NGO participation in international lawmaking and democratic legitimacy

The debate and its future

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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 lawmaking, 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 lawmaking, 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.
3 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.

505 See for a general elaboration on the context of the legitimacy challenge of international law, Kumm 2004, p. 907-931. The ending of the Cold War is often considered to be the starting point for a rapid development of a constellation of merely isolated states to an international community of states and an emerging world economy in which NGOs are considered to start playing an important role. Anheier explains why as follows: '[t]he end of the Cold War has reduced many barriers to NGO action thereby facilitating their internationalization. NGOs can now move into countries that were previously beyond bounds under the USSR. Moreover, the end of many regional conflicts that had been fueled by the Cold War has allowed NGOs unprecedented access across the globe. Similarly, the spread of democracy and plural regimes has increased space for NGO action.' Anheier 2005, p. 343, referring to Clark, J. 2003, Lindenberg and Bryant 2001.


507 See generally, Rosenau 1997; Lebow 1995; Young 1999.


509 Alkoby 2003, p. 29.

510 See Slaughter 2004a.

511 Cassese 2013. Cassese referred to Steward, who described during a workshop the international legal order as a 'Jackson Pollock' landscape. See Tompkins 2004.

512 This trend can be contrasted with scholarship that focuses on international constitutionalism. See Krisch 2010, chapter 2, p. 28; Klabbers, Peters, and Ulfstein 2009. See for a useful introduction and contextualization of constitutionalism, Walker 2008, p. 519-543.

513 Koskenniemi 2006b; Krisch 2013; Gerards and Schrijver 2010, p. 5-6.

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.

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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 for 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.

518 D’Aspremont 2011d, p. 28.

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

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

521 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 as is sometimes contended, 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). According to a traditional account of international law, based on purely horizontal lawmaking processes among states, states are the exclusive lawmakers.

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 These developments in the creation of international law are subject of criticism. Bolton for example warns that 'globalism' negatively affects the constitutional autonomy and popular sovereignty of states. Bolton 2000, p. 221. 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 Wheatley 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 See Jenks 1958.
530 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.\textsuperscript{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,\textsuperscript{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,\textsuperscript{533} do not find an easy translation into international lawmaking.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{537} However, procedures of lawmaking and decision-making differ per legislative context these to be legislative in nature. Indeed, it was only in relation to Resolutions 1373, S/RES/1373, Sept. 28, 2001 (\textit{Threats to international peace and security caused by terrorist acts}), and UNSC, Resolution 1540, S/RES/1540, April 28, 2004 (\textit{Non-proliferation of weapons of mass destruction}), respectively, that states for the first time used the term international legislation.

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.

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.

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 (\textit{Threats to international peace and security caused by terrorist acts}), and UNSC, Resolution 1540, S/RES/1540, April 28, 2004 (\textit{Non-proliferation of weapons of mass destruction}) from previous binding, but situation-specific resolutions of the UN Security Council. This substantive dimension also distinguishes international legislation from binding judicial or arbitral decisions, which are by definition concerned with specific disputes and situations.

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

535 Boyle and Chinkin 2007, p. viii.

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.

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. International legal norms can bind subjects universally, or not, and to varying degrees. There is no formally established hierarchy among legal sources or various legal areas. The lack of a central lawmaker, acting in accordance with secondary rules, consequentially requires an ad hoc reflection on the large variety of questions related to the validity of resulting international norms. 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.

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’. The traditional view of the legitimacy of international law is consent-based. 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: 547 ‘if you and I consent to a certain arrangement as to how we shall treat each other, then surely that arrangement is legitimate’. 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. 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. 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. 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. 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. 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. 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. 555 Explicit state consent to law or to the delegation

547 See chapter 1, section 1.3.1.
548 Buchanan 2010, p. 91.
550 Franck 1997, p. 29.
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 objecing 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.
552 See for an attempt to modernize this consensual conception of customary international law, Orakhelashvili 2008, p. 70-107; D’Amato 1962, p. 1-43.
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,\textsuperscript{557} states have not relinquished their external and general lawmaking powers.\textsuperscript{558} 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{559} 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

\textquote{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{558} 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.\textsuperscript{559} 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.

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\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.564 Through democratic elections the continuing consent and democratic scrutiny of the peoples of states is allegedly assured.565 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.566 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.567 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.568

States are considered to maintain sufficient direct or indirect control over international lawmaking. Non-state governance is considered an inappropriate subject for democratic theory.569 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.570

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 1989.571 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

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.\(^{573}\) 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.\(^{574}\) 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’.\(^{575}\)

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.\(^{576}\) International institutions, in Europe and elsewhere, reacted quickly to the abovementioned revolutionary events and the new era of democracy that they promised to evoke.\(^{577}\) The ideal of state-based democracy gradually became a norm of international law, ‘applicable to all and implemented through global standards’,\(^{578}\) in which human rights, the rule of law, and democracy are interlinked and considered to be mutually reinforcing.\(^{579}\) International organizations started to encourage the strengthening and development of national democratic governance.\(^{580}\)

\(^{573}\) 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.

\(^{574}\) 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.

But as Rosanvallon states, ‘To be sure, they soon came in for vigorous criticism themselves. They were accused of failing in their mission: their representation of society was highly imperfect, and political parties had taken them over.’ Rosanvallon 2011, p. 137.

\(^{575}\) 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.

\(^{576}\) Fox and Roth 2000, p. 2.

\(^{577}\) Pippan 2012, p. 203.

\(^{578}\) Pippan 2012, p. 206.


\(^{580}\) 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.581

The democratic norm thesis, as discussed in the previous sub-section, is translated into global standards.582 Both the International Covenant on Civil and Political Rights (ICCPR),583 and the International Covenant on Economic, Social and Cultural Rights (ICESCR),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.585 Among others there is the right to political participation, which is laid down in statements of the ICCPR Human Rights Committee,586 and the UN General Assembly.587 Article 21 of the 1948 Universal Declaration of Human Rights (UDHR) clearly sets out the normative desirability of a democratic norm of elections.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.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

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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.
582 See for an overview Pippan 2012, p. 204, referring to Fox and Roth 2000, and Burchill 2006.
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).
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).
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.

