NGO participation in international lawmaking and democratic legitimacy

The debate and its future

Beijerman, M.

Citation for published version (APA):
Part III

The impasse of institutional preconditions

and moving beyond
Part III - Preliminary remarks

In light of the conceptual framework of democratic legitimacy developed in Part I, Part III assesses the persuasiveness of the NGO democratic legitimacy thesis, as discussed in Part II. This involves an evaluation of the way in which the thesis is presented, and more generally, its consistency with the main features of democratic legitimacy.

Part I explained democratic legitimacy as an evaluative standard to test whether the exercise of authority by law is acceptable to its legal subjects in light of its respect for freedom from domination and equality. For legal subjects to be ruled by law and simultaneously to be free from domination requires a lawmaker that enables and guarantees actual opportunities for all legal subjects to participate in the making of these rules that govern them. Whether a law passes the test of democratic legitimacy, can only be determined after two separate evaluations. In the first place, one should consider whether the exercise of authority has taken place in a political system that offers an infrastructure of institutional and social preconditions. In the second place, one should consider whether the actual exercise of authority of a particular lawmaking process is democratically legitimate, meaning whether that specific exercise has given opportunities for participation, through means of consent giving, deliberation, or control and has respected procedural norms that facilitate participation.

Based on different conceptual and practical considerations, we conclude that the persuasiveness of the NGO democratic legitimacy thesis is rather weak. This is not so much because of the role NGOs do or do not play in international lawmaking, but because of the problematic application of the standard of democratic legitimacy to international law. The evaluation of the NGO democratic legitimacy thesis will show that the preconditions for democratic legitimacy are insufficiently addressed in the scholarly discourse on the thesis. Our evaluation can be regarded partly as a continuation of the critique that was discussed in chapter 5. However, the center of gravity of our critique is different. As will be discussed, opponents of the thesis largely focus on NGOs, their poor performance, and their internal organizational failings, or on the strategic motives for international organizations and states to include NGOs in lawmaking processes. Our critique, on the contrary, focuses primarily on the insufficient attention paid in current academic discussions on the thesis to the fundamental question of whether any democratic legitimation of law is possible in se at the international level.

This Part is structured as follows. Chapter 6 focuses on the lack of attention paid to the institutional preconditions of democratic legitimacy and shows the consequences for the validity of the NGO democratic legitimacy thesis. An underestimation of the importance of institutional preconditions to democratic legitimacy of law problematizes essential democratic questions, such as who is able to participate, based on what title, and how one is able to enforce the right to participate. Chapter 7 engages in a reflection on what could be the next steps in the debate on the merits of the participation of NGOs in international lawmaking, once the relation between NGO participation in international lawmaking and the analytical terms of democratic legitimacy has been found to be unconvincing. When taking into consideration all the different themes, claims, and elements that have passed in our

1435 Our critique on the conceptual deficiencies of the thesis will, due to the emphasized tensions in chapter 5, section 5.6, between scholars that adhere an institutional perspective and scholars that adhere a non-institutional perspective, probably not be shared by proponents of the thesis.
review of the discourse on NGO participation in international lawmaking, we suggest that the most appropriate grounds for justification of international law are the procedural quality of the lawmaking process and the substantive quality of the resulting law. And yet, from a normative point of view, such a, what we call ‘quality justification of law’, we will argue, cannot offer more than a ‘second best’ justification, compared to democratic legitimacy.
6 The impasse of institutional preconditions

This chapter seeks to show why the NGO democratic legitimacy thesis proves unconvincing. The primary reason is the impossibility to secure the necessary institutional preconditions for democratic legitimacy to apply to international law. This is what is called here the “impasse of institutional preconditions”. Oddly enough, this impasse has been hardly discussed by scholars engaged in the NGO democratic legitimacy discourse despite these necessary preconditions of democratic legitimacy being essential to answer the question whether NGOs participation in international lawmaking could be considered a contribution to the democratic legitimacy of international law. This chapter demonstrates this statement, spells out the consequences of leaving aside institutional preconditions, and discusses the impasse of international institutional preconditions.

Yet, before we do so, it is considered helpful to recapitulate briefly the main approaches to democratic legitimacy of international law as discussed in chapter 5, section 5.6. In light of the taxonomy developed here, there are, in theory, different possibilities for scholars in favor of the thesis to approach democratic legitimacy and NGOs contribution to it. Given their efforts to think about how to strengthen the democratic legitimacy of international law, proponents of the thesis share a monist approach towards the desirability of the application of democratic legitimacy as an evaluation standard for international law.1436 When that first step is taken, four alternative perspectives on the manifestations and preconditions of the democratic legitimacy of international law could, again in theory, have instigated their adherence to the NGO democratic legitimacy thesis.1437

1) Multiform-institutionalist approach: NGOs are considered complementary to democratic states as sources of the democratic legitimacy of international law. International law requires a different, institutional conception of democratic legitimacy than domestic law. A combination of an indirect democratic legitimation of international law with direct influence of global civil society is considered sufficient. Democratic legitimacy’s necessary preconditions are found in democratic states. This approach is embedded in a two-track model of democracy, which will be discussed in section 6.3.

2) Uniform-institutionalist approach: NGOs are sources complementary to democratic legitimacy in the development of a global democratic system. Democratic legitimacy’s necessary preconditions should be provided internationally. This approach is embedded in cosmopolitan democracy theory, which will be discussed in section 6.3.

