomplish – precisely because they are not, and are not seen as being, ‘representative’ in the sense of democratic representation.’\textsuperscript{1247}

‘They do not stand for office. (...) NGOs in their most exalted form (and there are many hybrid exceptions) exist to convince people of the rightness of their ideals and invite people to become constituents of those ideals, not to advocate for whatever ideals people already happen to have.’\textsuperscript{1248}

Comparable to the conceptual discussion on the impossibility of applying democratic legitimacy to international law,\textsuperscript{1249} it is questioned by critics of the NGO democratic legitimacy thesis whether the concept of civil society, understood as a social arrangement within a relatively coherent system of domestic political institutions, can be translated to the

\textsuperscript{1241} Falk and Strauss 2000, p. 215. See also Charnovitz 1996. Charnovitz concludes after his extensive study of NGO involvement that ‘the involvement of NGOs seems to rise when governments need them and to fall when governments and international bureaucracies gain self-confidence, suggesting a cyclical pattern’. Charnovitz 1996, p. 190.

\textsuperscript{1242} See for an extensive overview of different understandings civil society in international lawmaking: Pedraza-Fariña 2013.

\textsuperscript{1243} Charnovitz 2005, p. 10, referring to Keohane and Grant 2005.


\textsuperscript{1245} Anderson and Rieff 2005, p. 5, referring to Williams 1997.

\textsuperscript{1246} Anderson and Rieff 2005, p. 5.

\textsuperscript{1247} Anderson and Rieff 2005, p. 5, referring to Anderson 2000.

\textsuperscript{1248} Anderson and Rieff 2005, p. 5.

\textsuperscript{1249} See section 5.3.
Global civil society is extremely heterogeneous and fragmented and is full of unequal relationships in terms of power and dependency. Equation with global civil society is considered incorrect, as it is often merely to serve the value-laden view of the supporters of NGOs as representatives of civil society. Anderson and Rieff argue that "[i]t is, in a word, institutionalized ‘new social movements’ – promoting environmentalism, feminism, human rights, economic regulation, sustainable development, and so on – that count." Yet the Roman Catholic Church and many far more politically conservative Christian denominations, for example, are in fact transnational NGOs of great size, resources, members, and energy. For their politics, they surely would be included as part of ‘global civil society’ on any politically neutral interpretation of that term. But ‘global civil society’ is understood by its advocates to be a ‘progressive’ movement. Critics accuse this perception of civil society to contain only a selection of politically progressive NGOs and social movements.

It is argued that we should critically assess why NGOs and civil society are often conflated, in which it is often argued that NGOs play a crucial role in civil society. In general terms, ‘civil society’ is used to refer to that segment of society that ‘interacts with the state, influences the state and yet is distinct from the state’. Such a tendency is easily explained by a reference to political philosophy in which a blossoming associational life is considered a vital factor for well-functioning democracies. Besides, Kelley refers to a more instrumental and strategic consideration: political actors from ‘the Global North’ hope that by supporting NGOs, problems of failed states in the developing world, particularly in Africa, would be easier to solve. The indeterminacy of how, and whether, the concept of civil society is organized beyond the domestic level contributes strongly to the clash between opponents and proponents of the NGO democratic legitimacy thesis.

5.4.2 Procedural limitations
Besides these more substantive limitations, critics point to a broad range of procedural limitations, ranging from skeptical notes on the promise of the internet and the uses of new forms of communication as a vehicle for the democratic legitimacy of international law, to the alleged misfit of NGO involvement within a deliberative democratic framework.

1251 Critique goes further than false analogy of domestic civil society and global civil society. Walzer argues more fundamentally against any ‘division between state and civil society’. Characteristically for liberalism’s ‘world of walls’, that ‘art of separation’. Walzer 1984, p. 315.
1252 See Carothers 1999.
1255 See chapter 2, section 2.1.2.
1256 Kelley 2011, p. 999; Kennedy argues that the human rights movement and NGOs associated with it, have promoted an interventionist agenda based on Western models that impoverishes local political discourse in developing countries. Critical to this proposition are Kennedy and Fisher. Kennedy 2008, p. 20-21; Fisher 1997, p. 445-446.
1257 See for a skeptical view: Weinstock Netanel 2000, p. 447-491. The technological advantages of the Internet cannot guarantee the emergence of real political action (even where shared global concerns do exist). And some countries may dominate the use of Internet, as some people are cut off any Internet opportunities by their state authority.
Complexity of democratizing transnational deliberation

According to critics, proponents of the NGO democratic legitimacy thesis often overlook the complexity of transnational deliberation, on the one hand, and the lack of grounds for reciprocity that underlie the duty of justification in public deliberations, on the other. The fact that NGOs have fixed positions based on their mission obstructs, rather than facilitates, an open debate. NGOs are not willing to change their positions, which is considered a precondition of deliberation. Further, although NGOs might criticize lawmaking practices of international organizations and states, the way NGOs employ their activities can be provoking and intrusive, which can negatively affect the willingness of the other participants to listen and be receptive to persuasion. Another issue that seems to be overlooked is that many NGOs do not feel attracted to the way they have to represent their constituency in the lawmaking processes of international organizations. Some social movements emphasize the impossibility of translating the ideal of deliberative lawmaking into the international lawmaking processes that are, in their opinion, characterized by structural inequalities.

On a more practical level, Rebasti notes that the growth of NGOs seeking participation in the lawmaking processes of international organizations requires facing an ‘openness dilemma’: the more that international organizations are open to civil society, the more difficult it is to select the information channeled by NGOs and to benefit from their potential contribution in order to enrich the rationality of the debate. The selection issue requires a constructive answer to the question of who should participate and how. On the one hand, equal access to every group would frustrate decision-making. Exemplary is the 1992 United Nations Conference on the Environment and Development in Rio de Janeiro. More than 1,500 NGOs were accredited. Inclusion of all interested NGOs was impossible to have effective deliberations. As a result, government delegates increasingly withdrew behind closed doors. Scholars have shown that in practice the withdrawal of government delegates is quite common: even though the deliberation processes are open in the early stages of discussions and preparations, NGOs are shut out at later stages when states enter the stage of final decision-making. As He and Merphy point out, during the Kyoto Protocol NGOs were denied access to the floor during plenary debates and most negotiation took place in closed-door meetings. Rossi calls this a problem of overcrowding. Overcrowding equally causes a concern for NGOs, since more participants implies less substantive impact of their participation. The growing number of NGOs that seek participation turns their single contribution into something consequently less influential.

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1258 Gutmann and Thompson 2004, p. 36.
1259 This claim is in line with the nineteenth-century liberalism that requires an independent attitude of the representative towards the executive power. The prohibition of instruction and consultation secures the fact that in the Assembly the public interest is served. Witteveen 1996, p. 234-235.
1260 NGOs often perceive direct activism and opposition such as street marches or boycotts as the only indispensable instruments to achieve social change. Young 2001, p 670-690.
1261 We come back to this point in the subsequent subsection ‘representing elites’.
1262 Rebasti 2008, p. 41-42, referring to prof O. De Schutter at the EUI Workshop.
1264 Raustiala 1997a, p. 733.
1267 Bettati 1986, p. 21. The issue of formal overcrowding can however lead to advantages for NGOs who stay far away of formal accreditation and opt for an informal relationship with International Organizations.
The requirement of an inclusive lawmaking process seems to cause tension with the requirement of a deliberative lawmaking process. In theory the two ideals seem to be complementary. Rossi argues that ‘[p]articipation complements deliberation by helping to limit monopoly rents from interest group politics, by providing better information and by fostering democratic process and citizenship. Deliberation ensures that participation in agency decisions will be meaningful and not perfunctory’. However, when a lawmaking institution is confronted with too many participants, it equally means that it has to deal with too much information, which might decrease the ability of lawmakers to focus in depth on specific problems. This in turn creates space for strategic uses of information by participants. Increases in participation with the aim of making the lawmaking process more inclusive can even lead to a movement of the authoritative power towards a model of lawmaking characterized by experts.

In sum, critics emphasize the limited room NGOs have for true impact. Under the present conditions of the international system, non-state actors generally do not participate directly in law-creating processes. Non-state actors may be the origin of a proposed legal rule, but in order for a proposal to become a legal rule, it must be accepted as such by states.

Lack of independence

Another concern is that NGOs are not able to uphold an independent position towards international organizations and states due to the existing donor constructions that foresee their financial support. As Spiro states, ‘NGOs now routinely accept government funds, potentially compromising their ability to bite [sic] the hands that feed them’. A risk of donor practice is that when the donor withdraws, NGOs collapse. This truism raises questions as to whether NGOs are intrinsically organizations of civil society rather than state organizations, or whether they are in fact part of a governmental and regulatory complex and should be identified as part of the ‘extended state’. Critics fear that in practice the connection is merely to assist the operationalization of the lawmaking activities of international organizations. NGOs are no more than apolitical tools without any specific meaning for the principle of equality or deliberation. The focus of the critics shifts from a democratic legitimacy approach to a functional efficiency perspective. NGO participation is seen as beneficial to states and international organizations when the NGOs fulfill tasks that are difficult for the states or international organizations to conduct by themselves.

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1268 Rossi 1997, p. 211.
1271 Arend 1999, p. 43.
1274 Hirsch 2003, p. 238-239 referring to Gramsci 1986. In a newspaper article published at the 10th of May 2010, the Moscow Times clearly shows the questionable character of funding of NGOs by governments. Moscow times: 5 NGOs Dole Out $33M in State Grants (May 10, 2010).
1275 The general theoretical expectation that civil society actors should be independent from governmental actors or market in order to be of democratic relevance is explained by Post and Rosenblum 2002, p. 90.
1276 See Tallberg 2008.
1277 Tallberg 2008, p. 3. Mitrany earlier theorizes this functional understanding of NGOs contribution. Charnovitz refers in this respect to Mitrany’s work on international cooperation along functional lines. Charnovitz 2003, p. 58.
Critics emphasize that in practice, most governments fund specific NGOs. Given the imbalance with regard to international NGOs between the North and the South, the involvement of NGOs in international lawmaking may mirror state power structures by furthering the bias in favor of agendas of the North. The type of forum and activities developed in international organizations are criticized as being a reflection of Western ways of governance. A bias in international organizations also affects the way lawmaking practices are organized, which consequently affects what type of NGOs feel attracted to these processes. One might even question the neutrality of law as an instrument to govern. Law as an effective means to establish social change might be a typically hegemonic concept, which is appealing for Western NGOs but arguably less so for other NGOs. And while NGOs can appear to bypass traditional divisions, beliefs, and interests, there remains a chance that they do so by promoting particular agendas. Scholars argue that if NGOs are taking up greater roles in international lawmaking activities as more donor funding becomes available, then the legitimacy of their claims to work with and represent the interests of the poor and disenfranchised might come under threat.

The issue of independence touches upon the relationship between the ‘constituency’ of NGOs and NGOs themselves. It is argued that NGOs face a paradox in their role as facilitators of social engagement. Kilby warns that ‘empowerment’ by NGOs is a subjective activity. NGOs’ interaction with the community is empowering of that community at a certain level but it can also lead to a disempowering ‘dependency’. Kilby fears that NGOs may exert their power and influence to prescribe what they believe is empowering. This issue brings us to the most often-heard points of critique on the NGO democratic legitimacy thesis, namely the issues of accountability and representation of NGOs. The primary procedural concern of critics is NGOs’ alleged internal legitimacy, which is assumed necessary in order for the thesis to be persuasive.

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1278 As long as the funds received from governments are declared, and ‘devoted to the purposes in accordance with the aims of the UN’. ECOSOC, Resolution 1996/31, E/RES/1996/31, July 25, 1996 (Consultative relationship between the United Nations and non-governmental organizations), para. 13. Glasius and Timms also point out the risks of state funding in relation to social forums: ‘State funding is equally problematic: the 2004 ESF in London was severely criticised for accepting a £400,000 donation from Ken Livingstone, the Mayor of London, and the Greater London Authority (see Box 6.4). Funding is problematic not only because it may conflict with the Charter of Principles but also because of the power of the funders and the potential for their policies and aims to influence the social forums through the conditions that come with their donations.’ Glasius and Timms 2006, p. 231.


1281 As indicated in the introduction of Part II, the discussed overview of arguments is not exhaustive. The critique on NGOs lack of independence has led to counterreactions that refute that independence is required of NGOs to be of any relevance for the democratic legitimacy of international law. Bolton, for example, argues that ‘it is precisely the detachment from governments that makes international civil society so troubling, at least for democracies’. Bolton 2000, p. 217.


1283 Some scholars would argue that the mere existence of NGOs already prove their legitimacy as that means that they were able to succeed for the ‘public opinion’ test. It is argued that if NGOs are not perceived as working for the common good, if they are not entirely independent of governments, or if they have no mechanisms for internal accountability, NGOs will attract few supporting individuals. This leads to insignificant funding and probably a modest impact on the international plane. In the contrary, NGOs that manage to be vocal, and are part of a broader network of NGOs, are more likely to be considered as valuable channels for civil society. Kamminga 2005, p. 111. Also Wapner states that NGO legitimacy rests largely on their ability to garner widespread support.
5.5 Disputing accountability of and representation by NGOs

Besides the more fundamental discussion on the right level of application of democratic legitimacy, and the more general substantive and procedural limitations of NGO participation in international lawmaking processes, questions regarding the internal legitimacy of NGOs predominate the scholarly critiques on the NGO democratic legitimacy thesis. Most of the critique on NGOs’ legitimacy focuses on two main themes: NGOs’ lack of accountability and their representation deficit. 1284 Anderson, one of the most fervent contesters of the thesis, summarizes the consistent critique as follows: ‘International NGOs lack the capacity in accountability, representativeness, and political intermediation to carry out the legitimation functions that one prevailing, prominent account of global governance gives them’. 1285 Primarily the claim that NGOs give voice to otherwise unheard individuals or groups is problematic. The issues of accountability and representativeness both refer to the (lack of) democratic credentials of NGOs. The argument is twofold: a) NGOs’ representation is considered exclusive; and b) when representing their constituencies, NGOs are not sufficiently accountable for their representation. Criticism of NGOs’ accountability is, however, broader than criticism of the representativeness of NGOs, and relates to all three alleged contributions of NGOs to the democratic legitimacy of international law as discussed in section 5.1: concerning the alleged contributions of NGOs to giving legal subjects a voice, to knowledge base of international lawmakers and to social engagement. 1286 The following section 5.5.1 discusses the dominant criticism of NGOs’ accountability. Thereafter, section 5.5.2 focuses on NGOs and their contested representativeness.

5.5.1 Disputed accountability

The expectations concerning NGOs, as sketched in the scholarly works in favor of the thesis, are often accompanied by its critics by a sort of reciprocal demand on the functioning of NGOs themselves. The requirement of independence, as mentioned in the previous section, is just one example. It is primarily the issue of accountability that plays a prominent role in the NGO democratic legitimacy critiques. 1287 This section discusses how accountability is related to the NGO democratic legitimacy debate. 1288

1284 Both accountability and representation require more systematically explanation and more analytical study than can be provided in this chapter. The purpose of this study is to show how the critics of the NGO democratic legitimacy thesis invoke these concepts.
1285 Anderson 2011, p. 846.
1286 The accountability quest can be placed in a development in international legal scholarship in which there is a strong focus on guarantees based on procedural mechanisms for international actors in general, which results in questions concerning the accountability and transparency with regard to the exercise of power. This in contrast to decennia ago, when international legal scholarship was predominantly concerned with questions related to the possibilities of conferring legal titles to international actors.
1287 NGOs are asked to address three types of accountability questions by a wide variety of actors – effectiveness questions, questions of organizational reliability and legitimacy questions. See Jordan 2005.
1288 Evidently, the fact that the international legal order does not know of a global democratically elected body to which organizations must account, intensifies the debate concerning accountability. Global organizations from all sectors are often criticized as having large accountability gaps. There is an extensive body of literature concerning accountability in the international legal order, mainly with regard to the formal position of states and international organizations. See the reports of International Law Association (IIA), Committee on Accountability of
As discussed in chapter 2, section 2.2.2, accountability relates to the answerability for actions for which an actor bears responsibility. General accountability applies to governance in the broad sense, including private governance. Accountability is often part of ethical codes of conduct stating the principles and practices of accountability applicable within the organization. These principles and practices aim to improve both the internal standards of individual and group conduct, as well as external standards, such as sustainable economic and ecological strategies.1289 Political accountability, on the other hand, relates specifically to the exercise of public authority. It is based on the premise that public institutions should be responsive to the public interest.1290 When accountability mechanisms are in place, individuals can detect potentially unauthorized or arbitrary exercises of public authority. As mentioned, NGOs are the subject of accountability claims as well. In this respect, Slim refers to an accountability process ‘by which an NGO holds itself openly responsible for what it believes, what it does and what it does not do in a way which shows it involving all concerned parties and actively responding to what it learns’.1291

NGOs are criticized for insufficient account giving to the public, donors, and other political actors for their actions.1292 The lack of account-giving is considered to be caused by the fact that NGOs are assumed to be guided by authoritarian or charismatic personalized leaders; that NGOs are competitive; that they are divided along class, gender, religious, regional, spatial, and ethnic fault lines; and that they are captivated by either states or donors, or both.1293 Critique on the lack of NGO accountability partly derives from a sense of ‘practice what you preach’.1294 NGOs that are particularly conscious of the lack of accountability by states and international organizations are supposed to lead by example.1295 In general, the promise of NGOs to offer broader and more pluralistic engagement in international politics allegedly requires scrutiny by public opinion.1296

The accountability critiques NGOs should respond to, according to critics of the NGO democratic legitimacy thesis, are multiple, complex, and diffuse.1297 With regard to NGO functioning, one can roughly divide the accountability critiques into internal and external

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1289 Spiro argues that ‘wherever power is exercised, questions of accountability are appropriately posed’. Spiro 2002, p. 162.
1292 As Slim warns, ‘they will lose all legitimacy if they are found to be masquerading – a sort of ventriloquist to the poor and oppressed’. Slim 2002, p. 5.
1294 Accountability is seen as a key factor in understanding how NGO participation can enhance the legitimacy of global regulators. Brakman Reiser and Kelly 2011, p. 1023, referring to Kamminga 2007. Some NGOs specifically have embraced accountability as their core mission, such as One World Trust. www.oneworldtrust.org (last visited January). Here you can find an example of the procedural expectations with regard to better control, more accountability and more transparency.
accountability quests. External accountability quests address the responsiveness of NGOs to larger systems of which they are a part. 1298 A form of external accountability is created by the accreditation mechanisms of international organizations as described in chapter 3. When states invite NGOs to participate and refrain from intervention in the accreditation process of international organizations, they are considered to affirm NGOs’ legitimacy. 1299 In addition, on a national level, states demand NGOs’ external accountability via both formal legal sanction and through registration processes. 1300 The most vulnerable aspect of accountability, is supposed to be caused by NGOs’ lack of internal accountability. 1301 Internal accountability quests confront the agency problem that occurs when a necessarily limited number of leaders represents its members. 1302 Accountability as such is directly linked to NGOs’ alleged contribution to political participation. 1303 Calls for the increased political accountability of NGOs fall into a broader discussion over the last several decades on the increase in public service provision by private entities. 1304 In this sense, accountability concerns are considered relevant for NGOs, as for any other actor that is politically active in the international legal order. 1305

Criticism concerning NGOs’ accountability is primarily based on the proposition that NGOs should have some level of formal or semi-formal accountability to those they wish to see empowered — their ‘constituents’. Notwithstanding NGOs attempt to demonstrate the precise extent of their support, through voting mechanisms, committed monthly donors, additional occasional givers, or donations from governments, 1306 NGOs generally are not fully membership based, governed, or financed. 1307 Furthermore, donations do not exclusively derive from their claimed constituents. 1308 As Spar and Dail state, ‘we cannot judge the Red Cross, for example, simply by how much money it raises’. 1309 Often the broad

1298 Spiro 2002, p. 163.
1299 Wapner argues that the form of scrutiny through the accreditation instruments of international organizations should not be overstated. ‘To be sure, accreditation is no necessarily a rigorous process, and NGOs can often demonstrate relevant participatory credentials. Wapner 2002a, p. 203.
1301 Ebrahim 2003, p. 824.
1302 This section further articulates the functioning of accountability with regard to NGOs tasks and is merely based on Wapner 2002a.
1303 See section 5.1.1.
1304 See for a three-tier case study on private sector interest in engaging in labor standards, international environmental protection and information privacy and the accountability issues: Haufner 2013. See also Freeman’s extensive discussion on the public/private devide and private power, that offers, notwithstanding its focus on American administrative law, a very informative introduction to the related theoretical challenges. Freeman 2000, p. 543.
1305 The reasoning that NGOs, just as corporations, as schools, as sport associations, have to be accountable for their spending, their acting, and their performance to their stakeholders is less controversial than the question whether the obligation to be accountable should be stretched to democratic considerations. It must be noted that not everyone is as convinced that NGOs are in need of more accounting mechanisms. Kingsbury fears that the attention towards NGO accountability can have unwelcome effects on their functioning. ‘The total possibilities for participation are inescapably constrained by the need to accomplish the institution’s tasks’. Kingsbury also doubts the relevance of demanding strict accountability of NGOs. NGOs do often have weak institutions for internal accountability, but on the other hand, their members can easily exit. Kingsbury 2002, p. 186.
value-based weltanschauung of an NGO complicates approaches to internal accountability.\textsuperscript{1310} The claims of NGOs to have a voice in international lawmaking depend on beliefs that they actually speak for victims of injustice and that they are true to the normative principles they articulate. It is, however, difficult to hold NGOs to account for these values, as they are hard to quantify. Due to the complexity of pinpointing values and acting in line with them, accountability pressures that require specific mechanisms can become privileged,\textsuperscript{1311} which might lead to an erosion of broader values and to a possible weakening of the relationships between NGOs and their constituents.\textsuperscript{1312}

The accountability of NGOs has to respond to two areas of assessment: not only do NGOs have to demonstrate the veracity of what they say, they also have to prove that they have the authority to speak for those they intend to represent in international lawmaking processes.\textsuperscript{1313} Unlike elected officials who are able to substantiate accountability by putting their careers on the line to test the proposition that they well-represent their constituency,\textsuperscript{1314} in the case of NGOs it is questionable how the expected processes of public disempowerment of NGOs can be assured.\textsuperscript{1315} NGOs have not yet developed customary mechanisms for responding on their activities to align them with the wishes of their constituency.\textsuperscript{1316} As Spiro states, ‘[i]ndividual members are unlikely to monitor complete organizational agendas; insofar as they do engage in such monitoring, they are unlikely to take NGO leadership to task on particular issues’.\textsuperscript{1317} The fact that a formal constituent relationship between NGOs and their members or represented individuals, based on what NGOs are required to be accountable, is non-existent is criticized.\textsuperscript{1318}

5.5.2 Disputed representation

The critique on NGOs’ lack of internal accountability mechanisms is instigated by general concerns regarding the representation by NGOs of the voices of individuals or groups of individuals. As discussed in section 5.1.1, the expression of the popular will through NGOs’ input into international lawmaking is seen as one of NGOs’ major contributions to

\textsuperscript{1310} Kilby 2006, p. 952, referring to Lissner 1977.
\textsuperscript{1312} An example is the campaign initially promoted by Greenpeace against fur sealing that had adverse effects on the livelihoods of indigenous hunting communities in the Arctic. Keohane 2002, p. 477-478, referring to Kingsbury 2002, p. 189. Increasing demands on NGOs to develop accountability instruments could lead to increased acceptance of NGOs by states and international organizations. However, paradoxically, this could also lead to a more bureaucratized and more distant relationship with their assumed constituents, the people NGOs seek to engage and to represent. See Edwards 1999; Slim 2002; Goodin 2003b.
\textsuperscript{1313} Slim 2002, p. 4.
\textsuperscript{1314} However, in the same vein, one might argue that parliamentary representatives are too preoccupied with their own re-election instead of with the protecting the common good and controlling the government.
\textsuperscript{1315} Macdonald states that these processes of disempowerment are contingent upon mechanisms of stakeholder signaling, rather than upon unilateral decisions by the political actors who furnish NGOs with support. Macdonald 2008, p. 217.
\textsuperscript{1318} Kilby 2006, p. 953, referring to Ferejohn 1999.
international law’s democratic legitimacy. When NGOs attempt to advance the cause of the poor and oppressed, NGOs are expected to represent the interests of their constituency. Critical scholars question the basis on which NGOs purport to understand, let alone, embody, the public interest. Scholars question the assumption that NGOs foster an inclusive and equal lawmaking process, primarily because they fail to represent. Spiro summarizes the views of opponents as follows: ‘NGOs have mounted a sort of free-form coup against international institutions, representing nothing more than themselves.’

NGOs often act as self-appointed representatives. In some instances ‘constituencies’ are not even aware of an NGO’s existence. The geographical scope of the constituency of NGOs is broad, scattered, and differently constituted than that of states or political representatives. This makes critics question whether there is enough proximity of NGOs to the needs of the people whom they are supposed to represent. What, as is often questioned, ‘then gives NGOs, few of which formulate their positions via elections of their constituents, any democratic legitimacy?’

1319 Reus-Smit 2004, p. 35. See chapter 5, section 5.1.1.
1320 Kilby 2006, p. 952, referring to Nelson 1995. A clear example of the tendency to require that NGOs are democratically organized, in order for NGOs to be able to contribute to the democratic legitimacy of international law is: Roose 2012, p. 347.
1321 Wapner 2002a, p. 156.
1322 Cullen and Morrow argue that the inclusivity factor of NGOs is damaged by NGOs’ lack of representativeness. Cullen and Morrow 2001, p. 10. It is important to acknowledge the increasing body of literature that conceptualizes civil society and NGOs within the tradition of Hegel, Marx and Gramsci, in which it is argued that the democratic role of NGOs is circumscribed by wider social, economic and political cleavages. There is however no simple division between those writers who adhere to a Tocquevillian perspective (civil society is a ‘good’ and therefore all NGOs are ‘good things’) and those who adhere to a Gramscian one (civil society is a contested space; therefore NGOs reflect struggles within wider society). Blum emphasizes that NGOs ‘belong to a very specific subset of the international community’, representing men more than women, the rich more than the poor, and specific cultural groups more than others. Blum 2008, p. 364. See also Wheatley 2012, p. 161.
1324 NGOs are what Rosenau calls ‘sovereignty-free’ actors. Rosenau 1997, p. 64. States, in short, are accountable to their people and to the international organizations of which they are part. As such, they focus primarily (and often exclusively) on the interests of those who live within their borders. NGOs are arguably more accountable to global citizenry than states. These observations call on scholars to expand their conception of what counts as an instrument of accountability and, normatively, to enhance all such instruments wherever they operate. Wapner 2002a, p. 204-205.
1325 Moreover, if we are afforded a small sidestep, part of the critique on NGOs representative character can be traced back to a more fundamental level. Not all democratic legitimacy scholars are convinced that representation in se is a good thing, whether or not NGOs can live up to the need to proof their lineage with their constituency. Critics have rejected representation, also on a national level, based on the conviction that its institutions separate power from the people, as those who make the rules are not the same as those who are obliged to follow the rules. Representation is supposed to affect ‘authentic democracy’. This image of authentic democracy assumes an overlapping identity of the rulers and the ruled. Young reports this paradox in contemporary thinking about representation. Young 2000, p. 126. The image of democratic decision-making, which requires a co-presence of citizens, complicates the image of representation as indispensable for democratic legitimate lawmaking. However, scholars seems to be convinced of the need for representation, and some even urges focus on a ‘right of representation’ – ‘the right to have one’s interest adequately represented’. Fiss 1993, p. 965, 979.
membership, any greater claim to representativeness than autocratic governments or monarchs’.

Objections to the alleged democratic legitimizing power of NGOs are primarily related to the observation that often only a selected group of people is represented by NGOs, under the guise of representing the people at large. Further, NGOs’ capability to carefully weigh different interests is examined, not least because of the considerable self-interest of the organizations in pursuing pre-selected goals. Anderson, for example, argues that ‘the glory of civil society is not that it speaks with the authority of the “people”, the masses, the popular will, the general will, or with a single voice at all, but instead that organizations in civil society speak each for itself’. Kennedy asserts another severe downside of perceiving NGOs as representative: the detachment between NGOs and the people they purport to represent might even reinforce a global divide of wealth, mobility, information, and access to audience. Slim summarizes the debate in one thorny and unresolved question: ‘[d]o NGOs speak as the poor, with the poor, for the poor or about the poor?’

The approach to representation of Macdonald does not seem to respond to the interference to which critics point. It remains unclear how the principle of equality is safeguarded in the representation of individuals or groups by NGOs. Here the issue of representation of NGOs overlaps with the issue of accountability. It is argued that without the usual electoral mechanisms, NGOs themselves disregard the equality principle in their representation, as stakeholders do not have equal access to influence the internal decision-making process of an NGO. Besides, as mentioned in relation to the ‘second bite of the apple’ thesis, such a partial representation by NGOs might negatively affect the current - highly questionable – system of equality of states through state consent in international lawmaking. Critics accuse NGOs to have too many biases towards different groups to speak of any true representation of the peoples. Instead, NGOs are allegedly representing factions, states, or elites.

First, instead of representing the people, NGOs are criticized for representing the will of organized interests, of factions. This suggests a corporativist approach to international lawmaking that is troubling for democratic legitimacy because it posits ‘interests’ as

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1326 Raustiala 2011, p. 171.
1327 Hirsch 2003, p. 256.
1328 Anderson 2000, p. 118.
1329 According to Kennedy, ‘the professionalization of human rights has created a mechanism for NGO people to think they are working “on behalf of” less fortunate others, while externalizing the possible costs of their decisions and actions. The representational dimension of human rights work that is covered by the terminology of “speaking for” puts the affected by human rights breaches both on screen and off. This practice transforms the position of someone into the “victim” in his or her society and on the international plane. Instead of the possibility for the injured to speak for itself it is practically overtaken by the interpretative and representational practices of the relevant human rights movement’. Kennedy 2002 p. 121.
1330 Slim 2002.
1331 This is discussed in chapter 5, section 5.1.
1333 See section 5.3.1.
1334 See section 3.4.2, under ‘unequal representation - democratic deficits among states’.
1335 Scholars share this fear for factions; they might take both a civic republican and a more liberal perspective. Pedraza-Fariña 2013, p. 663. See also Lomasky 2002. See for an alternative view Pettit 2001, p. 167-172 (emphasizing that the perils of elite manipulation, faction or corruption can be remedied by “editorial” control through contestatory democracy).
legitimate actors along with popularly elected governments. Consultative lawmaking, with structured roles for business and NGO interests, as for example takes place in the European Union, has been criticized for such an inclination towards ‘corporativism’. Some scholars, including Davarnejad, therefore state that the contribution of NGOs should not interfere with lawmaking, instead, ‘their contribution should primarily be regarded as policymaking and not as law’. It is feared that the representation of special interests by NGOs takes advantage of open decision-making processes to distort policy outcomes. This critique seems to originate from the classic problematization of the unbalanced influence of factions on the exercise of public authority. Scholars fear that participation may give too much power to those with strong views, which can lead to insufficient attention to the public interest at large. They emphasise the importance of a carefully structured policy-making dialogue so as to respect the interests of all those who might be affected by the outcome, for participation to be meaningful for any democratic legitimation of law.

Second, NGOs are often considered to represent states, rather than the ‘otherwise not heard voices’. The criticized dependency relationship to states, as discussed in section 5.4.1, is considered one of the obstructions to a positive validation of the NGO democratic legitimacy thesis. When autonomous, NGOs can pluralize the debate, detect exclusionary practices, and control governmental practices. According to the critics, this independent position of NGOs is severely hindered by the cooperative nature of the relationship between NGOs, states, and international organizations. NGOs are primarily considered to function as service providers, as policy analysts and expert advisors beneficial to governments. The cooperative role of civil society organizations in international lawmaking is reflected by the evolution of the analytical terms employed in both official documentation of international organizations and in international legal instruments. Since the early 1990s, new sets of concepts have been progressively introduced in which NGOs are often qualified as ‘partners’ of governments and international organizations in the pursuit of global goals and ‘active participants’ in the ‘dialogues’ that characterize international processes. Spar and Dail argue that ‘the NGO sector risks becoming intimately intertwined with the state, losing its independence and perhaps some control over the direction of its activities’.

Although in theory accreditation mechanisms of international organizations are explained as a means for NGOs to enhance the inclusiveness of the lawmaking process, critics consider there is a fluid line between being invited to challenge the international
exercise of authority, based on its possibly exclusive lawmaking process, and being invited to support the international exercise of authority. 1346 According to Raustalia, ‘[i]f NGOs are perceived to threat[en] the interests of important states, they can be denied accreditation, as was the case recently with a gay right NGO, the International Gay and Lesbian Human Rights Commission’. 1347 By selecting which NGO can participate and which does not, NGOs are considered to be no more than an extended arm of the respective states that partake in lawmaking under the auspices of international organizations. Because of its power to decide which NGO is accredited, an international organization unavoidably acts as the ‘supreme coordinator of the NGO world’. This is considered to limit the ability of NGOs to criticize the international lawmaking system from the outside. 1348

As argued by critics of the NGO democratic legitimacy thesis, as long as NGOs are de facto part of the international organizations, it is improbable that they will take on political opposition to the positions of states or international organizations. 1349 Even if NGOs were accepted by the international organizations on independent grounds, NGOs often get caught in the tangled web of competition between developed and developing nations. NGOs ‘are therefore not completely free’. 1350 The dependence of NGOs on states has power implications in the international legal order; also between states, as NGOs are often used by states as tools to gain more influence in international lawmaking. 1351

Third, a culture-related argument is often made against the NGO democratic legitimacy thesis. NGOs’ contributions to an inclusive, deliberative, and controllable lawmaking process cannot be implied due to the geographical imbalance of interests, and due to the advantages of the better organized, more powerful, and mostly Northern NGOs. 1352 International NGOs in particular, by virtue of their role to operate globally rather than locally, are considered to be fundamentally elite organizations, thereby representing the elite exclusively. 1353 As argued, these NGOs are not ‘connected’ enough in any direct way to masses of people. This implies that the conversations initiated by NGOs about international lawmaking are not

1346 As Vabulas states, ‘NGOs can advocate transnationally all they wish, but at the end of the day, states are the ones who endorse formal IGO-NGO status.’ Vabulas 2011, p. 18
1347 Raustalia 2011, p. 156, referring to Charbonneau 2010. Vabulas states that ‘[p]owerful states know that employing NGOs as monitoring partners might present a risk to their own reputation, just as would delegating enforcement capabilities to an independent IGO (International Organization) secretariat.’ Vabulas 2011, p. 11.
1348 Perez 2003, p. 44. This negative effect of an International Organization’s accreditation system was already acknowledged by the League of Nations. One of the arguments put forward at the time by the League of Nations Council not to adopt formal arrangements for NGO participation was precisely that ‘it is not desirable to risk diminishing the activity of these voluntary international organizations (...) by even the appearance of an official supervision’. See quotation in Seary 1996, p. 22, referring to Pickard 1936, p. 460-465.
1349 Hirsch 2003, p. 258.
1350 Vabulas 2011, p. 17.
1351 NGOs with standpoints in favor of those states are more likely to be accepted by states to be part of lawmaking activities within international organizations than their dissenting counterparts. According to Tallberg, ‘this approach expects the pattern of transnational access to reflect the preferences of the most powerful states’ Tallberg 2008, p. 4. Vabulas states in this respect that ‘[t]he counterintuitive but important result is that when states allow IGOs to give access to NGOs, states do not abdicate power to non-state actors but instead strengthen the power that they retain in international cooperative agreements’. Vabulas 2011, p. 12-13.
1352 Peters 2009s, p. 318. See also Scholte 2012, p. 185.
1353 Anderson 2000, p. 117; Johns 2003a, p. 2. Although NGOs expand the range of voices at international lawmaking practices, John doubts whether they truly expand the equal opportunities to participate in lawmaking or whether they only expand the ranks of political elite.
vertical, as suggested, but merely horizontal, taking place primarily between these elite organizations.\textsuperscript{1354}

Part of the strong domination of NGOs of industrial countries might be explained by the lack of resources of NGOs of developing countries. However, as mentioned in section 5.4.2, other scholars argue that the focus on NGOs as democratic legitimizers of international law is considered to represent not more than “just another in a long line of attempts at misguided policy transfer from the West”.\textsuperscript{1355} Civil societies in countries that do not achieve a comparable process of “democratization from below” are labeled “weak” and “underdeveloped”, which allegedly necessitates measures to breathe life into local NGOs, often through donor practices. However, the earlier mentioned democratization of national civil society groups through the support of international NGOs\textsuperscript{1356} seems to be the experience of only a handful of countries. The emphasis on NGOs is considered to imply a pre-set of normative assumptions that may not correspond with the views of the countries where the empowerment of civil society is less flourishing.

The elitist character of NGO participation in international lawmaking is considered to be encouraged by international organizations. The UN accreditation system is criticized for indirectly encouraging the involvement of the ones that are activists by nature, that feel engaged to influence international lawmaking.\textsuperscript{1357} Anderson argues that NGOs do not complement democratic representation but function as substitution.\textsuperscript{1358}

The crux of the critique on NGOs is their claim to represent constituencies without having received any form of authorization from them.\textsuperscript{1359} The tendency to question whether NGOs can be held politically accountable for their actions, just as for every political actor,\textsuperscript{1360} relates to the assumption that a constituency relationship should exist between NGOs and the people they represent. Slim notes that “[t]he question of voice is perhaps the most

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\textsuperscript{1354} Also in the context of social forums, organized by civil society actors that purportedly enable new forms of inclusion and diversity, Glasius and Timms correspondingly observe: “while another world may be possible, the forums are still of this world, and they struggle to avoid reproducing existing inequalities within the forums”. (...) “Perhaps one of the most persistent criticisms of social forums, particularly in Africa but elsewhere too, is that they are in fact elitist forms of ‘champagne activism’ open only to those who can afford the time and money to fly around the world discussing global problems”. Glasius and Timms 2006, p. 225.

\textsuperscript{1355} Lewis 2002, p. 574.

\textsuperscript{1356} See chapter 5, section 5.1.3.

\textsuperscript{1357} Although the United States have a “vigorous and diverse civil society, civil society is not conceived of as being a substitute for processes based on the principle of equality, let alone conveying democratic legitimacy”. Johns 2003a, p. 2.

\textsuperscript{1358} Anderson 2000, p. 118. This is considered problematic, as Johns states that “aid cannot sustain democracy; it provides an artifice of activism, but not a sustained belief among a populace”. Johns 2003a, p. 7.

\textsuperscript{1359} Peruzzotti states that especially for advocacy NGOs – unlike governments, corporations, service provider NGOs, or intergovernmental organizations – the claim of a clear lineage to a specific constituency is complicated. None of those they claim to represent has formally delegated power to them. Peruzzotti 2010, p. 162-163. As a response Mantanaro has developed conceptual tools for assessing the democratic legitimacy of such ‘self-appointed’ representatives. See Montanaro 2012, p. 1094-1107.

\textsuperscript{1360} The conventional democratic requirements set forth for public state-based institutions are equally applied to NGOs. According to Peters, who recognizes that ‘NGO involvement can contribute to the accountability of international institutions towards citizens, and thereby enhance their legitimacy’, stresses that ‘constitutionalism asks for the accountability of all actors participating in the fulfilment of constitutional functions, including the NGOs themselves’. Peters 2009b, p. 237. This tendency is consistent with the earlier considerations related to NGOs as political actors, as representatives of the marginalized people.
contested area of NGO accountability and legitimacy. To gain authority to speak for other individuals or groups of individuals, NGOs should, according to critics, be internally organized in a democratic way. This demand is confirmed in some legal frameworks for NGO participation in international organizations. As we have seen in chapter 4, the ECOSOC rules on accreditation require a democratically adopted constitution from NGOs. NGOs have the authority to speak for their members only when they are authorized to do so. Marks, too, emphasizes that NGOs can only contribute to democratic legitimacy as long as NGOs themselves live up to the principle of inclusion, which she connects to a continuous striving by NGOs to be part of large networks themselves. The degree of politicization of NGOs seems to be an important issue when discussing the need for democratic accountability. Highly politicized NGOs, which take part in decision- or rule-making for a larger community, are, according to Uhlin, subject to stricter demands of democracy than are non-political transnational actors. NGOs’ ‘constituencies’ should be able to validate the congruence between (their understanding of) the NGOs’ roles and activities and their own legitimacy claims, and where necessary, bring NGOs nearer to meeting those claims.

In sum, just as noticed in the academic discussions of proponents of the NGO democratic legitimacy thesis, its critique equally demonstrates a broad diversity of arguments and focal points. Some scholars focus primarily on the transplantation of the standard of democratic legitimacy to international lawmaking. Democratic legitimacy is considered to be an unnecessary, impossible, or unfitting tool for evaluating the exercise of international authority. Others focus on the procedural obstructions that NGOs face when they participate in international lawmaking. Scholars problematize the fact that the intensity of the participation of NGOs in international lawmaking has been, and still is, dependent on the willingness of the relevant international organization to involve NGOs. Most scholars criticize NGOs’ internal democratic legitimacy, due to the lack of accountability to and authorization by the individuals or groups they purport to represent.

5.6 Methodological vagueness towards democratic legitimacy

While we might all observe and agree upon the growing involvement of NGOs in the international realm in quantitative terms, the previous sections on the study of the arguments of proponents and critics of the NGO democratic legitimacy thesis demonstrated that divergence in the assessment of the qualitative consequences of that involvement is, to a certain extent, inevitable. The explanations of scholars as to how exactly to conceive
NGOs in the international legal order are prompted by their incorporated theoretical mindset of democratic legitimacy, which does not necessarily match that of others.\textsuperscript{1368} The lens through which NGOs are viewed and judged is to a great deal determinant upon the validation of the relationship between NGOs and the democratic legitimacy of international law.\textsuperscript{1369}

Notwithstanding the obvious differences in perspectives, academic discussions concerning the thesis largely remain silent on their normative starting points on democratic legitimacy. Making the perspectives taken explicit is vital to lift the debate from the current Babylonian scene where criticisms and opinions in favor of the thesis do not substantially engage in discussions at the same level. Clarifying standpoints is also crucial for a further understanding of the enthusiasm and equally, the pessimism surrounding the NGO democratic legitimacy thesis. Most importantly, an explicit formulation of perspectives helps us get to the core of the dispute, which considers the application of democratic legitimacy in the context of international law.\textsuperscript{1370}

The ambiguity towards democratic legitimacy that characterizes the discourse is explained in section 5.6.1. Section 5.6.2 discusses the different causes of the variations, how they have informed the debate on NGOs’ contributions to the democratic legitimacy of international law, and how they have caused the heterogeneity in the conception of the standard of democratic legitimacy. We categorize the different causes of variations into two dominant divides: institutionalism versus non-institutionalism, and monism versus dualism. A taxonomy of different variations in perspectives on democratic legitimacy is developed.

5.6.1 Democratic legitimacy as object of ambiguity

The NGO democratic legitimacy thesis is constructed as a response to the democratic deficits of international law.\textsuperscript{1371} Notwithstanding the broadly shared concerns regarding the democratic legitimacy of international law,\textsuperscript{1372} the presented solution, namely the involvement of NGOs in international lawmaking, is far from univocal.\textsuperscript{1373}

Standing alone, and assessed on their own terms and conceptual frameworks, most of the arguments mentioned in the previous sections have merits. However, considered in conjunction, they confront us with the irreconcilable differences in the underlying conceptions of the central elements of democratic legitimacy. As a result, scholars involved in the debate concerning the validation of NGO involvement rarely confront each other at the same conceptual level.\textsuperscript{1374} The standard of democratic legitimacy can be considered the primary object of ambiguity, which complicates the assessment of the thesis. Whether NGOs

\textsuperscript{1368} Foucault reminds us of the general subjectivity of conceptions. Foucault 1989, p. xxi.
\textsuperscript{1369} As Fisher points out: ‘Whether NGOs are seen as collections of individuals engaged in what De Tocqueville called the democratic ‘art of associating’, or engaged in a Hegelian struggle for respect and recognition as human beings with dignity, depends on what concept of democracy the relevant scholar has in mind’. Fisher 1997 p. 446.
\textsuperscript{1370} Farina demonstrates conceptual and theoretical differences in the debate about the proper role of civil society but focuses on the differences in theoretical understandings of civil society. See Pedraza-Farina 2013. Although closely related, we are of the opinion that also the different perspectives on civil society’s appropriate role boils down to how one theorizes democratic legitimacy of law, or in the broader sense, of legitimacy of public authority.
\textsuperscript{1371} See chapter 4.
\textsuperscript{1372} See chapter 4.
\textsuperscript{1373} This can only be partly explained by the fact that the others notions part of the thesis (NGO and international law) are problematic in terms of their possible multiple conceptions See Part I, Introduction.
\textsuperscript{1374} See also Noortmann and Ryngaert 2010, p. 199.
contribute to the democratic legitimacy of international law cannot be presented as a basic ‘yes or no’ issue.\textsuperscript{1375}

An example of such an unbridgeable difference in conception is readily detected when comparing Kamminga’s work, which relies on a conception of democratic legitimacy based on pluralist interest representation,\textsuperscript{1376} with Anderson’s critique on the thesis, which is largely based on a conception of democratic legitimacy in which representation is perceived in a political, liberal individualist way.\textsuperscript{1377} Macdonald, on the other hand, explicitly rejects this narrow traditional approach to representation and broadens the scope of what she calls ‘jurisdictional representation’ with ‘constitutive representation’.\textsuperscript{1378} These diverging conceptions of key elements of democratic legitimacy, ranging from authority, representation, civil society, and participation, evidently guide the stances taken in the debate concerning NGOs’ alleged contributions to the democratic legitimacy of international law and complicate the commensurability of the thesis.

In light of the diverging normative starting points of critics and proponents, discussants rarely meet substantively on the different issues that constitute the thesis, as it first requires an unlikely adaptation of their basic conceptions on democratic legitimacy. Any attempt to live up to one of the dominant points of critique concerning NGOs’ inadequate accountability and representation,\textsuperscript{1379} for instance by strengthening the accountability structures and instruments of NGOs, is elusive when the conception of representation to which critics adhere is based on a constituency relationship between the actor and the represented.\textsuperscript{1380} Given the fact that most NGOs are neither membership-based organizations nor elected bodies,\textsuperscript{1381} any discussion concerning their accountability requires fundamental reforms of their organizational structure in line with the critic’s perception of representation, or an adaptation of the critic’s conception of representation, which are both unlikely to happen.

There is no consensus about what is meant by democratic legitimacy in the context of the international legal order.\textsuperscript{1382} Different perspectives on the building blocks of the thesis reveal a strong disagreement on democratic legitimacy’s content, manifestations, and governmental level of application. Scholars base their assessment of NGOs involved in international lawmaking processes on their own normative perspectives on the functioning, the desirability, and the organization of the international legal order. Some scholars take a moral,\textsuperscript{1383} and others a more systematic standpoint;\textsuperscript{1384} some focus on the practical barriers

\textsuperscript{1375} Fisher 1997, p. 447.
\textsuperscript{1376} Kamminga 2005, p. 110.
\textsuperscript{1377} Anderson and Rieff 2005, p.5, referring to Anderson 2000.
\textsuperscript{1378} See chapter 5, section 5.1.1; Macdonald 2008, p. 99-100, 182-220.
\textsuperscript{1379} See for critique on NGOs accountability and representation, section 5.5.
\textsuperscript{1381} Ebrahim 2003, p. 815.
\textsuperscript{1382} Many questions arise when undertaking an effort to conceptualize international democratic legitimacy. Does a certain ideal-type of democratic legitimacy exist for the international legal order? Or can such an ideal-type be construed? Does international legal theory offer us enough handholds to be able to answer these questions? Or is a preliminary indication of certain components of democratic legitimacy at the international level the most feasible? We come back to this in the subsequent chapter 6, section 6.3.
\textsuperscript{1383} See for the conception that democratic legitimacy is indeed rated as a ‘universal aspiration, rather than a merely localised form of government’. Marks 2000, p. 83.
\textsuperscript{1384} See the earlier statements of for example Peters, Lindblom, Young and McGrew, as discussed in section 5.1 and 5.2.
to establishing democratic legitimacy by NGOs in international lawmaking practices. Others doubt the value of the discussion entirely, given the ‘intrinsic’ democratic deficiencies of the international legal order itself. Fundamentally different perspectives on traditional international law-related themes characterize the discourse on the NGO democratic legitimacy thesis: idealist solutions versus realist proposals; sovereignty versus community; and ideas influenced by constitutional thinking versus pluralist thinking.