594 In 2009, the UN Secretary-General explains that its position on democracy is based on 'universal principles, norms and standards' derived, in particular, from 'references to essential democratic underpinnings' in the preamble and Article 1 of the Charter of the United Nations, Oct. 24, 1945, 1 U.N.T.S. XVI, ('life in larger freedom', 'self-determination', 'human rights', 'fundamental freedoms') as well as from the provisions on political rights contained in the UDHR, UNGA, Resolution 217A(I), A/810, Dec. 10, 1948 (Universal Declaration of Human Rights), and subsequent UN treaties and instruments. See Secretary-General of the United Nations 2009, p. 1-2.

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 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,\textsuperscript{596} which is supported by the one hundred and sixty-seven states that have become parties to the ICCPR.\textsuperscript{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.\textsuperscript{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.\textsuperscript{599} Some treaties go beyond an executory type of contract and create longer-term obligations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{602} The instruments to achieve this were collective security and disarmament, and settling international disputes through negotiation and arbitration.\textsuperscript{603} From then, one witnessed a move to the codification of international law.

\textsuperscript{596} Pippan 2012, note 69, p. 217
\textsuperscript{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.
\textsuperscript{598} Weiler 2004, p. 549.
\textsuperscript{599} Danilenko 1993, p. 46.
\textsuperscript{600} Examples are US Friendship, Commerce and Navigation Treaties, Free Trade Area Agreements, or Bilateral Investments Treaties.
\textsuperscript{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-Mirabella 1925, p. 345-391; Brölmann 2007, p. 55-56.
\textsuperscript{602} Tomuschat 1995, p. 77.
\textsuperscript{603} Covenant of the League of Nations, April 28, 1919. http://avalon.law.yale.edu/20th_century/leagcov.asp, (last visited January 2016). Other issues include labour conditions, just treatment of native inhabitants, human and drug trafficking, arms trade, global health, prisoners of war, and protection of minorities. See Art. 23. 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.\textsuperscript{604} After the end of the World War II, the United Nations replaced the League.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 and in the long run, customary law, developed.\textsuperscript{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’.\textsuperscript{610} Consequently, the International

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\textsuperscript{604} See for a summary on the topics discussed at the first conference for the Codification of International Law, Hudson 1930. See for a historical overview of the work of the International Law Commission in this regard, United Nations 2004.

\textsuperscript{605} The League of Nations ultimately proves incapable of its main aim to encourage peaceful cooperation and preventing aggression. Germany withdraws from the League, as does Japan, Italy, Spain and others. See for further reading on League of Nations, Howard-Ellis 2003; Northedge 1986; Armstrong, Lloyd, and Redmond 2004.

\textsuperscript{606} Lowe sees the establishment of the Permanent Court of International Justice in 1920 as proof that ‘international law has arguably reached the stage of practical completeness’. Lowe 2000, p. 212.

\textsuperscript{607} Jennings sketches the coming into existence and developments of the International Court of Justice: Jennings 1995, p. 493-505.

\textsuperscript{608} Besson 2011a, p. 7.

\textsuperscript{609} Klabbers 2005a, p. 224, referring to Schermers 1999, p. 62.

\textsuperscript{610} UN Charter art 13.
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.\textsuperscript{618} UN law started to generate norms applicable to a wider range of actors than the actors traditionally involved in transactional lawmaking.\textsuperscript{619} Furthermore, customary law revived itself into the so-called new sources of international law.\textsuperscript{620}

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.\textsuperscript{621} 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.\textsuperscript{622} 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,\textsuperscript{623} and urge the definition of other ways to legitimize international law.\textsuperscript{624} 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.\textsuperscript{625} 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

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\textsuperscript{618} 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.

\textsuperscript{619} 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.

\textsuperscript{620} Weiler 2004, p. 549.

\textsuperscript{621} For interesting insights into the international legal scholarly discussions on sources and normativity of international law of that time, see Cassese and Weiler 1988.

\textsuperscript{622} 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.

\textsuperscript{623} The term ‘discredited conception of legitimacy’ is borrowed from Buchanan and Keohane. Buchanan and Keohane 2006, p. 405-437.

\textsuperscript{624} 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 Agné 2006, p. 438.

\textsuperscript{625} 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.
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’. 626 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’. 627 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. 628 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. 629

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. 630 International scholars have referred to different descriptive notions in their efforts to make sense of international lawmaking: deformalization, fragmentation, and differentiation. 631

626 Twining 2007, p. 70. Globalization, or in other contexts called ‘global governance’, though often used, remains a contested concept. See Pattberg 2009; Ladeur 2013.
627 Giddens 1990, p. 64.
628 Von Bogdandy 2004, p. 888. Globalization is in this respect primarily understood as a term of legal geography.
629 Twining 2007, p. 70.
630 An example can be found in the work of Goldmann 2008, p. 1871-1879; Von Bogdandy, Dann and Goldmann 2008, p. 1387-1388. See for an overview on the developments of international organizations Benvenisti 2014, p. 10.
631 See Koskenniemi 2007.
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

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634 Thürer 2009, under 3.
635 See Pauwelyn, Wessel, and Wouters 2014.
636 Besson 2011a, p. 7. See also Abbott, Green and Keohane 2013.
637 'Low politics' is used in political theories in opposition to 'high politics'. The concept high politics covers all matters that are vital to the very survival of the State: namely national and international security concerns. 'Low politics' refer to these issues that are not absolutely vital to the survival of the state, it refers to regulatory politics related to social security.
638 Levi-Faur 2011, p. 5.
639 The European Union as an international organization has such a sui generis character, that it will not be taken into account extensively here as no conclusions can be drawn from it for the development of regulatory autonomy more in general.
641 See Benzing 2007. The most prominent example of this form of secondary legislation is to be found in the law of the EU, whose organs can pass legislative acts in the form of regulations and directives. Apart from this, there are few international organizations endowed with the express competence to issue resolutions of a legislative character. These include the WHO, which can adopt regulations. Besides, a few Multilateral Environmental Agreements empower their plenary bodies to adjust certain treaty terms with binding effect for all parties. The most frequently cited example is: art. 2 (9) Montreal Protocol Montréal protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, U.N.T.S. no. 26369. See for further examples of legislative activities by international organizations by MEA's: Brunée 2010, under nr 31-33.
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. The General Assembly cannot independently, on its own volition, decide that its instruments are mandatory for member states. However, some regulatory norms have a profound effect on
the national regulatory system, and should be accepted by states even if they contradict national law or policies.653

