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. 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. One of the proposed remedies for the democratic deficits of international law concerns the participation of NGOs in international lawmaking. 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. 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. 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. Scholars present NGOs as

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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 academicians as a contribution to the democratic legitimacy of international law. See Spiro 2002; Crawford and Marks 1998, p. 72; Kamminga 2005, p. 83.


representatives of marginalized people,\(^7\) as facilitators of a flourishing global public sphere,\(^8\) and as contributors to the strengthening of deliberations taking place during international lawmaking processes.\(^9\) 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,\(^10\) which have been endorsed by many international organizations.\(^11\)

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.\(^12\) 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.\(^13\) 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,\(^14\) 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.\(^15\) 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.\(^16\) 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’.

\(^8\) Görg and Hirsch 1998, p. 599.

\(^9\) 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.

\(^10\) See Witte, Reinicke and Benner 2000.


\(^12\) 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 falls, although highly interesting, out of the scope of this study. See Anheier 2005.

\(^13\) See Lindblom 2005a; Woodward 2010; Aspremont 2011a.

\(^14\) 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.

\(^15\) 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.\(^\text{17}\) The wide varieties of forms of NGOs, and their varying contributions to lawmaking, are the subject of empirical examination.\(^\text{18}\) 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.\(^\text{19}\) The Geneva Convention of 1864,\(^\text{20}\) the World Anti-slavery Convention,\(^\text{21}\) private international law on shipping, the Statute of the International Court of Justice,\(^\text{22}\) the Convention on the Rights of the Child,\(^\text{23}\) the Convention on International Trade in Endangered Species,\(^\text{24}\) and the Ottawa Landmine Convention\(^\text{25}\) are but a few examples of treaties influenced by the pressure exerted by NGOs.\(^\text{26}\) 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’,\(^\text{27}\) based on the central standard of assessment of this study: democratic legitimacy.\(^\text{28}\) This study focuses on the body of scholarly work that has normatively assessed NGOs’

\(^{17}\) 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.

\(^{19}\) Spiro 1996, p. 961.


\(^{22}\) See for NGOs’ influence on the Statute of the International Court of Justice, Kirsch and Holmes 1999, pp. 2-12.


\(^{25}\) Short 1999, p. 481 - 500.

\(^{26}\) Vedder 2007; Steffek, Kissling, 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, Kissling 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

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.
35 Young 1994, p. 47.
36 Pérez for example calls the claim that NGO involvement substitutes democratic legitimacy a ‘universalistic dream’. Pérez 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. Constitutionalist 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: Wolfske 1993, p. 3; Hoofd 1983, p. 63. Compare Meijers 1978, p. 9 (acknowledging that in the first stage of CL 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. Elslander 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 as a matter of scholarly division of labor. Lawmaking is considered to some extent as 'pre-legal', to be political, relevant for political scientists.54 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.55 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.56 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,57 and this study aims to contribute to it.58

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 legitimacy 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 legitimacy 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.