5.6.2 Causes of the variations

While most scholars involved in the debate concerning NGOs emphasize the value of democratic legitimacy of law, the scope, manifestations and reach they assign to democratic legitimacy differ. There are three variations that cause the differences in the appraisals of NGOs contributions to international law: monism versus dualism and institutionalism versus non-institutionalism. Understanding these different causes for the current strong disagreement on the NGO democratic legitimacy thesis helps us to get to the root of the problems related to the NGO democratic legitimacy thesis, which will be discussed in Part III.

First cause of variation – monism versus dualism

The first and preliminary cause of variation that seems to determine a scholar’s stance on the validity of the NGO democratic legitimacy thesis, refers to the scholarly conception of the right level of application of the standard of democratic legitimacy. Instead of the traditional idea that the nation-state is the only possible vessel for democratic legitimacy, scholars in favor of the NGO democratic legitimacy thesis seek to entrench the idea that democratic legitimacy is relevant wherever and whenever authority is exercised which affects the capacity of individuals and groups to determine the conditions of their lives. The focus on the individual instead of on the boundaries of nation-state communities implies an analysis in which the jurisprudence of democratic legitimacy is not limited to a specific governing level. From this perspective, any difference in territorial level should be relativized, as it does not automatically lead to more or better enjoyments of rights or freedoms.

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1385 See section 5.4. Rebasti for example mentions the ‘openness dilemma’ of international organizations. The more open lawmaking is for NGOs, the more NGOs get involved the more difficult is it to select to what input the organization should be responsive.

1386 See section 5.3.

1387 As a matter of the valuation of the role of individuals and NGOs in the international legal order, Kennedy has indicated that ‘[t]here have been those more interested in recognizing sovereign prerogatives and those more interested in speaking of, and for, an international community. These differences reflect broad theoretical orientations rather than adherence to specific propositions about the nature of law or the international system.’ Kennedy 2000, p. 362.

1388 Koskenniemi calls the tendency of legal scholars to build up their argument around a certain international legal matter ‘style’. Hereby he wants to make clear that the arguing about on the first sight irreconcilable differences in opinion, is mostly a matter of language. Koskenniemi 2006a, p. 573. We agree with Koskenniemi in so far that we recognize the different dichotomies and the analysis of them as useful analytical tool for understanding the NGO-democratic legitimacy debate. However, we believe that the different standpoints taken are not solely a matter of style, but also of faith or trust in certain values or institutions. In that sense, we believe that scholars are not only searching for the better argument but also reveal a preference for how they think rules and standards for living together in the broad sense should be developed. The trust in institutions or on the other hand in values or norms seems to be besides a matter of style, also a matter of conviction.

1389 See Marks 2000, p. 104; Besson 2009b, p. 65.
As is argued, international law, just like national law, has to derive from the people. Here one detects the first strong and influential divide between scholars involved in the thesis, which we call the monism versus dualism divide.

The monism versus dualism divide in international legal scholarship traditionally relates to the way international law is incorporated in national legal systems. It could also relate to the degree of independence of parliament relative to the cabinet. The monism-dualism divide offered here posits that the perception of democratic values is whether specific democratic norms have universal value (the monist approach) or are inseparably related to certain institutions or territorial spaces (the dualist approach). This conception is inspired by Murphy’s introduction of the monism versus dualism divide.

From a monist approach to democratic legitimacy, individuals, rather than peoples, states, or societies, constitute the basic ground for morality. Regardless of the institutional character of an organization, the requirements of morality are applicable. Precisely because any social construction, irrespective of whether this construction focuses on a small or large and institutionalized group of individuals, needs to be justified with regard to individuals. Monism depicts the idea that ‘any plausible overall political/moral view must, at a fundamental level, evaluate the justice of institutions with normative principles that apply also to people’s choices.’ A monistic perspective thereby avoids the alleged ‘impossible separation of national and transnational law’. It implies an analysis in which the jurisprudence of democratic legitimacy is universal and applicable to all levels.

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1390 Charnovitz’s statement is exemplary: ‘[t]he distance between the individual and his homeowner community may be closer than the distance to the United Nations, but the ability of the individual to influence any of the authoritative decisions may be very limited’. Charnovitz 2005, p. 12.
1392 This use of monism-dualism concerns the theoretical problem whether international law and municipal law are parts of one legal order, or whether there is any priority of international respectively national law. See for further reading, Dupuy 2011.
1393 The term monist used in this section is related to what in international legal scholarship is often termed ‘liberal’ or ‘constitutionalist’. However, the term ‘monist’ does not give indications to the theorized manifestations of democratic legitimacy, as the term constitutionalist already does. A monist can equally be an informalist, and might refuse any institutionalized manifestation. The indication monist sees in our presentation on the conviction that all legal orders should be measured by the same standards, (without being in advance bounded by domestic manifestations and the analogy of them in international context) while the dualist conception retorts applying of similar standards to different institutional governmental levels. The monist-dualist clash can be compared with ‘particularism and universalism’ in legal theory, set out by Von Bogdandy and Delavalle 2008.
1394 As Murphy states, ‘I am interested in the specific claim that the two practical problems of institutional design and personal conduct require, at the fundamental level, two different kinds of practical principle. I will use the label “dualism” for this claim and “monism” for its denial. (…) What monism rejects, then, is that there could be a plausible fundamental normative principle for the evaluation of legal and other institutions that does not apply in the realm of personal conduct’. Murphy 1998, p. 254.
1397 McDougal and Laswell 1959, p. 32. A monistic approach to the conception of democratic legitimacy presupposes two things that require explanation. First, it weakens the importance of a sense of national belonging, which in the traditional doctrine is seen as a decisive condition for the existence of democratic legitimacy. Second, it centralizes the individual who’s actions and expectations with regard to the justification of the exercise of public authority are not limited to state borders. This assumption derives from the factual observance that the legislative work of UN agencies can be compared to exercise of public authority at domestic level. In other words, the exercise of legislative power by UN agencies is considered an appropriate object of democratic legitimacy.
Presenting NGOs as democratic legitimizers of international law requires a monist outlook on the necessity to democratically legitimize international law. The monist perspective on democratic legitimacy formed part of the reason to introduce the NGO democratic legitimacy thesis in the first place, as discussed in chapter 3, section 3.4. The individual is perceived as the constant point of gravity in developing an international legal system. Therefore, the interest of an individual in influencing decision-making could not be limited to certain spaces but is defined by the impact of a authoritative decision on his or her life. The need to engage in politics, and the significance of doing so, are considered omnipresent. A global democratic community should be created that both includes and cuts across national democratic communities.

Critics that focus primarily on state sovereignty, contest the monist claim of universality that presents democratic rights as rights for everyone, applicable everywhere. They take a dualist approach towards rights and values. A dualist perception on democratic legitimacy is often based on a holistic view on democracy. This perspective was the basis for disputing the rationality of the NGO democratic legitimacy thesis, as discussed in section 5.3. From a dualist approach, democracy is an institution, or set of institutions, achieved through electoral processes, and is closely associated with the ideas of political community. The perspective rests strongly on the idea of a demos, a defined political community, a ‘common world’, and on the identification of international law as a voluntary association of democratic states.

From this perspective, as discussed, the exercise of public power, whether national or global, is considered ‘closed’. Dualists argue that the inherently divergent institutional

\[\text{1398 Bryde 2005, p. 109.}\]
\[\text{1399 From this point of view, one considers the individual who uses the NGO as an instrument of voluntary association as the source of legitimacy for an NGO. See Charnovitz 2005, p. 13.}\]
\[\text{1400 According to Koskenniemi; ‘Today’s Human rights, environmental and trade law, seeks to break through the ‘artificial’ boundaries of sovereignty so as to realize the promise of world unity articulated as the (hegemonic) universalisation of the values underlying human rights, environment or trade.’ Koskenniemi 2011, p. 223, referring to Koskenniemi 1994, p. 22-29. The universalization of international rights is reflected in for example two provisions in the International Covenant on Civil and Political Rights, Dec. 19, 1966, U.N.T.S. no. 14668. Art. 19, states: ‘everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’. Art 21 states: ‘the right of peaceful assembly shall be recognized’. None of these rights seem expressly inapplicable to the relationship between an individual and an international forum such as the United Nations. The situation may be different for the right to participate referred to in art. 25 which seems to hinge upon citizenship: ‘Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;….’ See for a more general account of the rights and obligations of individuals, and on the question whether there exists such a thing as universal rights and principles accepted by the whole international community: Schriijer 2014.}\]
\[\text{1401 Rawls is well known for taking a dualist perspective that insists on the application of different principles to different types of entities. To quote Rawls; ‘the correct regulative principle for a thing depends on the nature of that thing.’ Rawls 1999, p. 25.}\]
\[\text{1402 However, a holistic view on democracy is not always dualist in nature. The best example is Cosmopolitanism, that takes an monist, but uniform-institutional approach to democratic legitimacy. See the taxonomy offered in subsequent section 5.6.2; chapter 6, section 6.3.1.}\]
\[\text{1403 Christiano 2006a, p. 85. Christiano relativizes the interdependencies of persons across borders, by mirroring them to the interdependencies that exist within political societies and remarks that these interdependencies are far greater.}\]
\[\text{1404 See chapter 3, section 3.2.1. Macdonald is critical towards the ‘closed’ conception of democratic legitimacy. See Macdonald 2008, p. 13. Her definition of the exercise of ‘public power’ is a broad one embracing any}\]
design of international organizations and conduct of peoples on different territorial levels require different kinds of principles and normative expectations than the inherent design and characteristics of a state. Different types of governance require different types of legitimacy, not necessarily democratic legitimacy. Dualists point to the intrinsically undemocratic character of international organizations that frees them of any obligation to take into account democratically legitimate requirements. In the debate on NGOs possible contribution to democratic legitimacy of international law, these dualists evidently consider the discussion in itself irrelevant, as they do not support the conceptual move of transporting democratic legitimacy to another legal order than that of the nation-state.

Second cause of variation - uniform versus multiform approach towards the manifestations of democratic legitimacy

The monism-dualism variation is preliminary. It concerns the question of the right level of application of democratic legitimacy as a standard for evaluating public authority. When a monist approach is taken towards the applicability of democratic legitimacy to international law—in other words, when applying democratic legitimacy to international law is considered desirable—again another variation manifests itself. At this stage, it distinguishes scholarly perspectives towards the manifestations of the concept of democratic legitimacy. This is where the third cause of variation reveals itself: the uniform versus multiform approach to democratic legitimacy. Some scholars argue that every evaluation of law, based on its democratic legitimacy, requires the same preconditions and manifestations. In other word, these scholars adhere to a rigid conception of democratic legitimacy. The same standard of democratic legitimacy is used to whatever level of governance democratic legitimacy is applied. We call this the uniform approach to democratic legitimacy. This contrasts with the view of others that the way one applies democratic legitimacy evaluation to international law differs from the way one applies the democratic legitimacy evaluation to domestic law. We call this the multiform approach to democratic legitimacy, meaning as much as upholding a variable conception of democratic legitimacy, whose manifestations might change according to the characteristics of the setting to which it applies. The chances and pitfalls of both approaches will be discussed in subsequent chapter 6.

Third cause of variation – institutionalism versus non-institutionalism

After the preliminary shifting based on different theoretical ideas concerning the desirability of using democratic legitimacy as an evaluation tool to assess the acceptability of international law, clearly another cause of variation can be inferred from the way the views on the NGO democratic legitimacy thesi are presented. The second dichotomy that allows
us to cognize the variations of perspectives in the debate is the institutionalist versus non-institutionalist approach to democratic legitimacy. Scholars in favor of the NGO democratic legitimacy thesis seem to focus primarily on the non-institutional characteristics of democratic legitimacy. The scholarly conceptions of democratic legitimacy are based on distinctive preferences for more dynamic and informal conception of democratic legitimacy and towards the international legal order at large, as opposed to a formal, institutional conception of democracy, law, and the legal order. One can understand these non-institutional readings of democratic legitimacy as reactions to academic discussions on democracy in the international context that was informed in one way or the other by some type of state-centric formalism.

An example is the approach scholars take towards international legal personality and NGOs. Proponents of the NGO democratic legitimacy thesis do not show any objection to theorizing a role for non-state actors in international lawmaking while lacking international legal personality. However, formal, institutionally oriented scholars perceive international legal personality as a determining factor in stipulating rights and duties of actors involved in international lawmaking. Given the asserted importance of international legal personality, some institutional scholars perceive only states as relevant subjects and actors of international lawmaking. Any theory of a global public sphere leads to skepticism, as no ‘juridical public’ exists internationally, and ‘a genuine global public comparable to publics in well-established democracies does not exist’. Another example is the importance that is attached to the role of consent to the determination of international law. Institutionalist scholars are sensitive to the clarification of consent for understanding international obligations, while their critics argue that law should be perceived as a matter of principle, and dependent on a particular reading of it, so that law is a matter of judgment or expertise.

With regard to democratic legitimacy, a formal, institutional approach seems similar to the abovementioned monist approach to democratic legitimacy. Often, also in a institutionalist approach to democratic legitimacy, states’ sovereignty is appreciated as the spillover of liberal legal theory. However, it is not so much the claimed undesirability to apply democratic legitimacy to other levels than the state that make institutionalists question the validity of applying democratic legitimacy, it is the trust in the institutions that

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1409 See chapter 2, section 2.1.2.
1410 Taking a formalistic approach is a persistent tendency, especially for public legal scholars. See Boyle 1992, p. 394.
1411 See chapter 3, section 3.2.
1413 Scholars have different views on sovereignty. While one group considers sovereignty as a ‘legal on/off status’, others argue that sovereignty is only a ‘social construct of a psychological character’. Kennedy 2000, p. 111. See for example Woodward 2010, p. 143 referring to Berman 2007, p. 1165. Legal pluralists for example argue that hybridity, that is, normative contributions from State and Non-state sources, is an inescapable reality, and a pure sovereignist or universalist position is considered to be unsustainable as a practical matter.
1415 Kennedy 2000, p. 366. This divisions and variations are not timeless. One should be aware that categories in legal scholarship might change axes. Kennedy 2000, p. 355; Koskenniemi 2006a, p. 611, referring to Kennedy.
1416 Scholars that adhere strongly to the idea of state sovereignty mostly deny the necessity and possibility of democratically legitimizing international law. De Búrca has dubbed these scholars, the ‘denial approach’. De Búrca 2007-2008, p. 136-239. As became clear in chapter 3 as well, the concept of sovereignty brings forth a strong theoretical debate. Koskenniemi 2006a, p. 584.
states have at their disposal. Only state authority, with its claim to a monopoly of coercive force, lends itself to an analysis in terms of democracy and democratic legitimacy. Chapter 3 demonstrated that as a reaction to these formal and institutional readings, scholars started to question whether such a formal conception of the international legal order did not shift too much from the basic unit of the public, which is the individual human being. Scholars critical of formal approaches to international law pleaded that multiple objects should be taken into account, and held inter-state and international relations against the more flexible idea of international civil society. The international legal order was understood as a global community that both includes and cuts across national democratic communities. Kennedy observed a move in international legal scholarship towards the latter: ‘Since the late-nineteenth century, international lawyers have quite consistently told the story of international law’s development as the overcoming of a formal, positivist law rooted in a rapaciously political world of sovereign autonomy by a more pragmatic or functional law appropriate to a more mature international community’.

The scholarly focus on the importance of NGOs and ‘civil society’ for the international legal order in general is arguably prompted by such ‘world public order’ idiom. In the late 1990s, attempts were initiated to overcome the institutional inter-state reading of the international legal order. Scholars perceived individuals as active participants, on occasion united in the formation of an NGO. They understood international lawmaking as far from static, as ‘expanding circles of interaction’ or as a ‘series of arenas ranging in comprehensiveness from the globe as a whole … to nation states, provinces and cities, on down to the humblest village and township’. This understanding of international law did not create or rely on separate functional or territorial spheres in which actors have institutionalized positions.

Scholars in favor of NGOs’ assumed contribution to the democratic legitimacy of international law specifically retorted that every exercise of authority should entail concerns of its democratic legitimacy. International governance exercises public authority, although it does not fall easily into conventionally or nationally defined categories, and notwithstanding its (in many cases) ‘soft’ or ‘liquid’ appearances. These scholars broadened their focus to less formal characteristics of the international legal order, which was favorable to their aim to restore missing dimensions of democracy that cannot be captured by ‘one dimensional’ approaches to democracy, characterized by a focus on nation-state electoral majorities. The international legal order was not perceived as a single public regime but as a pluralization of spheres, captured by the buzzword ‘governance’ instead of government. Such a non-institutionalist approach to the international legal order with a focus on informal elements related to democratic legitimacy, such as a vibrant public sphere, deliberation, and an active global civil society, was primarily motivated by monists concerns regarding the lack of connection between those who

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1418 See chapter 3, section 3.4. See Charnovitz 2005, p.11.
1419 McDougal and Lasswell, for example, described a ‘world social process’ in which the participants ‘are acting individually in their own behalf and in concert with others (...).’ McDougal and Lasswell 1959, p. 7.
1420 Kennedy 2000, p. 368.
1422 McDougal and Lasswell 1959, p. 7, 8.
1424 For a critique on this ‘one-dimensional’ approach to democracies: See Rubenfeld 2001; Eisgruber 2009.
established international legal norms and individuals who were considered affected by the implementation of those norms.\textsuperscript{1425}

\textbf{A taxonomy}

These different variations can also be further diversified. A monist approach towards the necessity for the democratic legitimation of international law does not exclude an institutionalist approach towards the types of manifestations of democratic legitimation that focuses primarily on participation through votes, on the identification of equal, individual, political agents that sporadically have the opportunity to decide who will represent them.\textsuperscript{1426} In contrast, other monist-oriented scholars might look at specific informal elements of democratic legitimacy in isolation.\textsuperscript{1427} Furthermore, a non-institutionalist scholar, with a focus on engagement, inclusiveness, and deliberative democracy relying on the permanent opportunity to participate by all who are affected by the public decisions made,\textsuperscript{1428} does not in se embrace an international (monist) account of democratic legitimacy. The following model illustrates the different possible syntheses between the three variations.

To briefly summarize, the first preliminary cause of variation concerns the monism-dualism divide about the desirability of applying democratic legitimacy to international law. A dualist approach is characterized by its reliance on the nation-state as having unique characteristics that require democratic legitimacy, such as popular sovereignty and a shared nationality. In other legal contexts that do not have these characteristics, democratic legitimacy as a standard should not be applied. In contrast, scholars adhering a monist approach to the desirability of applying democratic legitimacy argue that every type of law requires democratic legitimation. International law, just as regional, national or local law must derive from all individuals affected by the law.

After this first preliminary dichotomy, after which the part of scholars that adhere a dualist approach consequently is left behind as they dismiss the relevance of thinking about democratic legitimate international law in principle, one can further distinguish the differences in perspectives on democratic legitimacy of the monistic-oriented scholars by a distinction into two main categories: the ones that adhere a uniform conception of democratic legitimacy, and the ones that adhere a multiform conception of democratic legitimacy. After this distinction is made between the ones that adhere a monist-uniform approach with the ones adhering a monist-multiform approach, the second cause of variation, the institutionalist versus non-institutionalist becomes relevant.

\textsuperscript{1425} See chapter 3, section 3.4.3. Formalists might also be concerned about the lack of influence of legal subjects on the international laws they are ruled by, but they will formulate a different answer to that concern.
\textsuperscript{1426} Van Ham, for example, notes that we should strive to the establishment of a postmodernist democratic system, with a better fit to the current requirements of a larger and more diverse political environment. Van Ham 2001, p. 1-22. See chapter 6, section 6.3.2 where we will outline the cosmopolitan approach to democratic legitimacy.
\textsuperscript{1427} See Buchanan 2002; Buchanan 2004; Buchanan 2006.
\textsuperscript{1428} See section 5.2 under ‘deliberation’.

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Figure 3 - A taxonomy of approaches to democratic legitimacy

We can distinguish four approaches to democratic legitimacy of international law, that are, besides the fundamental and preliminary monist-dualist approach, relevant in understanding the differences in appreciation of the validity of the NGO democratic legitimacy thesis.

1. The multiform institutionalist approach: In light of the characteristics of international lawmaking, a non-institutionalist reading of democratic legitimacy suffices, although at the domestic level institutional preconditions are indispensable.

2. The multiform non-institutionalist approach: The characteristics of international lawmaking require fundamentally other institutional manifestations of democratic legitimacy than we are familiar with at the domestic level.

3. The uniform non-institutionalist approach: Just as at the domestic level, social preconditions and democratic practices as deliberative practices, inclusion and openness are decisive for the democratic legitimation of law. Institutional preconditions are not indispensable.

4. The uniform institutionalist approach: To democratically legitimize international law, the same institutional preconditions we are familiar with at the domestic level should be implemented in the international legal order.

Any attempt to bridge these different perceptions will turn out to be problematic, as the foundation of these variations is deeply entrenched in scholars’ normative beliefs. This figure clearly shows that critics of the NGO democratic legitimacy thesis adhering to another democratic legitimacy school than is implied in the work of proponents will not consider any empirical case study valid, whether it ‘proves’ NGOs’ contribution to the democratic legitimacy of international law and of course vice versa. Skepticism towards a positive relationship between democratic legitimacy and NGO involvement might well be instigated by a dualist approach to concepts like democracy, justice, or legitimacy that rejects any
monist approach to morality, or by a monist but institutionalist approach towards the manifestations of democratic legitimation. On the contrary, the often-implicit ‘social capital’ arguments of scholars that adhere a non-institutionalist approach to democratic legitimation, ‘already suggest the inadequacy of state-centered conceptions of democracy’. The indication of the two main tensions in perspectives between scholars, and the consequential lack of theoretical consensus with regard to the instrument of assessment, aims to challenge the sentiment of genuineness and commensurability linked to the positions taken and set out in Part II.

The fact that belief systems, which inform scholars in their validation of NGOs’ contribution to the democratic legitimacy of international law, do not match is seldom explicitly acknowledged in scholarly writings concerning NGOs. The discourse regarding the thesis is characterized by isolated discussions on related themes such as whether NGOs represent people, whether a global civil society exists, and whether NGOs are accountable. What is missing, but necessary to be able to have a constructive debate about the NGO democratic legitimacy thesis, is a shared standard of democratic legitimacy. This confirms the statement in the introduction to this study that while the current debate on NGOs’ assumed contribution to the democratic legitimacy of international law seems to focus on the pros and cons of NGOs and their actions, the discussion should take place at a more fundamental level: not with the NGO forming the center stage of contention between the different groups of scholars, but what is expected of the democratic legitimacy of (international) law.

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1429 A clear parallel can be drawn between the deniers of NGOs as democratic legitimizers and Hobbes approach to the concept of justice. He even did not see any room for a principle of justice without sovereignty. He argued that although we can discover true principles of justice by moral reasoning alone, actual justice cannot be achieved except within a sovereign state. See Nagel 2005, p. 114: ‘Justice as a property of the relations among human beings (and also injustice, for the most part) required government as an enabling condition. Hobbes drew the obvious consequence for the international arena, where he saw separate sovereigns inevitably facing each other in a state of war, from which both justice and injustice are absent’.

1430 Waldron 1999c, p. 355.

1431 Connolly for example observes that ‘the project of non-territorial democratizing necessarily exudes an air of unreality’ given the lack of any territorial base which anchor democratic forms. Connolly also observes, however, that the impact of globalizing processes has been to heighten the extent to which domestic democracy ‘exudes its own aura of unreality.’ Connolly 1991, p. 219.

1432 Koskenniemi 2006a, p. 601, referring to Marks 2000, p. 18-29, who offers an overview of various ways in which critique works.

1433 An exception is Fisher 1997, p. 447. He demonstrates that any assessment of NGO involvement in international lawmaker requires that one questions the selective use of examples to illustrate the claimed advantages of these organizations, unpack the asserted generalizations about the relative democratic advantages of NGOs, and attend to the ideology and politics of the analysts.

1434 In Kennedy’s words, ‘[i]t is always tempting in this sort of situation to imagine that each has hold of one piece of the elephant: They do, certainly. But they are also each proposing a different elephant’. Kennedy 2008, p. 844.
Part II - Conclusions

The first two chapters of Part II aimed at contextualizing the NGO democratic legitimacy thesis, which was discussed in chapter 5. Chapter 3 discussed the current scholarly concerns about the democratic legitimacy deficits of international law. Chapter 4 explored the legal frameworks for NGOs to participate in international lawmaking.

Chapter 3 demonstrated that the democratic legitimacy of international law, according to the traditional doctrine, relies on state consent and domestic democratic practices. Opportunities for states to participate in international lawmaking and to consent to the resulting laws protect a type of state autonomy, which, in turn, protects the autonomy of its legal subject. The will of the people should form the basis of the exercise of international authority by its government, which is guaranteed by the consent of states to international rules. This doctrine is supported by the many internationally organized efforts to invite states to adopt a democratic governing structure of representation, elections, and majority voting.

The traditional doctrine of state consent fits well with a conception of international lawmaking that is based on states as exclusive lawmakers. At the beginning of international cooperation, indeed, international law evolved primarily out of the conclusion of bilateral agreements by states. As the activity of international lawmaking expanded to multiple states working together in the formulation of international legal solutions, the contractual character of international law slowly developed into a more communal one. In the post-war era, international negotiations, decision-making, and resulting lawmaking further expanded to conferences and an institutionalized state cooperation facilitated by international organizations. Consent by states to new legislative proposals was often preceded by preparatory activities of these international organizations, creating room for the progressive development of international law.

More recent developments in international lawmaking have instigated scholars to question the normative force of the traditional conception of international lawmaking as they have outgrown the characteristics of a purely ‘statal’ affair. The regulatory power of international organizations has increased, and informal forms of lawmaking have become common practice. The larger the variety of forms that international law took and the greater the impact of international cooperation became, the more scholars were concerned about the normative status of international law and its democratic legitimacy. Scholars were concerned that the exercise of authority could not be reduced purely to a state’s authority. Scholars increasingly started to question why democratic requirements related to the exercise of political authority by state institutions were not applied in parallel to international institutions.

Not only the waning of state autonomy, but also the consequential gap in representation by states due to the more recent developments in international lawmaking have been reasons for scholars to discredit the conception of state consent as the basis for the legitimacy of international law. There are also conceptual objections formulated towards state consent, due to deficits in indirect representation through state consent. Even when states are the principle lawmakers, scholars discern a lack of opportunity for diligent scrutiny of international lawmaking activities back at the domestic level. In addition, representation by states is considered unequal because of the existing democratic deficits between states. Existing power imbalances between states is considered to obstruct a reliance of the traditional doctrine of state consent that assumes an international practice in which states
are able to jointly and fairly create international law. In sum, state consent is a discredited conception of the democratic legitimacy of international law, according to its critics.

Discussions on the diversification of lawmakers, practices, the impact of international law on individuals, and the conundrum of concerns regarding the effects of globalization on democratic entitlements such as self-legislation and control triggered the emergence of a set of claims concerning NGOs and democratic legitimacy, which was explained in chapter 5. These claims accompanied a trend, demonstrated in chapter 4, to structurally increase formal and informal NGOs’ involvement in international agencies, and an increasing interest of NGOs in influencing the content of international law. Chapter 4 shed light on the legal status of NGOs in international law and on the scholarly understanding of their formal involvement in international lawmaking.

While it is not granted international legal personality, the NGO is considered an actor of relevance in international lawmaking. Although the main document concerning international lawmaking, the Vienna Convention on the Law of Treaties, does not specifically refer to NGOs’ involvement, an extensive collection of policy documents of international organizations mentions the importance of NGO involvement. The involvement of NGOs depends on accreditation procedures of specific international legal regimes that are far from generally applied. Most legal regimes have developed their rules on participation autonomously, although they have often been inspired by the ECOSOC rules on accreditation as laid down in Resolution 1996/31, based on Article 71 of the UN Charter.

Therefore, the main focus of chapter 4 was on the legal status of NGOs in the UN system. This was also because of the UN’s dominance in terms of international codification efforts and facilitation of international legislative conferences, and the fact that relationships with NGOs are mostly elaborated in the UN system. The principal entry point for NGOs involved in economic and social development is consultative status with the UN Economic and Social Council (ECOSOC). Other than these formalized opportunities for NGO participation, ranging from UN conferences to providing consultation to different international organizations, NGOs also rely on informal arrangements with states and international agencies. In sum, although NGO participation has been overtly desired, the investigation into the legal status of NGOs has demonstrated that the influence of NGOs on international lawmaking is conditional upon the goodwill of states. The participation of NGOs in international lawmaking is characterized as ‘a voice, but not a vote’. Notwithstanding this continuous discretion of power holders concerning the already limited legal space for NGOs to participate in international lawmaking, this contextualization effort has also taught us that one can hardly deny the political fact of the growing number of NGOs that have been accepted and invited to participate in international organizations.

Chapter 5 described the arguments on which the NGO democratic legitimacy thesis is built. Three main arguments are distilled out of the broad range of arguments made by proponents of the thesis. The first argument holds that NGOs articulate people’s aspirations. NGOs’ perceived contribution to the democratic legitimacy of law relies on their institutionalized involvement in preparatory phases of international lawmaking. NGOs’ input represents the affected communities that would otherwise not have a voice. The second argument concerns NGOs’ contribution to the knowledge base of both international lawmaking and individuals affected by international law. The expertise of NGOs, which is also reiterated with regard to their role in informing civil society at large, is encapsulated in the accreditation of NGOs in international lawmaking with the aim of achieving greater rationality. The third category of arguments relates to NGOs’ supposed contribution to
furthering social engagement. NGOs are understood to be social actors that mobilize peoples, formulate public discourse, and are active outside the institutional realm of UN lawmaking. The activities of NGOs centered on the public sphere are supposed to have a spillover effect upon all levels of democracy. This manifestation largely overlaps with how civil society is theorized, traditionally at the domestic level, in which role it complements the democratic legitimacy offered by suffrage and representative organs. From a procedural perspective, the proponents of the thesis primarily focus on NGOs' contribution to deliberation and control.

As discussed in chapter 5, there has been a chorus of complaints that question NGOs' representativeness and accountability. NGOs are assumed to constitute a disruption to the national democratic process. One of the recurring arguments has been that the lack of political and financial independence of NGOs bars them from acting as a watchdog or as a democratic institution in general. Further, whether NGOs can or do function as authentic agents of the interests of the ‘people’ has been contested. The study of the discourse of the NGO democratic legitimacy thesis has shown above all that the relationship between NGOs involved in international lawmaking and the democratic legitimacy of international law is contentious.

Our assessment of the NGO democratic legitimacy debate has made us heedful of the impact of the variations of scholarly normative perspectives on democratic legitimacy underlying the NGO democratic legitimacy thesis. The final section of chapter 5 identified a methodological obstruction to the debate on the NGO democratic legitimacy thesis. The discussions on NGOs’ contribution to international lawmaking are clouded by a problem of definition. Participants of the debate do not share conceptual starting points concerning the use of democratic legitimacy. This severely obstructs an academic exchange of ideas on how to democratically legitimate international law, which consequently hinders a shared understanding of NGOs’ role. To bring some clarity to the vagueness in using the concept of democratic legitimacy in the NGO democratic legitimacy debate, in the final section of chapter 5, the academic discussions on the NGO democratic legitimacy thesis has been categorized. First, the preliminary variation relates to the monism-dualism divide. Scholars that do not consider the application of democratic legitimacy desirable as an evaluation tool to assess the authority of international law take a dualist approach. Scholars, who do consider the application of democratic legitimacy to international law desirable, take a monist approach. Second, the latter body of scholarly work is further categorized in four different approaches to democratic legitimacy: a non-institutionalist uniform approach; and an institutionalist uniform approach; a non-institutionalist multiform approach, and an institutionalist multiform approach. These existing varieties of conceptions on democratic legitimacy can be considered a principal reason why the NGO democratic legitimacy thesis is considered contentious. Whether or not NGOs do contribute to international law’s democratic legitimacy depends in the first place on one’s conception of democratic legitimacy.
Part III

The impasse of institutional preconditions

and moving beyond
Part III - Preliminary remarks

In light of the conceptual framework of democratic legitimacy developed in Part I, Part III assesses the persuasiveness of the NGO democratic legitimacy thesis, as discussed in Part II. This involves an evaluation of the way in which the thesis is presented, and more generally, its consistency with the main features of democratic legitimacy.

Part I explained democratic legitimacy as an evaluative standard to test whether the exercise of authority by law is acceptable to its legal subjects in light of its respect for freedom from domination and equality. For legal subjects to be ruled by law and simultaneously to be free from domination requires a lawmaker that enables and guarantees actual opportunities for all legal subjects to participate in the making of these rules that govern them. Whether a law passes the test of democratic legitimacy, can only be determined after two separate evaluations. In the first place, one should consider whether the exercise of authority has taken place in a political system that offers an infrastructure of institutional and social preconditions. In the second place, one should consider whether the actual exercise of authority of a particular lawmaking process is democratically legitimate, meaning whether that specific exercise has given opportunities for participation, through means of consent giving, deliberation, or control and has respected procedural norms that facilitate participation.

Based on different conceptual and practical considerations, we conclude that the persuasiveness of the NGO democratic legitimacy thesis is rather weak. This is not so much because of the role NGOs do or do not play in international lawmaking, but because of the problematic application of the standard of democratic legitimacy to international law. The evaluation of the NGO democratic legitimacy thesis will show that the preconditions for democratic legitimacy are insufficiently addressed in the scholarly discourse on the thesis. Our evaluation can be regarded partly as a continuation of the critique that was discussed in chapter 5. However, the center of gravity of our critique is different. As will be discussed, opponents of the thesis largely focus on NGOs, their poor performance, and their internal organizational failings, or on the strategic motives for international organizations and states to include NGOs in lawmaking processes. Our critique, on the contrary, focuses primarily on the insufficient attention paid in current academic discussions on the thesis to the fundamental question of whether any democratic legitimation of law is possible in se at the international level.

This Part is structured as follows. Chapter 6 focuses on the lack of attention paid to the institutional preconditions of democratic legitimacy and shows the consequences for the validity of the NGO democratic legitimacy thesis. An underestimation of the importance of institutional preconditions to democratic legitimacy of law problematizes essential democratic questions, such as who is able to participate, based on what title, and how one is able to enforce the right to participate.1435 Chapter 7 engages in a reflection on what could be the next steps in the debate on the merits of the participation of NGOs in international lawmaking, once the relation between NGO participation in international lawmaking and the analytical terms of democratic legitimacy has been found to be unconvincing. When taking into consideration all the different themes, claims, and elements that have passed in our

1435 Our critique on the conceptual deficiencies of the thesis will, due to the emphasized tensions in chapter 5, section 5.6, between scholars that adhere an institutional perspective and scholars that adhere a non-institutional perspective, probably not be shared by proponents of the thesis.
review of the discourse on NGO participation in international lawmaking, we suggest that the most appropriate grounds for justification of international law are the procedural quality of the lawmaking process and the substantive quality of the resulting law. And yet, from a normative point of view, such a, what we call ‘quality justification of law’, we will argue, cannot offer more than a ‘second best’ justification, compared to democratic legitimacy.
6 The impasse of institutional preconditions

This chapter seeks to show why the NGO democratic legitimacy thesis proves unconvincing. The primary reason is the impossibility to secure the necessary institutional preconditions for democratic legitimacy to apply to international law. This is what is called here the “impasse of institutional preconditions”. Oddly enough, this impasse has been hardly discussed by scholars engaged in the NGO democratic legitimacy discourse despite these necessary preconditions of democratic legitimacy being essential to answer the question whether NGOs participation in international lawmaker could be considered a contribution to the democratic legitimacy of international law. This chapter demonstrates this statement, spells out the consequences of leaving aside institutional preconditions, and discusses the impasse of international institutional preconditions.

Yet, before we do so, it is considered helpful to recapitulate briefly the main approaches to democratic legitimacy of international law as discussed in chapter 5, section 5.6. In light of the taxonomy developed here, there are, in theory, different possibilities for scholars in favor of the thesis to approach democratic legitimacy and NGOs contribution to it. Given their efforts to think about how to strengthen the democratic legitimacy of international law, proponents of the thesis share a monist approach towards the desirability of the application of democratic legitimacy as an evaluation standard for international law.1436 When that first step is taken, four alternative perspectives on the manifestations and preconditions of the democratic legitimacy of international law could, again in theory, have instigated their adherence to the NGO democratic legitimacy thesis.1437

1) Multiform-institutionalist approach: NGOs are considered complementary to democratic states as sources of the democratic legitimacy of international law. International law requires a different, institutional conception of democratic legitimacy than domestic law. A combination of an indirect democratic legitimation of international law with direct influence of global civil society is considered sufficient. Democratic legitimacy’s necessary preconditions are found in democratic states. This approach is embedded in a two-track model of democracy, which will be discussed in section 6.3.

2) Uniform-institutionalist approach: NGOs are sources complementary to democratic legitimacy in the development of a global democratic system. Democratic legitimacy’s necessary preconditions should be provided internationally. This approach is embedded in cosmopolitan democracy theory, which will be discussed in section 6.3.

3) Multiform-non-institutionalist approach: Although at the domestic level institutional preconditions might be necessary and suitable, at the international level NGOs contribute to a non-institutional manifestations of the democratic legitimacy of international law, which is tailored specifically to the non-institutional characteristics of the international legal order, such as transparency, deliberation, and accountability. This approach will be discussed in section 6.1.2.

4) Uniform-non-institutionalist approach: Activities of NGOs, as part of global civil society, form independent sources of democratic legitimacy. Institutional

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1436 See chapter 5, section 5.6.2.
1437 See chapter 5, section 5.6.2.
preconditions, in this conception of democratic legitimacy, are not considered necessary on whatever level of lawmaking. This approach is embedded in global deliberative democracy theory, as will be discussed in section 6.1.2.

The first approach remains closest to the democratic norm thesis as discussed in chapter 3, and to the traditional position of civil society in existing democracies as discussed in chapter 2. The multiform-institutionalist approach supplements the democratic norm thesis with an emphasis on the merits of global civil society for the democratic legitimacy of international law, and therefore constitutes a two-track approach to international democratic legitimacy. State consent and state autonomy both remain the dominant pillars of the democratic legitimacy of international law. In light of the debate as discussed in chapter 5, one can reasonably suspect that most advocates of the NGO democratic legitimacy thesis probably do not feel attracted to this approach to NGOs’ contribution to democratic legitimacy, as their inclination towards NGOs as contributors to the democratic legitimacy of international law was primarily fuelled by criticism on the waning of state autonomy and the normative weakness of state consent as a legitimizing tool.

The second approach shares its roots with the previous two-track approach, but it takes a uniform-institutionalist approach to democratic legitimacy’s necessary preconditions. It understands NGOs’ participation as a complementary contribution to necessary global institutional preconditions for the democratic legitimacy of international law. This cosmopolitan approach requires the international legal order to be transformed into a full political institutional constellation, compared to domestic democracies. In light of the general lack of attention of the scholars in favor of the NGO democratic legitimacy thesis to institutional preconditions, it is highly doubtful whether they share this ambition of uniform-institutionalist scholars to establish a cosmopolitan institutional democracy.

The arguments presented by scholars favoring the NGO democratic legitimacy thesis point however towards reasoning in line with the third and fourth approaches. The impression is given that NGOs can directly democratically legitimize international law by contributing to global deliberative practices. Global deliberative practices are considered to enable democratic legitimation internationally, without requiring the backing of institutional preconditions. Whether or not these scholars perceive it as necessary domestically to have institutional preconditions (whether these scholars take a uniform or a multiform approach towards the preconditions and manifestations of democratic legitimacy) often remains unexpressed in their work.

Symptomatic for this neglect of discussing institutional preconditions is the tendency in the discourse to approach the NGO democratic legitimacy thesis in a fragmented way. Section 6.1 describes this general tendency, which is primarily witnessed in scholarship supporting the NGO democratic legitimacy thesis. Two manifestations of this tendency are discussed. On the one hand, one notices a selective focus on NGOs’ internal democratic legitimacy as a precondition for the validity of the thesis. On the other hand, if there is a

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1438 The thesis that NGOs’ participation in international lawmaking contributes to democratic legitimacy of law is probably inherited from theoretical approaches towards civil society that, ‘pretend that we can have a vital, well-integrated, and just civil society without states constitutionally guaranteeing that universalistic egalitarian principles (open to critique and revision) inform social policy regardless of which social institution or level of governance carries it out’. Cohen 1999, p. 213.

1439 See Dryzek 2011, p. 225; section 6.1.2.
focus on the democratic characteristics of the lawmaking processes, one notices a selective focus on single democratic practices or features, often related to democratic legitimacy’s operational aspects, without linking these practices to an institutional framework consisting of rights and judicial safeguards. In both instances, the necessary preconditions for democratic legitimacy remain underexplored.\textsuperscript{1440}

As will be discussed in section 6.2, the underexploitation of institutional preconditions can be considered the main weakness of the NGO democratic legitimacy thesis.\textsuperscript{1441} In doing so, this section will simultaneously substantiate earlier critique stated by, among others, Besson and Erman.\textsuperscript{1442} The drawbacks are as follows: a conception of democratic legitimacy without institutional preconditions offers an inadequate response to the current discretion of power holders concerning NGOs participation in international lawmaking, and it underestimates the importance of democratic agency. In sum, it disregards the need of an all-encompassing political structure, which leads to a compromise of the principles of democratic legitimacy as discussed in chapter 1. The main normative consequence of the underestimation of democratic legitimacy’s preconditions is the inadequacy of the scholarly work on the NGO democratic legitimacy thesis in protecting the main premise of democratic legitimacy: freedom from domination.

This all said, it is not an easy instruction to theorize the translation of institutional preconditions into the international legal order, which brings us to the second dimension of this impasse of institutional preconditions, that is the huge difficulties that arise when one seeks to theorize and implement the institutional preconditions necessary for the democratic legitimacy of international law to the international legal order. This second aspect of the impasse of institutional preconditions will be discussed in section 6.3. It will be shown that these difficulties can partly explain the current lack of reflection on them in the discourse on NGOs’ possible contributions to the democratic legitimacy of international law. On this occasion, two specific approaches to institutional preconditions in international democratic legitimacy theory will be identified and inventorized. As will be demonstrated, although these approaches reflect on institutional preconditions for democratic legitimacy, the solutions put forward give rise to many new unresolved problems, which on a more conceptual level emphasize the weakness of the NGO democratic legitimacy thesis.

This conclusion will not invalidate the general claim that NGOs could contribute to the democratic legitimacy of law. However, as will be explained in section 6.1.1, their contributions can only be evaluated as relevant for democratic legitimacy of law, \textit{ad hoc} or \textit{ex post}. In addition, before NGOs can contribute in any sense to democratic legitimacy, a

\textsuperscript{1440} In Erman’s words, the selective focus on different elements of democratic practices seems not to take into consideration the necessary institutional preconditions to ‘knit together’ these single democratic practices. Erman 2012, p. 10.

\textsuperscript{1441} Our critique on the academic discussions concerning the thesis focuses primarily on the often-neglected issue of institutional preconditions for democratic legitimation. Consequently this chapter does not provide an answer to other complicated questions of international democratic theory. Many imaginable problems that have been implicitly part of our review will not further explained, studied or criticized, such as the status of international law, and of international standard setting. Also other controversies fall outside the scope of this critique such as controversies concerning the existence of global civil society, the conception of international representation, problems of international accountability, or issues strongly related to social preconditions as mentioned in Part I: whether or not the member state is the only possible ‘special sphere of authentic national culture, effective cultural protection and lively democratic politics of identity’. See for the latter point De Beus 2001, p. 306.

\textsuperscript{1442} Besson dubbed this tendency earlier ‘fast food democracy’. Besson 2011a. Also Erman has been critical towards this tendency, calling it the ‘seperability premise’ See Erman 2013. Erman and Uhlin called it earlier the ‘additive view’. See Erman and Uhlin 2010a.
political governing system needs to be at place that fulfills both social and institutional preconditions. In this respect, our rejection of the thesis refers to the level of application of the thesis. In a domestic democracy, there is a complementary role to play for NGOs in democratically legitimizing law. NGOs, including those that are active internationally, remain relevant for the democratic legitimation of the state’s position towards proposals for international law back in domestic democracies. Section 6.4 concludes that the academic discussions in favour of NGO participation in international lawmakers might be understood solely as an attempt to democratize the international legal order rather than a quest for the democratic legitimation of international law.

6.1 A fragmented approach to democratic legitimacy

The methodological vagueness concerning democratic legitimacy discussed at the end of chapter 5, not only leads to implicit ambiguities in the debate, but also hides the general inattention paid by a large number of the scholars engaged in the discourse to democratic legitimacy’s necessary institutional preconditions. This disregard for institutional preconditions originates in a proclivity to focus selectively on specific elements, or on specific actors that supposedly have to live up to these elements, which in turn can be explained by the general scholarly tendency to break down the concept of democratic legitimacy into separate components. A gradual approach towards democratic legitimacy is taken, in which a situation that has, for example, a high level of transparency is considered more democratically legitimate than a situation in which transparency has not been taken into account. The scholarly review of the political opportunities of NGOs to participate is often limited to an assessment of the organization of a specific NGO, or of the attitude of the legislative authority in terms of commitment to norms such as openness and responsiveness.

While section 6.2 discusses the consequences of these fragmented approaches for the validity of the NGO democratic legitimacy thesis as a whole, this section describes the two types of fragmentation noticed in the debate on NGOs alleged contribution to the democratic legitimation of international law, which informs the disregard for the question of institutional preconditions. Section 6.1.1 discusses the selective focus on NGOs’ democratic legitimacy and explains the pitfalls of such a focus on their democratic legitimacy. Section 6.1.2 discusses the second form of fragmentation, namely the tendency to isolate democratic practices from an institutional framework. The presentation of these fragmented approaches allows us to carry through our general critique that the NGO

1443 Besson has also made this observation. See Besson 2011a. The focus on procedural values seems to be in line with the Global Administrative Law project (GAL). However, the main difference is that GAL’s reason for breaking down the concept of democracy into workable elements is that it perceive a democratic system of transnational governance as an impossibility, at least in its representative form, because representation cannot function accurately beyond a certain scale and size. What they find indispensable for democracy to flourish is a well-defined community, a demos, such that there can be said to be a collective public interest in and shared responsibility for the decisions and norms enacted in the name of that community. Scholars engaged in Global Administrative Law project predominantly refrain from using the notion ‘democratic’ and focus primarily on ‘good governance’. For that reason, De Búrca dubs this approach to single democratic elements the ‘compensatory approach’ to democratic legitimacy. De Búrca 2007-2008, p. 241. See for further reading on GAL: Kingsbury, Krisch, and Stewart 2005, p. 15-61; Krisch and Kingsbury 2006, p. 1-13; Kingsbury and Casini 2006, p. 319-358.

democratic legitimacy thesis as defended by scholars forfeits the essential principles of democratic legitimacy, namely equality and freedom from domination.