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.654 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.655 Resolutions of the UN Security Council merit separate treatment in this respect.656 The UN Charter specifically authorizes binding decision-making by the UN Security Council.657 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 1373,658 1540,659 and 2178,660 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.661 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.662

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.663 Treaty-making, the formation of customary law, and regulatory processes by international organizations are

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653 Krajewski 2008, p. 3, point 12.
654 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.
655 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.
656 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)).
659 UNSC, Resolution 1540, S/RES/1540, April 28, 2004 (Non-proliferation of weapons of mass destruction).
661 The critique on state consent will be discussed in subsequent section 3.4.
alternated with more informal lawmaking processes, which often occur beyond the control of domestic democratic institutions and processes.\textsuperscript{664} 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.\textsuperscript{665} 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.\textsuperscript{666} The focus is on standards\textsuperscript{667} and soft norms,\textsuperscript{668} 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.\textsuperscript{669}

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,\textsuperscript{670} is witnessed. Some scholars frame the relationships between private actors, international organizations, and states in the new constellations as partnerships.\textsuperscript{671} 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.\textsuperscript{672} 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.\textsuperscript{673} 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.\textsuperscript{674} Abbott and Snidal recapitulate these developments as a gradual shift made between state-centric lawmaking to member-centric lawmaking, from centralized steering

\textsuperscript{664} See Sassen 1996; Reisman 1987.
\textsuperscript{665} See Hamzeh 1968, p. 179-187; See for survey of the efforts around 1960 to codify or restate the law of treaties: Lissitzyn 1962, p. 1178-1205.
\textsuperscript{666} Pauwelyn, Wessel and Wouters 2012, p. 22.
\textsuperscript{667} See Scott 2014. Under 6.2.1., Scott explains the status of standards; ‘The term regulatory standards is often understood to refer to the standards developed by specialised standardisation institutes. These standards, which are very numerous and of great significance in many industries, are typically not legally binding, but are liable to be incorporated into supply-chain and other contracts. In some instances, compliance with particular standards may be specified as a legal requirement in primary or secondary legislation.’
\textsuperscript{669} See Krisch 2013.
\textsuperscript{670} See also Abbott, Green and Keohane 2013, p. 3.
\textsuperscript{671} Abbott and Snidal 2009, p. 506.
\textsuperscript{672} We deliberately describe the influence of states as ‘changed’ instead of ‘weakened’, as scholars often tend to do. The account in which states, due to globalization have lost sovereignty is one-sided. States also gained from globalization in terms of sovereignty as it acquired more pathways for influencing politics crossing their borders. As for example the article of Kanetake and Nolikæmper illustrates, domestic courts engage in informal instruments, and this practice is likely to continue. As Kanetake and Nolikæmper state: ‘National case law can contribute to both the formation and interpretation of customary law and the development of precedential treaty interpretation’. Kanetake and Nolikæmper 2014, p. 807-808.
\textsuperscript{673} Pauwelyn, Wessel and Wouters 2014, p.11. In terms of impact, it is assumed to go beyond regulatory international law and to exercise new forms of authority. Hall and Biersteker 2002, p. 3, 4.
\textsuperscript{674} Happold 2012, p. 2.
to limited centralization, with a resulting shift from mandatory rules to recommendations. Some legal scholars notice a statal preference of cooperation outside the framework of international law. Some even argue that ‘international law lost its privileged place as the primary conceptual framework for understanding the cross-border development of norms’. Informal lawmaking is considered increasingly to ‘supersede’ formal international lawmaking in terms of quantity and quality, while formal lawmaking is ‘stagnating’. Although it is difficult to empirically find proof for the reasons why an increase in alternative forms of lawmaking gains in popularity, 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.

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. 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. For example, international lawmaking forums are often argued to be in danger of becoming sites

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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.
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.
677 Berman 2005, p. 556.
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’ 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.
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.
681 The international public authority (IPA) approach is founded in the Heidelberg research project, See Von Bogdandy, Dann, and Goldmann 2008, p. 1375, 1387.
for the exercise of dominating power.\textsuperscript{683} Therefore, the results of international lawmaking are supposed to ‘undemocratically’ govern us,\textsuperscript{684} compromising democratic values such as freedom and equality.\textsuperscript{685} It is, often implicitly, assumed that ‘[s]ince power relations do not stop at national borders, democratic principles must not be allowed to stop there either’.\textsuperscript{686} Public international law is considered authoritative, sufficiently similar to state regulation, such as to require democratic legitimation.\textsuperscript{687} In finding responses to the democratic deficits of international law, academics concentrate on theorizing ‘how democracy can “catch up” to our globalizing economy’.\textsuperscript{688}

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,\textsuperscript{689} on the assumption that all states are democratically organized, which is evidently not the case.\textsuperscript{690} 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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{685} 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.

\textsuperscript{686} Marks 2001, p. 66.


\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{690} Wolfrum 2008, p. 8.
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 lawmaking 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 lawmaking, 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 lawmaking as described in the previous section, an image of international lawmaking 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 lawmaking. Flexible lawmaking 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

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 treat
ties that do not require parliamentary consent.

The many lawmaking activities occurring in informal settings of international bureau
cracy networks are considered to further aggravate the lack of parliamentary control of activities beyond exclusive national jurisdiction.\textsuperscript{699} 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.\textsuperscript{700} Due to the informality and lack of transparency, parliamentary oversight of administrative activities in international settings is obstructed.\textsuperscript{701} In addition, current informal negotiating forums that characterize regulatory networks are considered to effectuate a ‘deep transformation in the conduct of public affairs’.\textsuperscript{702} 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.\textsuperscript{703} In these pluralistic acts of informal cooperation between private actors and states, states do not automatically have the final say.\textsuperscript{704} This changing power position of states in these informal settings is considered to weaken the normative force of state consent.\textsuperscript{705}

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.\textsuperscript{706} 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.\textsuperscript{707}

Besides, a considerable part of the norms concerning international society arises in the public sphere beyond states, outside constitutionally controlled conditions.\textsuperscript{708} These

\textsuperscript{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.

\textsuperscript{700} Warning 2009, p. 25. See also Vaubel 2006, p. 125, 126-127.

\textsuperscript{701} Warning 2009, p. 203.

\textsuperscript{702} Von Bogdandy, Dann, and Goldmann 2008, p. 1375.

\textsuperscript{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.

\textsuperscript{704} Abbott and Snidal 2009, p. 506; Brown Weiss 2000.

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

\textsuperscript{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.

\textsuperscript{707} Besson 2010, p. 174.

\textsuperscript{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 inspirit negotiations for
examples of de facto exercise of international lawmaking authority imply a claim to authority.709

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.710 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.’711

While the possibilities of different actors to cooperate internationally are increasing, the abilities of states to unilaterally intervene decrease.712 A state’s volition does not seem to encompass all international legislative activities.713 Although states remain sovereign in that

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709 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.

710 As Kumm states: ‘International law does not consist of a set of suggestions that states are encouraged to take to heart, depending on domestic political and legal constellations. Instead, international law makes a claim to authority. It is a trite proposition of international law that domestic law, even domestic constitutional law, does not serve as a justification for non-compliance with international legal obligations’. 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 . . . ’.


712 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 2009, p. 496–497.

713 See Meyer 2009, p. 4–5; Bolton 2000.
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. 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. 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.

These contemporary developments are considered one of the drivers for scholars to criticize the traditional doctrine of the democratic legitimacy of international law. 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. Scholars are concerned about the lack of accountability mechanisms at a global level, and call for democratization of international governance. It is considered pressing to research the extent to which the concept of democratic legitimacy 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.

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. 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

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714 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.


721 Weiler 2004, p. 556.
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

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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.

\(^{729}\) Andersen and Burns 1996, p. 227-252.

\(^{730}\) 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

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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. 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.

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. 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. As is argued, many citizens lack resources, knowledge or motivation to behave like active political citizens. 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.

Unequal representation - democratic deficits among states
The second main category of criticism towards the intrinsic malfunctioning of state consent as an instrument to democratically legitimize 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. An equal vote for all individual states is supposed to ensure the equality of all individuals. All individuals are equally

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242 Reisman 1987, p. 141.
243 Held mentions in this regard the ‘institutional dependence on the imperatives of private capital accumulation’. Held 2006, p. 275.
244 Bekkers and Edwards 2007, p. 49-50.
246 Wapner 2002a, p. 199.
247 Krajewski 2008, p. 3, point 10. See Franck’s four requirements of international legitimacy as mentioned in the introduction of section 3.2.
248 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. 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’. 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’.

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. States, most of the time, face pressure from other states that undermines the voluntariness of their consent. 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. 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. 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 any given time.’ Szasz 2001, p. 12.
754 Weiler 2004, p. 556.
inegalitarian, [which] activities are primarily responsive to the interests and concerns of the world’s most powerful states. 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. 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 lawmaking shapes national options, but still eludes national control. 758 Consequently, territorially rooted mechanisms of democratic legitimacy are considered insufficient to effectively confer democratic legitimacy on international law. 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, 760 are considered to require a reconsideration of ways to establish the democratic legitimacy of international law. 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, 762 in which the ‘publicness’ of international lawmaking authority is dependent on its impact on individuals instead of on territorial boundaries. 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. 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.

756 Christiano 2006a, p. 94.
758 Marks 2000, p. 84.
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.
762 Boyle and Chinkin 2007, p. 97.
763 See for an academic debate on international authority: Von Bogdandy, Dann and Goldmann 2008.
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.\textsuperscript{765} 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.\textsuperscript{766}

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.\textsuperscript{767} 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.\textsuperscript{768} The strong in these studies are as broad as international lawmakers in general.\textsuperscript{769} Scholars question the validity of the current legal position of the individual in the international legal order, which is summarized by the idea that if individuals benefit from the operation of international rules, they do so not as subjects, with legal personalities, but as objects of international law.\textsuperscript{770} Scholars criticize the denial of the power of individuals and non-state groups to engage in international lawmaking.\textsuperscript{771} According to Bodansky, especially for non- or sub-state actors, the principle of state consent may have little legitimizing effect.\textsuperscript{772} Scholte fears that ‘on the whole, current arrangements to regulate global communications, global ecology, global markets, global money and finance, global organisations, 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’.\textsuperscript{773} 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

\textsuperscript{765} Benvenisti 2014, p. 20.
\textsuperscript{766} Gorski 2013, under 52.
\textsuperscript{767} Higgins 1994, p. 51.
\textsuperscript{768} See chapter 1, section 1.2.2.
\textsuperscript{769} 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.
\textsuperscript{770} Dunn 1941, p. 14.
\textsuperscript{772} Bodansky 1999, p. 606. Bodansky stated that the more international law resembles domestic law, the more it should be subject to the same standards of legitimacy that animates domestic law. Bodansky 1999, p. 611.
\textsuperscript{773} Scholte 2001, p. 12.
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}

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\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

\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.

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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.\(^{787}\) 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, the environment, and official corruption. In these international legal regimes one strives for the highest degree of popular participation in formulating future plans, policies, and strategies.\(^{788}\) The IMF and the World Bank have responded to challenges regarding their democratic legitimacy, particularly where there have been clear policy failures.\(^{790}\) 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.\(^{792}\)

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.

\(^{787}\) 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.

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


\(^{790}\) 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.


\(^{792}\) Commission on Global Governance 1995, p. 258-60.
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

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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 Exactly how independent from governments NGOs act is a large point of debate, which has been touched upon in chapter 5, section 5.4.
806 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

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.
812 The International Law Association encourages for example states to develop private international law on
International Congress of Women*, 1919, p. 245.
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 of NGOs in the lawmaking process.

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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 Raustiala 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


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 UNGA, Resolution 13/(I), A/RES/13/(I), Feb. 1, 1946 (Organization of the Secretariat).

828 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).

829 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 Krut 1997, p. 11. See also Bousros-Ghali 1995.