6.1.1 A selective focus on NGOs’ democratic legitimacy

Critique on NGOs arises from many different grounds. The motives and actions of certain NGOs are doubted.\textsuperscript{1445} Other critics argued that the information spread by NGOs distorts, rather than enlightens, public opinion.\textsuperscript{1446} Others have claimed that the large number of NGOs active in the international legal order creates an ‘excess of civil society: too many competing interest groups with too little common space’.\textsuperscript{1447} NGOs are assumed to have an inherently biased position, and the risk of NGOs forming dominant factions is considered to increase with their participation in international lawmaking forums. Still others have contended that the competition with each other for access to resources distracts most NGOs from their social purpose.\textsuperscript{1448}

Notwithstanding these different focal points, both critics of and adherents to the NGO democratic legitimacy thesis are primarily occupied with theorizing and criticizing the internal democratic legitimacy of NGOs.\textsuperscript{1449} The tendency to require a democratic internal organization of NGOs as a precondition for understanding their input into international lawmaking as a contribution to the democratic legitimacy of international law in our view falsely prioritizes NGOs’ democratization above a reflection on the democratic characteristics of the political space for NGOs to partake in the exercise of lawmaking authority. Above the incorrect prioritization, which consequences for the validity of the NGO democratic legitimacy thesis will be addressed in the final subsection and further elaborated in section 6.2, we question in this section whether the move to submit NGOs to government-like expectations is justifiable in se. We question the normative desirability of formulating democratic rules for the highly dynamic and unpredictable phenomenon of NGOs. In addition, we question the merits of scholarly attempts to capture NGOs’ involvement in content-independent, procedural terms. Before we substantiate our critique, a preliminary remark will be made regarding the unpredictability of NGOs, which in general should lead to reservations in theorizing pre-determined expectations concerning NGOs. Thereafter, the specific democratic expectation concerning NGOs’ internal organization will be problematized.

The scholarly tendency to focus on NGOs’ internal democratization

As chapter 5 demonstrated, the internal democratization of NGOs plays a dominant part in the NGO democratic legitimacy debate.\textsuperscript{1450} NGOs’ limited representativeness,\textsuperscript{1451} their elitist

\textsuperscript{1445} Johns 2003b, p. 29.
\textsuperscript{1446} Simmons 1998, p. 82-96; Florini 2003.
\textsuperscript{1447} Teegen, Doh, and Vachani 2004, p. 472, referring to Florini 2003, p. 39.
\textsuperscript{1448} Dichter 1999, p. 38-58.
\textsuperscript{1449} A recent example of the tendency to prioritize NGOs democratic legitimacy is the article of Marxsen, 2014.
\textsuperscript{1450} Exemplary is the summary of Wheatley in which he dismisses the validity of the NGO democratic legitimacy thesis: ‘First, it is not necessarily the case that NGOs are legitimate actors; second, NGOs are required on this argument to undertake a function for which they were not constituted - the aim of civil society actors is to influence debate, not to legitimate the exercise of political power; third, it is not clear whom international NGOs and civil society actors represent, as opposed to whom they claim to represent.’ Wheatley 2012, p. 161.
\textsuperscript{1451} See chapter 5, section 5.4.; Cullen and Morrow 2001; Johns 2003a.
character, and the dependency of NGOs on states are assumed to preclude a positive reading of NGOs as democratic legitimizers. Scholars are skeptical about the possibility of NGOs making a substantial contribution to the democratic legitimacy of the international legal order if NGOs do not fulfill some democratic requirements themselves. The argument behind the democratic accountability requirements is often based on a certain urge for reciprocity. See for example Anheier’s statement: ‘[I]f a nonprofit seeks to promote democracy and the rule of law, must it not itself be democratically organized and soundly governed? Otherwise, the organization may face accountability deficits and risk losing [sic] its legitimacy.’ Also, Black’s statement is exemplary as to the type of reasoning that characterizes the NGO democratic legitimacy debate: ‘Enrollment can potentially enhance a regulator’s legitimacy within a legitimacy community, but if the actor enrolled is not considered legitimate, it may well erode it.’

Many of the critics of the lack of the democratic credentials of NGOs go on to require reorganization of NGOs’ households. The most obvious reason is that scholars seem to consider it necessary for NGOs to prove whether they are authentic intermediaries of the interests of the ‘people’ and whether this title really confers legitimacy on international organizations. It is also argued that the internal deficits of NGOs negatively affect the authority of governmental representatives, which leads to a degradation of the democratic process due to an over-representation of ‘an urban, middle-class minority of armchair radicals’, to the detriment of the people truly affected by global legal developments.

Equally resilient in academic discussions is the focus on NGOs’ independence. It is often argued that NGOs cannot function as a watchdog or have any other democratic effect as long as they are not capable of remaining independent of state organs. Further, in more general terms, scholars require civil society at large to be a transparent sphere in order to be able to create space for consultation, evaluation, and revision by interested and affected stakeholders.

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1453 See chapter 5, section 5.5.
1454 See chapter 5, section 5.1; Spiro 1996, p. 966.
1456 Anheier 2009, p. 1090.
1458 NGOs have to subject themselves to requirements of accountability, as all organizations have to obey existing laws and regulations, cannot engage in illegal activities, nor can they violate constitutional guarantees or rights without risking judicial sanctions. Peruzzotti 2010, p. 165. We understand this tendency in the broader political trend to value accountability. However, as we have stated in Part II, it remains elusive why we should keep NGOs to account. The accountability quest has the danger to turn into a hen-egg discussion. NGOs need to have accountability structures at place in order to be allowed to play a role in international lawmaking. However, accountability becomes only relevant when NGOs can actually participate. The current involvement of NGOs in international lawmaking is conditional. Why does an NGO need to show its support when it does not have the institutional ability to fulfill a political role? Two questions seem to intertwine and affect each other. 1) Why does one demand for public accountability to NGOs as they do not get institutional space to perform a public duty? 2) Can NGOs play a public role at all?
1459 Anderson 2000, p. 117.
1461 An interesting question in this regard is whether a tension arises between the endogenous precondition to remain independent and the requirements to internally democratize. The latter loses congruence with the former of course when it is not the NGO itself that chooses to democratize, but when peers, states or international organizations put the NGO under pressure to reform. One can question in the latter case whether that is not contrary with the NGO’s autonomy and self-identity.
people.\footnote{Scholte 2011, p. 333.} In sum, critics question the democratic legitimacy of NGOs, which is considered necessary for them to play a role in democratically legitimizing international law.\footnote{As a reaction to that criticism, standardization on independent institutional footing or accountability of NGOs has been developed. Of course, the substance given to the internal requirements depend on the specific role in democratic legitimizing international law is prescribed by scholars. Proponents that focus on NGOs as part of and constituent of global civil society move away from an individual assessment of the qualification of a specific NGO. They treat the topic in an abstract way by looking at the position of NGOs within a broader search for democratic legitimacy’s necessary preconditions. Relations with the entire system initially determine their potential. See Görg and Hirsch 1998, p. 602. See also Buchanan 2004, p. 317. NGOs are seen as one of many in a system of international actors, which put their internal shortcomings in a different light. See Hirsch 2003, p. 257.}

\textit{Ungeneralizable objects of study}

Underlying the claim that NGOs should be representative or accountable, there is a tendency to generalize ‘the NGO’ as an actor, capable of taking up a pre-determined role in democratic legitimacy theory.\footnote{Comparative is the scholarly assumption that ‘young people’ embody an inherently progressive revolutionary potential making them the natural enemies of autocrats. See for a critical note Caryl 2014. Only some skeptics have disapproved the abstract attitude towards NGO involvement, stating that it is misleading to regard all intervention in international lawmaking by non-state actors as moving in the same direction. See for example, Boyle and Chinkin 2007, p. 60.} Understanding NGOs to be democratic legitimizers presupposes that a uniform image of NGOs ought to, and implicitly can, be determined in international legal theory as comparable but distinct from ‘states’ or ‘international organizations’.

It is not only the advocates of the NGO democratic legitimacy thesis but also its critics who, while raising doubts concerning the internal democratic legitimacy of NGOs, indirectly presuppose NGOs to be generalizable objects. A large number of studies have empirically examined the activities of global civil society, thereby assuming a broad and shared understanding of what a global civil society or an NGO entails.\footnote{Part II shows that characterizations of NGOs are reinvented from ‘representatives’, the ‘voice’, ‘mobilizers’, to the ‘conscience’. See for the latter characterization, Willetts 1996. Labelling changed in time, from ‘new social movements’, to part of the ‘new policy agenda’, to a ‘post modern version’. See Kaldor 2003b, p. 584-586.} Lists of general expectations concerning NGOs have been developed based on the typologies\footnote{In the introduction, we illustrated the diversity in defining NGOs by giving a few examples, among others of Willetts 1996; Josselin and Wallace 2001, p. 3-4; Hirsch 2003, p. 239.} or taxonomies\footnote{Critics have continuously questioned the possibility to uphold the theoretical division between state, NGOs, and private profit seeking organizations. See Hopgood 2000, p. 1-25.} of NGOs. The characterizations of NGOs vary according to the writer\footnote{Woodward 2010, p. 73.} as well as the definitions held\footnote{Spar and Dail 2002, p. 171.} and the selection of NGOs as the subjects of their research. However, one can observe that the existing diversity of organizations that are covered by the notion ‘NGO’ is not perceived to be an obstruction to a general discussion of their pre-determined merits for international lawmaking.\footnote{See Simmons 1998.} NGOs, under such a general account, are
assumed to be able to have a standard form and offer an organized will.\textsuperscript{1472} Interestingly, the same generality in expectations keeps on changing in terms of internal content.\textsuperscript{1473} The tendency to make generalizations with presumably strong predictive power with regard to NGOs involved in international lawmaking offers insight into one of the recurring tendencies in the NGO democratic legitimacy thesis: the assumption of structural systematics in global civil society.\textsuperscript{1474} The scholars engaged in the debate imply that the sum of all NGOs, although different from one another, can be defined as a coherent, bound, identifiable object of theory. In line with what Skocpol has argued in her study of the history of civil society in the United States, one can question the persuasiveness of considering NGOs as an object of a law-like generalization, due to their formlessness and variety of manifestations.\textsuperscript{1475} The argumentative power of the generalizations concerning NGOs that characterize the thesis is flawed by NGOs’ indeterminacy, by the fact that ‘NGO’ might mean anything, and more importantly, that tomorrow’s NGOs might be something other than they are today.\textsuperscript{1476}

Three preliminary remarks can be made in this respect. First, it is clear that NGOs differ from one another.\textsuperscript{1477} This observation is in line with the most common critique of the concept of the NGO. Although there is a certain level of consensus regarding the importance of associations for democratic political processes as well as the virtuous role that citizens’ participation might have played in democracies,\textsuperscript{1478} the same consensus hides a significant disagreement over how to understand and select specific actors who are part of the broad term ‘associations’. As has been pointed out earlier,\textsuperscript{1479} the term NGO can be used quite freely to label any association of people. We have observed in the studies of the debate and the background of the thesis that there is a multitude of references to divergent types of NGOs, which may be operational, service providers, advocacy oriented, or protesting. An NGO can be formed by one or two active citizens or based on a large group of generally passive members.\textsuperscript{1480} NGOs might be large, small, rich, representing the voice of liberal or left wing activists. NGOs might be organized to attain goals beneficial to the self, such as

\footnotesize{era. (…) The emergence of global civil society holds the promise of making existing international institutions more democratic, transforming them through innovation and experimentation, and anchoring them in world opinion.’ Cameron, Lawson, and Tomlin 1998, p. 13.}

\textsuperscript{1472} Barnard 2001, p. 149, referring to Cole 1914, p. 158.
\textsuperscript{1473} See Amoore and Langly 2004, p. 89-110.
\textsuperscript{1474} We ran into a comparable tendency of generalization while there exists a multitude of interpretations with regard to the open characteristics of ‘international lawmaking’. Often scholars speak of ‘the international legal order’. However, Part II showed that the structure and consistency that it is suggested with the term ‘international legal order’ does not correspond with the diversity in ways in which the various international regimes function and the diversity of instruments they produce. See Introduction; Koskenniemi 2006b; Krisch 2013.
\textsuperscript{1475} Skocpol has criticized the systemic approach of, among others, civil society theorist Putnam. See Skocpol 2003.
\textsuperscript{1476} Jad describes the possible effects of general associations of NGOs. Jad 2007, p. 622-629. This adherence to generality presumably strengthens the credibility of the positions taken. Kennedy 2000, p. 373; Koskenniemi 2006, p. 589.
\textsuperscript{1477} In order to give analytical guidance for international organizations to clarify for what purpose civil society engagement is needed Perdrasa-Fariña offers a helpful taxonomy. See Pedraza-Fariña 2013, p. 655-656.
\textsuperscript{1478} See chapter 2, section 2.1.2 on social preconditions. Often the democratic developments in Eastern Europe and Latin America function as textbook examples of positive effects of associations.
\textsuperscript{1479} See chapter 4, section 4.1.
\textsuperscript{1480} Krut 1997, p. 14; Simmons 1998.
chess clubs or labor unions, or to strive for aims that are specifically beneficial to others, such as the World Wildlife Fund or Amnesty International. 1481

Different NGOs have different levels of independence. An NGO’s donor structure might be made up of private companies, states, a few well-to-do individuals, or a large group of disadvantaged people. 1482 In addition to the clear-cut financial support of members, most NGOs maintain donor relationships with philanthropic foundations, other NGOs, or governments. The financial dependence of NGOs on many actors with divergent institutional settings obfuscates thinking in general terms about how, to whom, and on the basis of which standards NGOs should be held accountable.

Notwithstanding the obvious variety of groups that are referred to by the term NGO, it is not so much the specific empirical fact of diversity that we consider problematic for their generalized contribution to the democratic legitimacy of international law. The fact that NGOs can change internally in terms of constituency, purpose, activity, and donor construction is more problematic. This brings us to our second hesitation with regard to the common move of scholars engaged in the debate to generalize the characteristics of the forms and functioning of NGOs. When one refers to NGOs, one refers to a body of organizations with a prismatic variety of content. 1483 NGOs’ manifestations – their position taken towards other actors and roles in a society – are subject to unpredictable change.

One can envisage that an expectation concerning the representativeness of an NGO that was primarily based on individual donors as part of a marginalized group does not hold when the same NGO is flourishing five years later on the basis of a substantial gift from one individual donor. NGOs’ functioning might change according to context, which is sometimes aimed at cooperation with states and international organizations, 1484 and sometimes in opposition, and sometimes on their own initiative, mobilizing the ‘excluded’ in order to give voice to topics that are otherwise neglected. Because of the fact that an NGO originates from a private initiative, there are no guarantees concerning the consistency of its policy, financial structure, or even its existence. This is not a bad thing per se, but it is problematic for the validity of the ante hoc theoretical expectations that underlie the NGO democratic legitimacy thesis.

Interrelated to the contentiousness of determining NGOs’ role in international lawmaking is the question of whether NGOs can be generalized as an equivalent for, or part of, (global) civil society is correct, 1485 which takes us to the third aspect of our hesitation towards the generalization of NGOs that characterizes the debate on NGOs contributions to the democratic legitimacy of international law.

1481 Yaziji and Doh 2009 p. 5.
1482 See on the relationship between funding sources and NGO activities: Hulme and Edwards 1997. See for a few illustrative examples for the enormous differences between NGOs, Simmons 1998.
1483 This fact complicates the analysis of the impact of NGOs at local, national, and global levels. This complication is also acknowledged by: Carroll 1992; Fisher 1993; Fowler and James 1994.
1484 For example, Pedraza-Farina points out that a new governance conception of civil society understating strategies of collaboration and that views civil society as ‘partners’ of both government and business is often implicit but characteristic for the institutional design of U. N. General Assembly Declaration of Commitment on HIV/AIDS (UNGASS), Pedraza-Farina 2013, p. 654.
1485 Also Amoore and Langly detect and criticize ‘the tendency to equate GSC (red: Global Civil Society) with the practices of voluntary associations’. ‘In short GCS becomes defined as voluntary associations and vice versa.’ Amoore and Langly 2004, p. 54.
The collectivity of NGOs, often equated with civil society, is far from a constant and uncontested factor. As we have observed, many biases are hidden behind the assumingly ‘neutral’ connection between NGOs and global civil society. The analytical terms used in current writings on NGO involvement is permeated by a distinction between public and private actors in which public is state and private is non-state.\textsuperscript{1486} For example, from a linguistic (and consequently political) point of view, placing the NGO within civil society prevents thinking of NGOs as participants in the exercise of public authority.\textsuperscript{1487} In our study of the debate we detected three manifestations of the controversy surrounding global civil society and NGOs. First, the actual existence of an ‘international’ public or civil society is highly controversial. Second, there is debate concerning the alleged benefits that a global civil society might bring to the democratic legitimacy of international politics. Third, there is no agreement over the boundaries of the concept: whether the generally shared ideal or typical representation of global civil society can be perceived as an identifiable sphere, space, or ‘third system’.\textsuperscript{1488}

To construct a suitable theory of democratic legitimacy with the NGO as the dominant building block, there is a risk that the selection of specific NGOs, while leaving out others, is instigated by a scholar’s theoretical mindset.\textsuperscript{1489} The reason for disagreement concerning the understanding of civil society is that concepts such as civil society and NGOs are, less than complex in terms of definition, inherently fluid and dynamic. The fragmentation in terms of what is implied by the term NGO excludes a priori conclusions with regard to the thesis. One cannot simply state that based on an assessment of the literature, NGOs do not contribute to the democratic legitimacy of international law in principle or that NGOs and democratic legitimacy do contribute to democratic legitimacy in general.\textsuperscript{1490} Upholding a thesis based on whatever contribution of NGO to international law requires empirical studies to learn case by case what role is performed by which organization, and in what political setting.\textsuperscript{1491} What is needed is a solid empirical study with reference to intentions, purposes, and reasons for actions of NGOs engaged in international lawmaking, to ‘purify its descriptive vocabulary’ of the current NGO democratic legitimacy debate.\textsuperscript{1492} However, notwithstanding its evident explanatory power,\textsuperscript{1493} any empirical study will still inherently lack predictive power. Any law-like generalization with regard to NGOs that lacks predictive power should be regarded critically.\textsuperscript{1494} The fulfillment of the pre-determined responsibility,

\textsuperscript{1486} Macdonald 2008, p. 44-45. The distinction between public and private is formally acknowledged, as states have, contrary to NGOs, international legal personality, states have a vote, unrestricted access, and therefore actual political power.

\textsuperscript{1487} Macdonald 2008, p. 44.

\textsuperscript{1488} Amoore and Langly 2004, p. 92, referring to Falk 1998 p. 100.

\textsuperscript{1489} Pedraza-Farina has made a convincing point and theory to respond to the diversity of scholarly conceptions and scholarly expectations of civil society. Pedraza-Farina 2013, p. 654.

\textsuperscript{1490} Macintyre argues that the studies of human behaviour cannot offer any general law-like observation, although they often assume to do exactly that. Macintyre 2011, p. 93-102.

\textsuperscript{1491} However, case studies are complicated by the fact that the efforts of NGOs to change the law often spread out over more than two decades. Only at a reflexive moment after a culmination of interactions initiated and driven by NGOs, one might be able to indicate that NGOs did have actual impact on the law.

\textsuperscript{1492} MacIntyre 2011, p. 98.

\textsuperscript{1493} However, according to Macintyre, studying NGOs role empirically will not do the trick. Predictability in human affairs is systematically obstructed. MacIntyre 2011, p. 98; MacIntyre 2011, p. 106; MacIntyre 2011, p. p. 109-114.

\textsuperscript{1494} MacIntyre 2011, chapter 7 and 8.
which is assumed with the thesis of NGOs as democratic legitimizers, can be empirically tested ex post, or ad hoc, but the diffuse and ever-changing characteristics of NGOs in terms of structure, content, organization, and membership exclude any ante hoc conceptual expectation.\textsuperscript{1495}

These observations concerning the barriers to ex ante qualifications of NGOs,\textsuperscript{1496} raises a question that needs to be critically assessed before one can persuasively claim a positive relation between NGO involvement in international legislative practices and the democratic legitimacy of international law.\textsuperscript{1497} Besides the questionable success of formulating general normative expectations with regard to NGOs, one can question the desirability of a specific and, in the NGO democratic legitimacy debate, dominant expectation concerning the democratic legitimacy of NGOs. It is debatable whether subjecting NGOs, which are primarily content-driven, to content-independent democratic norms does not negatively affect their contribution to international lawmaking. The next two sections aim to illustrate this objection by firstly focusing on the general problem of governing NGOs,\textsuperscript{1498} and secondly highlighting the questionable merits of describing NGO involvement in content-independent terms.

\textbf{The problem of governing NGOs}

Not only do scholars prescribe NGOs’ internal democratization, but also some legal documents concerning the accreditation of NGO participation in international organizations suggest that NGOs’ democratic legitimacy is a prerequisite.\textsuperscript{1499} The reasons for including NGOs in international organizations are manyfold. The most obvious one is that the working area of NGOs and governmental actors often overlap. The values on which NGOs base their activities and their existence is often related to governmental activities in the light of the common good, which makes it mutually beneficial for NGOs and governmental actors to work together. As critical scholars have noted,\textsuperscript{1500} there is a fine line between NGOs maintaining their value towards governmental organizations, which increases their chances of participating in international lawmaking, and

\textsuperscript{1495} Notwithstanding the common statement that at least we know what NGOs are not, namely non-governmental, one should be aware of the increasing boundary problems between NGOs and the surrounding domains of market, state, and community. Brandsen, van de Donk and Putters 2005, p. 750; Frumkin 2002, p. 1. As Rosenblum states: ‘The moral uses of associational life by members are indeterminate’. Rosenblum 1998, p. 155.

\textsuperscript{1496} With one of the three roles of NGOs as democratic legitimizers specifically, NGOs as facilitator of social engagement, the existent indistinctness of NGOs, and therefore the dependence of an ad hoc review of their organization, and aims, does not match the reliance on conceptual expectations. The role of NGOs when formally admitted to lawmaking institutions, as representative or as knowledge contributor, is less problematic as their ability to contribute is inherently based on an ad hoc assessment of their organization or contribution.

\textsuperscript{1497} This is acknowledged by Charnovitz who himself takes part in a similar generalizing exercise. He warns us that the lack of common structures, roles of NGOs and levels of involvement complicates thinking about suitable governmental structures. Charnovitz 2005, p. 32.

\textsuperscript{1498} We borrowed the title from the Brooklyn Journal of International law, the Chicago Journal of International Law, and Chicago Kent Law School Symposium, ‘Governing Civil Society: NGO Accountability, Legitimacy and Influence’, Brooklyn Journal of International Law 36, 2011, p. 813-1074.

\textsuperscript{1499} As already mentioned in chapter 4, international organizations prescribe NGOs’ internal democratic organization through accreditation mechanisms. It also showed an interesting difference between the European approach to not include democratic requirements for the organization of NGOs and the International UN approach to include democratic requirements.

\textsuperscript{1500} See chapter 5, section 5.4.2.
maintaining their own identity and independence. To prevent NGOs from becoming the fourth arm of governmental organizations, one might argue that it is better to abstain from too many regulations. Any formulated requirement by the international organization concerning the internal organization of NGOs would lead to the undesirable situation in which the demand-identity of international organizations or states is unilaterally made a decisive factor for the form, function, and characteristics of an NGO. Consequently, social-political conceptions will start to function as a substitute for the specific purpose-relevant identity of an association initiated by citizens.

Apart from any requirements attached to a specific instance of the institutional involvement of NGOs in a particular international organization, one can detect is a move in the debate on the NGO democratic legitimacy thesis to develop and advocate standards for NGOs' internal democratization in general. Also, many NGOs are themselves involved in such a general effort of independent standardization regarding their internal organization. The emphasis on NGOs' internal democratization is understandable in light of any legitimate attempt to assess and ensure NGOs' trustworthiness. As demonstrated in chapter 1, section 1.1, trust is a fundamental element of legitimacy, and therefore trust in international law, because NGOs are involved in the making of it, inherently implies trust in NGOs, which consequently must be grounded. There can be a tension between the influence that NGOs have on international lawmaking and the accountability in place to justify that influence. Logically, the perceived need for accountability may grow insofar as one perceives the legitimacy of NGO participation to be questionable. At first sight it seems perfectly valid to place requirements set by law or other rules on the organization of NGOs to prevent that, by their factual functioning, NGOs bar freedom from domination instead of support freedom from domination.

Notwithstanding the intuitively understandable tendency to scrutinize NGOs and assess their democratic legitimacy, the appropriateness and relevance of the tendency to impose requirements on NGOs such as transparency, accountability, and representativeness and to bind NGOs to certain rules and control should be critically assessed. There is evidently a difference between applying standards to prevent NGOs from engaging in wrongdoing, corruption, or illicit behavior, and requiring an NGO to be organized in the way 'we' think an NGO should be organized. We question whether it is in se justifiable to subject NGOs to democratic governance structures. When we impose our democracy-like standards on

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1501 Hereby excluding NGOs own efforts to adhere internal democratic procedures.
1502 Legitimacy is based on the belief of broad sections of the population that political institutions and their equipage are worthy of trust. Weber calls it ‘Legitimitätsglaube’. Weber put forward a sociological account of legitimacy that focuses primarily on faith, and excludes normative criteria. Weber distinguishes three main sources of legitimacy: tradition, charisma and legal rationality. Weber 1964, p. 382.
1505 These standards are often part of the preconditions of NGOs to obtain legal personality at the domestic level.
1506 The complexity of the issue of for example demanding democratic accountability of NGOs is convincingly shown by Slim. “The question asked of Oxfam by The Economist – ‘Who elected Oxfam?’ – implies an assumption that only democratically elected organizations are truly accountable and legitimate. The easy retort to such a question is obviously ‘Who elected The Economist?’ But the democracy issue requires more though than this because it will be a determining point for NGO legitimacy and requires NGOs to have a solid answer to it. There are perhaps two possible answers. Either NGOs could agree that only democratic structures are truly accountable and legitimate. This would require them all to transform themselves into democratic organizations. Or, NGOs could make a strong case for non-democratic accountability. This will require them to shape the case and prove it.
NGOs, we push them towards becoming particular organizations they might just not be, want to be, or have the intention of being. Prescribing and regulating their mode of decision-making and operation might undermine the specific purpose of and the values based on which many NGOs pursue their activities. An institutionalized private initiative should remain identifiable as an initiative by private persons, with its own identity.

Undeniably attached to, and reflected in NGOs' work, is their vision of humankind and its place in society. Any adaptation of democratic decision-making leads to the arbitrary interchangeability of their content-dependent vision of life and politics. Such interchangeability is, in the case of governmental actors, the primary reason to democratize them because it gives individuals the opportunity equally to steer the course of government and to prevent them being subjected to unwanted domination. However, in the case of NGOs, one can argue that such subjection to democratic decision-making might, in effect, be more intolerant than accepting NGOs' openly marketed signature. Our main aim here is to pay attention to the possible risks of ascribing content-independent standards to content-driven actors, which is what NGOs ultimately are. These remarks touch upon a whole complex of issues concerning the difficulty of striking a balance between integrity, independence, the financial support of NGOs, and interference by other actors that one can trace back to the NGO democratic legitimacy debate but, due to the limitations of scope, will not be further discussed at this stage.

Questionable merits of describing NGOs' contribution in content-independent terms

The scholarly debate on the NGO democratic legitimacy thesis is characterized by other mismatches between content-independent expectations of NGOs and their inherently content-driven character. Not only do we discover a scholarly desire to place NGOs under content-neutralizing government-like procedures, we also notice a theoretical tendency to explain NGOs as actors that contribute to a detached conception of democracy, suggesting that NGOs' involvement brings 'more transparency', 'more inclusiveness', and 'better representation'. The proposed manifestations of NGOs as facilitators of the public sphere and as representatives are presented as content-independent roles that manifest the interests and the will of citizens. These concepts and manifestations are related to input legitimacy.

Such a presentation of NGOs' involvement leads to the assumption that regardless of what opinion is formed by individuals or groups, NGOs facilitate the formulation of opinions, the provision of information, and the mobilization of individuals to think, speak, and discuss, and enable the representation of opinions on the international stage. The extent to which

(...) A key part of this argument will be determined by the claims they make for themselves as to whether they speak as, with, for or about oppressed people. Slim 2002, p. 8.

As Charnovitz states: 'In my view, Pope Leo XIII was right when he warned that the state “should not thrust itself” into societies and citizens banded together in accordance with their rights. Governmental bureaucrats and politicians do not have any special competence to oversee NGO politics and guide them towards attainment of the common good.' Charnovitz 2005, p. 33.

See for a discussion on these liberal democratic expectations towards associations, Muñiz-Fraticelli 2014, p. 245, referring to Rosenblum 1998. Rosenblum considers the hope that 'the character of all organizations could be reshaped to conform with principles of liberal and democratic legitimacy' false and dangerous. Rosenblum has called these hopes of democratization the 'logic of congruence and the liberal expectancy'. Rosenblum 1998, p. 36-42, p. 57-60.

Dworkin 2000, p. 186.

See chapter 5, section 5.2.
NGOs make the legislative process inclusive and contribute to the legitimacy of input, which one assumes to be neutral with regard to the interests and groups and individuals represented by NGOs, is in practice, however, often directly or indirectly associated with the content of the message of the NGO which, contrary to the suggestions made, implies a dependent conception of democratic legitimacy, focusing on the output of lawmaking.\textsuperscript{1511} We observe a gap between these content-neutral, procedural democratic expectations and the practical reality of the motives of governmental actors to include NGOs in international legislative practices, which can be, in most cases, traced back to the primary value of NGOs' substantive input. Although we have not undertaken any empirical studies to substantiate this assumption, we find support in, for example, the requirements of the accreditation procedure of ECOSOC that states that the work of NGOs should be in line with the objectives of the UN.\textsuperscript{1512}

Further, notwithstanding content-independent terminology, the scholarly work in favor of the thesis reveals, as has been pointed out already several times by critics,\textsuperscript{1513} the tendency to connect NGOs with a subjective level of goodness.\textsuperscript{1514} An example is Charnovitz's exploration of NGOs in which he focuses on the procedural democratic contributions of NGOs and at the same time views NGOs as correctors 'for the pathologies of governments and IOs'.\textsuperscript{1515} Other scholars envision the global civil society in which NGOs take part as a 'solidarity sphere', where all are working towards 'progressive transformation through collective association'.\textsuperscript{1516} NGOs are 'called upon to serve the “developmental” function of moulding the habits and attitudes of their members in the direction of overall cooperation'.\textsuperscript{1517} NGOs are expected to be committed to finding acceptable terms of international political cooperation.

These scholarly expectations of NGOs require a consensus of reasonably comprehensive views, and there seems to exist a certain underlying bias in defining what can be understood as 'reasonably comprehensive'. The terms and words used by the proponents of the thesis refer to value-laden perceptions of what is supposedly good or bad. This is difficult to rhyme with their inclination towards understanding NGOs' participation as a contribution to the democratic legitimacy of international law that, to the contrary, suggests a preference for opening up the political space to individuals to decide for themselves what is good or bad. Besides, as critics have mentioned, not all NGOs are good.\textsuperscript{1518} Sometimes it seems that academics involved in the NGO democratic legitimacy debate have a blind spot with regard

\textsuperscript{1511} See Kelley 2010.
\textsuperscript{1513} See chapter 5, section 5.4.1; Carothers 1999.
\textsuperscript{1514} In an attempt to explain the bias towards the 'good' in scholarly writing concerning NGOs, Amoore and Langly link this tendency to the 'continuing relevance of Marxist thought.' Just as the proletariat is juxtaposed to the bourgeoisie under Marxism, scholars of GSC (red: Global Civil Society) position the 'good' of civil society against the 'bad' of state and capital.' Amoore and Langly 2004, p. 96, referring to Keane 2001, p. 30.
\textsuperscript{1515} The selection of seven main tasks or expectations of NGOs by Charnovitz is exemplary. See Charnovitz 2011, p. 894-895.
\textsuperscript{1516} Amoore and Langly 2004, p. 92, referring to Alexander 1997, p. 115-133.
\textsuperscript{1517} Barnard 2001, p. 149, referring to Cole 1915, p. 158.
\textsuperscript{1518} See chapter 5, section 5.4.2.
to the miscellaneous manifestations of NGOs and civil society.\textsuperscript{1519} As briefly mentioned above, the content-dependent valuation of NGOs’ ‘goodness’ is also reflected in the accreditation of NGOs to international legislative practices. There is a strong connection between accepting or inviting NGOs to be active in international lawmaking and the subjective ‘goodness’ they purport to proclaim.\textsuperscript{1520}

Four grounds strengthen our assumption that a correlation exists between accepting NGOs and the content of their message. Firstly, as mentioned in section 5.4, any accreditation system indirectly encourages the involvement of the ones that are activists by nature, that feel engaged to influence international lawmaking.\textsuperscript{1521} Secondly, with regard to the legal framework for involvement, one discovers that the international governance seems to be conceptualized as ‘working together’ for the common good. Thirdly, NGOs that are predominantly active in what from a Western perspective would be labeled normatively desirable working areas, such as human rights and environmental law, seem to play a major role in the theory of NGOs’ contribution to the democratic legitimacy of international law. Fourthly, a link is often presumed between NGOs and democratic legitimacy when NGOs help specific minority groups with voicing their issues, for example indigenous peoples.\textsuperscript{1522}

The participation of NGOs seems to be predominantly appreciated for their substantive contribution (expertise, standards of justice, ability to protect the minority interest). As Pasha and Blaney point out, ‘NGOs in their most exalted form (and there are many hybrid exceptions) exist to convince people of the rightness of their ideals and invite people to become constituents of those ideals, not to advocate for whatever ideals people already happen to have’.\textsuperscript{1523} NGOs’ wider legitimacy seems to be morally derived, more than politically derived, and has exclusive characteristics.\textsuperscript{1524}

Most NGOs are driven by specific values, the desire to work not-for-profit, voluntarily, and for, in their specific views, a better society.\textsuperscript{1525} A content bias towards NGOs’ ‘goodness’ is therefore in itself intelligible. However, such a bias should simultaneously be reflected in any understanding of NGOs’ contribution to international lawmaking. NGOs’ efforts to influence international legislative practices might in substantive terms be ‘good for democracy’ if their efforts are directed towards pushing the international legal order to enacting norms that stimulate a democratic order and substantive equality. However, the way NGOs have been presented suggests a type of neutrality towards content that is often hard to maintain in the practice of inviting NGOs to take part in the preparatory phases of international lawmaking, and is therefore vulnerable to criticism.

The observations discussed in this section allow us to question the empirical validity of having normative expectations of NGOs as democratic legitimizers on different grounds.

\textsuperscript{1519} As Klabbers states, ‘[w]hile we expect our statesmen to be democrats, and while we try to sell the blessings of it to those that have hitherto remained deprived of democracy, we simultaneously allow our spirits to be uplifted by the utterly undemocratic politics of civil society, conveniently ignoring the circumstance that civil society not only includes our noblest dreams, but may also include our worst nightmares’. Klabbers 2005a, p. 341.

\textsuperscript{1520} ECOSOC is explicit about the requirements of admission and accreditation; the aims of the NGO should be in line with the mission of the UN.

\textsuperscript{1521} Johns 2003a, p. 2.

\textsuperscript{1522} Cox states that the possible implication of a biased focus on goodness is that the ‘dark forces’ of extreme right, terrorists, organized crime, and intelligence service remain out of sight, while at the same time further enjoying their ‘covert power’. Cox 1999, p. 13-15.

\textsuperscript{1523} Anderson and Rieff 2005, p. 5.

\textsuperscript{1524} Pasha and Blaney 1998, p. 423.

\textsuperscript{1525} Brandsen, van de Donk and Putters 2005, p. 760.
First, it is questionable whether one can formulate *ante hoc* expectations of NGOs, due to their inherent dynamic and prismatic character, which underscores their unpredictability in organizational structure and behavior. Second, subjecting NGOs to democratic governing structures, which is often suggested as a response to the critique of NGOs’ lack of representation, can be questioned due to the fact that such an external standardization can negatively affect the inherent voluntariness of NGOs. Third, it is questionable whether it is convincing to describe NGOs in procedural content-independent terms such as representation, transparency, or inclusion, because practice and legal documents suggest that NGOs are primarily valued for their content-dependent contributions. There is a fourth objection to be made against the scholarly tendency to prioritize NGOs’ internal democratization. Prioritizing NGOs’ democratization over the democratization of the international lawmaking processes leads to the somewhat strange situation in which NGOs are required to be internally democratized, but there is little attention paid to the democratic legitimacy of the system in which they are active.

The pitfalls of a selective focus on NGOs’ democratic legitimacy

The scholarly attention to NGOs’ internal democratic credentials is accompanied by a weak emphasis on institutional preconditions for the political opportunities of NGO involvement in lawmaking. As indicated in the introduction of this section, we consider the critical assessment of NGOs’ democratic legitimacy to be a matter of erroneous prioritization: the question of the democratic legitimacy of NGOs can only become relevant when one is assured that the system in which NGOs are involved offers a political opportunity structure to democratically legitimize lawmaking.

We are not the first to question the relevance of imposing democratic governing norms on NGOs. Charnovitz retorted that ‘numbers matter when votes are counted but should not matter when ideas are weighted’.\(^\text{1526}\) Also, Peruzzotti argued that the notion of political accountability in relation to NGOs loses its meaning in the absence of processes of formal authorization from a principal to an agent.\(^\text{1527}\) Peters refuted the often-heard claim of opponents of the thesis that an undemocratic internal organization of NGOs should lead to the conclusion that they cannot contribute to the overall democratic legitimacy of international law. According to Peters, the relative uncertainty about the democratically legitimate character of NGOs should not lead to a strict appraisal of their internal legitimacy, but should lead to the conclusion that NGOs are limited to a voice in lawmaking processes, not to a vote, which is the case in practically all international organizations.\(^\text{1528}\) A voice might be sufficiently justified by the reputational and moral legitimacy of NGOs, and does not need to be backed up by democratic procedures.\(^\text{1529}\)

\(^{1526}\) Charnovitz 2005, p. 36.
\(^{1527}\) Peruzzotti 2010, p. 163.
\(^{1528}\) See chapter 3, section 3.4.2.
\(^{1529}\) The ILO is an exception. See chapter 3, section 3.4.2.

Peters states: ‘It is precisely a feature of pluralist lawmaking processes to offer interest groups the opportunity to participate and give input into the process without requiring any democratic mandate.’ Peters 2009a, p. 317. Peters compares the practice with the legislative process in Switzerland, which includes for all federal bills a mandatory hearing of associations in the relevant fields. See Art 147 of the Federal Constitution and the Law on Consultation of Interested Parties (Vernehmlassungsgesetz of 20 December 1968, SR 172.061.) Peters concludes that further democratization of the international legal order requires that the participation of NGOs in lawmaking and law-enforcement be strengthened. Peters 2009a, p. 318. As Peters conclude, ‘democratic legitimacy of NGO voice does not require representativity in terms of a democratic mandate conferred by a (more or less virtual) global society’. Peters 2009a, p. 316-317.
Imposing democratic norms on NGOs implies an understanding of NGOs as political actors. The critique on NGOs’ accountability is closely tied to an understanding of NGOs as democratic representatives of groups of peoples. To question the democratic legitimacy of NGOs based on the lack of accountability mechanisms is really to ask whether NGOs are representative of those they claim (or once claimed) to represent and whether they merit the legitimacy that they claim such representativeness confers. In this light, it seems obvious that NGOs need to prove the existence and support of their alleged constituency.

However, the concept of democratic accountability is related to a particular public status of democratically elected officials: it is an attempt to regulate the exercise of public authority by subjecting its exercisers to constitutional, legal, and administrative norms to ensure that the activities of representatives are both legally and politically accountable. Demandings NGOs’ accountability as a precondition for their democratically legitimizing role suggests that there is a political role to play for NGOs in international lawmaking, as only a particular political conduct requires a relationship between a political actor and a forum (constituency): the democratic exercise of public authority. To turn NGOs ‘into democratic agents they must be part of a legal political structure, which fulfills the conditions of political equality and political bindingness’.

Thus scholars pleading for an internal democratic legitimation of NGOs should equally engage in theorizing institutional preconditions to ensure political space for NGOs to be able to function as political representatives (apart from the question whether such function would fit NGOs). Remarkably, scholars who criticize NGOs for their lack of democratic accountability rarely address the question of whether NGOs have sufficient political space to be in the position to truly represent individuals. This is even more remarkable in light of the limited legal and political room for NGOs to influence international lawmaking. NGOs do not autonomously exercise public authority, they have no means to engage in decision-making, and any influence of NGOs on international lawmaking is conditional upon the goodwill of states.

We should make a clear analytical distinction between what is desired and what is required of NGOs from a democratic legitimacy perspective. If room for political action by NGOs is non-existent, it seems unnecessary to subject NGOs to a strict, general appraisal of their democratic accountability structure. Besides, as discussed earlier, even if the international legal order was a democracy, a democratic mandate for an NGO could actually run counter to NGOs’ function to pursue one single issue or a special interest of minorities and vulnerable groups, if representing otherwise voiceless entities, such as nature, is one of

1530 Peruzzotti 2010, p. 164.
1531 This is in stark contrast with the way accountability is a practical matter for states to participate. According to Spiro ‘Governments can get away with an awful lot before having to answer to their membership, and yet of course that has supplied no argument against their participation in international institutions. Spiro 2002, p. 164, referring to the fact that not even democracy is in practice seen as a precondition.
1532 Peruzzotti 2010, p. 159-160.
1534 Erman 2012, p. 16.
1536 See chapter 4.
1537 This does not exclude the possible demand of members of specific NGOs to be accountable internally or externally. We do however in that respect not foresee a general obligation to be accountable, but a voluntary member based decision that its organization must fulfill certain requirements.
the values par excellence of NGOs. In most cases, NGOs have been founded precisely to counter the will of the majority, and to act as opposition.

6.1.2 A selective focus on specific democratic practices

While the essence of the previous section was the selective focus on NGOs' internal democratization, this section observes that scholars also maintain a selective view when it concerns their conception of democratic legitimacy. Most scholars that partake in the debate on NGOs alleged contributions to the democratic legitimacy of international law, predominantly its proponents, tend to isolate specific democratic practices, thereby neglecting the need for institutional preconditions. Democratic legitimacy is separated into different components, and a positive or negative relationship between NGOs and one of these components is selectively emphasized. Scholars seem to conceive democratic legitimacy as a bundle of core values, practices, and procedural norms, and presume that international law enjoys more democratic legitimacy if the lawmaking process has respected (one of) these values, practices or norms.

This section briefly reviews the three elements of democratic legitimacy that predominate the writings of scholars engaged in the NGO democratic legitimacy debate: deliberation, control, and inclusiveness. The first two, deliberation and control, mirror familiar manifestations of participation, as discussed in Part I. The last, inclusiveness, relates to the set of procedural norms that the lawmaking authority must follow to succeed in democratic legitimacy's operational aspects, as discussed in chapter 2, section 2.2.3. A caveat is warranted. The following considerations do not relate to the earlier discussed methodological variations of the concept of democratic legitimacy in general, as observed and discussed in chapter 5, but concentrate on the specific selective focus on democratic practices that characterizes the work of primarily the proponents of the thesis.

The most prominent democratic practice that is discussed in relation to NGO involvement in international lawmaking is deliberation. The deliberative model of democracy provides, for many proponents of the thesis, the basis for beginning to think about the necessary conditions for the ‘democratic exercise of political authority by international organizations and other non-state actors’. The recurring emphasis on the necessity of a ‘voice’ for NGOs, as demonstrated in chapter 4 and 5, can be traced back to

1538 See chapter 6, section 6.1.1.
1539 Peters 2009a, p. 316.
1540 De Búrca has most explicitly pleaded for such an approach, naming it ‘a democracy striving approach’. De Búrca 2007-2008.
1541 Take for example Dryzek’s statement: ‘I believe that it makes sense to examine the possibilities of democratization in connection with discursive sources of order already present in the international system that do not require any organization of international government.’ Dryzek 2000 p. 116. On the contrary, when Macdonald explains her model of ‘global stakeholder democracy’ that has as its main pillar deliberative practices without the incorporation of aggregative procedures, she admits the practical limitations in terms of reaching a decision. Macdonald indicates that when a final decision cannot be reached in deliberative practices, the procedure is complemented with traditional aggregation among state representatives. See Macdonald 2008, p. 162.
1542 In order to understand the inclination to focus on single democratic practices, we place this symptom in a broader context of academic discussions on democratic legitimacy, not specifically limited to work focusing on NGOs contributions to it.
1543 See chapter 1, section 1.3; chapter 2, section 2.1.2.
international deliberative theory, which equally corresponds with the emphasis on themes such as responsiveness, openness, and inclusiveness.

An approach to international deliberative democratic legitimacy is also dubbed as a ‘pluralized decentered non-territorial view’. The attractiveness of deliberation is based on the conceptual space that it offers beyond the familiar forms of state organizations, unlike proposals for state majoritarianism and global elections. Further, deliberative approaches to democratic legitimacy are receptive to the conception of a global civil society. It is believed that the democratic legitimacy of international law is not about constructing an institutionalized democratic system, but about how existing international governmental arrangements can be made more democratically legitimate in a meaningful way. With the emphasis on participation in deliberations, scholars try to steer a course between the ‘twin difficulties of arbitrary exclusion and implausible comprehensive inclusion, but which nonetheless remains more faithful to the democratic values of equal respect and the public interest’. This selective focus on deliberative practices demands of governing institutions ‘an equal consideration for the interests of all members of the community’. According to Dryzek, one of its main proponents, this can be done ‘without being committed to this particular institutional architecture, or even to the idea that more formal institutions are needed, or indeed to the idea that formal institutions matter very much’.

A second dominant focal point of scholars in favor of the NGO democratic legitimacy thesis is control. It is mostly republican democrats, such as Bohman and Pettit, who strongly insist on international practices of control, in Pettit’s words, ‘editorial’ legitimation, and contestation. As explained in Part I, control has an internal and external aspect. According to Krisch, popular influence in these accounts of democratic legitimacy with its strong focus on control primarily relies on ‘retrospective mechanisms of accountability, of a

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1546 See Moore 2006, p. 21. As stated by Harding and Lim, it is characteristic of the phenomenon of international normativity to abstain from a reliance on hard-and-fast definitions and concepts and that the distinctive dynamic of the international legal order is by definition a doctrinal fluidity and flexibility. Harding and Lim 1999, p. 3.
1547 The fact that the same civil society has its origins in a heterogeneous group of people, contrary to what is supposed by a national civil society is not seen as an obstruction. A multiplicity of demois of which the global civil society consists is accepted. Krisch readily acknowledges the multiplicity of demois in multinational settings. At the same time he warns for a constitutional approach towards international civil society. ‘Federal approaches typically need to define some form of hierarchy among layers of governance and demois, if only by distributing powers and defining rules for amending a common constitution, which is bound to create tensions with the socially unsettled character of these questions’. Krisch 2010, p. 269.
1548 The democratic qualification to the concept of democratic legitimacy is in this approach understood as a relative matter, instead of as a static institutional structure. See Dahl 1971, p. 9. De Búrca suggest that ‘rather than despairing at the difficulties of transposing our contemporary institutionalization of democracy from the domestic context, we can begin by identifying some of the basic component virtues and values of democracy with a view to translating the concept in a meaningful way to the international context’. De Búrca 2007-2008, p. 250. We have seen in chapter 1, section 1.3.2, that models of deliberative democracy prescribe citizens to enjoy equality in the form of equal opportunity to participate in and affect the outcomes of decisions. Macdonald 2008, p. 112, referring to Knight and Johnson 1997. All should be given equal deliberative consideration in the process of reaching a final decision.
1550 Dryzek 2011, p. 225. Dryzek is one of the most outspoken scholars concerning the democratic character of international deliberations. See for Dryzek’s definition of deliberation: Dryzek 2011, p. 212, referring to Gutmann and Thompson 1996.
1551 See for a presentation of different types of participation, among which reflective participation: chapter 1, section 1.3.
formal or informal kind, through plebiscites as well as demonstrations, court action as well as non governmental organizations (NGOs) activism, oversight instruments as well as the vigilance of citizens’. Kuper, for example, suggests a move away from the perception that democratic legitimacy requires individuals to see themselves as proactive co-authors of the law. One should instead focus on the democratic practice of responsiveness of the political system as a whole. Governance should justify its actions on the question of whether it has decided in the best interests of the public.