832 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.\footnote{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.} 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.\footnote{See Development Program of the United Nations 2000, p. 8; Yearbook of International Organisations 2014, 33, fig. 2.9 (Union of International Associations ed. 2014) http://www.uia.be/yearbook-international-organizations-online. [last visited January 2016].}

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.\footnote{Paul 2012, p. 71-74.} 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.\footnote{Paul 2012, p. 74, referring to Panel of Eminent Persons on United Nations-Civil Society Relations 2004.} 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.\footnote{Paul 2012, p. 75.} 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,\footnote{See for a 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.} 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
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

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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
“status,” on IGOs and similar institutions, they have done so only sparingly in respect of NSAs’. 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. 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. 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. 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’. 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’.

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. 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.

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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 usefully 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.862 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.863 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.864

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.865 Again, especially in the fields of human rights and the environment, NGOs are active participants and are recognized as such.866 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.867 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 Ljubowinkov 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

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 Kamminga 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 Baumgartner and Jones 1991, p. 1050.
872 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.
873 Kamminga 2007, p. 184; See also Vabulas 2013, p. 191-192.
874 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.
875 See Martens 2005 for an exploration of the relationship between NGOs and the UN.
876 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.
877 Baumgartner and Jones 1991, p. 1050.
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 lawmakers, 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 Raustalia 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’. Raustalia 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. In practice, the need for governmental backing for NGOs to influence agenda setting and norm-making effectively sets limits on NGOs’ independence. 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. 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. 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. These UN agencies, programs, funds, and other bodies operate on the basis of their own accreditation programs in cooperation with the General Assembly. 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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{912} This is most clearly seen in the work of the Commission on Sustainable Development, under the support of ECOSOC, in promoting Agenda 21.\textsuperscript{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.\textsuperscript{914}

Agenda 21 notes that one of the fundamental preconditions for the achievement of sustainable development is broad public participation in decision-making.\textsuperscript{915} In the European Commission’s report Agenda 21 – The First Five Years: Implementation of Agenda 21 in the European Community,\textsuperscript{916} produced for the UN General Assembly Special Session, and in the Overall Review and Appraisal of the Implementation of Agenda 21 in 1997,\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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

\textsuperscript{910} Willetts 2000, p. 193-194.
\textsuperscript{913} 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 UN 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.
\textsuperscript{914} 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.
\textsuperscript{915} 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 UN 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.
\textsuperscript{917} European Commission 1998.
\textsuperscript{918} General Assembly of the United Nations 1997, agenda Item 8.
\textsuperscript{919} European Commission 1998, p. 7.
groups in its proposal for sustainable development. The UN General Assembly passed a resolution recognizing and encouraging their efforts.

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. 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.

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. 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’.

Notwithstanding the lack of explicit conferral of authority to convene conferences, the UN General Assembly (UNGA) has also organized many conferences. 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. 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).

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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 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.

932 Boyle and Chinkin 2007, p. 57.

933 See for a proponent of conferring the right to participate for NGOs: Charnovitz 2011. However, in discussions concerning a possible right to participation of NGOs, the question what participation is considered to entail remains pressing.

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 (providing 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 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.
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. 952 The politically receptive climate of international organizations triggered social movements that transformed into well-organized international non-governmental organizations. 953 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. 954 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. 955 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. 956 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. 957 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. 958 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. 959

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. 960 For example, in the view of the government of the United Kingdom, NGOs ‘represent large segments of public opinion throughout the world’. 961 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’. 962 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

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

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 7(a)), 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. The UNCED Secretary-General Maurice Strong argued that NGOs could ‘enrich and enhance the deliberations of the conference and its preparatory process’. 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’. 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”’. According to Annan, ‘a partnership with civil society is not an option, it is a necessity’. 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’. 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. NGOs are invited to pluralize voices, lawmakers aim at achieving a ‘just, balanced, effective and genuine involvement of non-governmental organizations from all regions and areas of the world’. 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.’ Besides an increase in the legitimacy of international organizations, partnerships seem to confer a new kind of legitimacy on NGOs themselves.

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.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’.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’,986 one should note that no actual recommendations of the Cardoso Panel were upheld.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’.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.989 Greater NGO participation is primarily accepted during the deliberative, preparatory phases of international lawmaking.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. When they had thoroughly thought their position through, they presented their ideas for consideration to the relevant international organization. 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.

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. One can read into the last part of paragraph 20 of Resolution 1996/31 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. 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’, and set out the three elements of public participation, namely access to environmental information, an opportunity to participate in
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.

and the IMF, criteria for NGOs’ participation focus solely on the alignment of a given NGO’s mission with that of the regulator.  

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, NGOs are restricted to observing and speaking. 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.’  

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. 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. 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’. 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

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.
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’.
1017 Willetts 2000, p. 206-207, referring to one critical exception in Habitat II which he discusses at p. 194-196, and 204-205.
1018 Boyle and Chinkin 2007, p. 88-89. See also Raustiala 2011; See chapter 4, section 4.1.
1020 Peters 2009b, p. 220.
1021 Krut 1997, p. 16.
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."1022

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 differ, 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.1023 Widespread enthusiasm for NGO participation in international lawmaking is closely related to the

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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.
perception that the ideal of participatory democracy is worth pursuing. 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. 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: scholars focus inclusive discussion and debate in which individuals have an opportunity to express their views on international law.

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’. Young notes that NGOs play a vital role in promoting political dialogue in developing government policy, 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’. Also, Peters describes the benefits of the participation of NGOs in general terms, which, according to Peters, relates to ‘non-state democratization’. 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. 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. 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:

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 movement who strives for change in a current legal system.
1025 See chapter 2, section 2.1.2.
1026 See chapter 3, section 3.2.
1028 Lindblom 2005a, p. 35.
1029 See Young 2000.
1030 McGrew 1999, p. 5.
1031 Peters 2009a, p. 332.
‘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.

References:
1034 Scholte 2000, p. 278.
1035 Ryngaert 2010, p. 87.
1036 Although scholars do not present these contributions separately, they are distinctive by nature and by what they require of a governing structure to be of any democratic value. We come back to this point in chapter 6.
1037 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’.
1038 Dingwerth 2007, p. 20. See chapter 1, section 1.2 and 1.3.
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 Gaelle Breton-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.\footnote{Esty 1998, p. 126.} Within a favorable ‘political opportunity structure’,\footnote{See Kriesi 1996.} 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.\footnote{Young 2000, p. 121-122.} In the radical, direct sense of the instruction of inclusion, it requires the inclusion of every single person affected by the law.\footnote{Schaffer 2012, p. 322.} 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.\footnote{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.} 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.\footnote{Marks 2000, p. 113.} 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.\footnote{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.}

Equality as a democratic norm for lawmaking is the underlying ambition of strengthening the procedural norm of inclusion in international lawmaking processes.\footnote{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 argues 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.} 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.\footnote{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 argues 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.} 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 jurisdictional community.\footnote{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’. 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. As public power is dispersed, so can the responsibility to represent the various individuals and social interests, according to Macdonald.