Responsiveness is characterized by access to information and the existence of institutional channels to pressure authorities and voice opinions. Rosenau argues in a similar way that the assessment of whether democratic legitimizing practices are developing in the ‘globalized space’ lies in the degree to which control mechanisms guide politics in the direction of more checks on possible excesses of the exercise of authority, provide more opportunities for interests to be heard, and impose ‘more balanced constraints among the multiplicity of actors that seek to extend their command of issue areas’. Keohane and Grant argue, in relation to accountability requests, that due to the lack of a clearly defined public in the international legal order, the appropriateness does not flow directly from an analogue reading of national democracies. Grant and Keohane call for ‘abandoning the belief that global accountability, to be genuine, must conform to abstract, maximal principles of democratic organization’.

Besides deliberation and control, many of the selective accounts of international democratic legitimacy focus on inclusiveness. The concept of democratic inclusion should function as a principle that guides the elaboration, application, and invocation of international law. That principle should weave into the fabric of international law ‘a kind of bias in favor of popular self rule and equal citizenship, that is to say, a bias in favor of inclusory political communities’. In this version, democracy is similarly seen to entail an on-going call to enlarge the opportunities for popular participation in political processes and to end social practices that systematically marginalize some citizens while empowering others. Democratic politics is perceived as an affair of relationships and processes, with

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1553 In contrast to the vertical and sometimes causal picture citizenship depicted in responsiveness, one could insist, as does Manin, that meaningful political agency in a representative democracy requires that citizens be capable of learning what their co-citizens think about important policy issues or events independent of the authorities. Horizontal communication between citizens appears as a necessary condition to their being capable of political action. See Manin 1997, p. 170-171. The thing that makes citizens political agents is their capacity to act independently of authorities and this ability, in turn, depends on whether they regularly act and communicate together, even if this interaction is often mediated through institutions like the electronic media.
1555 Responsiveness might be measured, through statistical correlation. Public opinion is the dependent variable and policy output is the independent variable. For an overview see, for example Page 1994, p. 25-29.
1557 Grant and Keohane conclude that ‘if governance above the level of the nation-state is to be legitimate in a democratic era, mechanisms for appropriate accountability need to be institutionalized.’ Grant and Keohane 2005, p. 29.
1558 See Marks 2000. Marks focuses on the principle of inclusion as a theoretical response to the ‘democratic norm thesis’ adhered by Frank and Slaughter. See chapter 3, section 3.2.2.
1559 See Marks 2000, p. 111.
1560 Held and Archibugi 1995.
an open-ended and continually recontextualized agenda of enhancing control by citizens of decision-making that affects them. 1561

The principle of democratic inclusion serves to shift the focus from territorial sovereignty to international political community, from relationships between peoples and territory to relationships among individuals and groups. It provides reasons for widening the circle of participation in international lawmaking. Thus it endorses calls for participation in norm making of communities and identities of diverse kinds. 1562 Although the idea of inclusive lawmaking refers to the idea that all who are affected by a rule should have the right to a say in law creation, and that systematic barriers to the exercise of that right should be acknowledged and removed, 1563 no specific political community seems to be needed to strive for a lawmaking process as inclusive as possible. Anyone to whom the rules apply, or who is ‘affected’ by a rule, is defined as a member. 1564 The international legal order is perceived as ‘expanding circles of interaction’ and a ‘series of arenas ranging in comprehensiveness from the globe as a whole (...) to nation states, provinces and cities, on down to the humblest village and township’. 1565

Besides inclusiveness, predominantly the features of transparency, information provision, insight into events, open positions, and fair accreditation procedures are required of the political opportunity structure of international lawmaking. The efforts of international lawmakers to comply with one of these democratic practices or values are often seen, on their own, as an advancement of the democratic legitimacy of international law. 1566 Majone, for instance, suggests that it is promising to focus on closely related aspects of democracy, such as indeed transparency, equal treatment, or representation based on expertise and interests, rather than concentrating on the establishment of ‘traditional’ democracy at a supranational level. 1567 Steffek, Kissling, and Nanz selectively highlight reflective

1561 See Marks 2000, p. 110.
1562 See Marks 2000, p. 112-113.
1563 See Marks 2000, p. 119.
1564 Thus being subject to the rules and decisions of the association is an essential characteristic of membership; it is sufficient to distinguish members from non-members. Dahl 1979, p. 97.
1565 McDougal and Lasswell 1959, p. 7, 8.
1566 The most explicit example for this tendency is the attempt of De Búrca to capture these democratic values in terms of democratic legitimacy. Based on De Búrca’s plea for a ‘democratic striving approach’, Bijnakers makes a comparable move. See Bijnakers 2013, p. 288-301.
1567 Majone 1994, p. 1-29. Another textbook example of such an approach is the work of international environmental legal scholar Esty. Esty underlines the importance of a right process in order to confer democratic legitimacy on the exercise of political power. Following the right process will help to ‘clarify underlying issues, bring facts to bear, promote careful analysis of policy options, and engage interested parties in a political dialogue’. Esty 2006, p. 1520. Two of the fourteen elements are specifically mentioned with regard to the concept of democratic legitimacy: ‘representativeness’ and ‘accountability’. Three of them, ‘power sharing’, ‘legality’, and ‘fairness’ are specifically related to the ‘Madisonian’ legitimacy, which focuses on checks and balances and shapes the legitimacy of policy choices in the form of dispersing political authority as a way of protecting individual liberty by which Esty refers to the political theory of Rousseau. See Rousseau 1968. What Dahl calls ‘Madisonian’ theory of democracy is ‘an effort to bring off a compromise between the power of majorities and the power of minorities, between the political equality of all adult citizens on the one side, and the desire to limit their sovereignty on the other. Esty complements these elements with values such as ‘deliberation’, ‘transparency’ and ‘participation and due process’ as benchmarks for assessing the legitimacy of governance. See Dahl 2006, p. 4. According to this perspective, the best and most realistic way of tackling the existing democratic deficits at the international level is by strengthening specific values, such as openness, accountability, responsiveness, deliberation and reason-giving. De Búrca 2007-2008, p. 239. Not all values mentioned by scholars grouped under
legitimation: two forms of responsiveness of international lawmakers to make democratic legitimacy operational directly at the international level – justification and adjustment. Their presentation of democratic legitimacy concentrates on the justification of specific political proposals and decisions, and is accompanied by a process of reflection and adjustment. Other often-mentioned elements of democratic legitimacy primarily focus on the responsiveness of lawmaking institutions to NGOs’ input, such as relevant staff expertise, suitable procedures, and an overall receptive attitude towards NGOs’ contributions. A selective focus on these more fluid, non-institutional manifestations of democratic legitimacy has been perceived as a promising route to more democratically legitimate international law. Notwithstanding the apparent relevance of these mentioned democratic practices for democratic legitimacy, the next section examines the implications for the persuasiveness of the NGO democratic legitimacy thesis due the related lack of attention to institutional preconditions in these accounts.

6.2 The consequences of a lack of attention to institutional preconditions

Section 6.1. described some of the characteristics of the debate on the NGO democratic legitimacy thesis that inform the disregard of the institutional preconditions for democratic legitimacy. It specifically discussed the common fragmented approach to democratic norms, practices, and actors that are supposed to contribute to the democratic legitimacy of international law. Most arguments in favor of the thesis adhere to the idea that the more an international lawmaking practice has lived up to one of the mentioned values and practices, the more democratically legitimate are the resulting international laws. Scholars seem to
limit their conceptions of democratic legitimacy primarily to considerations related to process-specific evaluation of democratic legitimacy and, if engaged in discussions on democratic legitimacy’s necessary preconditions, they solely emphasize social preconditions. 1573

This section will now appraise three different, but interrelated, consequences of such fragmented approach towards democratic legitimacy. Firstly, it argues that the NGO democratic legitimacy thesis formulates an inadequate response to the conditionality of NGO participation in international lawmaking, due to the discretion of power holders. Secondly, it shows the underestimation of democratic agency in most conceptions of democratic legitimacy that underlie the arguments of the scholars in favor of the thesis. Thirdly, it observes that there is a general disregard of the importance of an all-encompassing political structure for a validation of NGOs’ participation in lawmaking as a contribution to the democratic legitimacy of law. As a result, as will be concluded in the fourth subsection, the principles of democratic legitimacy, freedom of domination and equality, are compromised.

6.2.1 An inadequate response to power holder’s discretion on NGOs’ participation

The expectations that underly the presented contributions of NGOs to international lawmaking, ranging from contributions to informal public discussions that can identify social problems that lie outside the agenda of formal politics and bring them into political decision-making, to critically examination of political rule-makers and their accountability,1574 seems rather optimistic given the restrictive legal frameworks for NGOs participation. Especially in the presentation of NGOs ability to represent the largely neglected voices, the impact of NGOs participation depends on the goodwill of states and international organizations. 1575 Current accreditation mechanisms underline general international practice in which NGOs are asked to become engaged in political action but are not given any right to participate in the exercise of authority. This political fact is hard to reconcile with both the emphasis on NGOs’ democratization and the isolated emphasis on informal requirements, such as deliberation, inclusiveness, and contestation. The academic discussions on NGOs’ alleged contribution to the democratic legitimacy of international law leaves us puzzled with the question of how to proceed from the current conditional ‘voice’ of NGOs that might lead to ‘influence’ on international lawmaking processes, to democratically legitimate international law.

The observation that the scholarly work in favour of the NGO democratic legitimacy thesis seems to broadly neglect the lack of guaranteed impact in the final stage of decision-making on the formulation of a law, coincide with a large part of the discussed scholarly skepticism concerning the NGO democratic legitimacy thesis that has pointed towards the inadequate responsiveness of UN lawmaking agencies when it comes to NGO participation. To name just one, the governmental and non-governmental platforms for action of the Fourth World Conference on Women, presented by many as a textbook example of a great achievement for NGO involvement, was characterized by Otto as ‘shallow and even

1573 This is not only illustrative for the NGO democratic legitimacy thesis in international context. As Cohen argues, the same neglect of law and institutions is characteristic for theorists of social capital and civil society in the tradition of Putnam. See Cohen 1999.
1575 Bianchi makes a similar point. See Bianchi 2013.
Mertus stated that ‘the significance of social change activists is underscored by the ways in which states and non-state actors attempt to use them to further their own agenda’. Primarily Anderson, in his critique on the NGO democratic legitimacy thesis, focused on this misfit between the current international legislative constellation and the assumed democratic role of NGOs. Also, Mertus argued that a substantive empowerment of NGOs’ institutional position was required before an increase in democratic legitimacy could be expected from NGOs. The bottom line of the critiques is that NGOs’ participation cannot materialize independently from states into the exercise of public authority.

The understanding of NGOs as representatives, as discussed in chapter 5, is the most evident example of the overestimation of NGOs’ impact and the underestimation of the need for institutional preconditions in international lawmaking processes in order to make that claim theoretically sound. Let us briefly recall the fundamental principle of democracy on which representative theory is based: each person ought to have (the possibility of) an equal say in the process of collective decision-making, or in Schumpeterian terms, in the process of deciding who will decide for them. In the reading of NGOs as political representatives, the essential duality of the role of political representation seems to be flawed. A representative must, first, mobilize the power that is granted to him or her, and second, a representative must make decisions. NGOs are expected to actualize the existential capacity of people to speak and act. NGOs are believed to represent both the articulated interests and individual interests in social relationships. Leaving aside the empirical questions of whether any title to represent individuals is granted to NGOs, and whether NGOs succeed in mobilization, the representative manifestation runs amok in the last part of the assignment of political representation, as NGOs do not have the actual and equal opportunity to participate in any formal decision-making process. Instead, NGOs’ contribution is limited to arbitrary forms of influence in different, often preparatory phases.
of lawmaking. The contribution of NGOs to representation loses its democratic relevance due to the discretion of power holders regarding NGOs’ institutional involvement in lawmaking.

To illustrate the misinterpretation of NGOs as representatives, consider the following imaginary example. A group of inhabitants of Tuvalu deeply care about the reduction of greenhouse gas emissions because they believe that such a policy might prevent their country from vanishing into the ocean. They see no options nationally to push policy towards an environmentally friendly strategy. Besides, the inhabitants of Tuvalu are well aware of the fact that their own government alone will not be able to make a change politically, due to its weak bargaining power internationally. Nor will the single arrangements of their government in terms of decreasing emissions have the desired effect, as this problem obviously requires international cooperation. They decide to support an internationally renowned NGO to represent them at the 2014 UN Conference on Climate Change in the hope that it will represent their case well and might be able to push for new international norms in line with their wishes. The chances to become involved in international lawmaking are, as elaborated upon earlier in Part II, conditional and out of the hands of both the NGO and the group of inhabitants of Tuvalu. First of all, the group’s chances of representation might be blocked at the gate of the conference, when one-third of the parties present objections to the admission of this specific NGO. Second, even if the organization of the international conference decides to grant accreditation to the NGO, the ‘voice’ of the representative NGO will be limited to submission of information and views that will be published on the website of the conference, and will not be issued as official documents. If the NGO nevertheless succeeds in convincing the members of the conference of the importance of a specific norm, and indeed the norm ends up in the final version of a new legal instrument, of course the Tuvalu inhabitants will be very pleased with the result, and would probably continue supporting this effective NGO.

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1586 Erman 2012, p. 11.
1587 The South Pacific nation of Tuvalu is expected to disappear due to rising sea water within the next century, see Perth Now 2008.
1589 Article 7, paragraph 6, of the United Nations Framework Convention on Climate Change (UNFCCC), provides that: “The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.”.
It is however unreasonable to interpret these actions of NGOs and the relations between this NGOs and its supporters as a contribution to general feelings of trust in the authority of international law because of the NGO’s contribution to the law’s democratic legitimacy. The success of that specific NGO is primarily the consequence of convincing lobbying. It has nothing to do with the actual, equal, and continuous opportunity to participate in the making of international law. Although the group of inhabitants of Tuvalu, through the NGO, gained a voice they possibly did not have before, it is not the mere fact that that an NGO represented them in lawmaking which is valued, but the fact that the final result of the NGO’s involvement is in line with what that specific group of people seems to appreciate as the right result. The group has trust in the authority to rule because it is grateful for the outcome of the legislative process.

Suppose, further, the case of another individual who is opposed to the new standard, let us say an inhabitant of India. He or she suffers severe financial disadvantages due to the new norm. Although the inhabitant of India obviously ‘lost’ this time, in Waldron’s terms, he or she remains empty-handed in terms of the prospects of changing these standards, or of ‘winning another time’, because of the lack of any institutionalized guaranteed opportunity to reopen the debate on the terms of that specific agreement. This is not only the consequence of the conditionality of NGO participation in international lawmaking processes, but also, and primarily, the consequence of the lack of an overall democratic institutional structure internationally that guarantees actual, and equal opportunities for reopening that specific lawmaking process.

The discretion of power holders is often underestimated when discussing the successes of NGO participation in international lawmaking. Often scholars refer to the coming into existence of the Ottawa Landmine Convention as the example of what social engagement by NGOs can bring about. The organization of the International Campaign to Ban Landmines and its founding coordinator, Jody Williams, were instrumental in the passage of the Ottawa Treaty, and for these efforts they jointly received the 1997 Nobel Peace Prize. The Convention gained 122 country signatures when it opened for signing on 3 December 1997 in Ottawa, Canada. The initiative is considered an inspiring example of what the bundling of social power can achieve. However, it also demonstrates that it remains up to the states to decide if that social power has political effect. Thirty-five countries have not signed the treaty, including a majority of the permanent members of the United Nations Security Council: China, the United States, and Russia.

One can, however, make a case that the fact that NGOs facilitate social engagement leads to the democratization of foreign policy within the context of domestic democratic systems. However, from a perspective of international law’s democratic legitimacy, the change that is accomplished by NGOs as facilitators of the international public sphere without institutional preconditions is based on the de facto influence of NGOs. This de facto influence of NGOs...
influence might lead to a change in policy, but this change is not democratically achieved. To make NGOs’ pushes for change politically effective, states should first be willing to open up to their input, to pool their sovereignty to pursue the proposed changes in policy. In other words, at the international level, NGOs’ ability to change depends on the right circumstances: NGOs’ efforts need to coalesce with political agents of transformation, with the wishes of the states. NGOs might raise the consciousness of political leaders by their activities that range from civil disobedience, convincing media campaigns, and protests. Indeed as Florini states, ‘[t]he political effectiveness of such groups depends on their ability to persuade others – state actors, the general public, corporations, or intergovernmental organizations – to alter their policies or behavior.’

For social engagement to have a democratically legitimizing effect, its resulting power has to flow from citizen activity to institutionalized decision-making and legislation. There must be guaranteed interactions between the legally institutionalized will-formation and culturally mobilized publics. The NGO democratic legitimacy thesis seems to inflate the institutional dimension to the point of making informal social action, in our conceptual framework, understood as a democratic practice complementary to institutionally secured democratic decision-making, the dominant yardstick of democratic legitimacy, thereby circumventing institutional demands derived from a more robust normative account of democratic legitimacy associated with rule of law principles. The necessary counterweight of these social practices by formal politics is thereby often overlooked. To apply persuasively a standard of democratic legitimacy to international law, one has to pay attention first to the way formal politics is designed internationally.

In addition, the way deliberation is defined, when pointing towardsthe deliberative practices in the preparatory phases of international lawmaking, marginalizes the critical potential of democratic deliberative practices. The exploration of the legal construction of NGO participation in international lawmaking taught us that NGOs are invited to work together for the ‘common good’ alongside states and relevant international organizations. Specifically in the context of the UN, NGOs are required to underwrite the goals of the international agency in which they participate. The general aim of these ‘inclusive’ international lawmaking practices seems to be based on avoiding clashes of opinion. The ability of states to veto and block NGOs from participating underscores this observation. It is reasonable to assume that states and international organizations only tolerate NGOs when

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1594 Murphy stresses the historical interconnection of civil society and state. See Murphy 1994.
1595 As Habermas states, ‘The public opinion that is worked up via democratic procedures into communicative power cannot ‘rule’ of itself but can only point the use of administrative power in specific directions.’ Habermas 1996, p. 300.
1596 See Florini 2009.
1597 Habermas 1996, p. 375.
1598 See chapter 2, section 2.1.3 on the complementarity of institutional and social preconditions.
1599 Krisch makes a comparable point, see Krisch 2010, p. 274.
1600 Dryzek conception of democracy is exemplary. Dryzek states, ‘democracy, in the international system no less than elsewhere, is a quintessentially open-ended project, within boundaries defined by a subject matter pertaining to the collective construction, application, distribution and limitation of political authority’. Dryzek 1999, p. 48.
1601 One has to assess first whether there exists ‘[…] the type of politics that insists on rules relating to voting and decision-making, that knows an ultra vires decision when it sees one, and insists that the ends not always justify the means, precisely because, ultimately, we cannot agree on the ends and thus end up imposing our ideals, or at least superior techniques on others’. Klabbers 2005a, p. 341.
their mission aligns with the wishes of the executive power, consisting of both states and international organizations. Such a cooperative practice of NGO involvement does not leave much political room for contestation, conflict, and struggle, which are understood to be principal characteristics of the democratic legitimacy of law. But even if there is room for contestation, without linking these contestative practices to rights and judicial safeguards that enable and guarantee proactive participation, the means to objections cannot lead to democratically established change. The fact that the impact of NGOs’ input is not guaranteed makes them dependent on the authority they are actually expected to control.

6.2.2 Sidestepping democratic agency

It is striking that in most accounts of the NGO democratic legitimacy thesis, the addressing of the ‘profoundly troubling questions of democratic theory’ in the international legal order, which concern the rightful source of political authority, seems to be elided. While focusing on transparency, accountability, deliberative practices and responsiveness, questions that have predominantly remained out of sight are: who is left out of deliberations, consensus seeking, and decision-making; who should be included in contestative practices; and when can we hope for, or better, rely on responsiveness and reflexivity of the authority to rule? In more abstract terms, who has the right to evaluate and contest the rightfulness of lawmaking on democratic terms? In this respect, it remains unansered how the autonomy and possibility for self-rule can be secured under law. This is something that states (notwithstanding the fact that state autonomy is assumed to be ‘waning’ and provided that it is democratically organized) still offer us. Regardless

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1603 See chapter 1, section 1.3.

1604 See for a critical account of the premise that NGOs involvement furthers inclusion, while aggravating exclusion: Tucker 2014, p. 376-396.


1606 See for example, Wheatley 2011, p. 543. ‘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.’ Notwithstanding the relevance of the mentioned democratic elements for democratic legitimacy, what is missing here is the explicitation of democratic agency, the equal opportunity for everyone to participate in lawmaking.

1607 See Krisch 2013.


1609 See chapter 3, section 3.4.1.

1610 Higgot and Erman 2010, p. 458, referring to Cohen 2007, p. 596. Higgot and Erman emphasize that scholars primarily perceive sovereignty ‘as a fact of power and control, while neglecting the legal and normative category it also entails.’ Scheuerman is very critical about this move in international democratic scholarship where the role of states seems to be overlooked. Scheuerman 2008, p. 133-151.
of the importance of the many democratic norms and practices mentioned in relation to NGOs that often relate to the assessment of democratic legitimacy’s operational aspects. These norms and practices cannot independently democratically legitimize international law. In this light, the current single focus on democratic practices and values without taking into account institutional preconditions can be considered relatively ‘unambitious’, as Krisch points out, towards the ideal of input legitimacy; to democratic agency, and to the principle ideal of democratic legitimacy: self-rule.

This consequence is evidently related to the previous one. The insistence on single deliberative practices overemphasizes the critical merits of social practices of, among other civil society actors, NGOs, and underestimates the basic normative assumption that in order for decisions to be democratically legitimate, free, and equal, deliberative participation and decision-making must be guaranteed. In the same vein, Erman notes that ‘the proposed political agent, often conceptualized in terms of “stakeholder”, is not equipped to be a democratic agent insofar as the civil society view does not fulfill two basic requirements for an arrangement to qualify as minimally democratic, namely political equality and political bindingness’. Only when legal subjects have an actual, equal, and continuous opportunity to participate can final authority by the people, which forms the reason for the trust of legal subjects in the resulting laws based on its democratic legitimacy, be established. To enable NGOs to democratically legitimize international law, democratic practices and rights ‘must be knit to each other and to the same actors through political equality and political bindingness’, as Erman demonstrates. Without political equality and political bindingness, deliberative practices, control, transparency, inclusiveness, and responsibility cannot, simply put, lead to democratically legitimate law. Public influence is converted into political power only after it has passed through the filters of institutionalized procedures of democratic will-formation into legitimate lawmaking. There is an indirect effect noticeable as well: as long as the actors engaged in international lawmaking have no decision-making power, they lack any instrument to force the states to keep them informed of the state of play in negotiations.

The foundation of the thesis is primarily based on the appreciation of deliberative practices, of an open critical examination in an argumentative discourse in which the NGOs actively partake. Such a discourse should lead to a rational and therefore acceptable democratic outcome for all of us. As demonstrated in Part II, NGOs allegedly offer a contribution to the democratic legitimacy of international law because of their knowledge provision to both international lawmaking processes and individuals. NGOs are assumed to make deliberations more rational. The value of rationality for the democratic legitimacy of law, however, also strongly depends on the dialectic characteristics of democracy: electoral

1611 See chapter 2, section 2.2.
1612 See Krisch 2013.
1614 See Erman 2012.
1615 See chapter 1.
1616 Erman 2012, p. 10.
1617 Without institutionalized practices of decision-making we move to a conception of deliberation that focuses on its epistemic merits. See General Conclusions, section III.
1618 See chapter 2, section 2.1.
1619 This consequential effect of the lack of bindingness for the willingness of the executive to inform is borrowed from Van Mourik and Besselink 2009, p. 318.
and contestatory input, proactive and reflective participation, or, in Pettit’s words, authorial and editorial impact.  

The problem at the international level is that the input by NGOs to the knowledge base of a specific lawmaker procedure, which supposedly contributes to a deliberative democratic procedure, does not take place at the same level as the authorial democratic procedures themselves. As a result, the possibilities for any electoral or authorial correction to NGOs’ input are obstructed. Here we should remind ourselves of the criticism concerned with the ‘second bite of the apple’ thesis, as discussed in Part II. Without a direct democratic lawmaking process at the same level, the knowledge NGOs might provide can have a disproportionate influence on the content of the norm, to the detriment of the possible democratic procedures taking place at the domestic level for at least the position of the executive governmental official that influenced the establishment of the international norm. Regarding the ‘social engagement’ arguments that reflected on the contributions of NGOs to the knowledge base of individuals who consequently might have more informed deliberations in the public sphere, the democratic legitimizing effects of these contributions can only be redeemed at the level of domestic democracies. 

An impasse in the debate on the democratic legitimacy of international law reveals itself: if states, with the intention to enlarge the opportunities of non-state actors to have an impact on the formation of law, do not retain a tight grip on lawmaker procedures, the protection of equality and freedom from domination at the domestic level consequently suffers. Without an international institutional structure of rights to enable equal and actual political power to balance and create rules of hierarchy and subsidiarity, the results of these lawmaking processes that provide for opportunities for influence by NGOs will inevitably affect the protection of the principle of freedom from domination at the domestic level. This dilemma concerning two-level democracy is only occasionally raised in the academic discussions concerning the NGO democratic legitimacy thesis. 

The obstacles for the underestimation of democratic agency are related to the inability to enable and ensure an equal representation of preferences, and the inability to foresee in a clear decision-making moment. Non-institutionalist deliberative approaches to international democracy struggle with the fact that a proposal for a new legal rule requires a final say, a final decision, to become law. There is no guarantee that the gap between the outcomes of deliberation and the authority to make binding rules will be closed in a democratic way. This is not considered decisively problematic when, as the original deliberative theory of Habermas prescribes, deliberations are complementary to institutional democratic decision-making procedures of elected representatives. Let us be reminded here of Habermas’ observation that ‘[n]ot influence per se, but influence transformed into communicative power legitimates political decisions’. 

1620 See Pettit 2006. See chapter 1, section 1.3.2.
1621 We will discuss this possibility in section 6.4.
1622 See chapter 5; Bolton 2000, p. 217.
1623 See Kuper 2004, Part II.
1624 This shortfall of deliberation was already mentioned when explaining participation through deliberation, but becomes even more problematic when scholars solely rely on deliberative practices to uphold democratic legitimacy. See chapter 1, section 1.3.2; chapter 2, section 2.2.2.
1625 Habermas 1996.
In sum, deliberative practices cannot in themselves serve as an assured path consisting of equal possibilities to transform the aspired into the actual. Deliberation is vulnerable to political pressure by the more politically equipped, which requires recourse to correction enabled by judicial safeguards and individual rights. To ground democratic decision-making, deliberative practices require a strong link to the formal processes of lawmaking and regulation to enable and guarantee democratic agency.

6.2.3 A disregard of the need for an all-encompassing political structure
Our recurring insistence on the need for democratic legitimacy’s necessary preconditions could be criticized for being overly static. It could be argued that one should understand the scholarly focus on different democratic practices as a cumulative, gradual strategy. The more democratic elements that can be discovered in a lawmaking process, the more democratically legitimate an international law will be. However, the answer to the current discretion of power holders concerning NGOs’ involvement in different legal regimes does not lie in strengthening the democratic practices and principles of deliberation, control, and responsiveness, which are primarily related to democratic legitimacy’s operational aspects. Any strengthening of these elements would arguably only lead to more inclusive accreditation mechanisms for specific international organizations.

The main difference between the way democratic elements are presented in the NGO democratic legitimacy debate and what we referred to as necessary conditions for democratically legitimizing law is as follows. Most of the proponents of the thesis impose democratic practices internal to a specific lawmaking regime, which we categorized in chapter 2 as practices related to democratic legitimacy’s operational aspects. We aim to argue that a primary focus should be on the necessity of institutional preconditions functioning everywhere, that enable and guarantee actual, equal, and continuous participation, be it in the manifestation of deliberation, contestation, or otherwise, equally applicable to all legal regimes.

Here we touch upon an issue that relates to the observation that in terms of the democratic legitimacy of law, an international legal order cannot be separated into compartmentalized legal regimes, of which some will offer receptive accreditation mechanisms or participation procedures that facilitate inclusive deliberations, while other international legal regimes remain largely closed for any actor other than states. Accreditation mechanisms only provide opportunities to participate in selective legal regimes. However, there is no such a thing as sectorial democratically legitimate international law. International legal regimes are not isolated political communities, affecting exclusively their own legal subjects. Resulting laws and decisions of one

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1627 Barnard 2001, p. 76.
1628 Bekkers and Edwards 2007, p. 53.
1629 Lustig and Benvenisti also raise this point. They state: ‘Providing greater voice and participation cannot replace the lost vote of the community in affairs essential to its wellbeing. Participation with no vote positions the public in an inherently inferior position’. Lustig and Benvenisti 2014, p. 125.
1630 Krisch 2010, p. 267, referring to Bohman 1998, p. 400-425; Young 2002. Therefore domestic theories of deliberative democracy typically place deliberation alongside elections as pillars of democratic governance and thereby ensure such a link. As Habermas states, ‘(n)ot influence per se, but influence transformed into communicative power legitimizes political decisions’. Habermas 1996, p. 371.

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international legal regime have impact on the other legal regimes.\textsuperscript{1632} Exclusive regimes evidently affect other regimes, thereby construing a possible dominating situation over the subjects of a more inclusive international legal regime. In this light, the broadly shared gradual approach of focusing on isolated democratic elements, whether they should be applied to NGOs or to lawmaking regimes, does not constitute a convincing standard of democratic legitimacy.\textsuperscript{1633}

If one aims to apply the standard of democratic legitimacy to evaluate the exercise of authority internationally, there should be an embeddedness of different international lawmaking processes in one single overarching institutional system. The need for an overarching political institutional system also relates to the discussed opportunities for, and pitfalls of NGOs having influence on a level other than where the democratic formation of will takes place. If an overall system consisting of right and judicial safeguards is at place, individuals can also touch upon second-order questions of democracy: questions about the very nature of democratic consociation.\textsuperscript{1634} As discussed in Part I, when there is dissatisfaction about the ratio of, or the proportion between the rational input of actors and the democratic procedure, or in general about the way law is made, democratic procedures should offer individuals who are affected by these laws the possibilities to change the procedural conditions of lawmaking. As discussed in chapter 2, democratic legitimacy’s necessary preconditions require providing the opportunity to decide on these matters of procedure, on how lawmaking procedures are arranged. Democratic legitimacy’s necessary preconditions require that there should be guaranteed opportunities to democratically change the modes of decision-making procedures, to change second order rules, that are valid for all decision-making procedures equally. As we understood in chapter 2, ‘[l]egitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of all about matters of common concern’,\textsuperscript{1635} which cannot be limited to one specific subject or type of international law. In other words, the application of democratic legitimacy to international law entails a heavy burden on an institutional structure consisting of rights and safeguards, which, as we are all aware, is non-existent in the international legal order at the moment.\textsuperscript{1636}

It is obvious that a certain circularity of the NGO democratic legitimacy thesis arises here. It is precisely the lack of an overarching institutional system consisting of social and institutional preconditions in the international legal order that has instigated an informal, gradual approach towards international lawmaking. And it is precisely the lack of institutional preconditions for legal subjects to equally, actually, and continuously participate in the making of international law that has instigated scholars to focus on NGOs, because of their track-record of emphasizing more flexible democratic values such as transparency, responsiveness, and inclusiveness, their attempts to represent ‘the otherwise unheard voices’, and their general tendency to focus on the ‘common good’.\textsuperscript{1637} However, there is a fallacy at the root. In a lawmaking process that offers isolated democratic elements but is not embedded in a system of rights and judicial safeguards, NGOs can provide no more

\textsuperscript{1633} Cullen and Morrow 2001, p. 15.
\textsuperscript{1634} See Bohman 2007a.
\textsuperscript{1635} Benhabib 1996b, p. 68.
\textsuperscript{1636} As Walker states: ‘What these highly diverse forms have in common is their lack of holistic attributes, their absence of claims to comprehensive authority in any register, whether legal, institutional, political or societal’. Walker 2010, p. 226.
\textsuperscript{1637} If they actually do so, should be subjected to empirical studies.
than a quasi-democratic legitimacy to international law. A focus on the internal democratic legitimacy of NGOs would equally lead to a quasi-democratic legitimacy of their input. The impasse that characterizes the NGO democratic legitimacy thesis is clear. The expectations as voiced by scholars in favor of the NGO democratic legitimacy thesis do not match the required infrastructure to successfully apply the standard of democratic legitimacy to international law. However, the required infrastructure does not match the current international legal and political constellation. We come back to this impasse in subsequent section 6.3.

6.2.4 The principles of democratic legitimacy compromised
It is submitted here that a non-institutional conception of democratic legitimacy that is espoused by most scholars in favor of the NGO democratic legitimacy thesis ends up compromising the very principles of democratic legitimacy. Indeed, as it is argued here, such a position confronts us with the ever-troubling balancing questions of democracy: to what extent should democratic legitimacy as a concept develop and adjust to remain relevant in light of current exercises of authority that are inherently different in nature than found in the context of democratic states, and to what extent should one hold on to democratic legitimacy’s traditional features to remain relevant for critically evaluating the normative status of these current exercises of authority?

In general, when challenged by the fact that international lawmaking occurs in a non-hierarchical setting, where no supreme lawmaker or adjudicator and no institutional rights exist, scholars have essentially two options with regard to the conception of international democratic legitimacy. Or scholars choose to adapt the standard of democratic legitimacy, what we called in chapter 5, section 5.6.2 a multiform approach. A multiform approach to the characteristics of democratic legitimacy aims to secure applicability of the standard in the current political circumstances of international lawmaking. Or scholars can leave the conception of democratic legitimacy intact, taking a uniform approach to the characteristics of democratic legitimacy. However, this might lead to the conclusion that notwithstanding the desirability of applying democratic legitimacy, the standard of democratic legitimacy simply cannot be applied to evaluate the acceptability of international law. The risk of the first and most common route, to mould democratic legitimacy to the characteristics of international lawmaking, is a watered-down test of democratic legitimacy. Stepping aside from considering the need for democratic legitimacy’s necessary preconditions give primacy to practice, with the consequence of minimizing democratic legitimacy’s critical potential to reveal dominating situations. The latter conclusion does not pretend to cure, but is nevertheless still able to uncover the dominating features of international lawmaking.

As discussed in chapter 3, the scholarly criticism of the democratic legitimacy of international law is based on an understanding of international lawmaking in which the interests of certain individuals or groups are unfairly favored over others. In an ideal-type presentation of the thesis, NGOs step in to correct the experienced domination by powerful states and international organizations by democratically legitimizing international law.

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\[1638\] The current international legal constellation is characterized by the fact that ‘law is everywhere (...) but no politics at all; no parties with projects to rule, no division of power, and no aspiration of self-government beyond the aspiration of statehood – aspirations identified precisely as what we should escape from’. Koskenniemi 2007, p. 29.

\[1639\] See Christiano 2011.
However, in light of the main features of democratic legitimacy, as discussed in Part I, one has to conclude that NGOs’ contribution to the prevention of legal subjects from domination is ambivalent. NGOs’ ability to instigate political change in international lawmaking processes depends on circumstances beyond the control of NGOs. The current legal frameworks that enable participation of NGOs seem to offer not much more than a tribute to the toleration of NGOs, for which critics already warned us in chapter 5. If any impact is established by NGOs, we can only argue in retrospect and empirically whether they were able to influence international lawmaking. This may lead to the conclusion that the influence of NGOs was hardly felt, and did not affect in any way the feared dominating power of international organizations or the informal lawmaking by the public and private actors that instigated the NGO democratic legitimacy thesis. Without enforceable tools applicable at the international level, individuals remain empty-handed in terms of exercising their democratic rights to participate.

Claiming that NGOs do contribute to the democratic legitimacy of international law leads to an overburdening of NGOs with normative aspiration. Due to the lack of conceptualizing institutional means to transform NGOs’ social power into political power, expectations concerning NGOs’ capacity to ‘bring about a degree of diversity and openness across existing political boundaries, working across borders to challenge unresponsive governments, trying to make them more accountable to a range of suppressed values and interests by ensuring that these voices finds some sort of public hearing’ cannot be substantiated. Without institutional preconditions NGOs cannot help to protect a minority against the tyranny of the majority.

A less strictly applied evaluation of law, based on its democratic legitimacy, in which NGOs are assumed to contribute, cannot expose international law’s deficits and dominating features. Besides the risk for relying on an actor that has no influence at all, an opposite consequence of the lack of institutional preconditions might also occur. Without theorizing institutional preconditions that enable democratic correction or counterbalance of the influence of NGOs, the arbitrary effect of NGOs on international lawmaking could lead to a disproportionate impact of NGOs, possibly becoming part of the democratically illegitimate domination by international public authority itself. As Venzke points out,

‘[t]he interaction with NGOs does not necessarily work to the institutions’ advantage and institutions are not themselves immune from the influence of NGOs. The institutions could lose in autonomy in relation to this capturing actor but gain in relation to others. To the extent that the bureaucracy’s actions can be reduced to the will of other powerful

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1640 Scholte points out that ‘the onus for corrective action on such problems lies with official bodies rather than civil society’. Scholte 2001, p. 20.
1641 See chapter 3, section 3.4.
1642 Any work on the NGO democratic legitimacy thesis characterized by a circumvention of theorizing mechanism for actual, equal and continuous participation, will, as Pedraza-Farina states, ‘undermine the very legitimacy it is designed to provide’. Pedraza-Farina 2013, p. 611.
1643 King 2003, p. 35.
1644 Our conclusion is in line with Anderson’s work. He concluded that NGOs do not make democracy, nor do they confer democratic legitimacy, least of all upon the profoundly undemocratic organs of the international systems. Even within domestic society, he further states, civil society and its organizations are not themselves the ‘democratic process’; they are part of the pressures brought to bear on the outcomes of the democratic process.
1645 See section 6.2.1.
actors, however, it could no longer be sensibly referred to as autonomous. (...) A mixture between autonomy and capture by powerful actors can be found.1646

Domination not only refers to state authoritarianism or to uncontrolled exercise of authority by international organizations, but could also refer to powerful cooperations, uncontrollable markets, or to NGOs for that matter.1647

Besides a loss of its critical potential to detect dominating power structures, in the long term a watered-down conception of democratic legitimacy could also arguably affect the normative force of international law. 1648 Due to the adaptation of the standard of democratic legitimacy, international law is legitimized on weaker grounds than other forms of law, be they national, local, or regional, while evaluated under the same denominator. That seems to imply that the authority of international law is also weaker than the authority of domestic law. In the figure below is shown which elements of democratic legitimacy are not met by the NGO democratic legitimacy thesis.

Figure 4 - The principles of democratic legitimacy compromised

Our critical assessment of the academic debate concerning the thesis seeks to prevent that, under the guise of NGOs' commonly assumed democratic potential, the exercise of public authority that international legislative practices involve is not further object of scholarly scrutiny regarding the content, reach, and consistency with the essential principles of democratic legitimacy: equality and freedom from domination.

Presenting NGOs as democratic legitimizers of international law without conceptualizing institutional preconditions seems to pay lip service to the politics in current international lawmaker.1649 International law remains, notwithstanding possible support for its content and necessity, authoritarian in the sense that it's making is not congruent with the foundation of democratic legitimacy, as explained in Part I. Even if the often-mentioned

1647 Ehrenberg illustrates the possible dominating aspects in which market dynamics and civil society intertwine in his exploration of the history of the idea ‘civil society’. ‘The ways in which civil society is affected by economic inequality has particularly important implications for the US since our recent history has been marked by widening material disparities and the largest transfer of wealth from the poor to the rich in human history.’ Ehrenberg 1999, p. 247.
1648 See General Introduction.
1649 We conclude in this regard in line with the critique of Anderson on the NGO democratic legitimacy thesis. See chapter 5.
democratic practices such as responsiveness, openness, and inclusiveness are taken seriously by international lawmakers, these soft requirements for political opportunities will not suffice to prevent state actors retaining a tight grip on when and what will be decided at the international level, and deciding unilaterally if and what they do with NGOs’ input, ‘which put[s] “democratization” in danger of being the captive of the self-serving dynamics of power’. In sum, these conditions for democratic legitimacy, notwithstanding their undisputed necessity, on their own are not sufficient for the involvement of NGOs to contribute to the effort of turning international lawmaking into democratically legitimate lawmaking. And, these conditions alone cannot prevent the involvement of NGOs perhaps inversely protracting, delaying, distorting, or even preventing the coming into being of international law.

As a consequence of the negligence of scholars engaged in the NGO democratic legitimacy debate towards the evaluation of democratic legitimacy’s necessary preconditions in the international legal order, their evaluation of the operational aspects of a specific lawmaking procedure becomes irrelevant for a validation of the democratic legitimation of international law. Here, the necessary hierarchy between these two levels of evaluation, as presented and discussed in Part I, reveals itself.

6.3 The stalemate of international institutional preconditions

Our conclusion has brought us to a challenging theoretical issue: how to conceptualize institutional preconditions in an international lawmaking context that makes international democratic agency possible? In this section we aim to introduce and revisit two proposals that have been made in the literature on international democratic legitimacy to offset the lack of attention paid to institutional preconditions in the current debate on the NGO democratic legitimacy thesis. These two approaches have been briefly mentioned in the introduction of this chapter: a multiform institutionalist approach to democratic legitimacy of international law, often called the ‘two-track approach’, and a uniform institutionalist approach to democratic legitimacy of international law, often called the ‘cosmopolitan approach’.

Section 6.3.1 explores these two alternative approaches to the global deliberative perspective that conceptualize democratic legitimacy including institutional preconditions. A brief outline is given of the main characteristics and vantage points of these approaches that might function as a stepping-stone for further studies. After the introduction to both approaches, section 6.3.2 lists substantial practical and conceptual difficulties. The scope of our study does not allow us to formulate any conclusive evaluative remarks on the question of whether or not these approaches to the application of the standard of democratic legitimacy internationally are persuasive. However, it observes the most eye-catching dilemmas attached to any effort to conceptualize international institutional preconditions. These dilemmas concern both feasibility and conceptual hurdles, and both require more contemplation that can be offered at this stage.

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1650 Coicaud 2010, p. 19.
1652 See chapter 2.
1653 Krisch states ‘[E]ven if we relax expectations to some extent – how to conceptualize democratic standards in the post national sphere, and how to realize them institutionally, has so far remained elusive’. Krisch 2010, p. 266.
1654 That would require a comprehensive analysis of existing theoretical approaches to international democratic agency. See Karlsson 2008.
6.3.1 An introduction to two approaches to institutional preconditions
The discussion concerning international institutional preconditions to enable the democratic legitimization of international law is far from new. The assumed shortcomings of the legitimizing effect of state consent, as discussed in chapter 3, have led, apart from a specific focus on NGOs’ assumed contribution to the democratic legitimacy of international law, also to many broader theoretical debates concerning alternative routes to establishing democratic legitimacy internationally that extend from cosmopolitan theories, a two-track model composed of institutionalized democracy at the domestic level and global public deliberations, an emphasis on international justice and domestic democracy,1655 to global deliberative democracy.1656

Although the strategies that scholars have developed to theorize democratic legitimacy differ, the approaches share a monistic approach to the necessity to democratically legitimate international law.1657 They share the belief that if one aims to consider democratic legitimacy on a scale beyond the nation-state, one is inherently forced to reconsider the traditional approach to international democracy, which is based on a classic Westphalian reading of international lawmaking.1658 Their shared dominant concern is the current gap between the exercise of international authority and the possible control of international lawmaking by states.1659 It is argued that democratic legitimacy requires that where norms, generated by an international institution, entity, or set of processes, have a clearly public quality in terms of their impact and scope, and where they enjoy or have acquired authoritative effect equivalent to that of national laws and policies, these norms have to derive from the people.1660 International law should be able to be justified to those to whom they apply on ‘grounds of global justice and cosmopolitan ethics’.1661 The need to engage in politics and the significance of doing so are considered omnipresent, and should not be limited to certain territorial spaces.

Two approaches specifically meet our central objection, formulated in the previous chapter, concerning the general lack of attention paid to institutional preconditions by scholars involved in the NGO democratic legitimacy thesis: the cosmopolitan approach and the two-track approach. Notwithstanding the fact that these two approaches have in common an institutional perspective towards democratic legitimacy, they take diverging views on the type of manifestations of democratic legitimacy. The two-track model adheres to a multiform approach, in the sense that its conception of international democratic legitimacy differs from its conception of domestic democratic legitimacy, whereas the

1655 See Buchanan 2003; Buchanan 2010; Buchanan and Keohane 2006, p. 405-437.
1657 See chapter 5, section 5.6.2. They all focus on the public character of international governance, although it does not fall easily in conventionally or nationally defined categories. Their monist perception of the necessity is in line with Murphy’s statement that ‘any plausible overall political/moral view must, at a fundamental level, evaluate the justice of institutions with normative principles that apply also to people’s choices’. Murphy 1998, p. nr 253-254.
1658 See Introduction; Chapter 1, section 1.2. As Besson illustrates; ‘The deterritorialisation of law should therefore be matched by the progressive deterritorialisation of democratic processes themselves.’ Besson 2009b, p. 70.
1660 Bryde 2005, p. 109. The research efforts seem to adhere the repeatedly resonated claim that law is legitimate ‘only if all who are possibly affected persons do in fact participate’, whether the claim is made in the context of the nation-state or in the context of international lawmaking processes. Wheatley 2009, p. 231.
cosmopolitan approach takes a uniform approach as to where, how, and what institutional preconditions must be materialized, irrespective of the level of application.

Two-track approach
The ideal of the two-track model, predominantly defended by Habermas, Besson, and Erman, is based on domestic democracy with an extension to deliberative practices of cosmopolitan citizens. The two-track model can be characterized by the attempt to construe an account of international democratic legitimacy that does not conflict with, but complements, domestic democracy. The fact that international democratic legitimacy does not stand by itself, in contrast to national democratic legitimacy, is taken as the starting point. International democratic legitimizing practices do not have to provide for ‘full’ democratic legitimation, as they ‘must connect up with the existing, though inadequate, modes of legitimation of the constitutional state, while at the same time supplementing them with its own contributions to legitimation’. Arrangements might appeal to elements of democratic legitimation other than what the traditional democratic legitimacy doctrine offers us, but it certainly should not conflict with national democratic legitimation. States are still considered the dominant forces in determining international law and as actors; they have obligations to be organized in a democratically legitimate way. Institutions at the domestic level primarily cover the enabling and ensuring of actual and equal exercise of political power. Habermas states that ‘[e]ven without the backing of state sovereignty, the arrangement sought for must connect up with the existing, though inadequate, modes of legitimation of the constitutional state, while at the same time supplementing them with its own contributions to legitimation’.

1662 Habermas argues that, ‘nation-states (…) represent the most important source of democratic legitimation for a legally constituted world society. From this follows, in particular, the requirement that the transfer of legitimation must not break off within the regional regimes.’ Habermas 2008, p. 447.

1663 Besson 2009b, p. 78 referring to Archibugi 1993, p. 313, 314. Habermas himself does not translate his deliberative theory fully to the international legal order, as he argues that such a translation is obstructed by the lack of a shared identity and degree of solidarity what facilitates deliberation in states are seldom found in the international legal order. Habermas 2006, p. 143.

1664 As Habermas states, ‘nation-states (…) represent the most important source of democratic legitimation for a legally constituted world society. From this follows, in particular, the requirement that the transfer of legitimation must not break off within the regional regimes.’ Habermas 2008, p. 447.

1665 According to Besson, one should acknowledge the importance of transnational deliberation but should be aware of possible detrimental effects on domestic democratic accountability. An underestimation of domestic democracy is deeply counterproductive given the pivotal role national processes still play in the ratification, reception and implementation of post-national legal norms and hence should have in their legitimation process; the national forum is the place where the plurality of legal norms applicable to an individual in a globalized world converge and hence the place where they can be made normatively coherent’. Besson 2009b, p. 78 referring to Archibugi 1993, p. 313, 314. Habermas himself does not translate his deliberative theory fully to the international legal order, as he argues that such a translation is obstructed by the lack of a shared identity and degree of solidarity what facilitates deliberation in states are seldom found in the international legal order. Habermas 2006, p. 143.