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.’ 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’. 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’. 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. 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. 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. 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.

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1060 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.
1061 Macdonald 2008, p. 182.
1066 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:

\textsuperscript{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.

\textsuperscript{1074} Raustiala 2011, p. 164.

\textsuperscript{1075} Willetts 1996, p. 44.

\textsuperscript{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’).

\textsuperscript{1077} Esty 1998, p. 135.

\textsuperscript{1078} See chapter 1, section 1.3.2, where we explain the relationship between knowledge and deliberation, relying
on Habermas’ deliberation theory.


\textsuperscript{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,

\textsuperscript{1081} ECOSOC, Resolution 1996/31, E/RES/1996/31, July 25, 1996 (Consultative relationship between the United
Nations and non-governmental organizations), para. 5.

\textsuperscript{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.

\textsuperscript{1083} Bohman 2005, p. 114.

\textsuperscript{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.’

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. 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. 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. 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

1085 See Bowman 1999, p. 298.
1087 Scholte 2001, p. 17.
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.
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 lawmakers 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 International organizations

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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 lawmakers 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 for 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. 283-299; 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} Görg and Hirsch 1998, p. 599.
\textsuperscript{1105} Wapner 1995, p. 311, 337. Wapner presents the thesis that civil power is the forging of voluntaristic 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.\textsuperscript{1110} It is argued that NGOs, independently from states, create new transnational social spaces.\textsuperscript{1111}

NGOs are seen as the international equivalent of what, within a domestic society, social and political theorists have called ‘civil society’.\textsuperscript{1112} Civil society stands for political association and public action not encompassed by the state or the economy.\textsuperscript{1113} Bratton was one of the first writers who advocated that NGOs are significant bolsterers of civil society by virtue of their participatory and democratic approach.\textsuperscript{1114} The phrase ‘bolsterers 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.\textsuperscript{1115}

Global civil society is perceived both as an emerging reality and an emerging concept.\textsuperscript{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’.\textsuperscript{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)’.\textsuperscript{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’.\textsuperscript{1119} Individuals are believed to be capable of understanding each other through interaction and political conversation, also on the global level.\textsuperscript{1120} Global civil society is perceived as transnational democratically organized associations that give voice to transnational common interests.\textsuperscript{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’.

\textsuperscript{1110} McGrew 1997a, p. 13.
\textsuperscript{1111} Lindblom 2005a, p. 17.
\textsuperscript{1113} Dryzek 1999, p. 44.
\textsuperscript{1114} Mercer 2002, p. 5-6, referring to Bratton 1989, p. 569-587.
\textsuperscript{1115} Lindblom 2005a, p. 17.
\textsuperscript{1117} Anheier, Glasius, and Kaldor 2001, p. 17.
\textsuperscript{1118} Scholte 2001, p. 6.
\textsuperscript{1119} Archibugi 2004, p. 439.
\textsuperscript{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.
\textsuperscript{1121} Bryde 2005, p. 118.
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.
1126 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.\footnote{Vabulas 2011, p. 4-5}

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.\footnote{See for an overview of political philosophical approaches towards civil society, Ehrenberg 1999, p. 83-88; Pierik, and Gordon 2010, p. 133-145.} 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’.\footnote{Kothari 1984, p. 216-224.} 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’\footnote{Habermas, McCarthy, 1977, p. 3-24.} into political impact on decision-making. NGOs function, in this reading, as indirect legitimizers of international lawmakers, because they are assumed to foster the public sphere, which is a necessary social precondition for democratic lawmaker\footnote{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.}ing, 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.\footnote{Dekker 2002, p. 19.} 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.\footnote{Social engagement arguments indicate the, in social networks captured, competence to work together outside formal lawmakers\footnote{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.}aking allegedly improves deliberations in, and control over, international lawmaking.

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.
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’.1139 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.1140 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,1141 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.1142

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’.1143 Behavior of individuals is coordinated by these discourses, which turn into social as well as personal sources of order.1144 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.1145 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’.1146 Due to the lack of democratic institutional hardware, Dryzek argues that the balance of discourse in the international legal order is more critical.1147 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.1148

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’.\textsuperscript{1149} 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’.\textsuperscript{1150}

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.\textsuperscript{1151} Moreover, lawmakers should be responsive to the comments put forward.\textsuperscript{1152} 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.\textsuperscript{1153}

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.\textsuperscript{1154} 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

\textsuperscript{1149} Burnheim 1985.
\textsuperscript{1150} McGrew 2000, p. 411. An example of such a traditional movements is organized labor groups.
\textsuperscript{1151} Esty 2006, p. 1527-1534.
\textsuperscript{1152} Esty 2007, p. 524.
\textsuperscript{1153} Corell and Betsill 2001, p. 90.
\textsuperscript{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.1155 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’.1156 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.1157 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.1158 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.1159 These developments fit with the idea that interpretive communities create law.

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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. The year before, the NGO protests derailed the negotiations about MIA (multilateral agreement on investment). 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 Europen 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, ‘electronic 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}

\begin{footnotesize}  
\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. 
\end{footnotesize}
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.\(^{1168}\) 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 Margaret 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.’\(^{1169}\)

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,\(^{1170}\) it is considered undeniably to contribute to the democratic legitimacy of international law.