1666 Besson 2009b, p. 71-72, referring to Gutmann and Thompson 2004, p. 37-38; Thompson 1999, p. 120.
over the legitimacy of the polity and its regime. It is based on a long-term process in which discussions may constantly be re-opened.\textsuperscript{1668}

The effect of international civil society actors is to enable national citizens to shape a well-informed opinion about global issues. These opinions, offered through their national delegates, have effect on the lawmaking processes of international organizations, most clearly on the General Assembly. \textsuperscript{1669} In line with the familiar arguments concerning the increase in ‘inclusive practices’ through NGO involvement,\textsuperscript{1670} adherents of the two-track model argue that transnational or international deliberations offer a forum for barely represented interests, so that they can have some influence internationally that they might be lacking nationally.\textsuperscript{1671}

Negotiating powers, including regional regimes, that have the political power to decide about what law will be enacted, are only legitimate to the extent that internally and transnationally a process of political opinion- and will-formation is created ‘concerning the parameters of global domestic politics’, ‘among the citizens who are in a position to influence the delegating authorities’.\textsuperscript{1672} Besides the indirect democratic legitimation by national citizens through state delegates, cosmopolitan citizens influence the negotiating partners directly.

‘The first of which (read: ‘path of legitimation’) would lead from cosmopolitan citizens, via an international community composed of member states responsive to their citizens, to the peace and human rights policy of the world organization; whereas the second would lead from national citizens, via a corresponding nation-state (and the relevant regional regime where one exists), to the transnational negotiation system that would be responsible, within the framework of the international community, for issues of global domestic politics, so that both paths would meet in the General Assembly of the world organization, for the latter would be responsible for the interpretation and further development of the political constitution of world society, and hence for the normative parameters of both peace and human rights policy and global domestic politics.’\textsuperscript{1673}

In this reading of democratic legitimation, the legitimizing power of civil society, although enabling the construction of ‘hypothetical consent’, \textsuperscript{1674} should be complemented by international institutional reforms that make international cooperation fairer:

‘To be sure, a diffuse world public opinion armed solely with the weak sanctioning power of “naming and shaming” could at best exert a weak form of control over the

\begin{itemize}
  \item \textsuperscript{1668} Besson 2009b, p. 75, referring to Gutmann, and Thompson 2004, p. 6.
  \item \textsuperscript{1669} See for a critique on Habermas: Scheuerman 2008, p. 133-151.
  \item \textsuperscript{1670} See chapter 5, section 5.1.1; Chapter 6, section 6.1 for the elaboration on the tendency to focus on inclusion as democratic practice.
  \item \textsuperscript{1671} Besson argues that “[t]his is a straightforward way in which foreigners, whose interests cannot actually be included in national deliberations, may still exercise some influence over national decisions; public officials are indeed often to some degree more accountable to representatives of those foreigners’ interest in international for a than they would be in national debates’. Besson 2009b, p. 79-80, referring to Gutmann and Thompason 2004, p. 39.
  \item \textsuperscript{1672} Habermas 2008, p. 452.
  \item \textsuperscript{1673} Habermas 2008, p. 448.
  \item \textsuperscript{1674} Higgott and Erman 2010, p. 460.
\end{itemize}
interpretive, executive, and judicial decisions of the world organization. But couldn’t this deficiency be made good through internal controls, namely through enhanced veto rights of the General Assembly against resolutions of the (reformed) Security Council, on the one hand, and rights of appeal of parties subject to Security Council sanctions before an International Criminal Court equipped with corresponding authority, on the other?

Besson develops a demo-cratic version of the two-track model and emphasizes the importance of mutual openness of domestic, regional, and global democratic practices. The transnational deliberations of citizens of different demoi constitute one demos along different functional lines in each case. Democracy as a political regime is conceptualized at the domestic level, as long as the democratic subject remains the domestic people. The prescribed accumulation of democratic processes, however, takes place within and beyond the domestic and transnational legislative practices in ways that link national democratic processes to other transnational, international, or supranational democratic processes.

‘The functional and territorial inclusion (pluralistic) in national, regional and international lawmaking processes, and at different levels in those processes (multilevel) of all states (and groups of states) and individuals (and groups of individuals) qua pluralistic subjects of the international political community (multilateral), whose fundamental interests are significantly and equally affected by the decisions made in those processes’. Besson 2010, p. 177.

In the two-track account, democracy is a pluralist model that recognizes different levels of democratic legitimation. Besson does not offer a concrete overview of what the complementary democratization of international lawmaking processes should entail. She admits that international lawmaking ‘will not always be substantively democratic legitimate in practice’, but she finds it sufficient that in conditions of moral disagreement international law ‘can make an acceptable claim’ to be democratic legitimate. In her view, this is the case if lawmaking processes are procedurally legitimate and respect the political equality of all participants.

See Habermas for a justification; ‘However, the political empowerment of a pre-political global civil society composed of citizens from different nations is a different matter from imposing a constitution on an existing state power. In classical political theory the thought experiment of “leaving the state of nature” which reconstructs state power as if it proceeded from the rational will of free and equal individuals, is appropriate for taming the absolutist state. But given our present dilemma, it is not appropriate to ignore the legitimacy of nation-states under the rule of law and to return to an original condition prior to the state.’ Habermas 2008, p. 448.
legitimacy of international law, the representation of foreign interests in national deliberations needs to be enhanced. According to Besson, this is the primary step to be taken before one should start working on the inclusive quality of other lawmaking forums beyond the state. Erman and Higgott complement the two-track model. Their two-track model correspondingly relies on domestic political communities for effective and actual participation by individuals. However, formal decision-making by states internationally should also, besides its basis in state consent, be informed by striving towards three democratic values: justice, equality, and accountability. Their two-track approach accepts a relatively weak form of democratic legitimation of international law.

While actual consent is the major justificatory practice of global institutions and state, hypothetical consent is the major practice of global civil society to justify global institutions. Of course, through this split we end up with a normatively weaker form of legitimacy than the traditional conception of democratic legitimacy associated with a bounded political community such as the democratic state.

A cosmopolitan approach

A cosmopolitan perspective on international democratic legitimacy is based on the belief that humankind is bound together morally. Compared to the taxonomy as offered in chapter 5, section 5.6, it is inherent to cosmopolitanists to take a monist approach to values. This requires an expansion of concepts traditionally bound to the territory of the nation-state. Not only to our fellow citizens do we owe the duties of fairness and equality; we owe them to every human being. The moral basis for the requirements of democratic legitimacy is consequently universal in scope. As Pierik and Werner summarize cosmopolitanism: ‘[i]n short, cosmopolitanism emphasizes the moral worth of persons, the equal moral worth of all persons and the existence of derivative obligations to all to preserve this equal moral worth of persons’.

Cosmopolitans question the capacity of nation-states independently, or in cooperation with other nation-states, to address adequately the most pressing transnational political issues. Most notions of cosmopolitan democracy therefore involve simultaneous efforts to deepen democracy within nation-states and extend it to international and transnational
The extension of democratic practices exceeds the two-track account in terms of what cosmopolitans expect institutionally from international and transnational settings. Cosmopolitans aim at the ‘creation of a democratic community which both involves and cuts across democratic states’. Cosmopolitans do not by definition entail a complete centralization of authority. There are different gradations in terms of proposals for federalization. Some require the abolition of states, while others opt for a replacement of states with regimes relegating functional issue-areas. Other cosmopolitans add layers of authority on top of the authority of existing democratic states. They aim at democratizing various international institutions, creating ‘multiple and overlapping networks of power’. The fulfillment of a cosmopolitan democracy would deliver the ultimate victory of democracy, for it seeks ‘the recovery of an intensive and participatory model of democracy at local levels as a complement to the public assemblies of the wider global order: that is, a political order of democratic associations, cities and nations as well as of regions and global networks’.

A cosmopolitan approach to democratic legitimacy emphasizes a monist approach to the necessity of ensuring individual democratic rights. The ideal of self-determination, the principle of congruence, and values such as participation and inclusiveness are found equally relevant at the supranational level. The primary claim is that global governance institutions cannot be legitimate unless they are democratic in the individual-majoritarian approach to democratic legitimacy.

1688 The internationalization of institutional preconditions requires an institutional reform that establishes a comprehensive international democratic system. Scholars rely on ideas inherited from national democratic practice, that is, on elements of majoritarian democracy and on the establishment of some form of government. To make international law more democratic, cosmopolitan scholars promote popularly elected international bodies with general or limited decision-making powers, and a central global government. As suggested by Held, one could create an independent assembly of democratic peoples. Held formulates a model of cosmopolitan democracy that provide the conditions for and to give shape to ‘the successful entrenchment of legitimate political power’. Held 1995, p. 22; Held 1992. Another proposal is made by French, in which representatives of national parliaments compose a decision-making body. French 1994, p. 3.

1689 Held and Archibugi call this twofold agenda the project of cosmopolitan democracy. Held explains that ‘the term cosmopolitan is used to indicate a model of political organization in which citizens, wherever they are located in the world, have voice, input and political representation in international affairs, in parallel with and independently of their own governments’. Archibugi and Held 1995, p. 13. Cosmopolitanists differ in their perception of the role of states: for some, states have only instrumental value, others consider the role of states as independent value, as long as they do not act contrary to cosmopolitanist ideals. Pierik and Werner 2010, p. 4-5.

1690 In the cosmopolitan approach the issue at stake determines the optimal level of democratization, and strongly relies on the ‘all affected’ principle. See Scheuerman’s critique; Scheuerman 2002; Scheuerman 2008.


1692 Held 1993, p. 269.

1693 Many scholars criticize the way cosmopolitans have defined rights. See Scheuerman for a general critique on cosmopolitan thinking on rule of law: Scheuerman 2002, p 439-457. Erman, while referring to Christiano states that the mere recognition of human rights is inadequate, when ‘a man is not recognized as a citizen’. Erman 2012, p. 7 referring to Christiano 1996. Besides, the linkage of the individual and universal values is contested. As Koskenniemi argues, ‘[T]odays human rights, environmental and trade law, seeks to break through the ‘artificial’ boundaries of sovereignty so as to realise the promise of world unity articulated as the (hegemonic) universalization of the values underlying human rights, environment or trade.’ Koskenniemi 2011, p. 223, referring to Koskenniemi 1995, p. 22-29. However, Barnard states that a monistic approach towards democratic legitimacy, ‘would need be no bar to political plurality, provided it gave scope for political differentiation’. Barnard 2001, p. 15.

1694 Dingwerth 2007, p. 20.
Cosmopolitanism inherits its normative framework from the classic twentieth-century democratic theory in which the engagement of individuals in the diverse forms of political affairs has a central position. This is based on key insights offered by enlightenment philosophers that ‘naturally free individuals have to create a good order by their own limited means’. The ratio is the restriction of the lawmakers’ omnipotence, as the lawmaker should be bound to general principles of higher law. Lawmakers, among which are predominantly states and international organizations, are bound not only to procedural rules about lawmaking and adjudication, but also to substantive principles, laid down in the rule of law and human rights.

Democracy is seen as an institution or set of institutions closely linked to the ideas of political community and political equality. An extensive constitutional structure divides political power among different decision-making jurisdictions, and guarantees the observance of global democratic norms.

6.3.2 Limitations to current approaches to international institutional preconditions

Both approaches respond differently to the issue of institutional preconditions to enable and ensure democratic agency. Both, in contrast to global deliberative democracy, introduce the individual as a bearer of political rights, enabled to participate in decision-making. The approaches, though, differ in theorizing the level at which individuals can exercise their political rights. In the two-track model the political constellation of nation-states remains the central forum for individuals to actually, equally, and continuously participate, and consequently require institutional preconditions at the domestic level. The cosmopolitan approach, on the other hand, theorizes the individual as the international bearer of political rights and therefore requires democratic legitimacy’s necessary preconditions to be established in the international legal order.

Both approaches entail different conceptual and practical hurdles. As a matter of introduction to these difficulties, we will mention a few of the most obvious dilemmas. A cosmopolitan approach seems at first sight to be consistent with the rationale of democratic legitimacy: it conceptualizes direct opportunities and rights to participate for individuals. However, it is questionable whether a cosmopolitan approach pays enough attention to the principle of limited government. It promises protection from arbitrary power as well as meaningful possibilities for self-determination, individual self-development, and economic opportunity, and its commitment to upholding “cosmopolitan democratic public law” is essential to its liberal-democratic credentials.

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1695 Buchanan 2010, p. 93.
1697 Bryde 2005, p. 106. See the similarities between the rationale of cosmopolitanism and international constitutionalism we have included hints to constitutionalist thinking in this overview. For further reading on constitutionalism in international law, see Krisch 2010; Dunoff and Trachtman 2009.
1698 De Búrca 2007-2008, p. 239.
1700 Scheuerman summarizes cosmopolitanist roots in the democratic tradition as follows: ‘insofar as it aspires to realize both the principles of self-determination and limited government. It promises protection from arbitrary power as well as meaningful possibilities for self-determination, individual self-development, and economic opportunity, and its commitment to upholding “cosmopolitan democratic public law” is essential to its liberal-democratic credentials. Scheuerman 2002, p. 444. See also Held 1995, p. 150. Only by exercising political power in accordance with a legal ‘structure that is both constraining and enabling’ can transnational liberal democracy, like its nationally-based cousin, realize both self-determination and a commitment to the ideal of rule of law.’ Held 1995, p. 147. However, Held’s approach deviates from our model of law that functions at the base of institutional preconditions, in his account of the basic rights needed: he selected seven types of rights that exceed our principally procedural approach. Held includes health, social, cultural, civic, economic, pacific, and political rights. See Held 1995, p. 190-201.
effects of a cosmopolitan international system on the functioning of domestic democracies.\textsuperscript{1701} Extensive institutionalization and federalization are required to ensure that different spheres of democracy, globally, nationally, and locally, do not bite each other.\textsuperscript{1702}

Based on this argument one might be inclined to opt for the two-track approach, in which states are not required to give up state sovereignty to achieve an international democratic legal order. The strong orientation towards domestic democracy, however, implies that the sum of democratic states, harboring independently institutional preconditions, is able to maintain freedom from domination internationally.\textsuperscript{1703} The same conceptual dilemma occurs, as we mentioned, in relation to the democratization of different international legal regimes. In order to democratically legitimize international law, the establishment of an international system that offers direct opportunities to actually, equally, and continuously participate should be prioritized.\textsuperscript{1704}

However, the most obvious problematic issue is the practical feasibility of reforms in the international legal order that are in line with a cosmopolitan approach or a two-track approach to democratic legitimacy’s necessary preconditions. One might argue that in light of existing international lawmaking processes,\textsuperscript{1705} theoretical approaches to international democratic legitimacy run amok in the first place because of the fact that these are proposals for future international democratic legitimation and do not offer an actual and existing legal political structure for political participation.\textsuperscript{1706} In pragmatic terms, one can state that considering our conceptual framework of democratic legitimacy, international democratic legitimation is hindered by the fact that the two selected approaches rely on institutional and social preconditions that are simply not put into place in the international legal order.\textsuperscript{1707} While the cosmopolitan approach, seen from a feasibility perspective, has often been criticized, the two-track model is equally hard to reconcile with current international legislative practices that are characterized by the fact that state authority is waning as a

\textsuperscript{1701} Besson 2011a, p. 16. If one is prepared to consider the concept of democratic legitimacy beyond the state, ‘the core principles of democratic liberty – that is self-governance, the demos, consent, representation, and popular sovereignty – are made distinctly problematic’. McGrew 1999b, p. 12.

\textsuperscript{1702} As Görg and Hirsch states, ‘for what is the meaning of ‘democracy’ if there exist neither a people, in the democratic-constitutional legal sense, nor general elections, nor active and legitimate political parties, nor a parliament and organs of representation, nor a central state equipped with a monopoly of coercion?’ Görg and Hirsch 1998, p. 606.

\textsuperscript{1703} Christiano strongly criticizes this approach. See Christiano 2006b, p. 81-107.

\textsuperscript{1704} See chapter 6, section 6.2.3.

\textsuperscript{1705} See chapter 3, section 3.3.

\textsuperscript{1706} Erman 2012, p. 8. She states in her critique on Macdonalds’ Stakeholder democracy: ‘Concerning political equality, nowhere do these institutional structures secure for stakeholders the equal opportunity to participate in egalitarian decision-making’, notwithstanding the fact that the increased nature and authoritative quality of international lawmaking demands for democratic aspirations. De Búrca however would not agree with this statement: ‘Conceiving and designing practicable ways to strengthen the democratic character of transnational governance is unquestionably difficult, but the proposal to do so is not utopian.’ De Búrca 2008, p. 248-249.

\textsuperscript{1707} See chapter 2, section 2.1. As we have seen in chapter 2, familiar institutional preconditions in terms of guaranteed right to political power, such as parliamentary systems, voting, and ministerial accountability, are not institutionalized in the international legal order. After chapter 1, we could have bluntly concluded that for that reason any democratic legitimation is excluded in international legal order, even without delving into the debate concerning NGOs specific merits. However, not only would that have implied the unsustainable perception that democracy as a concept is unalterable, it would also have short-changed the efforts of international scholars to articulate possible theoretical answers to the dilemma of lacking international institutional preconditions. See for a historical outline of the changing dynamics of democracy: Keane 2009; Dunn 2005.
result of framework resolutions, public-private partnerships, informalization, fragmentation, and multipolarity.1708

In these conflicting spheres between what is conceptually necessary and what is realistically feasible we introduce an analysis of the normative desirability of the two approaches to international democratic legitimacy. We start with existing feasibility dilemmas.1709 Thereafter, we introduce conceptual hurdles to both approaches while assuming a receptive political situation. The main purpose of this section is not to offer any definite judgments as to what should be done with regard to these complex issues, but rather to show that both selected routes towards international democratic legitimacy, although receptive to institutional preconditions, are not devoid of political and conceptual implications.

Political unfeasibility of the necessary reforms

In the NGO democratic legitimacy thesis one seldom finds a reference to the condition that the proposed cosmopolitan ideal should be translated internationally or that states need to be democratized before NGOs could contribute to the democratic legitimation of international law.1710 Most proponents of the thesis specifically oppose institutional, formal approaches to an overarching global political order and believe in democratization through the amelioration of democratic practices.1711 The most obvious explanation is the fact that both approaches, in terms of predictability, lie far beyond current political feasibility.1712

The institutional reforms suggested by cosmopolitans, especially, are often criticized for being too idealistic or far-fetched.1713 The proposals concerning a democratic world government are of such an institutionally challenging caliber that we, in the short term, probably have little to expect from them. Although at first sight the cosmopolitan approaches seem to match the main features of democratic legitimacy, at least three reasons complicate this reading of international democratic legitimacy. First, given that we have a state system, to make sense of the idea that individuals have an equal say in global governance requires us to think of the latter as the global counterpart of a democratic federal state; yet in the current international system the chances of changing it in this direction seem negligible for the foreseeable future.1714 It is highly questionable whether states would ever be willing to give up their autonomy. It seems improbable to expect that international reforms for referendums or elections of international parliamentary deputies, or majority voting, will be established within the international legal order in the near future.1715

1708 See chapter 3, section 3.4.2. As Cox argues, is liberal democracy is not doomed to be subordinated by the ‘uncontrollable, inflexible force’ of economic globalization? Cox 1997, p. 51.
1709 See for an exploration on what can be understood by political feasibility, Gilabert and Lawford-Smith 2012, p. 809-825.
1710 See the introduction of chapter 6, in which we sketched the possible perspectives on the relationship between NGOs, institutional preconditions and democratic legitimacy.
1711 See chapter 5, section 5.6.2.
1712 Buchanan and Keohane state that ‘the social and political conditions for democracy are not met at the global level and there is no reason to think that they will be in the foreseeable future’. Buchanan and Keohane 2006, p. 416.
1714 Falk and Strauss 2000, p. 212.
Second, the problem of achieving ‘an equal say’ or political participation ‘as equals’ for all in a system of global governance is even more daunting than achieving domestic democracy.\textsuperscript{1716} Size and the numbers of people governed might ultimately matter.\textsuperscript{1717} The distance between citizens and international legal processes is often assumed to be too large. As mentioned in chapter 5, in a modern standard approach of democracy applied on a large scale, Dahl and Tufte proved the ambiguity of political influence and control. Influence, on the one hand, is built upon effective citizen participation because active participation measures the individual impact on decision-making. Proximity of the citizen to the decision-making process positively influences the individual impact of a citizen. On the other hand, influence is measured by the degree of control of the system of an effective government.\textsuperscript{1718} Participation and system capacity are from a traditional point of view indissoluble in relation to each other and to the size of an area. Participation decreases when size increases. This is in contrast to system capacity, which increases together with size. Any federalization should therefore include a theory of subsidiarity, as it is called in the European context, in order to constantly balance proximity and size by making choices between centralization and decentralization.

Third, if states were to be thought of as the units of a global democratic federation, many of them would have to be radically transformed. When undemocratic, they cannot serve as intermediate links between the individual and the global governance institutions in a democratic global federation. Thus the democratization of states, to make them representative of their citizens, seems to be a precondition for democratization of the international legal system, at least so long as states play an important mediating role between individuals and global governance structures. The need for decentralization, due to subsidiarity considerations, is however contradictory to the common trend to seek close external cooperation through international networks to take on international challenges. For these reasons it is not unreasonable to think that institutional democracy cannot be achieved for the planet as an entirety, but only in its particular parts.\textsuperscript{1719} The emphasis placed on states in the two-track approach seems a better fit for international democracy because it expects states to be democratically organized and publically accountable and requires from international practices only that they are adequately inclusive and egalitarian.\textsuperscript{1720} However, the emphasis on the democratic organization of states does not reflect the reality of global politics either.\textsuperscript{1721} What is needed for a two-track model of international democratization is first of all that all states are democratically organized. That might then lead to a voluntary association of democratic states. The precondition that all states must be made democratic, however, is highly problematic as that entails forced democratization, which is, according to Christiano, a contradiction in termine. Christiano argues that if we opt for democratization of all states, we need powerful international institutions to hold the states in check and to ensure background conditions for fair negotiations. But then the international organization that monitors domestic

\textsuperscript{1716} Buchanan 2004, p. 323. However, others might argue that globalization, especially the growing worldwide access to electronic communications, may eventually provide the basis of at least a limited sphere of global individual democratic decision-making. Buchanan 2004, p. 324.

\textsuperscript{1717} See Dahl and Tufte 1973.

\textsuperscript{1718} See Dahl and Tufte 1973.

\textsuperscript{1719} Christiano 2006b, p. 81-107.

\textsuperscript{1720} Besson 2009b, p. 63-64.

\textsuperscript{1721} Undemocratic states participate too in international lawmaking. See D’ Aspremont 2011c, p 549-570.
democracy requires strong democratic legitimation itself: the democratic legitimation burden shifts to the international organization. Further, democratization of all states does not provide an answer to the fact that some democratic states will still have so little bargaining power that their consent in international lawmakers could hardly be called free and informed. The other option is the exclusion of states that are not democratically organized from international lawmakersing. Exclusion would, however, strongly affect the cogency of the two-track model, as large parts of the world’s population do not get represented at all. Besides domestic democratic reforms, one has to find an answer to the fact that currently, there is a lack of correlation between the democratic representation of individuals and state-majoritarianism, due to the immense differences between the sizes of different populations of states. To recall, China represents around 1.3 billion inhabitants with its one vote, while Denmark represents with its one vote roughly 6.5 million inhabitants.

These political hurdles have fuelled our presumption that the required institutional reforms of the international constellation offered by both approaches seem difficult to reconcile with the current political receptiveness towards these reforms. The political reality of international lawmakersing confronts us with a considerable number of undemocratic states, international lawmakersing practices that are non-egalitarian, and an unlikelihood that states would be willing to move towards a federalist system. Above all, we are confronted with the political reality of the non-exclusiveness of state-made law.

Mismatch between institutional preconditions and international authority

Due to its diversified and fragmented character, international lawmakersing presents itself as a complex body of different actors, products, and activities. If international lawmakersing continues to make progress in empowering individuals and groups to help shape international law without being dependent upon representation by states, then any presented solution that strengthens a state-based system of international lawmakersing becomes consequently less significant. The lack of insight into the exact form and nature

1722 See Christiano 2010.
1723 Buchanan 2004, p. 320.
1724 Buchanan therefore rejects the emphasis most scholars put on consent, voting and state-majoritarianism with regard to the concept of democratic legitimation and argues instead that consent and democratic legitimation are two separate concepts, which are not interdependent. Buchanan 2004.
1725 As set out in section on state consent in chapter 3, section 3.4.2, the domestic chain of democratic legitimation toward the people is considered weak. See Wolfrum 2008, p. 20. National parliaments are of limited significance in terms of determining the content of international law. Non-state sites for the production of global norms that regulate social, economic and political life emerge within and outside the state. See Wheatley 2010; Fenger and Bekkers 2007, p. 28.
1726 See Christiano 2010.
1727 Territoriality though is no longer central to social geography in a way comparable to six decades ago. See Scholte 2001, p. 9. Tomuschat confirms that the system of international law is a man made product, and should be understood as such. Tomuschat 1993, p. 235.
1728 See chapter 3, section 3.3.
of international public governance\textsuperscript{1730} complicates the search for the right practice and locus of democratic legitimacy and its preconditions.\textsuperscript{1731}

Primarily the two-track model is complicated by the current fragmentation and ‘liquidity’ of international authority that characterizes international lawmaking.\textsuperscript{1732} The focus on the state and its derived consent of states’ citizens through parliaments does not capture the dynamic characteristics of international law and its formation.\textsuperscript{1733} The proposal for complementary institutional reforms suggested by Habermas, related to the enhancing of the quality of state majoritarianism,\textsuperscript{1734} depends for its cogency on how important states are in the international lawmaking system. As the two-track model relies on the perception that the democratic agency by states covers the political authoritative power exercised, it does not seem to formulate an adequate answer to the problems posed in chapter 3, which showed that the rise of the NGO democratic legitimacy thesis came about as a reaction to the recognition of the fact that state consent does not cover all international legislative developments.

The Catch-22 of conceptualizing democratic legitimacy in the international context is that to uphold the purpose of democratic legitimacy - that is, to protect individuals’ freedom from domination - one is obliged to have recourse to institutional preconditions. However, at the same time, any theory of these institutional preconditions does not seem to offer a solution to the fact that current international governance is characterized by a pluriformity of actors and spaces, and by an inexistence of a normative institutional frame of authority.\textsuperscript{1735} Given the informalization of many global interactions, and the plurality of sites, topics, and actors producing many different types of instruments, from standards to recommendations, to frameworks and treaties,\textsuperscript{1736} one can strongly question the appropriateness of applying an evaluation standard of democratic legitimacy to international law that requires institutional safeguards, unity, shared democratic values, and more.\textsuperscript{1737}

While the global deliberative account results in a mismatch with the rationale of democratic legitimacy in theoretical terms, both the cosmopolitan answer as well as the two-track approach to the democratic legitimacy of international law (although relying on a ‘reappraisal of the formal – the formal basis of ethical and purposive politics’, in order to provide for ‘the legal constructions constituting a space for politics’\textsuperscript{1738}) cause a mismatch between their ideas and the political characteristics of the object that needs to be democratically legitimized: namely the fluidity of the exercise of international authority. This

\begin{footnotesize}
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\item\textsuperscript{1730} Warning 2009, p. 62.
\item\textsuperscript{1731} As Weiler states: ‘The fox we were chasing in the traditional model was the executive branch – our state government. In the universe of international regulation, even governments are no longer in control.’ Weiler 2004, p. 560.
\item\textsuperscript{1732} See Krisch 2013.
\item\textsuperscript{1733} Chapter 3, section 3.4.1 has shown the, what are believed to be, first cracks in the persuasiveness of a state-based system of international lawmaking. Not all of the international lawmaking dynamics seems to be controlled by, or controllable by states See McCorquodale 2010, p. 304.
\item\textsuperscript{1734} See section 6.3.2.
\item\textsuperscript{1735} See Krisch 2013.
\item\textsuperscript{1736} See chapter 3, section 3.3.
\item\textsuperscript{1737} See Krisch 2013.
\item\textsuperscript{1738} Venzke 2008, p. 1425.
\end{itemize}
\end{footnotesize}
is problematic because democratic legitimacy cannot be conceptualized without thinking through the concept of public authority, which is necessary to structure society.1739

**Persisting conceptual dilemmas – An array of unanswered questions**

As a result, a dead end is created for which we have four challenging escapes with regard to the application of democratic legitimacy to international law. First, we might perceive international lawmaking efforts based on a public-private partnership level, framework conventions whose further elaboration is left to the relevant institutional organizations, and rules delegated to non-state actors as not having the same authoritative power as domestic law such as to require democratic legitimation.1740 Second, we might choose to persistently theorize and advocate for global institutional reforms. Although these reforms seem to lack political support, there is, in principle, no normative reason to attach a necessity to that result. Political barriers, such as the fact that not all states are democratic and that states represent a very divergent number of citizens, just like other institutional barriers such as veto procedures in the Security Council, could be solved. If power on different sides looks to be even roughly balanced, then that may create a space where the international order can interfere in the affairs of different states under the equal and effective control of terms that are accepted on all sides. We may be very far from that ideal, as things currently stand, but there is no evidence that institutional design might not prove capable of removing political hurdles. Third, we might theorize a complementary account of democratic legitimation for those more liquid forms of legislative authority that respects both informality of authority and formality of safeguards to enable individual political power. Fourth, we might rule out the possibility of applying the standard of democratic legitimacy to international law, as it is doubtful whether ‘we know enough about the structure of global arrangements, whether legal or political, economic, cultural, to be confident that what we know domestically as “democracy” is a good idea for the globe’.1741 Consequently, a new set of terms is needed to comprehend the contribution of the participation of NGOs in international lawmaking to international law.

The first escape requires a theoretically complex discussion on the normativity of international law. Building on the remark made in section 6.2.4 concerning the importance of protecting the integrity of the concept of democratic legitimacy, we raise a conceptual difficulty with regard to the multiform conception of democratic legitimacy, among which the two-track model is one. We detect in both Habermas’ and Buchanan’s account this multiform tendency to perceive international law as a different type of authority that needs less democratic legitimation compared to domestic law. In Habermas’ account of international democratic legitimacy we observe a mitigation of the urge to place the same

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1740 Non-state governance is perceived as an inappropriate subject for political theory. The international legal order is from this (neo-) realist point of view characterized by power relations. See De Búrca 2007-2008, p. 238, p. 225. International lawmaking is in this regard ‘devoid of any central authority or rule of law; dominated by great powers and power struggles; riven by entrenched hostilities and insecurities; and permeated by irreconcilable cultural particularities and civilizational differences’. McGrew 1997a, p. 233. Wheatley leaves in the middle and up to the relevant legal communities to decide whether or not an international rule has ‘authority’. See Wheatley 2012, p. 171.

burden of democratic legitimation that applies to domestic law to every international legal instrument, as these instruments are supposedly less political. 1742 Habermas states that

‘[t]his missing link in the chain of legitimation would have to be balanced off against the nature of the need for legitimation. The General Assembly, as the legislator under international law, (already) observes the logic of an internal elaboration of the meaning of human rights. In so far as international politics takes its orientation from this development, therefore, the resulting tasks at the supranational level would be more judicial than political ones’. 1743

Buchanan, while engaged in a broader enquiry on what concept or conceptions of legitimacy at large are relevant for international law, also distinguishes a different standard of democratic legitimacy for international law as for national law. 1744 As briefly discussed in Part I, these multiform approaches to democratic legitimation weakens the normative burden attached to the authority to rule for international law compared to domestic law. Tasioulas has already problematized this tendency in light of the principled variation between monist and dualist thinkers 1745:

‘[G]iven that there is a plausible univocal account of the focal meaning of legitimacy, an especially persuasive case must be made for rejecting it in favour of dualism. This is all the more so given the threat dualism poses to PIL (read: Public International Law) status as fully-fledged law. If it belongs to the essence of law to claim authority, and if the authority claimed by PIL is a diluted version of that claimed by domestic law, PIL’s status as the poor relation of domestic law is confirmed.’ 1746

The consequential deteriorating critical potential of the standard of international democratic legitimacy leaves us with a difficult issue: in what ways does such an under-theorized and uneffectuated international democratic system, lacking institutional and social preconditions to ensure freedom from domination, affect international law’s authority? 1747 What is the status of international laws enacted by non-democratically legitimized authority? 1748 Formulating a solid answer to this question requires a theoretically complex investigation that would take this research assignment beyond its intended scope.

1742 A comparable observation is made by Wheatley. Wheatley 2012, p. 165.
1744 Buchanan argues that the demands for global democracy are unreasonably strong given two conditions; 1) The benefits that global governance institutions provide are quite valuable and not likely to be reliably provided without them. 2) The key values that underlie the demand for global democracy can be reasonably approximated if these institutions satisfy other more feasible conditions, including what we call Broad Accountability. Buchanan 2010, p. 80.
1745 See chapter 5, section 5.6.2 for an exploration of the monist-dualist variation that informs the NGO democratic legitimacy debate.
1748 See Dworkin 2013; Buchanan 2010. Buchanan states that, ‘[w]hether the current democracy deficit is sufficiently serious to deprive the existing international legal order of legitimacy, is a further question, and one which in my judgment has not been adequately addressed’. Buchanan 2010, p. 87.
At this stage we will leave aside the question of international law’s normatively acceptable authority without institutionalized possibilities for democratic legitimation.

The second and third escape will, after a closer look, reveal conceptual issues that constitute a myriad of political and normative problems concerning democracy’s boundaries, addressees, and requirements internationally. Although these issues remain largely unaddressed by the scholars that apply the analytical terms of democratic legitimacy in relation to NGO participation to discuss and assess the authority of international law, they require further contemplation before we are able to construct a convincing application of the standard of democratic legitimacy to the exercise of international authority. As we cannot aim to solve any of these puzzles adequately at this stage of the study, what remains is a very brief summary of often-cited problems and references to the scholars who have posed them. By pointing out these conceptual dilemmas, we intend to justify our choice for the fourth escape, which will be introduced in chapter 7.

The problematic issues are the following: the already-mentioned interaction of different democratically legitimized governance levels; \[1749\] the definition of the (boundaries of) political community and the related issues of membership; \[1750\] whether or not a constitutive moment for a political community is necessary; \[1751\] whether or not a constitution for democracy is necessary; \[1752\] whether or not a shared identity or ‘common world’ is indispensable; \[1753\] the impact of the lack of a shared language for democratically making law; \[1754\] the indispensable nature of the ‘state’ construction; \[1755\] the absence of a

\[1749\] The meaning of participation in domestic process is undermined as international law limits the realm in which national self-government can take place. See Besson 2011a, p. 8, referring to Besson 2009a; Besson 2009b, p. 66. See also Habermas 2008, p. 447: ‘There is a major gap in the proposed architecture, which primarily concerns the legitimate expectations and demands of citizens in their contrasting roles as cosmopolitan and national citizens.’ See also Walker 2010, p. 223-227.

\[1750\] See Wheatley 2011, p. 541-542. See also Näsström 2003, p. 808-834. Most scholars use the lack of a community as a yardstick for the non-applicability of the concept of democratic legitimacy beyond the nation-state; the community being a \textit{conditio sine qua non} for a democratic nation-state. See Habermas 2001, p. 107.

Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. The self-referential concept of collective self-determination demarcates a logical space for democratically united citizens who are members of a particular political community. (…) This ethical-political self-understanding of citizens of a particular democratic life is missing in the inclusive community of world citizens.’ See on the issue of constituting a \textit{demos}, Goodin 2007, p. 40-68. See for an opposite view: Besson 2009b, p. 69.

\[1751\] See Christiano 2010; Agné 2006. Agné shows in this respect the difficulty of the distinction what is \textit{good for democracy} and what is \textit{democratic}, with an example of Sweden and Finland in times that Finland was threatened by totalitarian pressures of the Soviet Union. Sweden, ‘supported’ Finnish democracy with loans and the participation of voluntary corps, which in itself is not a democratic move but might be a democracy improving move. Agné 2006, p. 444.

\[1752\] See for an overview on what constitutions mean for democracy: Sunstein 2001. Sunstein remarks ‘In my view, the central goal of a constitution is to create the preconditions for a well-functioning democratic order, one in which citizens are genuinely able to govern themselves’. Sunstein 2001, p. 6.

\[1753\] Christiano 2006a, p. 81-107.

\[1754\] Sceptics of global democracy have worked to identify basic background conditions to democratic institutions and procedures while showing that they cannot be satisfied beyond a certain threshold. Kymlicka, for example, insists that linguistic/territorial political associations are the primary forum for democratic participation, rather than higher-level political associations that cut across linguistic lines. Kymlicka 1999, p. 121.

\[1755\] A political community is by some scholars understood as the undeniable historical achievements of the nation-state. See Smith 1995, p. 24. As Scheuerman argues, the state construction enables the traditional virtues of Rule of Law, which are in many cosmopolitan theories of international democracy, badly preserved. Scheuerman 2002, p. 439-457.
coordinated coercive authority; the issues of equal stakes, persistent minorities, and reciprocity; the issue of the scope of democracy, and the working of the delegation model of individual-state-international law, to name but a few. The overarching challenging dilemma is how to define the subjects of international law, the issue how, and by whom, it can be decided who is entitled to participate, or who should be entitled to participate, and the reach/persuasiveness of the ‘all affectedness’ principle. If we cannot find a convincing account of affectedness, or of determining the different political communities, there is a considerable chance that inclusion into ‘indefinite cooperative schemes’ is non-voluntary, as agents might have developed laws that include them without giving them the opportunities to provide their cooperation or consent freely, which leads in some cases to forms of domination.

These persisting conceptual issues raise the question whether international democratic legitimacy is in se possible. We should not take the current lack of institutional preconditions on international democratic legitimacy and the possibilities for changing these constraints lightly. These are ‘institutional facts that are deeply entrenched in some historically contingent, specific social order rather than as universal normative constraints on democratic institutions’. However, this situation does not have to be permanent. Scheuerman states in this regard:

1756 Christiano 2011, p. 69.
1757 Political actors ought to become democratic agents if and only if they have interdependent interests and roughly equal stakes. Christiano has called this the ‘commonworld condition’. In domestic democracies, citizens are deeply interdependent and as a result are connected in multiple ways, both legal-politically and institutionally. They have roughly equal stakes in the world in which they live. This in contrast to arrangements such as organizations and associations in which people have a very different stakes and are differently affected. Christiano 2006a, p. 97; Erman 2012, p. 15-16.
1758 See Dahl and Tufte 1973. Democratic decision-making or legislation has, according to many democracy theorists, an inevitable spatial dimension attached to it. See Arendt 2005; Lindahl 2010 p. 30-56.
1760 These questions, and many more have (such as: ‘Is it possible for moral cosmopolitanism to become institutionalized and still to retain its critical stance towards power? What are the effects of institutionalizing moral cosmopolitanism on power politics? Will cosmopolitanism help to civilize politics or will it end up as yet another justification for imperialistic designs?’) have instigated Pierik and Werner to edit a book on how cosmopolitanist ideals are translated in the context of specific international legal regimes. Pierik and Werner 2010, p. 3.
1761 Besson 2009b, p. 72. According to Dewey, the people who believe that they have been affected must organize themselves into a visible community: a public. There where is law; people subject to it have a legitimate claim to be included in the making of it. See Dewey 1988.
1762 Besson is critical towards the neglect of the issue of subjects for democratic legitimation by international democratic legitimacy theorists. Besson 2011a, p. 3. Determining the demos, delineating the community, drawing political boundaries, appointing who is subject of law are in itself exercises of political power. Whelan explains in this context the ‘hen-egg’ paradox: before a democratic decision could be made on a particular issue (by those affected) a prior decision would have to be made, in each case, as to who is affected and therefore entitled to vote on the subject – a decision, that is again, on the proper boundaries of the relevant constituency. And how is this decision, which will be determinative for the ensuing substantive decision, to be made? It too should presumably be made democratically – that is, by those affected. Whelan 1983, p. 13-47.
1763 Most scholars find a way out in the ‘all affected’ principle: which leads to empirically testing whether individuals are affected, as individuals are not directly addressees of international law. Karlsson Schaffer 2012, p. 321-342. However, with embracing the all-affected principle, which is inherently subjective in nature, we are back at the question of how to draw proper boundaries of political communities. Agné 2006, p. 453.
‘let’s not pretend (...) that we can have our cake and eat it too: if we opt to pursue “stronger transnational and supranational mandates for governance,” as we very well may need to, let us not claim that we can do so without dramatically expanding relatively familiar forms of state power in arenas where they hitherto have been relatively limited. The inevitable result will be more global government, and not simply “multilayered governance”. Only if we face this fact head-on we can realistically consider the full range of tough intellectual and political challenges we face.’\textsuperscript{1767}

Our conclusions in this respect should be considered as a plea for rethinking the democratic legitimacy of international law, while maintaining the integrity of a democratic qualification of law: the proof that the potential of every legal subject’s capacity to act and speak in concert for public political purposes in order to together equally take part in the decision-making concerning the law, is enabled, and guaranteed.\textsuperscript{1768} At this stage of the study we are unable to present a satisfying answer to these questions of how to create equilibrium between the ideal of democracy and the conditions of its feasibility in an intermingling and interdependent polity, with which current international legislative practices confront us.

6.4 Democratization instead of democratic legitimacy?

Let us conclude this chapter with a brief exploration of the possible motives of scholars to support the NGO democratic legitimacy thesis and to espouse a conception thereof that disregards institutional preconditions. This section also briefly points out that notwithstanding the mentioned dilemmas of institutional preconditions internationally, NGOs might still be of relevance for the democratic legitimacy of domestic law, provided that they complement existing democratic institutional and social structures.

As the thesis is constructed in a context that does not offer automatically institutional preconditions to enable and protect democratic legitimation, a lack of attention to institutional preconditions is both remarkable and understandable. It is remarkable because it is precisely the apparent lack of institutional preconditions internationally that means that scholars cannot automatically fall back on, or take for granted, an existing institutional political structure that might be complemented by NGO activities. It is understandable because the current political landscape of international lawmaking does not offer any reason to assume that in the short term, rights or judicial safeguards for actual, equal, and continuous participation by individuals in international lawmaking will be enacted.\textsuperscript{1769} And yet, as was argued in this chapter, because the debate concerning the thesis does not involve an elaboration of some of the necessary conceptual preconditions of democratic legitimacy, the NGO democratic legitimacy thesis overlooks some essential principles of democratic legitimacy. As a result, the ideal construct of democratic legitimacy used by scholars to assess NGOs’ involvement in international lawmaking is flawed.

\textsuperscript{1767} Scheuerman 2008, p 148.

\textsuperscript{1768} Besides the NGO democratic legitimacy thesis, there are other, more institutional proposals developed, that might be worth exploring. An example is Kuyper’s approach towards two flexibility instruments that might be developed for treaty making; escape clauses and sunset provisions. See Kuyper 2013, p. 195-215.

\textsuperscript{1769} See chapter 3, section 3.1. Besides, as we have outlined in chapter 3, section 3.4, also the more ‘traditional’ idea that state consent as practice upholds, though indirectly, the actual and equal opportunity for individuals to participate is for multiple reasons problematic.
The tendency to overlook institutional preconditions while focusing on the internal democratization of NGOs or on specific democratic practices and characteristics in isolation of institutional preconditions leads to the impression that scholars are, on the one hand, in favor of connecting democratic theory-building with international lawmaking, but on the other hand are hesitant to mirror familiar institutional preconditions that have hitherto more or less succeeded in generating democratic legitimation within domestic democracies.\(^{1770}\) One finds an interesting dynamic of demanding democratically legitimate international law, i.e. ensuring that everyone affected by the law should have influence in the making of the law, and demanding democratically accountable international actors, while at the same time dismissing the contemplating on what is needed for democratic legitimation to uphold its necessary critical potential to trace and address dominating exercises of authority. This approach is characteristic of the ‘now theoretically fashionable view that we can realize global governance without substantial elements of global government’.\(^{1771}\)

Notwithstanding the current unsuitable institutional characteristics of international lawmaking for any democratic legitimation of international law, it seems difficult for scholars to dissociate from entrenched democratic intuitions, which is, to a certain extent, understandable. The activity of NGOs in international lawmaking practices is obviously a manifestation of individuals’ desire for political change. However, neither the desire itself nor the organization that facilitates and offers a platform for such desire is democratically legitimizing law in se. To democratically legitimize law, the actions of individuals require conversion into political actions. Institutional safeguards to guarantee conversion of NGOs’ actions into political actions are necessary to make possible and ensure an actual, equal, and continuous political opportunity to democratically legitimize law.\(^{1772}\)

Although the concept of democratic legitimation is often an explicit part of the terminology used, one can question whether the literature concerning NGOs’ position in international lawmaking is related to the evaluative tool of democratic legitimation. It might be more appropriate to qualify the scholarly debate concerning NGOs’ involvement in international lawmaking as a mindset towards democratization.\(^{1773}\) The selective focuses on democratic practices such as deliberation, contestation, transparency, and accountability could be part of a broader trend in the literature concerning international ‘democratization’,\(^{1774}\) which is

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\(^{1770}\) See for example Habermas 2008. Habermas warns us for the counter productivity to ‘cling to the state-centered tradition of modern political thought’. As mentioned earlier, the reason for that is possibly the fear of false analogism, and for Western conceptual imperialism. See Stoter and De Jong 2009.

\(^{1771}\) Scheuerman 2008, p. 136, referring to the way Rosenau has introduced the term ‘global governance’. In Rosenau 1992, p. 1-29.

\(^{1772}\) The main focus of our critique is related to the lack of consideration of institutional preconditions. It is however also questionable to what extent the complementary social preconditions are, or can be established at the international level. An interesting contribution to the debate of what is required globally in order to establish international democratic legitimacy has been made by Dingwerth, who focuses on the current social inequality and the necessary empowerment of the weaker members of the international society by a focus on health, education and subsistence in order to reach democratic legitimacy. Dingwerth 2014, p. 1125.

\(^{1773}\) As is commonly and explicitly done by scholars, see, for example, Boyle and Chinkin 2007. An example of understanding civil society groups active at the international level as part of a democratization process is Slaughter 2014, p. 310-337. Kleinlein draws a comparable conclusion with regard to the academic discussions on international constitutionism. Kleinlein 2011b, p. 48.

\(^{1774}\) It is contestable if we ever can truly discover ‘seeds for programs for future democratic development’, because arguably it is only possible to explain in retrospect, after the democratic minimum is reached, whether what element has contributed to the preceding ‘democratization’. Held 2006, p. 279-280.
not bound by institutional preconditions in an international context, given the lack of, or perhaps the undesirability of, institutional international frameworks.\textsuperscript{1775} A democratization theory, in terms of aims and perspectives, is fundamentally different from a conception of democratic legitimacy. A theory of democratization provides an answer to how a transformation of a non-democratic system to a democratic constellation occurs, and what factors, processes, and actors play a role in that.\textsuperscript{1776} Where theories of democratization might provide a detailed analysis of democratization as a process that is to be carried out in a particular order, comprising identifiable steps of which the formation and participation and other activities of associations may be one, democratic legitimacy is an evaluative tool of the exercise of the authority to rule.

Democratization is seen on the global level as being a series of socio-political changes that alter global politics in a democratic direction.\textsuperscript{1777} This implies that various ways can be taken to reach more democratic global governance. Among others, Omelicheva states that democratization is fostered by ‘Global Civil Society organizations [which] can enable participation’.\textsuperscript{1778} Placing NGOs in a democratic configuration responds to a pragmatic path to global democratization, which can be accommodated within the existing institutional structures of global politics. Instead of seeing the creation of a ‘closed’ or ‘constitutionalized’ framework of public power as a necessary first step in a project of global democratization, it seeks to democratize the framework of global power in its current pluralistic structure.\textsuperscript{1779}

Distinguishing democratization from democratic legitimacy is important, again to protect the integrity and critical potential of the concept of democratic legitimacy. Contrary to democratization, legitimacy provides an ad hoc evaluation of the basis of the trust of the legal subject in the authority of the lawmaker. Legitimacy is an evaluative tool of the current exercise of authority; legitimacy has no future perspective; and is binary: authority has democratic legitimacy or it does not have democratic legitimacy. It gives us an actual account about the relationship of trust between the rulers and the ruled and consequently about the chances that the exercise of the authority to rule leads to actual compliance.\textsuperscript{1780}

Democratization theory, on the other hand, which concerns a constellation that has not (yet) been transformed into a democratic constellation, relies heavily on the probability of its predictions.

If we want to start imagining an international democratic system, and if we refer to NGOs as the instigators of that imagined democratic system, only after the establishment of that (yet still imagined) democratic system could we determine whether NGOs were decisive.

\textsuperscript{1775} We perceive institutional preconditions necessary to enable and ensure democratic agency. See chapter 2. Pettit makes a distinction between electoral and contestatory aspects of democracy. Pettit 2006; See Pettit 1997; in most accounts one witnesses a shift towards contestatory democracy, thereby largely neglecting the self-governmental side of democracy. Krisch criticizes this tendency. See Krisch 2013.

\textsuperscript{1776} See for an overview on what different theories of democratization have been developed at state level: Mazo 2005.


\textsuperscript{1778} Omelicheva 2009, p. 116.

\textsuperscript{1779} Macdonald 2008, p. 33.

\textsuperscript{1780} See chapter 1, section 1.1.
actors in its development. Possibly, the NGO democratic legitimacy thesis predominantly reveals an expectation towards a move to collectively use every individual’s political power, the dynamics of which is captured by Arendt:

‘When revolutions seize the power that lies in the streets; when a populace committed to passive resistance confronts alien tanks with their bare hands; when convinced minorities contest the legitimacy of existing law and organize civil disobedience when the “pure desire for action” manifests itself in the student movement – these phenomena confirm again that no one really possesses power; it springs up between men when they act together and vanishes the moment they disperse’.1782

This study has not articulated a plea against the importance of civic engagement for a democratic system. However, as emphasized in section 6.1, it is important to take into account the possibility that the inherent dynamics of NGOs resist an ante hoc theory building of NGOs. This, together with the lack of (theorizing) institutional prerequisites that enable and guarantee actual, equal, and continuous participation by legal subjects, has weakened the NGO democratic legitimacy thesis.

At this stage, it is important to stress that the abovementioned impasse of institutional preconditions internationally does not necessarily invalidate all elements of the thesis completely. It is primarily the application of the thesis to international law that fails. Opportunities for NGOs to be of democratically legitimizing value remain relevant at the state level if states offer an institutional framework to translate NGOs’ social power into political power. NGOs rely on national political communities and their formal institutions for the materialization of their contributions to the democratic legitimacy of national law.

The international influence of NGOs can be converted into democratic control back at the democratic state level, assuming that at the domestic level there are institutional preconditions such as the accountability that periodic elections provide, and the free operation of NGOs that can guarantee actual impact on democratic deliberation.

The actions of NGOs that are internationally active can trigger a movement that might have democratic effect on a domestic level, for example when, as a result of an NGO’s

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1781 When explaining the transformative characteristics of political power in chapter 1, we discussed Arendts’ theory on human action. Action is unpredictable because it is a manifestation of freedom, of the capacity to innovate and to alter situations by engaging in them; but also, and primarily, because it takes place within the web of human relationships, within a context defined by plurality, so that no actor can control its final outcome. As Arendt puts it: ‘The reason why we are never able to foretell with certainty the outcome and end of any action is simply that action has no end’. In Arendt’s words, ‘only when action has run a certain course, and its relationship to other actions has unfolded, can its significance be made fully manifest and be embodied in a narrative, whether of poets or historians’. Arendt 1958, p. 231.

1782 Arendt 1958, p. 200. See also Habermas 1977, p. 15.

1783 The importance of civic engagement for democratic legitimacy is explained in chapter 2, section 2.1.2.

1784 As Habermas states: ‘[t]aken together, […] form a “wild” complex that resists organization as a whole’. Habermas 1996, p. 307.

1785 We agree with Kymlicka that ‘the weak transnationalism of advocacy networks is predicated on, even parasitic on, the ongoing existence of bounded political communities’, Kymlycka 2003, p. 291.


1787 Buchanan, and Powell 2008, p. 331. A parallel can be drawn with Walker’s suggestion that non-democratic constitutional values can be relevant not only within one site, but also across sites, when reconnected to a democratic source. Walker 2010, p. 230.
campaigns and provision of information, foreign policy standpoints of governments are politically better scrutinized and changed accordingly. Domestically, NGO influence can make its way ‘via the surprising election of marginal candidates or radical parties, expanded platforms of “established” parties, important court decisions, and so on’. A national political community (or communities) and its formal institutions can act as the addressees of claims made by NGOs. NGOs, including the ones that are internationally active, might improve in this respect vertical complications in the current state-consent model, as discussed in chapter 3. That would lead to, and is also limited to, a democratic legitimation of the standpoint of that specific government.

The appreciation of the contribution of NGOs that are active in international lawmaking processes is in this limited reading of the thesis understood as a complementary exercise. The practices contribute to the democratic legitimacy of domestic law and are assumed complementary in the sense that they do not stand alone. NGOs offer complementary perspectives that strengthen deliberation, complementary means of accountability, and complementary pressures on governmental structures to comply with norms such as transparency, complementary to guaranteed democratic decision-making procedures. This understanding of NGOs’ contribution is congruent with the traditionally complementary role of civil society as sketched in Part I, notwithstanding the fact that they are internationally active. Perhaps superfluously to the state, the contribution of NGOs, whether active domestically or internationally, cannot, standing alone, provide indirect democratic legitimation to international law. It can only ensure the democratic legitimacy of national executive action, of its own law and of the position of its own governmental representatives in international negotiations concerning the formation of new international rule.

Arguably, one can be cynical about the democratic changes possible in domestic democracies. It is often stated that the changes made possible through these institutional

1788 Habermas 1996, p. 381.
1789 The coming into existence of the Ottawa Landmine Convention often functions as the example of what social power can bring about. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 17, 1997, I-35597 U.N.T.S. 2056. The organization of the International Campaign to Ban Landmines and its founding coordinator, Jody Williams, were instrumental in the passage of the Ottawa Treaty, and for these efforts they jointly received the 1997 Nobel Peace Prize. The original international citizen’s initiative launched in 1997 by the International Campaign to Ban Landmines gained 855,000 signatories worldwide. The Convention gained 122 country signatures when it opened for signing on 3 December 1997 in Ottawa, Canada. Thirty-five countries however have not signed the treaty, including a majority of the permanent members of the United Nations Security Council: China, the United States and Russia. See https://treaties.un.org/pages/showDetails.aspx?objid=0800000280006d60 (last visited January 2016). Although the initiative is an inspiring example of what the bundling of social power can achieve, it will nevertheless not lead to political change, as long as these major powers will remain reluctant to change their policy.
1790 This is precisely the role that Habermas has in mind for associations that enrich global public opinion. He illustrates the functionality of such a global public sphere: ‘For the mobilizing power that an alert global opinion acquires at critical moments of world history and transmits to governments through the channels of the national public spheres can have major political impact, as is shown by the worldwide protests against the invasion of Iraq in violation of international law.’ Habermas 2008, p. 445. The complementarity of NGOs is sketched well by Anderson: ‘In a genuinely democratic society, civil society organizations are free to advocate, organize, argue, debate, and cajole. Ultimately, however, political authorities are accountable not to civil society organizations, but instead to citizens who vote in the privacy of the voting booth. The legitimacy of the democratic system depends, ultimately, upon the free and unconstrained political power of the citizen, often encapsulated in a vote.’ Anderson 2011, p. 868.
means of parliamentary democracy are too minimal to speak of ‘true’ democracy. However, one can hardly ignore the fact that at least there are ensured and equal routes to change. Maybe the fact that possible change is restricted to choosing one’s government instead of choosing the content of a decision can be criticized, but no matter how small that change might look, it is an immense sort of power that distinguishes democracy from authoritarian systems. This small, but tangible way of translating someone’s power into decisionmaking power, open for every legal subject equally, stands in sharp contrast to current international lawmakers processes.

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1791 See for a critical account on the democratic characteristics of electoral representative democracy, Van Reijbrouck 2013.

1792 Jennings, a British constitutional scholar and lawyer, has illustrated this in his, still relevant, exposition on the role of the British Parliament in a democracy: ‘In truth, what the democratic system does is to harness a man’s ambitions, if they lie in the right direction to the national dog-cart. The horse will go of his own volition because he wants to get somewhere, and perforce the cart will follow; by choosing the right horses the nation will arrive at its chosen destination. The horse chooses the destination, but the nation chooses the horse; and – it is here that a dictatorship differs – the horse can always be changed, in mid-stream if necessary’. See Jennings 1969, p. 521.
7 Moving towards a change of the terms of the debate

The previous chapter has shed light on the current limitations of the debate on the NGO democratic legitimacy thesis. It primarily focused on the consequences of the common disregard of institutional preconditions. As said, revealing such limitations does not invalidate all elements mentioned in the NGO democratic legitimacy thesis. Indeed, the studies discussed in the previous chapters provided insight into NGOs’ various strengths and weaknesses, and their multifocal activities and types of input into international lawmaking processes, ranging from offering their expertise to advocating on behalf of neglected groups of individuals and values, and facilitating social engagement. To overlook these contributions all together, due to the mismatch between international lawmaking and democratic legitimacy, would lead to an underestimation of what NGOs can offer international lawmaking. This final chapter seeks to propose new terms for addressing and interpreting the contributions of NGOs, in order to provide a more satisfying explanation for the continuous resort to NGOs by international lawmakers.

As will be argued in this chapter, the most promising route to continue the debate on the possible contributions of NGOs for international lawmaking is to leave aside the terms of democratic legitimacy and to change them for the terms of quality justification. As the term suggests, such a justification sees on the quality of law. The quality of law is understood here in a broad sense, concerning the quality of the output and the quality of the procedure of international lawmaking processes. The general assumption on which this proposition of new terms is based is that to make a qualitatively good law (notwithstanding the apparent pitfall related to defining when a law can be qualified as ‘good’, which will be discussed) lawmakers need to be sufficiently well informed. Being well informed constitutes a qualitatively justifiable lawmaking process, and therefore a qualitatively justifiable rule. Information provision is understood as the core contribution of NGOs to the justificatory act of international law. Thanks to this pragmatic escape, as we called it in chapter 6, to this alternative framework of analysis based on quality justification, both the problems of the existing scholarship concerning the lack of attention to institutional preconditions has been sidestepped, as well as the inherent problems with the application of democratic legitimacy.

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1793 See Part II; Simmons 1998, p. 83. These conclusions therefore do not affect the observation that ‘civil society is showing remarkable creativity at keeping elements of undemocratic global power on the defensive and continually raising the issues of equity, justice, human rights, sustainable development, community empowerment and health’. Krut 1997, p. 37.

1794 If we do not expand our interpretation of NGOs contributions to international legislative practices in new terms we might miss, as Kennedy states, ‘the significance of the informal and customary world’. Kennedy 2005, p. 6.

The question of what civil society can bring to the table of international lawmaker remains a point of particular attention. There are of course many other roles thinkable for NGOs, not the least important the role NGOs play in effectuating international policy. We limit ourselves, let it be clear, to NGOs involvement in international lawmaking, not taking into account the fact that NGOs carry out vital work that government and the private sector are ill-equipped and disinclined to do. So our understanding does only a partial explanation, strictly related to lawmaking.

1795 We are not the first to present the merits of this contribution of NGOs to international lawmaking in this way. The idea that the quality of NGO participation would improve if the discursive interface improves can be found at the analyses of Wapner, Spiro and Edward.

1796 Primarily in the procedural connotation of ‘goodness’ we discover a certain overlap with democratic values as discussed in Part I, and Part II.
in the context of international lawmaking. This pragmatic move will come at a price, as will be discussed later.

The argument is presented as follows. Section 7.1 first explains the standard of justification and its distinctive conceptual characteristics in relation to legitimacy. Section 7.2 discusses two perspectives on quality justification: a functionalist approach that focuses on the substantive quality of a law, and a procedural-rationalist approach that focuses on the quality of the process of making a law. In section 7.3, the focus shifts to the specific merits of NGO participation in respect of these justificatory acts of international lawmakers, and discusses three different categories of information input NGOs commonly provide: expertise, testimonial knowledge, and values. In a lawmaking context that lacks the preconditions for democratic legitimate law, these contributions might be better appraised on their substantive merits, rather than on their democratic merits. This brief exposé is followed by in section 7.4, which gives some introductory insights into the normative value of a quality justification of international law. Notwithstanding the fact that the terminology of quality justification better fits current international lawmaking practices and the lack of international institutional preconditions, from a normative point of view it has considerable limitations. The pitfalls of a justification, instead of a legitimation of international law will be discussed. Section 7.5 concludes these tentative considerations with an outline of the methodological challenges that arise by further exploring quality justification of international law by NGOs. Different themes that could feed into a research agenda are introduced.

It is important to highlight that, at this stage, our attempt to redefine the terms of the debate about NGOs’ participation remains largely exploratory. The alternative understanding offered here is based on the materials gathered in the context of studying the NGO democratic legitimacy thesis. The subsequent proposal for a better understanding is therefore limited to NGOs’ participation in international lawmaking processes, and to their contributions to these processes that have already passed in review. Consequentially, many other possible understandings, based on the different tasks that NGOs fulfill in the international legal order (for example, related to their ability to provide services to contribute to the enforcement of international rules, or their contribution to international adjudication), are not taken into account. Besides, the study on the NGO democratic legitimacy thesis made us aware of the obstructed ante hoc generalizability of NGOs’ contributions. A predictive general account of NGOs’ contribution would not be persuasive in light of the inherent dynamic characteristics of NGOs. Therefore, this exploratory proposal for understanding NGOs contributions in terms of quality justification requires, in addition to further studies on its inherent normative pitfalls, empirical confirmation of NGOs contributions during their participation in specific international lawmaking processes and afterwards.

1797 Our preliminary steps towards an alternative presentation of the value of NGOs for international lawmaking has been made by some other legal scholars. See Koskenniemi 2005b, p. 61, 92; Esty 2006, p. 1490; Kingsbury, Krisch, and Steward 2005, p. 17.
1798 See chapter 6, section 6.1.1.
7.1 From democratic legitimacy to justification

Our search for a change of the terms of the debate is confronted with the question of what we search for in non-ideal circumstances. The current limitations in democratically legitimizing international law, do not exclude other grounds to justify the existence of international law, nor the making of it.\textsuperscript{1799} Let us reiterate briefly the main characteristics of legitimacy. As explained in chapter 1, legitimacy can be approached from two different angles.\textsuperscript{1800} One is sociological, which requires an evaluation that takes place between the individual that is subject to the law and an institution that makes the law. As discussed in chapter 1, relationships of trust between a law making authority and a legal subject enable rules to be accepted, which enhances the chances of compliance of these rules. Trust is obtained, for example, when the laws secure, or strive to secure, the well being of the legal subject, but also when the authority of a specific leader is accepted, based on religious or charismatic grounds. As a consequence of the reliance on the act of accepting, a law or a lawmaking authority can be fully legitimate towards one individual and fully illegitimate towards another individual.\textsuperscript{1801} From a sociological perspective, the significance of legitimate order and authority is, as Weber famously clarified, that the most stable ordering of conduct is achieved when the ordering principles are held to be binding by the actors subject to them.\textsuperscript{1802} As discussed in chapter 1, democratic legitimacy is, notwithstanding the normative assumption that it is the most desirable ground for trust in the legislative authority, from a sociological point of view not considered an exclusive ground for accepting authority.\textsuperscript{1803}

In general, as discussed earlier in chapter 1, being illegitimate does not exclude the exercise of de facto authority, or a claim to authority. Besides, it is not per se the case that without being democratically legitimate, international lawmaking serves the well being of the ruled less duly. Although a dominating situation by the international authority to rule cannot be prevented, these acts of authority might be considered beneficial for legal subjects when valued on their own merits. Theories of alternative grounds for justifying the authority of international law can be found in the work of many international legal and political scholars. Christiano, for example, pleads for a standard to assess the fairness of a non-democratic association of democratic states.\textsuperscript{1804} In line with Christiano, Besson focuses on individual general equality across different states, at least to the extent that fairness in interstate relations reflects their demographic size and the population’s interest in the negotiation and hence contributes to protecting transnational individual equality.\textsuperscript{1805} Habermas too does not refrain from a moral connotation in his proposition of an assessment standard of international lawmaking practices, proposing that international organizations should develop a juridical framework of human rights with which states should be obliged

\textsuperscript{1799} See chapter 1.
\textsuperscript{1800} See chapter 1, section 1.1.
\textsuperscript{1801} See Simmons 1999 p. 747-750, for an explanation of this ‘attitudinal’ legitimacy and a critique.
\textsuperscript{1802} Spencer 1970, p. 124.
\textsuperscript{1803} See section 1.2.2.
\textsuperscript{1804} See Christiano 2010.
\textsuperscript{1805} Besson 2011a, p. 19. As Besson states in this respect, ‘[s]upranational political integration is also progressively calling for political equality and, hence, for more than international human rights guarantees’. Besson 2011b, p. 33.
Pettit’s conception of a justification for international authority is based on equal, effective control of states over international bodies. Pettit suggests, with some reservations however, that the only plausible path to justifiable international lawmaking is, ‘by frameworking and networking those organizations so that they are more or less forced in their decisions to honor terms of association and argument that command allegiance on all sides. If this is right, then there has to be an international discourse among states that parallels the discourse of a domestic democracy. That discourse has to give rise to a currency of considerations that are recognized as relevant considerations that any state may reasonably invoke in assessing one or another international initiative’.  

There should be a strong connection between the different international agencies and their officials to enable such an international discursive practice. Further, according to Pettit, the agencies ‘will be subject to conditions that favor acting on such considerations; they will have to justify their decisions on the basis of the considerations; and those justifications will be exposed to public, potentially effective challenges from non-states as well as states: say, from the non-governmental organizations that operate in a global context’.  

Although these scholars expound on possible justifications of international law differently, Pettit, Habermas, and Besson, like many others, underscore the value of a procedural justification of international law in which lawmakers should demonstrate that they act in line with ‘good lawmaking practices’.  

As mentioned in the introduction to this chapter, and as discussed in chapter 1, section 1.1.2, the content of the rule itself constitutes another possible justification for the authority of law. Legal subjects might be more likely to accept law when they consider the laws effective, or in line with justice considerations, or when the result of a lawmaking process is characterized by a high level of expertise. Rules could be justified as qualitatively ‘good’, or efficient. Tasioulas hints in this respect towards a related justification of the exercise of authority of international lawmakers, which is the cognitive advantages international

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1806 See for example Habermas who states: ‘The negative duties of a universalistic morality of justice – not to commit crimes against humanity and not to engage in wars of aggression – are anchored in all cultures and fortunately correspond to the legally elaborated standards in terms of which the organs of the world organization would also have to justify their decisions internally. The confidence in the normative power of judicial procedures is nourished by a “credit” of legitimation that is “extended” to the collective memory of humankind by the exemplary histories of proven democracies.’ Habermas 2008, p. 451-452.  
1809 A combination of these law-following values is often theorized as basis for the legitimacy of law. Rosanvallon specifically pleas for a reconsideration of complementing democratic representation with experts engaged in issues related to how to protect the future common good: ‘The academies would have the right to intervene and be consulted systematically on issues within their range of competence, and they would issue public opinions to which government officials would then have to respond.’ Rosanvallon 2011, p. 149-150.
lawmakers have over their subjects in determining what the latter have reason to do, which is based on ‘a time tested collective wisdom’.1810

The question arises as to what such justificatory acts based on the quality of both process and rule brings us in terms of the legitimacy of international law. We learned in chapter 1 that legitimacy, from a normative perspective, means as much as recognizing the ‘right to rule’, with the consequent obligation for legal subjects to be normatively bound by these rules. The normative account of democratic legitimacy was, contrary to the abovementioned sociological account of legitimacy, not based on proved acceptance of law by legal subjects, but on a hypothetical acceptability by the legal subjects of the authority of law. Because of its democratic legitimacy, a law ought to be accepted by its legal subjects. Although it might well be that, based on empirical studies, one can conclude that legal subjects accept international law on grounds other than democratic grounds,1811 we have reservations in concluding that international lawmakers have the ‘right to rule’, without a democratic basis.1812 At this stage we cannot take a conclusive stance in the conceptual discussion on whether or not there are other grounds why legal subjects ought to accept the exercise of authority. This is why we follow the conceptual distinction between justification and legitimacy, as proposed by Simmons.1813

The most important distinguishing factor between justification and legitimacy is that justification does not entail an evaluation that leads to a judgment of whether the relationship of a public authority to its individual subjects is acceptable.1814 Legitimacy is based on the interaction between legal subject and public authority ‘in a way that we normally suppose gives one party a moral right to expect something of another – will seem to “legitimate” its imposition and / or enforcement of duties on you’.1815 Consequently, the legitimacy of law depends on its addressee. Legitimacy implies an evaluation of public authority that, when assessed negatively by its legal subjects, gives a reason not to accept the law.1816 Legitimacy has the characteristics of a binary on/off status, as authority cannot be partially acceptable. The fact that democratic legitimacy protects legal subjects against the arbitrariness of the exercise of public authority illustrates the inadequacy of a gradual approach to democratic legitimacy: an authority cannot be perceived to be a bit more authoritarian or a bit less. Only when, as explained in chapter 2, the requirements of a basic

1811 History demonstrates that many other grounds of legitimacy are accepted. Indeed, democracy as dominant ground for legitimacy is in this respect a relatively young phenomenon. In chapter 1, we referred to Weber and his sociological account on legitimacy, based on charismatic leaders or on the legality of the authority to rule.
1812 This hesitation seems contrary to most scholarly reasoning. The scholarly tendency to assume other grounds of legitimacy is exemplified by Besson who states that ‘[i]n any case, since democracy is incremental and rarely fully realized, this account of coordination based authority does not exclude less or non-democratic forms of legitimate coordination’. Besson 2009a, p. 354, referring to Raz 2006, 1031 fn 20, 1037-1040. See also Erman and Uhlin 2010b.
1813 See Simmons 2001. Although Simmons elaborates the distinction between justification and democratic legitimacy in nation-state context, we find his basic ideas of similar relevance to our discussion here.
1816 Legitimacy as a principle, responds to the idea that legal subjects ‘are not required to do whatever the legislature says, but that they are entitled to disobey or in extremis rebel when it goes beyond its limits’. Waldron 1999a, p. 309. Waldron explains the ideas of Locke concerning the tension between limits and supremacy of legislature’s powers, which was discussed in chapter 2. However, it seems to capture very well the actual rationale of democratic legitimacy. If there was no such a room for personal consideration to comply or not to comply with law any consideration of legitimacy would be redundant.
infrastructure consisting of social and institutional preconditions for the application of democratic legitimacy are fulfilled, a gradual approach considering the ‘thickness’ of the democratic legitimacy of law is possible, leading to a richer or poorer assessment of a law’s democratic legitimacy. Some manifestation of consent remains of fundamental importance to the democratic legitimacy of law to confer rights and obligations to legal subjects.\(^{1817}\)

Justification, on the other hand, is an act that stands on its own and is not related to the acceptance, or consent of the legal subject. In a justificatory act itself, the legal subject is simply not involved. Its addressee can consider a justificatory act unconvincing or unsatisfactory, but the explanatory act itself does not depend on legal subjects to be a justification in se. The independence of a justificatory act of its addressees obviously weakens its normative attractiveness, an issue to which we will return in section 7.4.

In a democratic context, the act of justification of one specific law and the democratic legitimacy of law can coexist. However, in an international context which is lacking institutional preconditions, instead of assuming that the basis on which lawmaking is conducted is acceptable to each individual, because we are equally and actually binding ourselves through a democratic process of legislation, we need to figure out on what basis international law can be justified, while acknowledging that some people are given a privileged position in the exercise of lawmaking authority to decide what is best for other subjects. A positive evaluation of a justification of international law might lead to the conclusion that international law merits our support, but such a conclusion does not allow us to infer the claim that international law, on that ground, has ‘the right to direct us and coerce us, which we are bound to honor’, \(^{1818}\) as is the case when a law is considered democratically legitimate.\(^{1819}\) When international lawmaking is justified, understood in the way Simmons has defined justification, it means ‘on balance a good thing’, which is inconclusive regarding the question of whether international law is normatively acceptable, or whether international lawmakers have the right to rule.\(^{1820}\) Nevertheless, a justification implies that the exercise of authority gives ‘us moral reasons to refrain from undermining it and will typically give us moral reason to positively support that state [read: lawmaking institution]’.\(^{1821}\)

A conception of justification involves an ad hoc explanation of a law or lawmaking process, and therefore only offers a specific account for a specific exercise of authority. A focus on ad hoc justificatory acts seems to fit international rules, for they make demands upon individuals for compliance without violent enforcement mechanisms, and sometimes without the clear consent by the its legal subjects.\(^{1822}\) Although not democratically

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1817 Our emphasis on some moment of consent-giving is in line with Lockean thinking. For the Lockean, the justice or goodness - the justifiability of the exercise of public authority gives us a moral reason not to undermine it, and perhaps to positively support it. But we only have an obligation to obey directives, and public authority only has an exclusive moral right to direct and coerce us, if either (a) we have directly interacted with public authority in some way that grounds a special moral relationship of that sort, or if (b) accepting membership in a state is the only way we can fulfil one of our other moral obligations or duties. See Simmons 2001, p. 154-155.

1818 Simmons 2001, p. 156.

1819 The standard of justification cannot tell us anything conclusive as to whether the specific authority has the right to rule, because it ’is not obvious that the mere unsolicited provision of benefits (and good treatment) would ground a right to direct and coerce’. Simmons 2001, p. 139.

1820 Important to note here is that this type of justification is often also understood, for example by Besson, Buchanan and Christiano, as being a part of a standard of legitimacy as well.

1821 Simmons 2001, p. 137.

1822 See for complications of state consent, chapter 3, section 3.4.
legitimized, international law, the process, and its makers may be justified by reference to the ‘good’ they do. Justification is understood as an evaluation standard ‘justifying an act, a strategy, a practice, an arrangement, or an institution [that] involves showing it to be prudentially rational, morally acceptable, or both (depending on the kind of justification at issue)’.1823 Just as in our day-to-day use of the term, justification has the connotation of being a defensive concept. With justifying a certain act, result, practice, or institution, we defend our choices based on the presumption that someone can raise some type of objection. In the context of international lawmaking processes, this perspective might be relevant because, as demonstrated in chapter 3, international lawmakers are consistently the subjects of criticism, not in the least because they work on the strong presumption of the non-democraticness of their ruling.1824

By distinguishing legitimacy from justification, a conceptual distance is created between the fundamental, and yet unresolved, issue of legitimacy of the exercise of international authority, including the underlying theoretical quest of whether the lack of democratic legitimacy affects the authority of international law, and the issue of justification of the present exercise of the de facto exercise of international lawmaking authority.1825

7.2 A justification based on substantial quality and procedural quality

In outlining current scholarly criticism on the democratic deficits of international law,1826 it was recognized that international lawmaking practices exceed the traditional image of international organizations as simple tools in the service of their principals: the states.1827 International lawmakers allegedly function as autonomous actors exercising public authority in a broader governance process. Notwithstanding the democratic legitimacy concerns regarding the types of lawmaking processes and the diversity of processes, actors, and locations, international lawmaking can still be assumed to be at least an instrument that attempts to manage common transboundary problems.1828 The issues that require international cooperation are political, and they refer to questions of justice and the common good. They involve questions about property, economy, what aid we owe to one another personally and collectively: the basic terms of social and economic coexistence. International lawmakers, in all their diversity, play a decisive role in not only making proposals for legally solving common problems, but also in defining the problems that need

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1823 Simmons 2001, p. 123.
1824 Against this background, they need to justify the policy or actions, as Simmons states, ‘by showing them to be true or valid, to defeat the objections of the skeptic or nihilist; we justify coercion against a background general presumption in favor of liberty; we justify our actions in legal settings against concerns about apparent or prima facie illegality; and so on’. Simmons 2001, p. 124.
1825 Reflecting on a justification of international law cannot give us normative guidance to what extent it ought to lead to more acceptability of international law. When the standard of justification is applied one is not engaged in the normative discussion whether, based on the justification, an authority has the right to rule, and the legal subjects should accept the lawmakers authority. As Simmons states a strict Lockean perception on the difference between justification and legitimacy is that ‘the mere justifiability of an arrangement need not give us any moral reason at all to support that arrangement’. Simmons 2001, p. 138.
1826 Chapter 3, section 3.4.
1827 See Venzke 2008.
to be solved internationally.\textsuperscript{1829} Reasonably, the identification of problems and formulation of answers to these problems should be justified.\textsuperscript{1830}

7.2.1 A functionalist approach
Quality, in terms of a law’s ability to provide the right answer to an existing problem, could be understood in pragmatic terms. Workable solutions, in this respect, prevail over theoretical concerns, taking a functionalist approach to international law. Law is accordingly seen as the instrument with which the purpose, derived from a policy choice, should be reached as effectively and efficiently as possible. The well-known comparison between sausages and law (‘it’s better not to see them made’)\textsuperscript{1831} leads in general to an emphasis on the evaluation of the quality of the outcome of a lawmaking procedure.

Such a functionalist approach to legislation cannot be separated from an instrumental view on law, in which law in general is considered as a managerial tool. Law is supposed to serve a specific aim or to help realize a particular policy, whether that is the aim of giving effect to our responsibility to mankind or, less stiltedly, of resolving a practical issue that troubles its legal subjects. In the relationship between law and policy, policy in this understanding is prioritized: legislation is the vehicle by which a certain policy is implemented. The content of the law is in this respect considered to be ultimately a matter of policy, a choice of how to organize society and the values that are associated with it. What law should deliver depends on specific policy aims. In the evaluation of legislative projects and programs, functionality and efficiency are often some of the first requirements mentioned. A (proposed) action is allegedly efficient when the corresponding effort actually contributes to the realization of the purpose and when the costs of the proposed action are in proportion to the revenues. There is evidently no clear-cut guide on how this standard of judgment is to be used. As expected, and emphasized by Bittner, there is a crucial gap between the generalized conception of ‘efficiency’ and any actual criteria that are precise enough to be usable in particular situations to judge the quality of law on its efficiency.\textsuperscript{1832}

The search for efficient law to achieve a particular goal, reminds us of the bureaucratization theory of Weber. The primary justification of bureaucracies is their efficiency.\textsuperscript{1833} Bureaucratization, in Weber’s view, means a move from the particularism of traditional justice to systematized, rational, and calculable lawmaking.\textsuperscript{1834} Characteristic of bureaucracies is the tendency of bureaucratic authority to lean heavily on its technical superiority. Its expert knowledge and specific information enables a bureaucracy to be ‘more precise, unambiguous, flexible, smoothly operating, and cost-efficient than other forms’.\textsuperscript{1835} Bureaucratization processes are dependent on administration by formally independent

\textsuperscript{1829} See Haas 1990. In this way, international lawmakers all take part in the construction of social reality. See Kennedy 2005; Allott 2002.
\textsuperscript{1829} See Waldron 2012.
\textsuperscript{1830} See Waldron 2012.
\textsuperscript{1831} Marleen Wessel drew our attention to this statement.
\textsuperscript{1832} MacIntyre 2011, p. 76.
\textsuperscript{1833} See for further reading on conceptions of efficiency, and efficiency as a political norm, Postema 2011, p. 181-206.
\textsuperscript{1834} More than a common striving for the good ethical life, bureaucratization strives for control, ‘understood as a territorially delimited and compulsory system of continuously administered power’. Weber 1970 p. 77.
\textsuperscript{1835} Weber 1970, p. 214.
groups such as the clergy, jurists, and court nobility. Interest representation instead of society representation takes a central position.

The diffuse constellations in which international lawmaking by international organizations occurs, could be similarly characterized by attempts to develop in functional terms effective answers to international problems. Venzke states for example that international lawmaking processes could be interpreted to endorse calculating, rationalized forms of organization. The expertise to formulate a ‘good response’ to an international problem is considered a strong ground for justifying the making of international rules. In their strategy to justify their legal proposals, international organizations strongly rely on sources of knowledge.

The way quality is determined varies per lawmaking arena, per function, and per role. Whether or not a law meets quality requirements, ranging from efficiency, effectiveness, enforceability, functionality, or justice, can in practice sometimes only be determined many years later. Besides, any fixed determination of what a qualitatively good law is, conceals the inherent tensions regarding different ideals and values that are enshrined in legislation. Although it sometimes seems that in retrospect or from a distance one is able to distinguish the ideals or sources of expertise that led a lawmaker to opt for specific rules to serve a specific society, formulating ideals and values when you are part of that society is one of the most difficult and constant struggles with which lawmakers have to deal. The problem is an everlasting one of reaching the level of abstraction when you are ‘inside’ or part of a society. As MacIntyre states, ‘[t]here is no rational way of deciding which type of claim is to be given priority or how one is to be weighed against the other.’ This ‘moral incommensurability’, as MacIntyre calls it, is only magnified in global contexts. Therefore, substantive quality arguments related to the content of a law cannot always provide strong arguments for the justification of law.

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1837 Weber 1968, Economy and Society, p. 753-760. The influence of bureaucratic organization on lawmaking was, according to Weber, ‘[t]he disappearance of the old natural law conceptions’. Thence bureaucracy has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its imminent qualities. In the great majority of its most important provisions, it has been unmasked all too visibly, indeed, as the technical means of a compromise between conflicting interests’. Weber 1968, p. 875.
1839 The bureaucratic character of international organizations is recently explained by, a.o. Venzke, Koskeniemi and also MacIntyre. As MacIntyre states: ‘For in our culture we know of no organized movement towards power which is not bureaucratic and managerial in mode and we know of no justifications for authority which are not Weberian in form.’ MacIntyre 2011, p. 128.
1840 For example, De Wet has argued that the ILO’s promotion of the developed labor standards was grounded ‘on the assumption that increased awareness, knowledge and expertise are the critical pathways for changing government policies and behaviors’. De Wet 2010.
1842 Pound has well illustrated this struggle: ‘[a]n idealized community of the rural agricultural America of our formative era, in which neighborhood and individual were economically self-sufficient, was near enough to the facts and accorded with the received ethical and economic views of the public. Today no such clear and definite picture of American Society is possible. That the received ideal must be replaced by one nearer to the facts is evident and admitted. That redrawing of the whole picture of the ideal community is called for is conceded. But we have not as yet been able to redraw it. We are not satisfied with the received nineteenth century measure of values. A new measure for this time has not yet been formulated.’ Pound 1939, p. 17-18.
1843 MacIntyre 2011, p. 85.
1844 Veerman 2004, p. 15.
7.2.2 A procedural-rational approach

Consequently, quality, in terms of a law’s ability to provide the right answer to an existing problem, is in our tentative approach primarily interpreted in a procedural-rational sense. In contrast with a functionalist approach as described above, a procedural-rational approach to justification of law refrains from formulating content-dependent values that assess the quality of the outcome. It does not formulate any substantive requirements on the product of lawmaking. Instead, it places requirements on the lawmaking process itself. It assumes a relationship between the quality of the law and the rationality of the lawmaking process.

In a procedural-rational approach to the quality of lawmaking, law is assumed to be the expression of a balancing of interests of a multiplicity of viewpoints. Opening up a lawmaking process to more and diverse sources of knowledge is considered fundamental for the quality of a lawmaking process and consequently for the quality of law. In this respect, a quality justification of the legislative process resembles common justification patterns of governance we know as technocracy, epistemology, and meritocracy. When more information is available about the context in which the law should be applied, interests can be determined and weighed more profoundly. In other words, the lawmaking process can be justified by the well informedness of its makers.

Well informed lawmaking is based upon a clear appreciation and understanding of the facts, implications, and future consequences of an action. If the legislature decides to deal with a problem through specific rules, it expresses its confidence that it has sufficient information to solve a social problem by law. Therefore, a pragmatist case for respecting diversity and for inclusive epistemic practices is based on a consequentialist focus on problem-solving by law to maintain a well-ordered and secure society. It is obvious that a perfectly rational procedure does not exist. The determination of the rationality of the procedure is therefore a matter of degree. Whether a procedure can be determined as rational is an empirical question that does not need to be addressed here.

Lawmakers commonly rely not just on information from the inside but from the outside as well, either by outsourcing an initiative, ordering a hearing, or requesting some specific information to be evaluated. Procedural practices that are considered to facilitate a procedural-rational law by legislatures are: openness to the views of affected persons and groups, a focus on factual information subjected to expert and critical scrutiny, and public deliberation through which the benefits and disadvantages of a specific legislative proposal are thoroughly discussed. A procedural account of quality justification leans heavily on deliberative practices. Deliberation is well equipped to address some of the qualitative problems of international lawmaking. Deliberation as such expressly refers to a substantive ground of justification rather than a democratic one.

1845 Flores 2005, p. 9; See chapter 2, section 2.2.1.
1846 As Pedraza-Farina states, ‘Rather than focus on defining the common good, or finding areas of agreement, the key functions of deliberation should be to expose participants to multiple perspectives often not reducible to a single common good.’ Pedraza-Farina, 2013, p. 636. Farina here summarizes one element of critique of feminist, minority and third world critics on Habermasian Critical Theory that aims at finding consensus through deliberation about the common good. See work of Fraser, Young and Mansbridge.
1847 The resemblance with an epistemic interpretation is closest, in the sense that decision-making processes are valued at least in part for their knowledge-producing potential and defended in relation to this. Cohen 1986, p. 26-28
1848 Higgot and Erman 2010, p. 449.
A strong informational dimension sounds familiar; the resemblance of rational-procedural quality justification to deliberative democratic legitimacy theory is evident. In deliberative democratic theory, however, contrary to justification as presented here, the principle of equal concern is understood to require that lawmakers enable an opportunity for participation in the deliberation for all, that laws pay heed to the interests of each ordinary person and to the impact of public measures of law and policy on the life of each ordinary person as that life is actually lived or experienced.

Although a quality justification might include characteristics of democratic legitimacy, such as a demonstration of transparency, openness, and responsiveness to a multiplicity of values, expertise, and experiences, the difference between a democratic legitimization and a justification is that in the latter account the input offered by epistemic agents does not intrinsically aim at protecting these democratic characteristics. While democratic lawmaking is based on public reasoning and political equality, qualitatively justified lawmaking is only concerned with the first feature: public reasoning. Inclusive public deliberation in this respect is considered valuable not for the ideal of political equality or freedom from domination, but for its epistemic contribution. It values epistemic diversity because of the fact that the expression of dissent can lead to an evaluation and transformation of qualitatively ‘bad’ laws. A quality justification based on the process of lawmaking has as its primary aim to reach a certain level of rationality to formulate what is ‘good’ for society based on a certain calculation, instead of why the individuals of society think something is good for them. It is not about aiming for a reflection of all individual equal interests. It is about reflecting the range of individual preferences as diversely as possible. The rational-procedural approach does not strive for impartiality of the content of the input and does not rule out self-interest. In addition, a quality justification by lawmakers focuses on the demonstration of taking into account and weighing different factors and perspectives, without the democratic burden of showing consensus. It does not share the objective of democratic deliberation that the participants in a rational debate should be willing to be convinced by others and leave their own standpoint behind in order to reach consensus. The exercisers of de facto authority take up the burden of reaching consensus on the correct answer, whether these are states, of civil servants of international organizations.

A procedural-rational approach to lawmaking is considered important for the justification of international law. As Charnovitz argues, ‘authoritative decision makers need a constant infusion of competitive ideas and values in order to make complex decisions in

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1849 See Waldron 2012.
1850 Peter 2005, p. 126.
1851 As Pound argued, ‘In each case the social interest in general security requires that it be guided and regulated by reason; that it conforms to principles and standards formulated dispassionately in advance of controversy upon weighing of all the interests to be affected, in insisting on the supremacy of law. (...) law is not bound of necessity to stand always against the popular will in the interest of the abstract individual. Rather its true position is one of standing for ultimate and more important social interests as against the more immediately pressing but less weighty interests of the moment by which mere will unrestrained reason is too likely to be swayed.’ Pound 1921, p. 80-81.
1852 Probably Pauwelyn, Wessel and Wouters will contest this, as it might be possible to categorize the proposed quality justification under the in their view developing ‘thick consensus’ practices, consisting of an emerging code of good practice for the development of standards, characterized by more inclusiveness, more transparency, and better predictability, or new forms of cooperation outside international law, which they consider ‘normatively thicker’. Pauwelyn, Wessel and Wouters 2012, p. 17.

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the best interest of the global community'. Diversity may result from differences in scientific approaches, different types of expertise, different institutional affiliations, or contrasting opinions on the fundamental assumptions underlying the issue. The multi-pluriformity and multi-perspectivism of the body of input should be up for evaluation regarding the extent to which the views taken into account were multi-disciplinary, multi-sectoral, minority and non-conformist, to majority and conformist.

The advantage of such an approach to quality, compared to a functionalist approach based on the substance of the law, is its sensitivity towards the plurality of social norm systems. The information itself does not have to be rational; nor the agent, nor the outcome; only the procedure in which the information is gathered. The process of inquiry – not its outcome – is the source of epistemic value. An investigation into a diversity of sources of information, allegedly necessary to prepare rationally ‘good’ laws, is based on the presumption that the observer can confront a fact face-to-face without any theoretical interpretation interposing itself. This internalization of multiple values and views on morality, on a just society, and scientific views in a lawmaking process is far from a mechanical exercise. In a justificatory act the lawmakers have to demonstrate that enough room is offered for multiple perspectives, and for a multiple set of sources such as expertise, values, and testimonial knowledge by a multiple set of actors. Further, they have to show that their information sources are well scrutinized and well-balanced. In addition, lawmakers need to justify the sources they have taken into account, based on what they have formulated their legislative proposal, in order to be able to justify the quality of the relevant law.

A rational-procedural approach to quality defends a set of practices in which agents critically engage with each other under conditions of transparency and reciprocity as the root of an account of the knowledge-producing potential of deliberation, with the aim of arriving at sustained critical interaction. A quality justification requires an evaluation-oriented approach to ensure the correct use of scientific methodology and the degree to which it is influential in the legal process and its final product. In practice, this means that the legislature must keep its eyes open to societal needs and wishes and be a good listener.

7.3 New terms to understand NGOs’ contributions to international lawmaking

With the proposed understanding of quality justification, we seek to offer a more suitable tool for coming to grips with NGOs’ prominent role in substantiating the knowledge base of international legislative procedures. A quality justification evidently fits NGOs’ earlier discussed contributions to deliberation because of their knowledge. Besides, a substantive approach regarding NGOs’ merits does not contradict their dynamic and

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1853 Charnovitz 2005, p. 39. Charnovitz quotes Tocqueville, “A government, by itself, is equally incapable of refreshing the circulation of feelings and ideas among a great people, as it is of controlling every industrial undertaking.’ De Tocqueville, Democracy in America (Vol. 2, Part II, Chapter 5).
1854 This possibility is strongly refuted in MacIntyre 2011, chapter 7. Our argument builds on his account of facts, explanations and expertise.
1855 Peter 2009, p. 128.
1858 See chapter 5, section 5.1.2.
prismatic characteristics.\textsuperscript{1859} In addition, understanding NGOs in terms of quality justification suits also the characteristics of international lawmaking: the existing multipolarity in lawmaking instruments, institutions, and actors in international legal order,\textsuperscript{1860} and the conditionality that characterizes NGOs’ legal frameworks.\textsuperscript{1861} Moreover, although all in a slightly different way, the legal frameworks for NGO participation in general, and the accreditation procedures specifically, typically follow rather rationalist conceptions of the benefits of NGOs’ actions: providing knowledge and the capability to contribute to the body of instrumental or problem-solving knowledge.\textsuperscript{1862} Paragraph 20 of ECOSOC Resolution 1996/31 states, for example, that NGOs are invited to provide expert information or advice, or to represent important elements of public opinion. A causal relation between more information and better laws is assumed.\textsuperscript{1863}

The incentive for international organizations to include NGOs based on a quality justification are probably comparable to the ones discovered when studying the debate on the NGO democratic legitimacy thesis, boiling down to the increasing critique of the lack of legitimacy through established procedures that are usually primarily based on participation by member states.\textsuperscript{1864} Criticized for being biased towards powerful actors, international organizations have attempted to organize lawmaking in ways that include the voices of weaker actors by improving participative practices, increasing transparency, deliberation, and including local actors.\textsuperscript{1865} From a strategic point of view, Olsen explains this tendency as follows: ‘Typically, an institution under serious attack reexamines its pact with society; its rationale, identity, and foundations; and its ethos, codes of behavior, and primary allegiances and loyalties.’\textsuperscript{1866} These reforms to include more voices and a diverse range of actors are assumed to contribute to a justification of their international legislative efforts.\textsuperscript{1867} An NGO is considered to fill the gap, as they have ‘a real and legitimate role in the education of political society on issues in which it has expertise’.\textsuperscript{1868} Ad hoc arrangements are set up according to the nature and urgency of the state of knowledge of the issue to be addressed. Given the ever-increasing numbers of NGOs at the gates of international legislative conferences, NGOs are clearly pleased to provide their expertise to international organizations.

A quality justification of international law seems to fit current characteristics of NGO participation in international lawmaking. As we have emphasized in chapter 6, the discretion of power holders concerning NGOs’ influence limits us to \textit{ex post} and \textit{ad hoc} evaluations of contributions and political opportunity structures. Although the latter observation did not rhyme easily with the need for guaranteed possibilities of democratic political power, it does not stand in the way of the evaluation of whether NGOs have contributed to the quality of the norm or the quality of the procedure. Equally, the inherently dynamic process of justifying the quality of both norms and processes, given the changing demands of

\textsuperscript{1859} See chapter 6, section 6.1.1.
\textsuperscript{1860} See chapter 3, section 3.3.
\textsuperscript{1861} See chapter 4, section 4.5.
\textsuperscript{1862} See chapter 4, section 4.3.
\textsuperscript{1863} In section 7.4, we come back to the complications of this assumption.
\textsuperscript{1864} See chapter 3, section 3.4, and chapter 5.
\textsuperscript{1865} Barnett, and Finnemore 2004, p. 171.
\textsuperscript{1866} Olsen 2005, p. 17, referring to Merton 1973, p. 267-278.
\textsuperscript{1867} Barnett and Finnemore 2004, p. 171.
\textsuperscript{1868} Slim 2002, referring to Whaites 2002.
information and value judgments concerning information, better fits the dynamic manifestation of NGOs, as there are no pre-determined characteristics of NGOs required for a quality justification based on their input.

The social initiative of NGOs to formulate norms and bring in knowledge to international forums is rewarded with their inclusion in a rationalized system. NGOs become in this respect service providers. Their service consists of bringing to the table relevant information that is needed for international lawmakers to prepare new regulations. What has often distinguished NGOs from other partners consulted by states and international organizations is that they are, generally speaking, committed to a public cause. NGOs often engage both their supporters and their constituency on the basis of values or some shared interest or concern, and often have a public benefit purpose. According to the studies of the scholars that presented the NGO democratic legitimacy thesis, a large number of the NGOs accredited by international organizations claim to aim at finding common, shared solutions, or compromises perhaps, to transnational problems by actively offering a strong knowledge base of values, scientific expertise, and testimonial knowledge. The acceptance of the involvement of NGOs by international organizations based on NGOs’ expertise can be understood as an affirmation of the assumed risk that was mentioned by critics of the NGO democratic legitimacy thesis in chapter 5, of NGOs becoming the ‘fourth arm’ of government.