As we have seen, democratically legitimate lawmakers 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.\(^{1171}\) 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.\(^{1172}\) 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.\(^ {1173}\) Cameron, Lawson, and Tomlin illustrate this statement with reference to the lawmaking processes of the Ottawa Landmine Convention.\(^ {1174}\)

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

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1169 King 2003, p. 35.
1170 See Bohman 2007a, p. 63.
1171 See chapter 1, section 1.3.3.
1172 Dryzek 1999, p. 37.
1173 See 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 - 27; Scholte 2004, p. 211 .33.
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

1177 See chapter 4, section 4.2.
1179 Scholte 2001, p. 18.
1182 See Young 2000. Although Young develops her thesis in the context of national political decision-making, her analysis is equally valuable for international lawmaking processes.
practices in which some participants dominate the process and deny other participants actual access to a lawmaking process. 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. 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. Young imputes to NGOs the task to expose these forms of exclusions, and to challenge the legitimacy of lawmaking practices based on exclusions. These NGOs change the current exclusive lawmaking practices into more inclusive lawmaking processes that will eventually result in fuller participatory democracy.

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. 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. 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.

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

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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”. 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. 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. 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. Scholars therefore conceptually disagree with the rise and relevance of the thesis in the first place. The objectivity of signaling the causes of scholarly attempts to rethink international law’s democratic legitimacy is questioned. 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

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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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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?’\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{1203} The political conception confers upon the state, with its monopoly of force, the function of

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.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.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’.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’.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.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.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,1214 as the sovereign state defines and delimits the people on whose behalf representatives act, and to whom they are accountable.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.

1210 Anderson 2011, p. 841.
1211 Rawls 1999, p. 25.
1212 This clash can be compared with ‘particularism and universalism’ in legal theory, set out by Bogdandy and Dellavalle. See Bogdandy and Dellavalle 2008.
1215 The concept of sovereignty brings forth a strong theoretical debate, or in Koskenniemi’s words, ‘the 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 lawmaking authority, and is simultaneously accompanied by a certain distrust towards the participation of NGOs in international lawmaking. 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. 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 advantage them over their opponents who are unwilling or unable to reargue their cases in international fora’. 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’.

For many critics it is far from clear whether there is a democratic imperative in giving individuals opportunities to participate in global governance. 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 lawmaking. As Johns argues, ‘they are good at voicing opinion, not at resolving the myriad claims that present to government’. 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’. The question at stake here is if and how different sorts of democratically legitimizing forces can be combined.

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. In general one can state that critical scholars are hesitant to assume the genuineness of NGO involvement in international

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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 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.


1219 Charnovitz 2003, p. 46.


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,1224 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.1225 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’.1226 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.1227 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.1228 Scholars are weary of the ‘unholy alliance between IOs and international NGOs who have a common interest in more lawmaking’1229 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’.1230 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 legitimate 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.

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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}

\textbf{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-Fariná 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 order. 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 in se 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.

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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 tot 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.\textsuperscript{1258} 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.\textsuperscript{1259} 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.\textsuperscript{1260} 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.\textsuperscript{1261}

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.\textsuperscript{1262} 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.\textsuperscript{1263} 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.\textsuperscript{1264} 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.\textsuperscript{1265} Rossi calls this a problem of overcrowding.\textsuperscript{1266} 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.\textsuperscript{1267}

\textsuperscript{1258} Gutmann and Thompson 2004, p. 36.\textsuperscript{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.\textsuperscript{1260} NGOs often perceive direct activism and opposition such as street marches or boycotts are as the only indispensable instruments to achieve social change. Young 2001, p 670-690.\textsuperscript{1261} We come back to this point in the subsequent subsection ‘representing elites’.\textsuperscript{1262} Rebasti 2008, p. 41-42, referring to prof O. De Schutter at the EUI Workshop.\textsuperscript{1263} Simmons 1998, p. 90.\textsuperscript{1264} Raustiala 1997a, p. 733.\textsuperscript{1265} Ahmed 2011, p. 839, referring to Corell and Betsill 2001, p. 39-97.\textsuperscript{1266} See Rossi 1997.\textsuperscript{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 ‘participation 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 governments 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 Tallberg 2008.
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. 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’. Primarily the claim that NGOs give voice to otherwise unheard individuals or groups is problematized. 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. 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. 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. 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 (ILAJA), 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’.

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


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

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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 bureaucratised 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.¹³¹⁹ When NGOs attempt to advance the cause of the poor and oppressed, NGOs are expected to represent the interests of their constituency.¹³²⁰ Critical scholars question the basis on which NGOs purport to understand, let alone, embody, the public interest.¹³²¹ Scholars question the assumption that NGOs foster an inclusive and equal lawmaking process, primarily because they fail to represent.¹³²² 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’.¹³²³

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.¹³²⁴ This makes critics question whether there is enough proximity of NGOs to the needs of the people whom they are supposed to represent.¹³²⁵ What, as is often questioned, ‘then gives NGOs, few of which formulate their positions via elections of their

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.
However, Mercer problematizes the thesis due to the fact that NGOs are often internally undemocratic; characterized by authoritarian or charismatic personalized leaderships; competitive; riften along class, gender, religious, regional, spatial and ethnic fault lines; and steered by either the state or donors, or both. In other words, the social, political, cultural or economic cleavages that exist in civil society are more likely to be replicated in (and even exacerbated by) NGOs than they are to be challenged. Mercer 2002, p. 13.
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?\textsuperscript{1326}

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.\textsuperscript{1327} 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’.\textsuperscript{1328} 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.\textsuperscript{1329} 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?’\textsuperscript{1330}

The approach to representation of Macdonald\textsuperscript{1331} 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.\textsuperscript{1332} Besides, as mentioned in relation to the ‘second bite of the apple’ thesis,\textsuperscript{1333} such a partial representation by NGOs might negatively affect the current - highly questionable – system of equality of states through state consent in international lawmaking.\textsuperscript{1334} 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.\textsuperscript{1335} This suggests a corporativist approach to international lawmaking that is troubling for democratic legitimacy because it posits ‘interests’ as

\textsuperscript{1326} Raustiala 2011, p. 171.
\textsuperscript{1327} Hirsch 2003, p. 256.
\textsuperscript{1328} Anderson 2000, p. 118.
\textsuperscript{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.
\textsuperscript{1330} Slim 2002.
\textsuperscript{1331} This is discussed in chapter 5, section 5.1.
\textsuperscript{1332} Macdonald 2008, p. 218.
\textsuperscript{1333} See section 5.3.1.
\textsuperscript{1334} See section 3.4.2, under ‘unequal representation - democratic deficits among states’.
\textsuperscript{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 ‘corporatism’. 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 emphasize 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 entwined 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 lawmaker process, and being invited to support the international exercise of authority. According to Raustalia, ‘[i]f NGOs are perceived to threaten 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’. 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 lawmaker 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 lawmaker system from the outside.

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. 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’. 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 lawmaker.

Third, a culture-related argument is often made against the NGO democratic legitimacy thesis. NGOs’ contributions to an inclusive, deliberative, and controllable lawmaker 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. 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. 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 lawmaker 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 Peters 2009, p. 318. See also Scholte 2012, p. 185.

1352 Anderson 2000, p. 117; Johns 2003a, p. 2. Although NGOs expand the range of voices at international lawmaker practices, John doubts whether they truly expand the equal opportunities to participate in lawmaker or whether they only expand the ranks of political elite.
vertical, as suggested, but merely horizontal, taking place primarily between these elite organizations.\footnote{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’.\footnote{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\footnote{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.\footnote{1357} Anderson argues that NGOs do not complement democratic representation but function as substitution.\footnote{1358}

The crux of the critique on NGOs is their claim to represent constituencies without having received any form of authorization from them.\footnote{1359} The tendency to question whether NGOs can be held politically accountable for their actions, just as for every political actor,\footnote{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

\begin{footnotesize}
\footnote{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.}
\footnote{1355}{Lewis 2002, p. 574.}
\footnote{1356}{See chapter 5, section 5.1.3.}
\footnote{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.}
\footnote{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.}
\footnote{1359}{Peruzzoti 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.}
\footnote{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 fulfillment 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.}
\end{footnotesize}
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

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1361 See Slim 2002, p. 4. However, as Black argues, ‘[a]lthough accountability relationships can be critical for legitimacy, legitimacy is not necessarily always dependent on accountability relationships. Accountability and legitimacy are usually conflated in debates on regulation or governance (as they have been thus far here), but analytically they are distinct’. Black 2008, p. 149.
1362 See Marks 2000, p. 113-114.
1363 We borrow from Uhlin the notion ‘the degree of politicization’. See Uhlin 2010.
1364 Just as Uhlin, Macdonald refers to the authority quest with regard to NGO involvement, assuming that the need to democratically legitimate NGOs depends of the publicness of their power. See Macdonald 2008.
1366 Little efforts have been undertaken to create a systemization of NGO functions and their corresponding accountability. The work of Wapner is an exception. Wapner 2002b, p. 156.
1367 Noortmann and Ryngaert 2010, p. 199.
NGOs in the international legal order are prompted by their incorporated theoretical mindset of democratic legitimacy, which does not necessarily match that of others. 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.

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.

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. Notwithstanding the broadly shared concerns regarding the democratic legitimacy of international law, the presented solution, namely the involvement of NGOs in international lawmaking, is far from univocal.

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. The standard of democratic legitimacy can be considered the primary object of ambiguity, which complicates the assessment of the thesis. Whether NGOs

1368 Foucault reminds us of the general subjectivity of conceptions. Foucault 1989, p. xxi.
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.
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.
1371 See chapter 4.
1372 See chapter 4.
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.
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

\begin{footnotes}
\item[1375] Fisher 1997, p. 447.
\item[1376] Kamminga 2005, p. 110.
\item[1378] See chapter 5, section 5.1.1; Macdonald 2008, p. 99-100, 182-220.
\item[1379] See for critique on NGOs accountability and representation, section 5.5.
\item[1381] Ebrahim 2003, p. 815.
\item[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 constructed? 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.
\item[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.
\item[1384] See the earlier statements of for example Peters, Lindblom, Young and McGrew, as discussed in section 5.1 and 5.2.
\end{footnotes}
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

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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.
authority.\footnote{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.} As is argued, international law, just like national law, has to derive from the people.\footnote{Bryde 2005, p. 109.} 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.\footnote{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.} 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).\footnote{Murphy 1998, p. 251-291.} This conception is inspired by Murphy’s introduction of the monism versus dualism divide.\footnote{McDougal and Lasswell 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.}

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.\footnote{Murphy 1998, p. 254.} 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’.\footnote{Nagel 2005, p. 124.} A monistic perspective thereby avoids the alleged ‘impossible separation of national and transnational law’.\footnote{Murphy 1998, p. 251-291.} It implies an analysis in which the jurisprudence of democratic legitimacy is universal and applicable to all levels.
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

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.
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) universalization 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: Schrijver 2014.
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.
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.
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.
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.\textsuperscript{1405} 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.\textsuperscript{1406} 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.\textsuperscript{1407}

\textit{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.\textsuperscript{1408} 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 words, 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.

\textit{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 thesis are presented. The second dichotomy that allows

\begin{itemize}
  \item \textit{prominent and influential role in the processes of production and maintenance of autonomy-constraining regulative norms}. Macdonald 2008, p. 64.
  \item Raustiala, on the contrary, considers the activism of NGO groups as a signal the international organizations indeed exercise a type of international authority; ‘Like lobbyists in national capitals, NGOs tell us where the governing power is; increasingly, that power rests at the international level’. Raustiala 2011, p. 153.
  \item See chapter 5, section 5.3.
  \item At this level of the monism-dualism divide, the scholars that have, in Walkers terms, a double scepticism of legal transnationalism, adhering to a ‘close causal and conceptual link between publicness, constitutionalism and statehood’, are separated from the scholars that affirm at least a possibility to translate the concept of democratic legitimacy to supranational settings. Walker 2012, p. 65.
\end{itemize}
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.\footnote{See chapter 2, section 2.1.2.} 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.\footnote{Taking a formalistic approach is a persistent tendency, especially for public legal scholars. See Boyle 1992, p. 394.} 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.\footnote{See chapter 3, section 3.2.}

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.\footnote{Kennedy 2000, p. 361.} 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.\footnote{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. Charnovitz 2005, p. 10, referring to Grant and Keohane 2005. Sheldon 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. 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.}

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.\footnote{Kennedy 2000, p. 361.} 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
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}

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 bou the lack of influence of legal subjects on the international laws they are ruled by, but they will formulate a different answer tot 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’. 
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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1429A clear parallel can be drawn between the deniers of NGOs as democratic legitimizers and Hobbes approach to the concept of justice. He evenly 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 lawmaking 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 lawmakers.

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 lawmakers.

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 legitimize 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.