As was shown by the historical observations made in chapter 4, NGOs often have attempted to shape the content of the agendas of states and international organizations by forming alliances that advocate the adoption of a new rule or standard. NGOs exert pressure on institutional actors to incorporate standards in many other international legal fields, such as refugee law, environmental law, and human rights law, which are issues often neglected by states. One of the instruments NGOs have at their disposal to achieve their goals is the formulation of proposals about what a law should look like. As discussed in chapter 5, the input of NGOs was argued to enhance the knowledge base of international lawmaking ranges from values, testimonials, scientific expertise, and contestatory opinions to interest representation. Let us briefly look into these three quite different types of input: scientific expertise, testimonial knowledge and values.

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1869 NGOs become part of the ‘staff’ in a Weberian bureaucratic way, in order to make international lawmaking more rational. Farinha categorizes this way of theorizing civil society the New Governance, state – society synergy theories. Pedraza-Farinha 2013, p.637-641.

1870 Take for example the WHO’s accreditation requirements that provide that NGOs must be free from “concerns which are primarily of a commercial or profit-making nature” screens out a number NGOs whose nonhealth interests might lead to a lack of mission alignment with the WHO. WHO Principles Governing Relations with NGOs.


1872 Kleinlein 2011a, p. 47. Kleinlein equally argues that the ‘global constitutional community’ of which NGOs are part, ‘provides legitimacy through common values, but it is not a source of democratic input’. Referring to Von Bogdandy 2006, p. 714.

1873 See chapter 5.

1874 Joachim 2003, p. 247-274. The example of the UN Fourth Conference on Women shows, that, although they had restricted ways of securing their impact, NGOs did seize the opportunities to change the law. See chapter 4, section 4.2.

1875 NGOs contribution to the knowledge base of international lawmakers was one of the three alleged contributions of NGOs to democratic legitimacy as discussed in chapter 5, section 5.1.2. NGOs contributions to representativity, as discussed in 5.1.1. are understood devoid of democratic connotation and is included in
First, it can be derived from the presentation of NGOs’ contributions in earlier chapters that NGOs could contribute to a quality justification by international lawmakers on the basis of the expertise they bring into the lawmaking process. The complexity of world affairs underlines the dependence of international organizations on often-external sources of expertise in their attempts to manage them. One of the explicitly mentioned expectations of international organizations is that NGOs can offer a contribution to the required expertise by finding proper legal answers to these problems. In chapter 5, section 5.2, the contribution of NGOs to deliberative practices was discussed. NGOs are often part of, or arguably are independently forming, an epistemic community, defined by Haas as ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’. NGOs generally seek to acquire information and gather the resources and the will to contest doubtful claims and to promote alternative options. NGOs have recognized that scientific knowledge is potentially one of their strongest advantages and best instruments for gaining influence to achieve their goals.

The involvement of NGOs in the environmental legal regime offers a good example. On issues as divergent as whaling, oil spills, ocean dumping of chemical or radioactive waste, the safety of nuclear power, river valley development, or climate change, disputes among environmentalists, industry and, frequently, states have centered on dissimilar appraisals of the probability and magnitude of adverse environmental effects. In such exchanges, NGOs have been considered useful for opening up the debate either by questioning prevailing expert opinion or by expanding the available information base with relevant bodies of local knowledge. As scientific fact-finding is not objective and scientific experts always end up producing diverging accounts, NGO could function as platforms where diverging scientific reports are discussed and debated. Standing outside the peripheries of official, usually state-sponsored, knowledge production, NGOs could be particularly well-situated to observe the limitations of dominant expert framings, to question unexplained assumptions, to expose tacit value choices, and to offer alternative interpretations of ambiguous data. As mentioned earlier as an obstruction to the NGO democratic legitimacy thesis, NGOs often present only one specific interest, and consequently gather their knowledge by focusing on a specific theme, resulting in sector-specific expertise.

Second, besides technical expertise, NGOs might also offer testimonial knowledge, if indeed, as often presented in relation to the NGO democratic legitimacy thesis, NGOs are able to translate populations’ personal experience into policy language. Including these stories of victims in order to get better informed might be effective as might help framing issues in terms of right and wrong, and in attributing responsibility. Chapter 5, section 5.1.1 made us familiar with the bridging function of NGOs and local communities. However, in the interpretation of NGOs as knowledge providers for a well-informed lawmaking process, it is not about representing these local communities, but about NGOs informing the lawmaking process about the characteristics, contexts, and needs of local communities.

context of NGOs contribution to the knowledge base. We focus primarily on the regulated involvement of NGOs and consequently leave aside manifestations concerning NGOs as facilitators of social engagement, which was discussed in section 5.1.3.

1876 Haas 1992, p. 3.
1879 Jasanoff 1997, 582.
NGOs are in this respect invited to share with international lawmakers their knowledge about local problems, usages, and systems derived from their relationships with local populations. This information could be important for a justification of the quality of international law as appropriate legislation that affects the peoples of these areas.

Third, the earlier-mentioned desire to express and push for certain values internationally fuels the motivation for a specific group of ‘advocacy’ NGOs to be involved in international lawmaking. These NGOs often claim to express a certain moral rightness, and advocate in this respect a perception of what is just. This function reminds us of the work of Spinoza and Fuller that was cited in chapter 1, section 1.1.2, when the distinction and relationship was clarified between legitimacy and content. In chapter 2, we familiarized ourselves with the work of theorists who have traced relationships between knowledge based on values and NGOs to the role of civil society for the democratic legitimacy of law at the nation-state level.\footnote{This has been the object of huge criticism and probably does not survive the critique of hegemony.} In line with this typically Western ideal type of civil society, NGOs also at the international level appear to be engaged in thinking about a desirable organization of international society. A considerable number of NGOs find it their essentialist responsibility to contribute to justice, global ethics, and norm-regulated action at the international level. NGOs can be considered in this respect as certain ‘moral agents’.\footnote{See for an exploration of ‘what it means to treat NGOs as a moral agent’, Obrecht 2011.}

Moral values can be context-specific and related to one legal regime, for example in the World Trade Organization to ‘fair trade’, or in the World Health Organization to ‘healthcare accessible for everyone’. NGOs often point to the duties and obligations the international society has, whether they refer to marginalized groups, the ozone layer, or endangered species, to name just few. But NGOs’ moral claims can also be of a general character, related to peace, freedom, democracy, prosperity, and equality. It is important to note here the ability of NGOs to express values that are contrary to the views of governmental actors.\footnote{According to Whaites, this is primarily the contribution NGOs, being part of civil society, can make. ‘The special contribution of civil society has often been the art of critique or the negative campaign rather than the promotion of a real vision for change. Landmines, debt, slavery… civil society, particularly in the rich world, usually knows more clearly what it wishes to abolish than to build’. Slim 2002, referring to Whaites 2002.}

Some values advanced by these NGOs, are similar to the values that are constituent of democratic legitimacy theory. Advocacy NGOs might promote values such as accountability, transparency, inclusion, and equality. Moreover, the principle of democracy itself is a value that might be advocated by NGOs. The lack of a democratic constellation does not obstruct NGOs from pursuing values related to the rule of law, justice, or democracy in other ways, by proposing new norms.\footnote{As Bohman has explained, ‘[D]omination is possible without the total absence of justice, in mixed circumstances in which institutions may provide for some, but not all, conditions instrumental to justice’. Bohman 2005, p. 105.}

Here again, the divergence of the understanding of NGOs in relation to quality justification and democratic legitimacy theory becomes clear. NGOs might promote the value of accountability, but cannot force international lawmakers to resign. NGOs might promote the value of transparency, but cannot impose it independently on international lawmakers. NGOs might promote the value of inclusion, but cannot enforce participation in international lawmaking. Nevertheless, these democracy-related values can be part of the input of NGOs in international lawmaking processes and might warrant a justificatory exercise by international lawmakers.
The proposed tool for reassessing NGOs’ involvement in international law leaves intact some merits of deliberation: public debate and public expression provide a rational basis for law and political authority. The procedure should have the capacity to be justification generating. A well-informed lawmaking process leading to ‘decisions which are the due result of those [institutional] processes must, by that fact alone, have a moral claim to acceptance’. On a case-by-case basis one might argue, and the lawmaker might justify, that the outcome of the lawmaking process is arrived at by taking into account a wide variety of sources, perspectives, and standpoints, which together provide enough information to reasonably conclude the adopted texts. The appeal of a quality justification is to a type of consideration that presupposes the existence of impersonal criteria – the existence, independently of the preferences or attitudes of speaker and hearer, of ‘standards of justice or generosity or duty’. In the words of Koskenniemi, ‘the agreement that some norms simply must be superior to other norms is not reflected in any consensus in regard to who should have the final say on this’.

Whether or not the lawmaking process or its result can be qualitatively justified by reference to the contribution of NGOs will become clear in the external accountability of lawmakers with regard to the legal process and outcome. As discussed in section 7.1, international lawmakers do not have to prove the equal consideration of voices of all who are affected, as this is directed to the action of NGOs in terms of knowledge provision. Nevertheless, a quality justification will invite lawmakers to account for the selection of consultants, their interests, the scientific evidence the input is built upon, the organizational intelligence of the consultants, and their conceptions of the public interest.

7.4 Limitations of quality justification: a ‘second best’ evaluation tool

While exploring the opportunities to change the terms of the debate from legitimacy to justification, we need to acknowledge that this shift does not come without problems. A presentation of NGOs’ participation in terms of the quality justification of international law is primarily a pragmatic turn. Our understanding is based on a descriptive presentation that remains closest to current legal texts on accreditation mechanisms and current lawmaking practices. This move to quality justification confirms the status quo of international lawmaking, not out of ideology, but based on an attempt to remain closest to what we understand is happening. There are objections to be made with regard to the normative power of such a move.

As indicated in section 7.1, we cannot derive an ‘ought’ theory from this ‘is’ analysis for at least two reasons. The first reason is methodological: This proposal depends on assumptions that should be substantiated by empirical studies on how a justification of international law and the contribution of NGOs to it works out in practice, which have not yet been carried out. The second reason is normative: this proposal provides a reading of NGOs involved in international lawmaking mainly based on functional considerations. No

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1885 Hart jr. and Sacks 1958, p. 166.
1886 Macintyre 2011, p. 11.
1888 De Beus has stated the importance of account giving in European Context. De Beus 2001, p. 302.
1889 See subsequent section 7.5.
normative account or proposal of how to legitimate international lawmaking authority is offered.\textsuperscript{1890}

This section focuses on some of the related normative challenges that a resort to quality justification brings along. There is a risk that quality justification gives leeway to a managerial, technocratic conception of lawmaking. What we arguably need most is a normative narrative that might prevent us from giving in to such a bureaucratic reading of the international legal order.\textsuperscript{1891} The interpretation of NGOs’ participation in terms of quality justification will not remedy, instead, it might arguably aggravate the fact that international law is made in a context in which there are ‘only the most marginal opportunities for engaged political contestation’.\textsuperscript{1892} A resort to quality justification cannot alter any current imbalance in the representation of interests in international lawmaking.\textsuperscript{1893} In this respect, a resort to quality justification of international law is relatively unambitious. As mentioned above, quality justification does not enter the field of acceptability of the authority to rule in general, it only refers to the way de facto authority has been exercised and accounted for.\textsuperscript{1894} No normatively satisfactory answer is formulated to the question of whether a justification of international law, based on the quality of the process or the quality of the norm, can be a ground for the acceptability of international lawmakers’ authority.\textsuperscript{1895}

From a normative perspective there is a clear hierarchy between a quality justification and legitimacy: a quality justification of international law is only considered to be a plausible evaluation tool on the assumption that the international legal order cannot, independently from states, preserve people’s freedom.\textsuperscript{1896} Estlund clearly explains why acceptability is not implied with mere justification based on the quality of the norm:

\textsuperscript{1890} Although international law might be successfully justified on the basis of its quality, this type of non-tyranny, as Bohman calls it, is ‘insufficient to establish the potential reflexivity about normative powers necessary for rectifying injustice’. Bohman 2005, p. 106.

\textsuperscript{1891} As Keane explains, ‘Weber is in principle opposed to Beamtenherrschaft, the dominating rule of senior civil servants without a calling, precisely because their authority, in his view must (and can only) be limited to the conscientious execution of the orders of political leadership. The expertise of technically trained officials has no rightful place in politician’s ultimate decisions about political goals and strategies. For the same reasons, a ‘leaderless democracy’ – the rule of civil servants supplemented with the rule of professional politicians without either a calling or charismatic qualities – is equally to be despised’. Keane 1984, p. 56.

\textsuperscript{1892} Kennedy 2005, p. 2.

\textsuperscript{1893} As Olsen points out: ‘Because administrative theory and practice are closely linked to the history and culture of specific states and regions, and as long as definitions of “good administration” and “good government” hinge on specific definitions of ends, purposes, and values, there can be no truly universal generalizations about public administration without a profound knowledge about the varying political, social, cultural, and economic characteristics that impinge on the administration.’ Olsen 2005, p. 18.

\textsuperscript{1894} Spencer 1970, p. 126.

\textsuperscript{1895} No adequate answer is formulated either, to the question if democratic legitimacy is the exclusionary reason to obey authority. Weber proposed that societies behave cyclically in governing themselves with different types of governmental legitimacy. In the outline of the conception of political legitimacy of Fabienne Peter, Peter points towards the opinions of Beetham and Habermas, that both find a strict normative approach towards legitimacy too narrow. They state that the normative focus of philosophers ‘neglect the historical actualization of the justificatory process’. Peter 2010. In other words, no satisfactory answer is formulated whether the concept of quality justification might lead to a normative ground for legitimacy. Many scholars see a democratic foundation for the exercise of authority as an exclusive foundation. To the extent that this is true, global governance is doomed to illegitimacy. See Held 1995, p. 17-18; Rubenfield 1971, p. 2020-2022.

\textsuperscript{1896} Or, as Pettit states, ‘[i]t would hardly make sense to invoke an epistemic, pragmatic, egalitarian or meritocratic feature – or the goodwill that Dworkin invokes – in arguing for the legitimacy of a freedom-denying regime, if there were an alternative regime available that could claim to preserve people’s freedom’. Pettit 2012, p. 148.
‘[F]rom the fact, even granting this it is a fact, that you know better than the rest of us what should be done, it certainly does not follow in any obvious way that you may rule, or that anyone has a duty to obey you ... To the person who knows better, the other might hope to say, “you might be right, but who made you boss?”’\textsuperscript{1897}

With the shift from a content-independent reason to accept the imposed authority of international lawmaking to an \textit{ad hoc} content-dependent justification of specific exercises of authority, we descend to a ‘second best’ evaluation, looking at how relatively ‘good’ the laws are that are created by the - in democratic legitimacy terms - unacceptable international legal order.\textsuperscript{1898}

Two shortfalls of quality justification underline this general statement. The most obvious one is the contested understanding of what quality as such entails.\textsuperscript{1899} A quality justification appeals to qualitatively ‘good’ law, implying that one could construct a valid rational justification based on objective and impersonal moral standards.\textsuperscript{1900} There is no set of normative principles that can guide us in the evaluation of the quality of lawmaking. The search for a standard of ‘good quality’ is fraught with difficulties. Effectiveness, as mentioned in section 7.2.1, does not autonomously offer a way out: judging the significance of a norm through a determination of its implications or consequences in a social context is a highly subjective undertaking.\textsuperscript{1901}

The air of neutrality around expertise, knowledge, and information, assumed by a reference to quality, can be easily contested. Expertise is used in order to formulate an answer in the form of law that should be beneficial in light of a certain general interest. However, it is difficult to determine objectively what a general interest or ‘the common good’ entails.\textsuperscript{1902} It is even questionable if such a thing as ‘the common good’ exists.\textsuperscript{1903} The formulation of what is in our general interest is based on a certain perception of underlying

\textsuperscript{1897} Estlund 2009, p. 40.
\textsuperscript{1898} See Pettit, UCL Quain lecture: Legitimacy and justice 2012.
\textsuperscript{1899} As Barnett and Finnemore state, ‘effectiveness or dysfunction is often in the eye of the beholder’. Barnett and Finnemore 2004, p. 168.
\textsuperscript{1900} See Macintyre 2011, p.11.
\textsuperscript{1901} According to Macintyre, this last step however is severely obstructed by the fact that the existence of a socially established set of rules come into existence only under particular social circumstances and at particular historical periods. They are not under any condition universal features of the human condition. See Macintyre 2011, p. 80-81.
\textsuperscript{1902} Weber also rejected the idea of a ‘general will’. A collectivity is an abstraction, not a real entity, and to impute a will to it is to indulge in myth-making. Titunik 2005, p. 156, referring to Weber, \textit{Gesamptausgabe}, vol. II/5 \textit{Briefe 1906-1908} p. 615.
\textsuperscript{1903} Waldron has explained some of the dynamics that occur. ‘As for the general interest, we should not think of this as anything separate from the interests of individuals. Talk of the general interest (like talk of the common good) is a way of considering the interests of individuals taken together. If we adopt a social welfare function—such as the principle of average utility or Rawlsian maximum—to determine what shall count for us as the general interest in circumstances where our interests as individuals diverge, we are still not attributing an interest to a thing called “the people.” A social welfare function is justified by some account of what is appropriate in circumstances where the interest of large numbers of individuals point in different directions. It is not justified by any principle of moral consideration for something called “society.” (...) They are not meant to preclude altruism or social justice or solidarity within a society, but they involve the frank acknowledgement that these are ways of considering the interests of persons (large numbers of them); they do not shift us away from either methodological or ethical individualism.’ Waldron 2012, p. 190. For different forms of individualism, see Lukes 1973.
values. A quality justification implies that international lawmakers, if well informed, can independently determine these values, which can be translated into legal norms. Here we touch upon the complex relationship between values and law that is a dominant feature of legal theory in general.\textsuperscript{1904} Apel speaks in this respect about an ‘apparent contradiction’: the necessity and at the same time the impossibility of a universal meaning of a value. The paradox is that, although we are in need of a universal understanding of values and, we are confronted with the difficulties to be found in such an ethical intersubjective validity in terms of a scientific type.\textsuperscript{1905} Although the need to provide an answer to common transnational dangers, harms, and problems can be demonstrated scientifically, technologically, or objectively, universal values on which we can base our solutions to these dangers seem simply not to be at our disposal.\textsuperscript{1906} The necessity to take the responsibility to solve problems on a worldwide scale does not easily match with the impossibility of finding and formulating an answer that is universally considered acceptable.\textsuperscript{1907}

The second, closely related shortfall of a quality justification is that the reference to the seemingly neutral activity of collecting multiple sources of information obfuscates the ‘politics’ that is involved in selecting and using this information. Politics is understood to refer to these activities of the actors involved of law-making organizations, who try to influence the way authority is exercised. We have learnt from public choice theory that we cannot assume that public officials, when selecting their information sources, are objective and public-spirited, impartially pursuing the intent of the legislation they are charged to administer. It involves the inherently subjective, and political exercise of weighing different interests is involved. While this statement is more easily accepted in relation to the contributions NGOs make to knowledge based on values and interests, it becomes a more destabilizing thought when we accept the same biases in NGOs’ contribution to the needed scientific expertise knowledge base of international lawmaking.\textsuperscript{1908} Expertise is in itself perspective-bound, as well as co-dependent on institutional and technological infrastructure.\textsuperscript{1909}

Although international lawmaking requires expertise and calculations of data in order to decide what might be the best outcome, in gathering and selecting the different sources of

\textsuperscript{1904} Habermas 1996, p. 106-107. See MacIntyre 2011, p. 75-79.
\textsuperscript{1905} Apel 1987, p. 43.
\textsuperscript{1906} As MacIntyre states, ‘But our pluralist culture possesses no method of weighing, no rational criterion for deciding between claims based on legitimate entitlements against claims based on need. Thus these two types of claim are indeed, as I suggested, incommensurable, and the metaphor of ‘weighing’ moral claims is not just inappropriate but misleading.’ MacIntyre 2011, p. 285.
\textsuperscript{1907} Therefore, as d’Aspremont states, ‘[t]he driving forces of international lawmaking are not immutable and are subject to constant and contingent changes, (…) it plays down the importance of global values and zeroes in on common interests’. D’Aspremont 2007, p. 225.
\textsuperscript{1908} The myth of neutrality of science was one of the motives for Habermas to propose deliberative democratic lawmaking, based on an enlarged knowledge base. He found it unrealistic to assume that: ‘[o]ne can separate the professional knowledge of specialists from values and moral points of view. As soon as specialized knowledge is brought to the politically relevant problems, its unavoidably normative character becomes apparent, setting off controversies that polarize the experts themselves. (…) Therefore, it is counterproductive, not only from the viewpoint, for attunement processes between governmental and societal actors to become independent vis a vis the political public sphere and parliamentary will-formation. From both viewpoints it is advisable that the enlarged knowledge base of a planning and supervising administration be shaped by deliberative politics, that is, shaped by the publicly organized contest of opinions between experts and counterexperts and monitored by public opinion’. Habermas 1996, p. 351.
\textsuperscript{1909} I thank Marleen Wessel for raising this point in our discussions.
expertise, international lawmakers coin particular conceptions of development, good
governance, or what constitutes a good economy. Consequently, an international lawmaker
cannot refer neutrally to a diligent balance of facts and interests, facilitated by NGOs’ input
that has enabled the lawmaker to find the most equitable solution. Just as with the
formulation of the ‘right’ legal norm as an answer to an international problem, the
underlying sources of expertise cannot be considered objective.\textsuperscript{1910} As Koskenniemi states:

\begin{quote}
\textquote{\text{"What might be “reasonable” for an environmental expert is not what is
“reasonable” to a chemical manufacturer; what is “optimal” to a development
engineer is not what is optimal to the representative of an indigenous population;
what is proportionate to a humanitarian specialist is not necessarily what is
proportionate to a military expert.\textquote{1911}}
\end{quote}

The lack of a normative standard of quality opens up space for competing claims, possibly
under the guise of competing sources of expertise, but often encapsulating other
substantive value preferences.\textsuperscript{1912} The suggestion, implied in referring to a quality
justification, that in handling these different and contesting inputs international
organizations act like bureaucratic agencies following abstract general rules to operate as
effectively as possible has often, and persuasively, relativized.\textsuperscript{1913}

The fragmentation into different functional international regimes provides decisional
space for the legal and technical experts appointed by the supervisory organs.\textsuperscript{1914} The risk
attached to the increasing decisional space for these experts is that it enables bureaucratic
practices rather than limits it.\textsuperscript{1915} The problem of these regimes in particular is the limited
space for political control. The work of experts, which is, according to Kennedy, part of the
‘background’ of lawmaking processes, dominates in many instances the ‘foreground’ of
lawmaking that is considered to be political, due to the knowledge gap that exists between
political leaders and its bureaucratic apparatus. The ‘foreground’ of lawmaking appears to
be becoming increasingly a mere ‘spectacle – a performance to which we attribute agency,
interest and ideology.’\textsuperscript{1916} Instead of clarifying and strengthening the much needed politics,
a strong focus on quality justification seems to further obfuscate the underlying political
processes related to the preparation of laws by different actors. Experts working in the

\textsuperscript{1910} The separation of technical issues from political issues is at least doubtful as a categorical premise. Venzke 2008, p. 1417.
\textsuperscript{1911} Koskenniemi 2007, p. 10.
\textsuperscript{1912} Boswell points out that ‘[w]hile participants may accept the relevance of technocratic modes of justification,
they will seek to deploy competing knowledge claims to substantiate preferences generated by non-technocratic
\textsuperscript{1913} This image of international organizations is acknowledged to be a misrepresentation of practices in which the
‘formal rationality of these organizations, it must be emphasized, is chronically obstructed by vested interests – a
most important reason why bureaucracies have a tendency to perpetuate themselves in power and scope, if not
to expand continuously’. Keane 1984, p. 62. Keane expressly addresses the difficult impasse of subjectivity of
rationality by referring to Weber: ‘Which of the warring gods should we serve?’. Keane 1984, p. 69.
\textsuperscript{1914} An overview and a discussion of positions can be found in Koskenniemi and Leino 2002, p. 553-579; Koskenniemi 2006b.
Koskenniemi describes the work of legal experts in particular working for ‘private or public-private
institutions, national administrations, interest groups or technical bodies, developing best practices and
standardized solutions – ‘modelisation’, ‘contractualization’ and mutual recognition –as part of the management
of particular regimes.
\textsuperscript{1915} Koskenniemi 2007, p. 8-9; referring to Cutler 2003.
\textsuperscript{1916} Kennedy 2005, p. 12.
‘background’, including invited NGOs, influence and steer international lawmaking, often lacking political control.

7.5 A research agenda

As the discussion above has demonstrated, the presentation of quality justification assumes a causal relationship between the involvement of NGOs and an increase in the knowledge base of the lawmaker. Knowledge of NGOs, based on testimonies, values, and expertise, would consequently make the law qualitatively ‘better’, the meaning of which can be stretched from ‘more rational’ and ‘more effective’ to ‘more fair’. This justification rationale requires from lawmakers to base their selection of NGOs on their contribution of qualitatively good sources of information that cover different perspectives amounting to a competition of ideas. Lawmakers should carefully hear and choose groups and that they exercise the selection of groups with the greatest possible balance. Lawmakers are supposed to have a sufficient level of knowledge in-house to be able to estimate the value and nature of the input.

Empirical studies are indispensable for testing these aforementioned assumptions. Comparative empirical studies into the lawmaking practices of different international organizations are relevant for understanding how a quality justification is often used by lawmakers and how it should be used. These empirical studies should equally be able to clarify the appropriateness of bureaucratic means for the realization of various desired ends. We can group the relevant empirical questions into five main questions that have many sub-questions, of which a few examples are given.

1. Who is selected? What interests are given a chance to be heard? And equally importantly, what interests are not heard? How many sources inform the lawmakers? What is the assumed threshold of the necessary multiplicity of perspectives? Is a (perceived) overload of information reached?

2. How is a selection made? Are the sources offered by consultants perceived to be reliable? What is the relation between information gathered by states and information gathered independently by international agencies?

3. Upon what grounds is a specific selection of sources of information made? Where does the information come from? Is there a certain bias in terms of destination and type of information? Which lawmaking actors balance the different sources of information? How do they do this? With regard to the experts, what vocabulary is used? If contestation arises between the experts, are there any terms for disagreement? Are there underlying schools of thought that impact upon the position taken by the NGOs? Are there underlying shared assumptions?

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1917 The OECD for example has formulated guiding principles for regulatory quality: http://www.oecd.org/fr/reformereg/34976533.pdf, (last visited January 2016). Comparative studies to national and local justificatory practices might be insightful. The United Kingdom considers itself a ‘best practice’ with regard to the formulation of principles of regulation. These principles are formulated as legal rules in the Legislative and Regulatory Reform Act 2007, No. 3544, 18 December 2007.


4. What are the intentions of the NGOs involved? (An inquiry to the motivations is necessary for a complete understanding of NGOs’ participation in international lawmaking. As MacIntyre argued, the linkage between context and intentions makes action understandable to both the agents and others).

5. What is the effect of the selected input? Are the knowledge contributions of the NGOs influential? Do we see any reflection of the input in the lawmaking agenda? What type of information is most influential: scientific input, values, or testimonial information? How is impact brought into effect; are coalitions formed? Are these coalitions effective? What is the result of this information process, and how well informed is the lawmaker?

Mapping exercises of actual lawmaking procedures are needed in order to discover why and how NGOs were involved. Openness seems to be the most promising defense to enable a check on lawmaking procedures. Experts should clearly highlight the evidence upon which they based their advice, as well as any persisting uncertainty and divergent views. More insight is required to analyze the motivations of lawmakers to include NGOs, how NGOs’ input was used, the extent to which the result of a lawmaking process has been informed by multiple perspectives, how much room for contestation was created, and if, and how, feedback loops were organized. These studies are necessary to open up, and enable a politicization of international lawmaking procedures.

Further exploring and testing the proposition that NGOs contribute to the quality justification of international law requires studies of three different types. First, in general, we must gain insight into the politics of quality justification. Second, we are confronted with the challenge of finding ways for a justifiable balance of interests. Third, virtues such as counter-balance, control, and responsibility need to be defined to strengthen the standard of evaluation of quality justification in normative terms.

7.5.1 Gaining insights in the politics of justifying international law

Our approach to NGOs’ contribution to quality justification tries to avoid engaging in the discussion on ethical objectivism, due to the irreducible contingency of what NGOs, lawmakers, and any other actor consider normatively valid. It acknowledges that both international lawmakers and NGOs are driven by values, motives, and desires. Future studies should investigate the motivations of international agencies to seek information, including the underlying opinions of the international lawmakers that prepare and guide

1920 MacIntyre 2011, p. 241. As MacIntyre explains; ‘To identify an occurrence as an action is in the paradigmatic instances to identify it under a type of descriptions, which enables us to see that occurrence as flowing intelligibly from a human agent’s intentions, motives, passions and purposes. It is therefore to understand an action as something for which someone is accountable, about which it is always appropriate to ask the agent for an intelligible account. When an occurrence is apparently the intended action of a human agent, but nonetheless we cannot so identify it, we are both intellectually and practically baffled.’ MacIntyre 2011, p. 243. This works obviously also the other way around. When actions of NGOs are understood in a certain way that does not link nor correspond with the intentions of the actors themselves, the account offered can only be partial at most.


these lawmaking processes.\footnote{These are considered the ‘blind spots and biases, which skew their choices’. Our proposal to investigate the political side of expertise is in line with Kennedy’s plea for a scholarly focus on mapping the work of experts involved in international lawmaking. Kennedy 2005, p. 18. Although Kennedy’s focus was primarily on the role of legal experts being part of governmental institutions, Kennedy’s identification of ‘apolitical self-presentation of much expert work’, could be equally relevant to the role and position that we attribute here to NGOs.} There should be investigation into who decides what input is valuable to ensure the pluriformity of the process; who determines what expertise is required; and who checks the selection procedures related to the gathering of relevant information. In addition, insight into the possible struggles between the different actors involved in offering their knowledge has to be gained.

Reflection on these processes is paramount as there is a real risk that political power and the power of experts will merge. As the critics argued in chapter 5, the consultation of stakeholders by international organizations often depends on their links to states and governments.\footnote{Since Weber elaborated his concept of bureaucracy, he has succinctly pointed out that ‘bureaucratic administration means: exercise of power by way of knowledge’. Venske 2010, p. 83, referring to Weber, \textit{Wirtschaft und Gesellschaft} 1046-1092 (2006), p. 226.} Such tendencies are currently criticized by a number of states, especially from the South. According to these states, the invitation of NGOs to participate is yet another manifestation of Western power, exercised through the means of private agencies within which Western civil society is considered to be disproportionately represented. Besides the imbalance in representation, these agencies are claimed to foster secular and rights-based agendas at variance with communal values that, so some would claim, only the local state can protect.\footnote{Keane 1984, p. 64-65.}

Besides, domination by expertise, precisely because of the dependence of governmental actors on expertise, looms large.\footnote{Lukács 1972, p. 395} Just as international law, as a set of rules, reflects the preoccupation of its creators, as critical legal scholars take pains to demonstrate, the selection of consultants equally reflects the preferences and interests of states and international organizations. A purely functionalist account of international lawmakers, resting on the belief that one can separate practical issues that are aimed at implementing uncontroversial welfare goals and political activities on the other, has been challenged.\footnote{MacIntyre 2011, p. 191, referring to Passmore 1962, p. xxii.}

International lawmaking is subject to struggles, not only of class,\footnote{Keane 1984, p. 64-65.} but also to numerous power struggles and resistance inside and outside the sphere of the office. Informal and formal debates and deliberations that are part of lawmaking processes also form the stage for protest movements, countercultures, and political movements that, although often marginalized, seek a share of social power.\footnote{Venze 2008, p. 1411, referring to Mitrany 1943, p. 19-24.} In other words, knowledge provision cannot be decoupled from the strategies of both lawmakers and information providers. Investigating these political aspects of international lawmaking and its justification is in line with what Australian philosopher John Anderson has urged us to do. We should ‘not … ask of a social institution: “What end or purpose does it serve?” but rather “of what conflicts is it the scene?”’.\footnote{MacIntyre 2011, p. 191, referring to Passmore 1962, p. xxii.}

Besides the general assumption that knowledge is used to rationalize the result of a lawmaking process, Boswell points out that there are many motivations for the use of
knowledge. International lawmakers could also be motivated to use knowledge as a ‘symbolic resource for underpinning the risky decisions of politicians, and bolstering the authority of embattled public authorities’.\textsuperscript{1931} In the latter case, the organization adopts rational or fair procedures because such processes conform to external expectations about appropriate lawmaking behavior. Especially when the effects of laws are hard to measure, such as in the case with many political organizations, and when international lawmakers are unable to generate support through pointing to the effects of their output, such organizations could be inclined to resort to demonstrating that their decisions are well informed, pointing towards the organization’s research capacity or to its recent commissioning of new research.

The latter motivation of lawmakers reminds us of the argumentation of some skeptical scholars towards the NGO democratic legitimacy thesis, as discussed in chapter 5.\textsuperscript{1932} They have made us aware of the dynamic that international organizations primarily invite NGOs in response to perceived pressure from their environments, in which case the NGO’s involvement at international organizations would constitute a mutual auto-legitimation. International organizations might do this by emulating the rhetoric or structures of organizations that appear to be doing a better job of meeting external expectations.\textsuperscript{1933} Knowledge as a means of substantiating policy preferences is most likely to occur in highly contested areas, where the organization is looking for ways of injecting scientific authority into its policy proposals.\textsuperscript{1934} Based on insights gained in Part II, we can conclude that notwithstanding the fact that the differences between agencies are considerable, what they have in common is that international organizations work in highly unstable, constantly changing constellations, without a formal superior constitutional framework that guides lawmaking processes. These factors might intensify the need to justify lawmaking on rational grounds. Where an organization’s preferences are contested, it may seek to win backing for them through technocratic modes of settlement.

Another motivation could be the expansion drift of international organizations. Characteristic of specific bureaucracies is the tendency to strengthen their position by keeping their own knowledge secret. Information that underpins the successes of an organization is made available, while the possibly negative information is kept back. Venzke has mentioned this type of ceremonialism.\textsuperscript{1935} The involvement of NGOs might be used as an attempt to seek the support of NGOs to increase their own autonomy towards states.\textsuperscript{1936} A study of the politics of justifying international law should pay attention to these possible auto-legitimation practices. However, these strategic and political aspects of the background practices of policy-making or standard-setting are difficult to investigate due to the tendency to understand the processes in which norms and ideas are shaped as neutral exchanges of expertise.\textsuperscript{1937} The power dynamics are difficult to trace, not in the least

\begin{thebibliography}{99}
\bibitem{1931} Boswell 2009, p. 251.
\bibitem{1932} See chapter 5, section 5.4.1.
\bibitem{1933} Boswell 2009, p. 61.
\bibitem{1934} Technocratic modes of substantiation are likely to involve drawing on expert knowledge where decision-making involves a high degree of risk, or where it revolves around problems of societal steering. Boswell 2009, p. 62.
\bibitem{1937} Kennedy explains ‘…it is tempting to return to the centres of political action in the foreground of our consciousness, demanding resolutions, regulations and funds. We should expand our ability to act through the
\end{thebibliography}
because of the necessity to be able to investigate these processes independently of knowing what experts know. Further, studies on the justification of international lawmaking to gain insight into the political side of expertise provision are complicated by the fact that, as chapter 3, section 3.4 demonstrated, many forms of international regulatory lawmaking escape formal political processes and agree upon standards contextually. Notwithstanding these obstructions, especially these practices should be subjected to thorough investigation.

7.5.2 Finding ways to balance interests
As demonstrated in chapter 5, opponents of the NGO democratic legitimacy thesis were concerned that politicians focus primarily on the demands of well-organized, vocal interest groups and give in often to their interests. Given the existing information surplus, privileging the opinions of any putative experts over others seems to be inevitable. Any privileging, however, requires justification.

To prevent self-fulfilling dynamics, if they can be prevented at all, moments of account giving for the selection of information sources should be regularized. Therefore we need a theory for how to balance different interests. Normative studies are required to find answers to how, in the current non-ideal situation of quality justification, we can approach a normatively desirable situation leading to a lawmaking process characterized by openness to a multiplicity of perspectives, and a justifiable balance of interests. Familiar concepts such as transparency, accountability, and publicity recur as central points of attention. It remains open for study to understand if and how competition and diversity of ideas, values, and information can be organized and how competition and balance of information can be ensured at the international level. Already in 1939 Roscoe Pound issued a request for a strong theory of how to settle competing interests. Such a theory is based on capillaries of private quality standards or investment guidelines, through consumer boycotts, property regulations and all the other norms and institutions which affect the use of force or the incidence of disease. We should expand our capacity to do so. Nevertheless, it remains all too easy, even comforting, to overlook opportunities to contest and reshape the background because we do not readily comprehend its power to distribute resources in society, nor do we have a clear view of how its terms might be contested. Kennedy 2005, p. 10. A theory for how to balance different interests is confronted with the dilemma of stating what is considered as an interest and what not. Mansbridge conceptualizes ‘interest’ as including ‘identity-constituting [. ] ideal-regarding commitments as well as material needs.’ Mere preferences, she suggests, are unreflexive, but interests are “enlightened preferences,” refined dialogically in light of not just “simple cognition” but “experience and emotional understanding”. Mansbridge 2003, p. 517, n. 6.

In many respects this research agenda can be linked to the research program of Global Administrative Law Project.
'an inventory of those which are recognized and of those which have been pressed or are pressing for recognition and a classification of them. They must be compared and valued, and by applying the measure of values it must be determined which shall be recognized and within what limits. Then it must be determined how to secure those, which are recognized according to the received measure of values. This has to be done in view of other competing interests and of the practical limitations of effective legal action. To do this thoroughly for the law of the next generation is one of the great juristic tasks ahead of us.”1943

According to Pound, a theory on a balance of interests has to deal with different ends of social control. The challenge is to conceptualize how to consider and find an equilibrium between for example the end of justice and the end of security, between the ideal relation between men, and the maintenance of a peaceable social order. Finding ways to justifiably balance interests should deal with the existence of competing claims and opposite purposes such as individual life and general security, stability, and change.1944 The formulation of a convincing balance of interest is not an easy task.1945 Paradoxically, the difficulties of selection and justification of selection is one of the driving forces for the normative acceptability of democratic decision-making as a legitimizing factor. It is often argued that because of the difficulty of an acceptable theory of balance of interests, it cannot be thrust on a people as an alternative to democracy. Therefore, it is argued that the rule of the experts must be made legitimate if it is to work politically, implying that there must be popular consentgiving or popular appeal at some level.1946

At this stage one could argue that at least a type of openness is necessary as a precondition for a formulation of balancing interests and multiple perspectives.1947 There is a certain inclination built into the standard of quality justification towards the assumption that values and ideals are formed in the midst of contestatory practices in which the ideal clashes with other ideals. Openness in this respect could facilitate supervision and ensure public access to information, which the administration might otherwise try to monopolize.1948

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1943 Pound 1939, p. 18.
1944 "If we put too much stress upon the ideal relation, upon the individual life, and up to change, we impair the general security and in particularly the stability upon the economic order must rest.” Pound 1939, p. 17
1945 Public choice theory has provided us with interesting insights into problematic dynamics for a true representation of multiple interests, such as free-riders dynamics, and the fact that a large part of society is not organized and has diffuse interests. References to public choice theory: Arrow 1963; Black 1958; Buchanan and Tullock 1962; Downs 1957; Niskanen 1971; Olson 1965; Riker 1962.
1947 Webers' defense of bureaucracy is exemplary for the paradox we just mentioned. Keane states that "[t]he principle of polytheism (of which his polemic against substantive democracy is one instance) contains the imputation of democratic, public life. This principle presumes a special type of institutional form about whose validity actors must already have come to agreement – it presumes, in other words, the availability of actually existing forms of public life, to which speaking actors can have recourse, and only by means of which they can express their opposition to (or agreement with) others' ideals. Spheres of autonomous public life, in short, serve as counterfactual, as a condition that must be established if value relativism of the type Weber defend is to obtain". Keane 1984, p. 68-69.
7.5.3 Defining lawmakers’ virtues
A shared fear of scholars is that bureaucratic rationalization processes become an end in themselves, thereby lifting functional interests to a decisive position to reach an ‘optimal result’. Common lawmaking practices are characterized by an ‘intense circulation of reports and memoranda, the multiplication of paperassie, the proliferation of meetings, the trend toward corporatist mediation of conflict, the phenomena for “participation”, decentralization, and joint consultations, the media campaigns’. A pressing concern, as stated above, is how to restrict and control the possibly dominating power of expertise. As discussed in the previous section, the most structurally recurring theme is the transparency necessary to check whether the procedural norms, already mentioned in the NGO democratic legitimacy debate, are fulfilled: openness and responsiveness. The international lawmakers should be transparent and explain its use of expertise to the public at large, as a counter balance for their discretion to use external participants when needed.

The contradiction is clear. After this preliminary reflection on the characteristics of quality justification, we indicated that the fusion of NGOs’ activities with international organizations is in need of more reflective participation, of public control. This seems to be surprising given the fact that the basic premise was that NGOs could offer this type of public control, which premise was refuted earlier in chapter 6, because of the absence of the necessary preconditions for such public control. Paradoxically, at this stage we suggest that NGOs, involuntarily perhaps, and due to the lack of institutional preconditions internationally, might help establish an impenetrable bureau of internationally organized legal action. This fear has been stated before. As chapter 5 demonstrated, many opponents of the NGO democratic legitimacy thesis have seen NGO involvement as such as fascinating and irrelevant, but also detrimental to domestic democratic practices. Factions were feared, just as domination by Western groups over other affected groups of individuals.

These dynamics might turn ‘those interests into winners that usually prevail in the relevant functional context’. These processes require scrutiny and control, in which room for contestation is as fundamental as difficult. In relation to international legal practices, Koskenniemi most explicitly expresses this fear: ‘When the floor of statehood fell from under our feet, we did not collapse into a realm of global authenticity to encounter each other as free possessors of inalienable rights. Instead, we fell into watertight boxes of functional

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1950 A paradox again occurs to what further studies should pay attention as well, namely that it is questionable to what extent bureaucratic lawmaking focused on quality of law is consistent with democratic practices. Let us again refer to Weber who noted that the striving towards democratic, public life would produce “technically irrational obstacles” for any bureaucratic organization. Weber 1978, p. 138.
1951 See chapter 4, section 4.5 and chapter 6, section 6.2.1.
1952 Koskenniemi describes a ‘deference to contextual deal-striking (...) [that] emphasizes the role of stakeholders’ organizations and technical experts, lifting functional and economic arguments to a decisive position’. Koskenniemi 2011, p. 236.
1953 Koskenniemi refers to Weberian thesis of deormalisation as a prologue for ‘the attempt to bring together technocrats rather than politicians, and seek only such legitimacy as is required to solve particular problems and presume only such legitimacy as is required – only to make a limited set of global trains run on time for the sake, especially, of very poor people about whom no else really very much cares – seems like it must be less disfavored, at least, even in a competitive multipolar world. (...) there is no grander structure’. Koskenniemi 2011, p. 236.
1954 As Kennedy states, ‘the difficulty is finding opportunities for politically contesting the results it generates’. Kennedy 2005, p. 9.
specialization, to be managed and governed by reading our freedom as the realization of our interest.\footnote{1955}

A partial answer could be found in the way experts, as part of the bureaucratic lawmaking process of an international organization, act themselves. A start would be for these experts to consider themselves and their work as political.\footnote{1956} Although they work in the ‘background’ as Kennedy calls it, these experts and advisors are making many impactful choices of which they should be aware. In a functionalist approach to bureaucratic lawmaking the primary question is ‘whose understanding of it should be authoritative, or more concretely, which experts should possess jurisdiction?’\footnote{1957} The seemingly small-scale decisions lawmakers make, based on the input they gain from NGOs and other private actors, often turn out to have more impact than expected.\footnote{1958} Experts should be aware of, and take responsibility for, the political discretion they have and create. A form of responsibility, as an ethical counterpart of accountability, should be developed that focuses on, along with the obligation that rests with political leaders to account for their actions to others, the moral obligation to take responsibility for their political influence.

The problems and the assumptions mentioned lead to a conclusion that in further studies we should map the selection, uses, and results of expertise.\footnote{1959} Besides, a further study of quality justification is required that pays attention to issues such as publicity, reflexivity, transparency, opportunities for multiple perspectives and contestation, and accountability in order to develop a theory of balancing interests. And, especially because of the lack of democratic legitimacy, virtues such as responsibility should be defined for international lawmakers as a partial compensation for the dominating power they exercise.

\footnote{1955} Koskenniemi 2007, p. 15.
\footnote{1956} Kennedy 2005, p. 24. ‘The goal would be to encourage a form of expertise, which could experience politics as its vocation.’
\footnote{1957} Koskenniemi 2007, p. 24, 29.
\footnote{1959} Notwithstanding his attempt to underscore the importance of a mapping exercise, Kennedy also outline the attached complexity of doing so: ‘Mapping the knowledge of experts is complex and technical work raising all sorts of methodological issues – who are the experts, what is their vocabulary, what is the relationship between disputes among experts, and agreement on the terms for disagreeing, or between different schools of thought within a profession and broadly shared assumptions?’. Kennedy 2005, p. 13.
Part III – Conclusions

Part III critically assessed the persuasiveness of the NGO democratic legitimacy thesis and put forward alternative analytical categories to pursue the debate in more meaningful terms. It was shown that the NGO democratic legitimacy thesis is characterized by some inherent weaknesses. Contrary to the majority of critical scholars, we suggested that these weaknesses are not caused by the internal characteristics of NGOs, but primarily by the lack of scholarly attention to the indispensability of institutional and social preconditions for the democratic legitimacy of international law.

Two tendencies were observed that both weakened the validity of the NGO democratic legitimacy thesis. On the one hand, we noted a relatively strong but fragmented focus on both the internal democratic legitimacy of NGOs. On the other hand we saw a fragmented focus on isolated democratic practices when conceptualizing democratic legitimacy. Both tendencies were characterized by a relatively weak emphasis on democratic legitimacy’s necessary preconditions, which are, as discussed in chapter 2, necessary to make possible any democratic legitimation of law. An informal reading of international democratic legitimacy seemed to accept the paradoxical situation in which the opportunities to democratically legitimize international lawmaking are conditional upon the goodwill of the exercizers of authority. This is contrary to our understanding that NGOs are inherently dependent on the existence of an institutionalized democratic system to act as democratic legitimizers, and therefore, in most democratic theories, they fulfill a complementary democratic role.

We subsequently elaborated on the obstacles created by this lack of consideration of institutional preconditions, which obstructs an affirmative answer to the question whether NGOs contribute to the democratic legitimacy of international law. We argued that to give content to the distinctive characteristics of democratic legitimacy, one must guarantee that freedom from domination is ensured by legally guaranteed rights and judicial safeguards as control mechanisms. We argued that without democratic legitimacy’s necessary preconditions at place, we can only argue in retrospect and empirically whether or not NGOs have been able to have political effect. We criticized scholarly work engaged in the NGO democratic legitimacy thesis for reducing democratic legitimacy to democratic practices, and for marginalizing the indispensability of political rights and judicial safeguards. We found that without a consideration of democratic legitimacy’s necessary preconditions, the normative thrust of the concept of democratic legitimacy is being obscured.

Our evaluation of the NGO democratic legitimacy thesis has led us to a contentious issue, which was central to chapter 6: whether democratic legitimacy in itself is a meaningful notion in the context of the international legal order. We touched upon two approaches to substantiate the democratic legitimacy of international law by looking at international institutional preconditions: the two-track model and the cosmopolitan approach. We demonstrated that notwithstanding the fact that these approaches theorize the necessary institutional preconditions, there are many, still unresolved, conceptual and practical obstacles to applying the standard of democratic legitimacy to international law. These pressing conceptual and feasibility issues that have been raised require us to address the problem of the democratic legitimacy of international law more extensively before we are able to offer any solution.
It was nevertheless shown that internationally active NGOs might contribute to revitalizing and strengthening domestic democracy, when they open up deliberation, push for more transparency, create awareness of the fact that important decisions of respective governments are taken at the international level, and provide information concerning international law and legislative proposals to citizens who can thereby steer and check their own governments. NGOs might be understood as a vehicle, as part of the public sphere, as a manifestation or even a symbol of a democratic system. Indeed, as explained in chapter 3, a well-functioning democracy relies on both a democratic culture as well as a democratic institutional framework of rights and judicial review; the activities of NGOs might contribute to upholding the authority of nation-state democratic governments. To ensure the democratic legitimacy of international law, however, the normative justification of the thesis is limited, without theorizing international institutional means to protect freedom from domination by international law.

It was acknowledged that our study has not brought us any further in terms of solving the pressing theoretical and practical issue of how to establish preconditions of democratic legitimacy in the international legal order. However, the indication of the difficulties and pitfalls of establishing the institutional preconditions internationally – in other words, by demonstrating that we cannot simply state that international law can be democratically legitimized by anyone – offered a justification for looking beyond the specific interpretation of NGO participation in international lawmaking as a contribution to the democratic legitimacy of international law. In chapter 6 we touched upon the possibility that the scholarly work in favor of the NGO democratic legitimacy thesis could be better understood as a contribution to a theory of democratization of the international legal order than as a proposal for a contribution to the democratic legitimacy of international law.

Chapter 7 suggested a possible alternative interpretation of NGO involvement. We argued for a decoupling and recoupling between normative expectations and institutional frameworks. It demonstrated that the NGO democratic legitimacy thesis encounters a democratic expectation towards NGOs’ involvement in international legislative processes and no formal institutional international framework of rights and safeguards is available to underpin that expectation. It further stated that although NGOs cannot contribute to the prevention of domination by international law, the involvement of NGOs has the potential to contribute to qualitatively ‘good’ domination, which might be valued on its own merits, as ‘bad laws are the worst sort of tyranny’, as Burke famously stated. NGOs’ input into lawmaking, consisting of testimonial knowledge, values, and expertise, can contribute to the quality of a lawmaking process. In this light, an alternative standard of evaluation for international lawmaking other than democratic legitimacy was presented: a quality justification of international law. A quality justification refers to the substantive quality of a law, or to the rational quality of a lawmaking procedure.

As discussed in chapter 7, quality justification differs conceptually from democratic legitimacy. Quality justification should be considered as an instrument used by the exercizers of authority to explain and defend the choices made that were constituent to a new law. A quality justification of law is independent of its legal subjects. We argued that a quality justification offered therefore a ‘second best’ evaluation tool to assess the exercise of authority. Two issues were considered specifically problematic with regard to the normative force of quality justification. First, a quality justification leads to a marginalized reading of the politics engaged in international lawmaking. Second, there is obviously a lack of a normative standard of quality. We demonstrated that notwithstanding its ‘neutral’
appearance, a quality justification standard cannot escape the political side of the international legal order. Equally, dismissing the applicability of a democratic legitimacy standard does not dismiss the political; instead it reveals the political, and its lack of current democratic control. The identified lack of opportunities to democratically legitimate international lawmaking pushed the political and the dominating power structures to the fore even more.

It was made clear that our tentative proposal for an alternative understanding only offers a partial solution for the scholarly quest of how to interpret NGOs’ participation in international lawmaking. It cannot offer an answer to the underlying fundamental problem that instigated the thesis in the first place: what is required in normative terms to legitimize the exercise of international authority? With our attempt to provide a better explanation of the relationship between NGOs’ involvement in international lawmaking and the justification of international law, we did not make claims as to whether a quality justification offers a full justification of international lawmaking authority or whether quality justification is sufficient for international law’s authority to be accepted. Our proposal was not a normative proposal about how international legislative practices ought to be organized.

Rather, what the alternative understanding of NGO participation in international put forward was a tool to analyse current lawmaking practices, the actors involved, the motivations of both private actors to get involved and of public lawmakers to take into account their input. The proposed resort to quality justification has shed light on the necessity to further empirically study the politics of justifying international law: who decides what input is valuable to ensure the pluriformity of the process; who determines what expertise is required; and who checks the selection procedures related to the gathering of relevant information. In addition, insight into the possible struggles between the different actors involved in offering their knowledge has to be gained. Normative study is needed to finding ways to justifiably balance interests and to define the lawmaker’s virtues. The gained insights, when studying these lawmaking processes in terms of quality justification, could facilitate clarification of the appropriateness of the contributions of NGOs to international lawmaking for the realization of justifiable international laws, and could reveal some of the dominating power structures that inform international lawmaking.
Summary – NGO participation in international lawmaking and democratic legitimacy: The debate and its future

This study revisited the debate about whether the participation of NGOs in international lawmaking contributes to the democratic legitimacy of international law. We called this the NGO democratic legitimacy thesis. The starting point of the NGO democratic legitimacy thesis was the assumption that authority exerted by international lawmakers requires democratic legitimacy to ensure broad acceptance of international law. Part I defined democratic legitimacy and defined what criteria should be met within the legal system to facilitate democratic legitimacy. Part II shed light in the first place on the context in which the thesis arose. Certain recent developments in international lawmaking, such as the increasing regulatory autonomy of international organizations and more informal lawmaking processes, have fuelled democratic legitimacy concerns in which primarily the waning autonomy of states, the weak representation of individuals by states and the existing democratic deficits among states have led to the conclusion that state’s consent to international law represents a discredited conception of the democratic legitimacy of international law. As demonstrated, the NGO democratic legitimacy thesis is often presented as a response to the democratic deficits. This led to review of existing legal frameworks that are the basis for NGOs’ participation in international lawmaking. Besides, the literature on the NGO democratic legitimacy thesis was studied and discussed by focusing on the argumentative structure of both the proponents of the NGO democratic legitimacy thesis and its opponents. Part III demonstrated that the persuasiveness of the NGO democratic legitimacy thesis is rather weak. The reason for this conclusion is not due to the role NGOs do or do not play in international lawmaking, but due to the problematic application of the standard of democratic legitimacy to international law. Our critique focused primarily on the insufficient attention paid in current academic discussion on the NGO democratic legitimacy thesis to the institutional preconditions necessary to enable the democratic legitimation of any law. However, when imagining international institutional preconditions, it follows that we are continuously confronted with conceptual and practical dilemmas. We therefore concluded at the end of this study, a choice of better fitting terms to enable us to reassess the contribution of NGO participation in international lawmaking to international law. The study suggested that NGOs participation in international lawmaking could be better understood in terms of a quality justification of international law.

Part I - Democratic legitimacy

In part I, the concept of democratic legitimacy that guided the analysis of the NGO democratic legitimacy thesis was defined. Legitimacy was understood to refer to people’s trust in, and acceptance of the exercise of public authority. The reasons why laws are accepted are likely to differ per individual. They range from motivations based on the content of the law, its legality, and validity, or law’s efficiency in bringing about the promised changes in society. The normative approach to democratic legitimacy central to our study, contrary to a sociological approach to legitimacy, was based not on proved acceptance of law by legal subjects, but on a hypothetical acceptance of the authority of the rule, or the rule-making institution: the normative acceptability of the authority of law. The ground for our normative approach to legitimacy was a given: the NGO democratic legitimacy thesis is built on the assumption that the democratic characteristics of a lawmaking process leads to the acceptability of law. As discussed, the normative force of democratic legitimacy is that
although laws rule legal subjects, they consider themselves the ultimate author of these laws.

In Part I, democratic legitimacy was defined as follows. To conclude that the exercise of authority is democratically legitimate, one should assess whether public authority respects the basic principles of democracy: equality and freedom. These principles protect the potential for every individual’s capacity to act and speak in concert for public political purposes and to translate their power into political impact in lawmaking equally. Freedom is understood as freedom from domination. It was argued that to respect the principles of equality and freedom, a public authority has to offer and guarantee every legal subject an actual, equal, and continuous opportunity to participate in, and to have a decisive impact on the making of law. Participation was understood in three different ways: participation by consent to, by deliberation over, or by control over the exercise of lawmaking authority. The assessment of a law’s democratic legitimacy was presented as a dual evaluation. The first evaluation refers to the assessment whether a political constellation meets democratic legitimacy’s necessary preconditions. These preconditions refer to institutional preconditions, consisting of rights and judicial safeguards, and social preconditions, consisting of a democratic culture entailing a functioning public sphere and civil society. A public authority should preserve these preconditions in order to enable the democratic legitimacy of law. Once has been determined that these preconditions are met, the second evaluation can take place, that refers to the operational aspects. Democratic legitimacy’s operational aspects are assessed by looking into the operationalization of the democratic principles in actual lawmaking practices: whether or not that specific lawmaking procedure offers actual and equal means of participation, and whether the lawmakers live up to democratic procedural norms, such as transparency, accountability, and inclusiveness.

Part II - The NGO democratic legitimacy thesis

After defining democratic legitimacy in Part I, Part II assessed the literature on the NGO democratic legitimacy debate. It first recalled the context in which the NGO democratic legitimacy thesis arose. The NGO democratic legitimacy thesis can be considered a response to growing concerns regarding the democratic deficits of international law. The justification for the acceptability of the binding force of international law, based on the traditional doctrine of state consent, was presented to have lost part of its normative power. Scholars who looked to NGO participation within international lawmaking often justified this by highlighting the empirical fact that the processes by which international rules are established are in constant, rapid development. International lawmaking was considered to evolve, with a consequential increase of the regulatory power of international organizations, and of regulations of a more informal character. Due to these recent developments in international lawmaking, states were assumed to have lost their autonomy in deciding the content and shape of international law. The concerns with regard to the democratic legitimacy of international law suggested an imbalance between the ideal of democratic legitimacy and the legislative processes that constitute international law. Besides these empirical concerns, the normative concerns of scholars regarding state consent were presented. These scholars discredited state consent as a base for democratic legitimacy due to difficulties tracing international law back to the individual as the author of these laws, which, although most of the time not the subject of international law, was considered affected by international law nonetheless. It was argued that both the lack of parliamentary scrutiny and the existing imbalance in power between the states have weakened the indirect representation by state
consent of individuals. In this alleged clash between the ideal of democratic legitimacy law and the reality of current international lawmaking practices, scholars emphasized the possible contributions of NGOs to international lawmaking, and considered these contributions to compensate, in different ways, for the democratic deficits of international law.

The NGOs’ growing participation in international lawmaking and their efforts to influence these processes and shape the outcome of international lawmaking processes explained the emergence of the NGO democratic legitimacy thesis. After outlining the democratic deficits of international law, we looked into the legal frameworks of NGO participation in international lawmaking. NGOs do not operate in accordance with mandates given to them by states under international law, in contrast to the specifically mandated organizations like the ICRC and UN agencies. However, as international organizations defer to NGOs admission, of which the consultative relationship between UN and NGOs, regulated by ECOSOC, often functions as an example, an increasing number of NGOs participate in the formulation of international norms. As discussed, although they differ considerably in degree, more and more international organizations were opting for formalizing or at least intensifying the relationships with NGOs.

Due to NGOs’ impressive track record of contributing to the body of international law, strong claims have been made in the past decades that this role of NGOs, often encapsulated in the more broad term ‘civil society’, is indispensable to the democratic legitimacy of international law. As discussed, scholars presented NGOs as contributors to the democratic legitimacy of international law by voicing the concerns of the ‘otherwise unheard’, by offering their knowledge in deliberative preparatory lawmaking practices, and by stimulating and facilitating social engagement. Additionally, NGOs’ participation was presented as a contribution to deliberative lawmaking, to its transparency, and to the accountability of lawmakers. These benefits of NGO participation in international lawmaking were accompanied by a call for creative institutional innovations to connect governments, international organizations, and civil society.

The study on the NGO democratic legitimacy thesis revealed that qualifying NGOs’ involvement in international lawmaking as a contribution to the democratic legitimacy of international law is a contentious matter. The NGO democratic legitimacy thesis drew criticism from some legal scholars and political scientists for idealizing NGOs and civil society actors as democratic forces. The inquiry carried out in this study uncovered a multitude of resources available for consideration, but equally highlighted how varied discussion around this topic can be, particularly in the absence of some standardized and broadly accepted concepts and processes. Critics challenged the perception of global civil society. They pointed out the dependence of NGOs on states, the questionable representation by NGOs of those marginalized ‘voices’, the lacking accountability mechanisms to hold the NGOs themselves to account. In addition, the current practice of ‘overcrowding’ which allegedly significantly reduces the chances of NGOs to have impact on international lawmaking was criticized, including the strategic incentives for states and international organizations to include NGOs in their work.

The most striking example of the diversity of the debate was the differences in underlying conceptions of democratic legitimacy of international law that informed the academics. What could be deduced from the debate, is that, notwithstanding the fact that the focuses of academics are most of the time on the performances of NGOs, states and international organizations, the transition from a domestic qualification of civil society actors as valuable
contribution to democratic legitimacy to an understanding of NGOs participation in international lawmaking as a contribution to the democratic legitimacy of international law, has led to vigorous debate with the focus around how to conceptualize democratic legitimacy in an international setting, in which complexity, globalization, and plurality dominate. Academic disagreement and debate with regards to NGOs’ participation revolved around, although implicitly, defining democratic legitimacy of international law.

Scholars varied on whether to take a monist approach or a dualistic approach towards the desirability to achieve democratic legitimacy international law, or scholars varied on whether to take an institutional or a non-institutional approach towards the conditions and manifestations of democratic legitimacy. Additionally, some scholars perceived democratic legitimacy as a multiform evaluation tool that could change in manifestations and preconditions according to the type and level of exercise of authority whilst others viewed democratic legitimacy as a uniform concept, that kept the same characteristics no matter to what type of authority is was applied. As was demonstrated, the differences in opinions concerning the validity of the NGO democratic legitimacy thesis hinged, among others, upon questions of whether or not there is an international demos, whether or not we can speak of an international public sphere, whether or not global deliberative practices could democratically legitimize international law, how inclusive international lawmaking processes should be, and how we should conceptualize representation without a global parliament to give content to the democratic legitimacy of international law. The clash between the institutionalists and the non-institutionalists, and between the monists and dualists, resulted in a widening gap in interpretation of the key concepts related to the concept of democratic legitimacy. This is what led part II to conclude that a uniform approach to democratic legitimacy, which is necessary to assess the validity of the NGO democratic legitimacy thesis was non-existent.

Part III - The impasse of institutional preconditions and moving beyond

The study on the NGO democratic legitimacy thesis revealed a tendency of scholars to take a fragmented approach towards democratic legitimacy. Two symptoms were detected that demonstrated this observation. First, both supporters and opponents selectively focused on NGOs. They emphasized primarily the organization of NGOs and their functioning, which was considered decisive in determining whether or not NGOs democratically legitimate international law. Second, predominantly the proponents of the thesis approach democratic legitimacy in a non-institutional manner. When attention was paid to the political opportunity structure of NGOs, we observed a selective focus on democratic practices and values without reference to an institutional embedding of these values and practices.

As discussed, this emphasis on the internal democratic organization of NGOs is unconvincing for two reasons. Firstly the chance of succeeding in theorizing a general role of such an unstructured body of different actors should be critically reviewed. Any theory around NGOs’ contribution falls short of reliable predictability. It was argued the fulfillment of a pre-determined responsibility, which is assumed with the NGO democratic legitimacy thesis, can only be empirically tested during NGO participation in international lawmaking (ad hoc) or after NGOs have participated in international lawmaking (ex post). Secondly, the prioritization of NGOs’ internal democratic legitimacy is unconvincing given the lack of institutional preconditions to translate NGOs’ input into political impact in decisionmaking on law. This point brought us to our central criticism of the NGO democratic legitimacy
thesis: a general lack of attention to the necessary institutional preconditions of democratic legitimacy.

Subsequently we observed that the NGO democratic legitimacy thesis was inspired by non-institutionalist understandings of democratic legitimacy that selectively focused on deliberation and civil society. As argued, a non-institutional fragmented approach to democratic legitimacy of international law could not provide a convincing answer to the political fact that NGOs opportunities to democratically legitimize international law are conditional upon the discretion of power holders. As discussed in Part II, the political opportunity structure of even the most receptive international legal regimes offers a more or less random correlation between NGOs input and the effects of its input in terms of impact at the decisional stage of lawmaking processes. A selective focus on democratic norms and practices without taking into account the need for institutional preconditions, leads to an underestimation of the importance of democratic agency for any democratic legitimation of law. In addition, a non-institutional reading of democratic legitimacy offers a marginalized reading of contestation, and a neglect of the need for an all-encompassing political structure consisting of rights and judicial safeguards. Contrary to the current tendency to take a multiform approach to democratic legitimacy, it was contended that a concept of democratic legitimacy should not be too easily influenced by the characteristics of certain political contexts. If this were to be the case, democratic legitimacy would lose its distinctive capacity to critically assess the acceptability of the exercise of authority with the ultimate risk of being captured by the dynamics of current power plays.

As a potential remedy for the general lack of attention to institutional preconditions in the NGO democratic legitimacy debate, two approaches of institutional preconditions were discussed: a cosmopolitan and a two-track approach. The cosmopolitan approach theorized institutional preconditions directly at the international level, taking a uniform-institutionalist approach to democratic legitimacy. The two-track approach relied on the already anchored institutional preconditions back at democratic state level, taking a multiform-institutionalist approach. Initially, the two-track approach to institutional preconditions, as presented by, among others, Habermas, Besson, and Erman, seemed convincing. When states provide institutional guarantees, their delegates approve certain international laws, and when civil society participants, including NGOs, further enrich the process of coming into being of those international laws the democratic legitimacy of international law seemed guaranteed. However, conceptual and practical complications arose at different levels. The two-track approach did not fix the earlier discussed flaws in state consent as a legitimizing instrument, related to flaws in the delegation chain and to the unequal decision-making structure of international lawmaking. Furthermore, one encountered the objection that the proper application of the two-track model requires a top-down democratization of current non-democratic states, which in itself is hard to reconcile with the principle of freedom from domination. Additionally, we argued that this approach to democratic legitimacy seems to legitimate only the positions and thus the behavior of states to their own citizens, and not international law. The democratic legitimacy of an international rule of law requires that ‘second order rules’ that prescribe the procedure of legislation can be changed, according to democratic procedures, too. If one wants to meet the ideal of democratic legitimacy one should, in the light of the principles of freedom and equality, establish institutional safeguards at the level where the authoritative decisions are made. Therefore, a cosmopolitan, uniform, institutional approach to democratic legitimacy was considered the most reasonable way to meet the ideal of democratic legitimacy of international law,
because it proposed means to give all individuals the actual, equal, and continuous instruments to make, contest, and change international law at the same level. However, it was argued that it was highly unrealistic to think that current international lawmaking processes will adapt to conform to democratic institutional standards.

After a discussion on the considerable conceptual and practical hurdles for creating institutional preconditions at the international level, we concluded that the appropriateness of the use of the term ‘democratic legitimacy’ in the context of international law should be strongly questioned. Instead, academics in favor of the thesis might have been better understood in terms of a reflection on possible means, participants and processes of democratization of the international order. As was argued, reflecting on democratization is a completely different exercise than reflecting on democratic legitimacy. Whereas the first is an ongoing effort, a process-based interpretation of a development, the second describes an ad hoc effort, a static evaluation of normative acceptability of the exercise of public authority.

As a provisional response to the impasse of institutional preconditions, a reinterpretation of NGOs’ role in international lawmaking processes was suggested. As was argued, NGOs’ participation in international lawmaking could be considered as a contribution to the quality justification of international law. NGOs’ knowledge, consisting of values, testimonials, and expertise, allegedly contributes to both the substance of, and the process of making international law. A quality justification does not preclude a conditional participation of NGOs in international lawmaking processes defined by the discretion of power holders. A quality justification is in principle bound to ad hoc and ex post empirical studies of justificatory acts of lawmakers. Equally, a quality justification offered a better fit with the previously described dynamic manifestations of NGOs. Although there is a considerable overlap with some notions with democratic legitimacy theory, such as transparency, openness, and responsiveness, and the importance of information, quality justification was distinguished by the fact that such a justification of both the rationality of the process and the substance of the norm is an independent defensive act of lawmakers, which does not rely for its status on its legal subjects, in contrast to democratic legitimacy.

As discussed, the evaluation test of international law seemed to have shifted from lawmaking by the people to lawmaking for the people. Two issues emphasized the weaker normative force of a quality justification of law, compared to the democratic legitimacy of law. First, a reading of NGO participation in terms of quality justification obfuscated the actual politics that takes place in lawmaking processes. Notwithstanding its seemingly ‘neutral’ connotation and references to well informed lawmakers, the necessity of multiple sources of information and expertise, in order to establish a procedural-rational deliberations, power play in lawmaking cannot be excluded. NGOs might be used to provide window dressing for what is actually at stake: the possible pursuit of the self-interests of states, international organizations, and arguably also of NGOs. Second, an understanding of NGO participation in international lawmaking in terms of quality justification was confronted with the lack of a normative standard of quality.

Our suggestion to change the terms on which the debate on NGOs’ participation was built, was accompanied by the recommendation to further study the participation of NGOs in international lawmaking. Suggestions for further research included: empirical studies on their contribution in terms of input into the processes of lawmaking, studies on the impact of NGOs on the final international law, and studies on the justificatory acts of international lawmakers. We argued that gaining insight into the politics of both lawmaking and of
justifying international law is necessary. We suggested that future research on a quality justification could also have normative components focusing on what a theory of balance of interests might look like and what virtues for international lawmaking could be defined.
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Samenvatting – De participatie van NGOs in internationale wetgevingsprocessen en democratische legitimiteit: Het debat nu en in de toekomst

Internationaal recht wordt beïnvloed door de betrokkenheid van non-gouvernementele organisaties (NGOs). Het interne recht van internationale organisaties regelt de toekenning van een consultatieve status aan NGOs, op grond waarvan NGOs aanwezig mogen zijn bij internationale beraadslagingen en hun standpunt ten aanzien van een internationale regeling of verdrag mogen toelichten. Hoewel NGOs formeel geen internationale wetgevende bevoegdheden hebben, kan de impact van NGOs groot zijn. Een vaak genoemd voorbeeld is de rol die NGOs hebben gespeeld bij het Verdrag van Ottawa van 1997 inzake het verbod van antipersoonsmijnen.

Sinds een paar decennia wordt door internationale juristen, politicologen en IR-academici de stelling verdedigd dat de betrokkenheid van NGOs bij internationale rechtsvorming bijdraagt aan de democratische legitimiteit van internationaal recht. Ik noem dit de ‘NGO democratische legitimiteitstthese’. Het startpunt van deze these was de aannamer dat autoriteit, nationaal of internationaal, democratische legitimiteit nodig heeft om een breed draagvlak en acceptatie te kunnen waarborgen. In deze studie heb ik onderzocht of de NGO democratische legitimiteitstthese aannemelijk is. Aan de these liggen veel conceptuele vragen ten grondslag. Bijvoorbeeld: welke organisaties vallen onder de noemer ‘NGO’? Wat wordt verstaan onder internationaal recht? En wat wordt precies bedoeld met democratische legitimiteit? In mijn onderzoek heb ik mij in het bijzonder op deze laatste vraag toegelegd.

Deel I definieert democratische legitimiteit en de criteria waaraan een rechtsstelsel moet voldoen om democratische legitimering van recht te kunnen faciliteren. Deel II werpt in de eerste plaats licht op de context waarin de these is ontstaan. Bepaalde ontwikkelingen in de manier waarop internationaal recht wordt gevormd, zoals de toenemende regelgevende autonomie van internationale organisaties, de informele wijze waarop internationale wetgevingsprocessen worden vormgegeven, de gevolgen voor de autonomie van staten, en voor de representatie van individuen door staten hebben de bezorgdheid over de democratische legitimiteit van internationaal recht doen opkomen. De NGO democratische legitimiteitstthese wordt vaak gepresenteerd als een antwoord op de democratische tekorten van internationaal recht. Deze claim nodigt uit tot een bestudering van de huidige wettelijke kaders voor de deelname van NGOs aan internationale wetgeving. Na deze schets van de context waarin de NGO democratische legitimiteitstthese is ontstaan, wordt het debat over de NGO democratische legitimiteitstthese besproken. Deel III presenteert de zwaktes van de NGO democratische legitimiteitstthese en concludeert dat de these niet aannemelijk is. Niet zozeer de specifieke rol die NGOs wel of niet in internationale wetgevingsprocessen spelen, maar de problematische evaluatie van internationaal recht op basis van democratische legitimiteit vormt de doorslaggevende reden voor deze conclusie. De huidige academische discussies over de NGO democratische legitimiteitstthese besteden onvoldoende aandacht aan de institutionele voorwaarden die noodzakelijk zijn om enige democratische legitimering van recht mogelijk te maken. Echter, bij de nodige reflectie op de mogelijke implementatie van internationale institutionele voorwaarden, wordt men geconfronteerd met conceptuele en praktische dilemma’s. Dit besef leidde tot de conclusie dat beter passende termen nodig zijn om de bijdrage van de participatie van NGOs in
Internationale wetgevingsprocessen te duiden. Een voorzet is gedaan voor nadere studies naar de betrokkenheid van NGOs bij internationale wetgevingsprocessen in termen van een ‘kwaliteitsverantwoording’ van internationaal recht.

Deel I - Democratische legitimiteit

Legitimiteit verwijst naar het vertrouwen in en de acceptatie van de uitoefening van publiek gezag. De redenen waarom wetten worden geaccepteerd verschillen per persoon. Ze variëren van motivaties op basis van de inhoud van de wet, de legaliteit van een wet, de geldigheid, of de effectiviteit van een wet. Een normatieve benadering van democratische legitimiteit, die centraal staat in deze studie, is, in tegenstelling tot een sociologische benadering van legitimiteit, niet gebaseerd op de bewezen aanvaarding van wetten door rechtssubjecten, maar op een hypothetische aanvaarding van het gezag van een regel, of van de regelgevende instantie: de normatieve aanvaardbaarheid van het gezag van een wet. De grond voor de normatieve benadering van legitimiteit was een gegeven: de NGO democratische legitimiteitsthesis is gebaseerd op de veronderstelling dat de democratische kenmerken van een wetgevingsproces leiden tot de aanvaardbaarheid van een wet. De normatieve kracht van democratische legitimiteit is dat, hoewel de wetten bepalen hoe rechtssubjecten zich dienen te gedragen, de rechtssubjecten zichzelf beschouwen als de uitleer auteur van deze wetten.

Het recht, zij het nationaal, lokaal regionaal of internationaal, presenteert zich als normatief, dwingend en gezaghebbend. De democratische legitimiteitsthed doctrine acht de impact die het recht heeft op het leven van burgers aanvaardbaar wanneer de wetten tot stand gekomen zijn met inachtneming van de beginselen vrijheid en gelijkheid. De republikeinse opvatting van vrijheid (freedom as non-domination), dient als leidraad voor mijn definitie van democratische legitimiteit. De inperking van de vrijheid wordt legiti geacht mits de rechtssubjecten hun onafhankelijkheid kunnen bewaken door zelf de voorwaarden te kunnen stellen voor de uitoefening van publiek gezag en gelijkelijk te participeren in de vaststelling van wetten.

Een tweeledige toets is noodzakelijk om vast te kunnen stellen of wetten voldoen aan de eisen van democratische legitimiteit. Allereerst moet het overkoepelende politieke systeem waarin de wetten tot stand komen aan sociale en institutionele voorwaarden voldoen, die niet los van elkaar kunnen worden gezien. Wanneer aan deze (minimale) voorwaarden voldaan is, heeft een ieder een gelijkwaardige, afdwingbare en actuele mogelijkheid om te participeren in de totstandkoming van wetten. Sociale voorwaarden zien, kort gezegd, toe op een goed functionerende publieke sfeer die een democratische cultuur, deliberatie en het bestaan van een maatschappelijk middenveld mogelijk maakt. Institutionele voorwaarden bestaan uit politieke grondrechten die gewaarborgd en afdwingbaar zijn, zoals het recht op vereniging, vrijheid van meningsuiting, vrijheid van pers en het recht om representatie te kiezen of zichzelf verkiesbaar te stellen.

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die actuele, gelijke en voortdurende participatie in wetgevingsprocessen mogelijk maken en garanderen, heeft de evaluatie van de operationele aspecten van wetgevingsprocessen weinig zin.

Deel II - De NGO democratische legitimiteitsthese

Het feit dat rechtsvorming zich niet beperkt tot de grenzen van de democratische rechtsstaat, lokt een wetenschappelijke discussie uit over de democratische legitimiteit daarvan. Internationale rechtsvorming wordt gekenmerkt door diffuse, zogenoemde ‘multipolaire’ processen. De grote verscheidenheid aan internationale juridische regimes wordt gekenmerkt door verschillende gradaties in formaliteit, afdwingbaarheid en impact, alsmede door de verschillende actoren die daarbij betrokken zijn. De NGO democratische legitimiteitsthese komt voort uit de zorg dat belanghebbende individuen meer gevormd worden door het resultaat van deze diffuse processen dan ze die zelf kunnen vormgeven.

Een discussie over de democratische legitimiteit van het internationale recht is urgent in het licht van de veronderstelling dat staten hun controle op internationale rechtsvorming deels hebben verloren. De tanende statelijke autonomie op grond waarvan staten zelf inhoud en vorm aan internationale wetgeving geven, verzwakt de traditionele democratic state consent doctrine. Deze doctrine leunt op de idee dat democratische staten als de vertegenwoordigers van hun burgers optreden en parlementen door ratificatieprocedures het internationale recht op indirecte wijze democratisch legitimeren.

De zorgen met betrekking tot de democratische legitimiteit van het internationale recht suggereren een gebrek aan evenwicht tussen het ideaal van de democratische legitimiteit en de totstandkoming van internationaal recht. Academici wijten de afname van de normatieve kracht van democratic state consent aan de problematische relatie tussen internationaal recht en het ideaal van de individu als auteur van rechtsregels. Alhoewel individuen formeel geen rechtssubjecten zijn van internationaal recht, worden ze wel degelijk beïnvloed door internationale recht. De indirecte vertegenwoordiging van individuen door de instemming van staten wordt geacht te zijn verzakt door zowel het gebrek aan parlementaire controle als het bestaande gebrek aan evenwicht in macht tussen de staten.

De toenemende deelname van de NGOs aan de internationale wetgevingsprocessen, verklaart de opkomst van de NGO democratische legitimiteitsthese. De bestudering van het juridisch kader van de participatiemogelijkheden voor NGOs in internationale wetgevingsprocessen wijst uit dat veel internationale organisaties NGOs toelaten tot hun beraadslagen op basis van accreditatie, waarvan de relatie tussen de VN en de NGOs, gereguleerd door ECOSOC, vaak fungeert als een voorbeeld.

Als tegemoetkoming op het democratisch tekort van internationaal recht worden NGOs geacht de naleving van democratische normen zoals transparantie, participatie, controle en verantwoording te bevorderen. Daarnaast worden ze verondersteld gemarginaliseerde groepen te vertegenwoordigen, een mondiale publieke sfeer te faciliteren en inhoudelijk bij te dragen aan de deliberaties tijdens internationale wetgevingsprocessen. Voorts wordt de druk die NGOs uitoefenen op ombudsmannen, parlementen, rechtbanken en media beschouwd als een bijdrage aan de democratische legitimiteit van internationaal recht.

De kwalificatie van de betrokkenheid van NGOs in internationale wetgevingsprocessen als een bijdrage aan de democratische legitimiteit van internationaal is omstreden. Tegenstanders bekritiseren de idealisering van NGOs en de perceptie van het bestaan van een mondiaal maatschappelijk middenveld en publieke sfeer. Zij wijzen op de bestaande afhankelijkheidsrelatie tussen NGOs en staten die eerder wordt gekenmerkt door
strategische drijfveren van staten en internationale organisaties dan door een bijdrage aan de democratische legitimité, de twijfelachtige vertegenwoordiging van de gemarginaliseerde stemmen door NGOs, en het gebrek aan processen om NGOs zelf ter verantwoording te kunnen roepen. Bovendien wordt gerefereerd aan de overbezetting van NGOs tijdens internationale wetgevingsprocessen die, naar verluidt, de kans dat NGOs daadwerkelijk impact kunnen hebben op de vorming van internationaal recht vermindert.

Alhoewel de onderliggende concepties van democratische legitimité vaak impliciet blijven, lijken die ten grondslag te liggen aan de huidige controverse rondom de NGO democratische legitimitésthese. Het debat centreert zich rondom vragen of er wel of geen internationale *demos* kan bestaan, of we wel of niet kunnen spreken van een internationale publieke sfeer, of globale deliberatieve praktijken wel of niet internationaal recht democratisch kunnen legitimeren, hoe inclusief internationale wetgevingsprocessen eigenlijk moeten zijn, en hoe vertegenwoordiging zou moeten worden gedefinieerd zonder het bestaan van een wereldparlement om invulling te geven aan de democratische legitimering van internationaal recht.

Uit de bestudering van de verschillende standpunten kan worden afgeleid dat de betrokken academici variëren in een monistische benadering of een dualistische benadering ten aanzien van de wenselijkheid van democratische legitimering van internationaal recht. Eveneens variëren ze in een institutionele of een non-institutionele benadering ten aanzien van de voorwaarden en manifestaties van democratische legitimité. Bovendien interpreteren sommige academici democratische legitimité als een evaluatiestandaard die verschillende vormen aan kan nemen, afhankelijk van het type gezagsuitoefening en het niveau waarop gezag wordt uitgeoefend, terwijl anderen democratische legitimité als een uniform concept zien, dat in elke context van publieke gezagsuitoefening dezelfde karakteristieken behoudt.

Deel III - De impasse van institutionele randvoorwaarden en een uitweg

Dat NGOs een rol kunnen spelen in de democratische legitimering van recht is op zich geen vreemde stelling. Al eeuwen wordt door theoretici het belang van vaillante organisaties voor democratie onderstreept. In die zin sluit de nadruk op NGOs aan bij de evaluatie van de eerder genoemde sociale voorwaarden voor democratische legitimité: het bestaan van een publieke sfeer die ruimte geeft aan een florerende *civil society*. Wat de NGO democratische legitimitésthese kwetsbaar maakt, is het gebrek aan aandacht in het discours voor de preliminaire vraag of democratische legitimité als concept wel kan worden toegepast op internationaal rechtsvorming.

De studie naar de NGO democratische legitimitésthese legt niet alleen een onoverbrugbaar verschil in opvatting over de definitie van democratische legitimité bloot, maar ook de neiging van academici om democratische legitimité op een gefragmenteerde wijze te benaderen. Zowel voorstanders als tegenstanders leggen voornamelijk de nadruk op de organisatie van NGOs en de manier waarop NGOs functioneren. Dit wordt doorslaggevend geacht in de vaststelling of NGOs internationaal recht democratisch kunnen legitimeren. Bovendien, voornamelijk de voorstanders van de theses benaderen democratische legitimité op een gefragmenteerde, non-institutionele manier. Als er al aandacht wordt besteed aan de ‘politieke mogelijkheden structuur’ van de deelname van NGOs aan internationale wetgevingsprocessen ziet men een selectieve focus op democratische praktijken en waarden zonder te refereren naar een institutionele inbedding van deze praktijken en waarden.
De nadruk op de interne democratische organisatie van NGOs is om twee redenen niet overtuigend. In de eerste plaats moet men kritisch bezien of het überhaupt mogelijk is om een algemene rol te theoreetiseren voor een dergelijk onestructureerd fenomeen als een ‘NGO’ dat verwijst naar een enorme verscheidenheid aan actoren. Welke rol men ook theoreetiseert voor NGOs, deze zal tekortschieten in betrouwbare voorspelbaarheid. Een vooraf vastgelegde verantwoordelijkheid voor NGOs, wat wordt verondersteld in de NGO democratische legitimiteitstthese, kan, gezien de veranderlijke aard van NGOs, enkel empirisch worden getest terwijl de participatie van NGOs in internationale wetgevingsprocessen daadwerkelijk plaatsvindt (ad hoc), of nadat NGOs hebben deelgenomen aan internationale wetgevingsprocessen (ex post). In de tweede plaats is de prioritering van de interne democratische legitimiteit van NGOs niet overtuigend gezien het gebrek aan aandacht voor institutionele randvoorwaarden die het mogelijk maken dat de input van NGOs vertaald wordt naar politieke impact op de besluitvormingsprocessen in internationale wetgevingsprocessen. Wanneer een doorvertaling van input van NGOs in daadwerkelijke impact op besluitvorming niet gegarandeerd is, lijkt het stellen van eisen aan de democratische legitimiteit van NGOs, naast anderszins normatieve bezwaren, voorbarig. Dit laatste leidt tot het centrale punt van kritiek op de NGO democratische legitimiteitstheorie: het algemene gebrek aan aandacht voor de noodzakelijke institutionele randvoorwaarden voor democratische legitimiteit van internationaal recht.

De argumenten die de NGO democratische legitimiteitstthese ondersteunen zijn geïnspireerd door een non-institutioneel begrip van democratische legitimiteit met een selectieve focus op democratische normen en praktijken zoals deliberatie, controle en inclusiviteit. Een selectieve focus op democratische waarden en praktijken leidt tot een onderschatting van het belang van democratisch agentschap voor welke democratische legitimering dan ook. Het formuleert geen overtuigend antwoord op het feit dat de mogelijkheden voor NGOs om te kunnen deelnemen aan internationale wetgevingsprocessen afhankelijk is van de welwillendheid van machthebbers, zoals staten en internationale organisaties. Bovendien, een non-institutionele lezing van democratische legitimiteit biedt enkel een gemarginaliseerde lezing van het belang van contestatie voor democratische legitimering van recht, en leidt tot de verwaarlozing van de noodzakelijkheid van een alles omvattende politieke structuur bestaande uit rechten en juridische waarborgen. Op een enkeling na, die ook in nationale context democratische legitimiteit definieert op grond van non-institutionele normen en praktijken, lijkt het gros van de deelnemers aan het debat hun conceptie van democratische legitimiteit aan te passen aan het niveau waarop de publieke gezagsuitoefening plaatsvindt. Met als gevolg dat een normatief ‘zwakkere’ toets, ontstaan van de evaluatie van institutionele randvoorwaarden, wordt toegepast op internationaal recht in vergelijking tot nationaal recht. Een die voornamelijk ziet op de kenmerken van een specifieke wetgevingsproces, zoals op transparantie of verantwoordingsmechanismen, of op de accreditatiemogelijkheden voor die participatie van andere groepen dan staten mogelijk maken. Met deze multiforme toets worden karakteristieke eigenschappen van democratische legitimitie, zoals de veronderstelling dat deliberatie leidt tot een aanvaardbaar besluit omdat een ieder gelijkwaardig kan deelnemen aan de besluitvorming of dat er altijd de mogelijkheid moet bestaan om rechtsregels – met voldoende democratische steun uiteraard – te kunnen wijzigen, gemarginaliseerd. Met als gevolg een verwasserij van de democratische legitimiteitsttoets, waardoor de intrinsieke waarde van democratische legitimiteit verloren gaat: de toetsing of met de uitoefening van gezag een ieders vrijheid gewaarborgd blijft. Er zijn risico's
verbonden aan deze benadering. Niet alleen verliest democratische legitimiteit zijn onderscheidend vermogen om kritisch de aanvaardbaarheid van gezag te kunnen evalueren (met het uiteindelijke risico om te worden gekaapt door bestaande machtsdynamieken), maar ook verzwakt de claim internationaal recht op autoriteit en bindende kracht, als verondersteld wordt dat een zwakkere toets volstaat.

De neiging tot de formulering van een non-institutionele democratische legitimiteitstoes is, alhoewel discutabel, zeer begrijpelijk. De relatie tussen internationale rechtsvorming en democratische legitimiteit is problematisch in het licht van de institutionele voorwaarden voor democratische legitimiteit. Directe en afdwingbare grondrechten en een overkoepelend politiek systeem waarin procedurele, universele regels voor wetgeving worden vastgesteld, zoals wij die kennen uit onze nationale democratische context, bestaan immers niet op internationaal niveau. Echter het belang van aandacht voor institutionele randvoorwaarden wordt bevestigd als we kijken naar de praktijk en het juridisch kader van NGOs participatie in internationale rechtsvorming. De impact van NGOs is in sterke mate afhankelijk van de bereidwilligheid van staten en internationale organisaties om NGOs bij het wetgevingsproces te betrekken. Binnen een democratisch bestel op statelijk niveau speelt de bereidwilligheid van politieke organen ten opzichte van NGOs ook een rol, ware het niet dat daar door andere kanalen de zeggenschap van burgers is gegarandeerd, zoals door verkiezingen en referenda. Het gebrek aan institutionele waarborgen op internationaal niveau heeft tot gevolg dat de betrokkenheid van NGOs niet op democratische wijze kan worden gecomplementeerd, maar ook niet kan worden gecorrigeerd. Het gevaar bestaat dat NGOs eerder onderdeel worden van het probleem van oncontroleerbare uitoefening van autoriteit dan van de oplossing.

Dan reist de preliminaire vraag: als we het eens zijn over de wenselijkheid van een evaluatie van internationale gezagsuitoefening op grond van de democratische legitimiteit daarvan, hoe moeten die internationale institutionele voorwaarden er dan uit zien? Als een potentiële oplossing voor het algemene gebrek aan aandacht voor de institutionele randvoorwaarden in het NGO democratische legitimiteit debat, bespreek ik twee bestaande benaderingen van institutionele randvoorwaarden: een ‘kosmopolitische’ benadering en een ‘tweewegen’ benadering. De kosmopolitische benadering theoretiseert institutionele randvoorwaarden direct op internationaal niveau, en benadert democratische legitimiteit op een uniforme-institutionele wijze. De tweewegen benadering is gebaseerd op de reeds verankerde institutionele randvoorwaarden op het niveau van de democratische staat, en benadert democratische legitimiteit op een multiforme-institutionele wijze. Aanvankelijk lijkt de tweewegen benadering overtuigend. Wanneer staten zorgdragen voor institutionele waarborgen, en hun afgevaardigden met bepaalde internationale wetten instemmen, en wanneer de deelnemers het maatschappelijk middenveld, met inbegrip van NGOs, verder het proces van het ontstaan van de internationale wetten verrijken, lijkt de democratische legitimiteit van het internationale recht gegarandeerd. Echter, op verschillende niveaus ontstaan conceptuele en praktische bezwaren. De tweewegen benadering is niet in staat de eerder besproken gebreken in de democratic state consent doctrine op te lossen, in verband met gebreken in de delegatie keten en de ongelijke besluitvormingssituatuur van internationale wetgevingsprocessen. Bovendien vereist een correcte toepassing van de tweewegen benadering een top-down democratisering van de huidige niet-democratische staten, hetgeen moeilijk te verenigen is met het democratische beginsel freedom from domination. Voorts lijkt deze benadering van democratische legitimiteit alleen het gedrag
van staten voor hun eigen burgers te legitimeren, en niet het resulterende internationaal recht zelf.

De democratische legitimiteit van een internationale rechtsorde vereist dat regels die de procedure van de wetgeving voorschrijven ook op democratische wijze kunnen worden gewijzigd. Wil men aan het ideaal van de democratische legitimiteit voldoen dan moet men, in het licht van de beginselen van vrijheid en gelijkheid, institutionele waarborgen kunnen garanderen op hetzelfde niveau waarop de uitoefening van publiek gezag plaatsvindt. Daarom lijkt een kosmopolitische, uniforme-institutionele benadering de meest redelijke manier om aan het ideaal van de democratische legitimiteit van internationaal recht te voldoen. Een kosmopolitische benadering schrijft processen en instituten voor op het niveau waarop de gezaghebbende beslissingen gemaakt worden. Zo wordt ieder individu voorzien van een actuele, gelijke, en voortdurende mogelijkheden om internationaal recht te maken, te bediscussiëren en mogelijke voorstellen te verwerpen en te veranderen. Het is echter onrealistisch om aan te nemen dat de huidige internationale wetgevingsprocessen zullen worden aangepast om aan die democratische institutionele normen te voldoen.

De theoretische complexiteit en de praktische onwaarschijnlijkheid van het implementeren van internationale institutionele waarborgen nodigen uit om te heroverwegen hoe NGOs’ onbetwiste bijdrage aan internationale wetgeving dan het beste geduid kan worden. In de conclusies van mijn onderzoek besteed ik kort aandacht aan deze vraag. Ik stel dat de deelname van NGOs aan internationale wetgeving beter kan worden beschouwd als een bijdrage aan de ‘kwaliteitsrechtvaardiging’ van het internationaal recht. De kennis van NGOs kan bijdragen aan zowel de inhoud van internationaal recht, als het proces waarin internationaal recht tot stand komt. Een kwaliteitsrechtvaardiging vormt geen beletsel voor de kenmerkende voorwaardelijke deelname van NGOs aan internationale wetgevingsprocessen. Ook sluit een kwaliteitsrechtvaardiging beter aan bij de eerder beschreven dynamische karakteristieken van NGOs die een ante hoc theorie van hun rol in de weg staan. In tegenstelling tot democratische legitimiteit, is een kwaliteitsrechtvaardiging in beginsel gebonden aan ad hoc en ex post empirische studies naar de gronden die wetgevers aanvoeren ter rechtvaardiging van de tot stand gekomen wet.

Er bestaat een aanzienlijk raakvlak tussen een aantal begrippen die centraal staan in een kwaliteitsverantwoording en de begrippen die terugkomen in democratie-theorie, zoals transparantie, de ontvankelijkheid van gezaghebbers voor standpunten van derden, en het belang van pluriforme bronnen van informatie. Een kwaliteitsrechtvaardiging wordt echter gerekend door het feit dat een dergelijke rechtvaardiging van zowel de rationaliteit van het proces als de inhoud van de norm een onafhankelijke daad van wetgevers is. Anders dan democratische legitimiteit is een kwaliteitsrechtvaardiging voor de vaststelling of er wel of niet sprake is van een rechtvaardiging niet afhankelijk van een aanvaarding door rechtssubjecten.

Alhoewel een kwaliteitsrechtvaardiging beter past bij de huidige internationale wetgevingspraktijken, is het vanuit een normatief oogpunt een zwakkere standaard voor de uitoefening van gezag dan democratische legitimiteit. De focus in de evaluatie van internationale recht verschuift van wetgeving door de mensen naar wetgeving voor de mensen. Een lezing van participatie van NGOs in termen van kwaliteitsrechtvaardiging verhult in zekere mate de feitelijke politiek waar wetgevingsprocessen door worden gekenmerkt. Niettegenstaande haar opvallende neutrale connotatie en verwijzingen naar goed geïnformeerde wetgevers, de noodzaak van meerdere bronnen van informatie en
deskundigheid, met het oog op een procedureel-rationele deliberaties, kunnen mogelijke machtsdynamieken niet worden uitgesloten noch worden gecorrigeerd. NGOs, onder het mom van een kwaliteitsrechtvaardiging, kunnen worden gebruikt om te verhullen wat er werkelijk op het spel staat: het mogelijke nastreven van het eigenbelang van staten, internationale organisaties, en van de NGOs. Voorts wordt een analyse van de deelname van NGOs aan internationale wetgeving op basis van kwaliteitsrechtvaardiging gehinderd door het gebrek aan een normatieve gedeelde standaard van wat kwaliteit nou is.

De suggestie om de termen te veranderen waarmede het debat over de deelname van NGOs wordt gevoerd, gaat gepaard met de aanbeveling om de deelname van NGOs in internationale wetgeving te onderwerpen aan nadere studie. Meer inzicht in de politiek van zowel de wetgevingsprocessen als de rechtvaardiging van internationaal recht is wenselijk. In vervolgonderzoek zouden empirische studies uitgevoerd kunnen worden naar de bijdragen van NGOs in termen van input in en impact op internationale wetgevingsprocessen, evenals studies naar de gronden die wetgevers aandragen ter verantwoording van de tot stand gekomen wetten. Toekomstig onderzoek zou zich eveneens kunnen buigen over normatieve componenten van een kwaliteitsrechtvaardiging van internationaal recht, zoals hoe een theorie van afweging van belangen eruit zou kunnen zien en welke deugden men zou kunnen definiëren voor de internationale wetgevers om het gebrek aan democratische legitimiteit enigszins te compenseren.
NGO Participation in International Lawmaking and Democratic Legitimacy: The Debate and its Future

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