3) Multiform-non-institutionalist approach: Although at the domestic level institutional preconditions might be necessary and suitable, at the international level NGOs contribute to a non-institutional manifestations of the democratic legitimacy of international law, which is tailored specifically to the non-institutional characteristics of the international legal order, such as transparency, deliberation, and accountability. This approach will be discussed in section 6.1.2.

4) Uniform-non-institutionalist approach: Activities of NGOs, as part of global civil society, form independent sources of democratic legitimacy. Institutional

---

1436 See chapter 5, section 5.6.2.
1437 See chapter 5, section 5.6.2.
preconditions, in this conception of democratic legitimacy, are not considered necessary on whatever level of lawmaker. This approach is embedded in global deliberative democracy theory, as will be discussed in section 6.1.2.

The first approach remains closest to the democratic norm thesis as discussed in chapter 3, and to the traditional position of civil society in existing democracies as discussed in chapter 2. The multiform-institutionalist approach supplements the democratic norm thesis with an emphasis on the merits of global civil society for the democratic legitimacy of international law, and therefore constitutes a two-track approach to international democratic legitimacy. State consent and state autonomy both remain the dominant pillars of the democratic legitimacy of international law. In light of the debate as discussed in chapter 5, one can reasonably suspect that most advocates of the NGO democratic legitimacy thesis probably do not feel attracted to this approach to NGOs’ contribution to democratic legitimacy, as their inclination towards NGOs as contributors to the democratic legitimacy of international law was primarily fuelled by criticism on the waning of state autonomy and the normative weakness of state consent as a legitimizing tool.

The second approach shares its roots with the previous two-track approach, but it takes a uniform-institutionalist approach to democratic legitimacy’s necessary preconditions. It understands NGOs’ participation as a complementary contribution to necessary global institutional preconditions for the democratic legitimacy of international law. This cosmopolitan approach requires the international legal order to be transformed into a full political institutional constellation, compared to domestic democracies. In light of the general lack of attention of the scholars in favor of the NGO democratic legitimacy thesis to institutional preconditions, it is highly doubtful whether they share this ambition of uniform-institutionalist scholars to establish a cosmopolitan institutional democracy.

The arguments presented by scholars favoring the NGO democratic legitimacy thesis point however towards reasoning in line with the third and fourth approaches. The impression is given that NGOs can directly democratically legitimize international law by contributing to global deliberative practices. Global deliberative practices are considered to enable democratic legitimation internationally, without requiring the backing of institutional preconditions. Whether or not these scholars perceive it as necessary domestically to have institutional preconditions (whether these scholars take a uniform or a multiform approach towards the preconditions and manifestations of democratic legitimacy) often remains unexpressed in their work.

Symptomatic for this neglect of discussing institutional preconditions is the tendency in the discourse to approach the NGO democratic legitimacy thesis in a fragmented way. Section 6.1 describes this general tendency, which is primarily witnessed in scholarship supporting the NGO democratic legitimacy thesis. Two manifestations of this tendency are discussed. On the one hand, one notices a selective focus on NGOs’ internal democratic legitimacy as a precondition for the validity of the thesis. On the other hand, if there is a

---

1438 The thesis that NGOs’ participation in international lawmakers contributes to democratic legitimacy of law is probably inherited from theoretical approaches towards civil society that, ‘pretend that we can have a vital, well-integrated, and just civil society without states constitutionally guaranteeing that universalistic egalitarian principles (open to critique and revision) inform social policy regardless of which social institution or level of governance carries it out’. Cohen 1999, p. 213.

1439 See Dryzek 2011, p. 225; section 6.1.2.
focus on the democratic characteristics of the lawmaking processes, one notices a selective focus on single democratic practices or features, often related to democratic legitimacy’s operational aspects, without linking these practices to an institutional framework consisting of rights and judicial safeguards. In both instances, the necessary preconditions for democratic legitimacy remain underexplored.\footnote{In Erman’s words, the selective focus on different elements of democratic practices seems not to take into consideration the necessary institutional preconditions to ‘knit together’ these single democratic practices. Erman 2012, p. 10.}

As will be discussed in section 6.2, the underexploration of institutional preconditions can be considered the main weakness of the NGO democratic legitimacy thesis.\footnote{Our critique on the academic discussions concerning the thesis focuses primarily on the often-neglected issue of institutional preconditions for democratic legitimation. Consequently this chapter does not provide an answer to other complicated questions of international democratic theory. Many imaginable problems that have been implicitly part of our review will not further explained, studied or criticized, such as the status of international law, and of international standard setting. Also other controversies fall outside the scope of this critique such as controversies concerning the existence of global civil society, the conception of international representation, problems of international accountability, or issues strongly related to social preconditions as mentioned in Part I: whether or not the member state is the only possible ‘special sphere of authentic national culture, effective cultural protection and lively democratic politics of identity’. See for the latter point De Beus 2001, p. 306.} In doing so, this section will simultaneously substantiate earlier critique stated by, among others, Besson and Erman.\footnote{Besson dubbed this tendency earlier ‘fast food democracy’. Besson 2011a. Also Erman has been critical towards this tendency, calling it the ‘seperability premise’ See Erman 2013. Erman and Uhlin called it earlier the ‘additive view’. See Erman and Uhlin 2010a.} The drawbacks are as follows: a conception of democratic legitimacy without institutional preconditions offers an inadequate response to the current discretion of power holders concerning NGOs participation in international lawmaking, and it underestimates the importance of democratic agency. In sum, it disregards the need of an all-encompassing political structure, which leads to a compromise of the principles of democratic legitimacy as discussed in chapter 1. The main normative consequence of the underestimation of democratic legitimacy’s preconditions is the inadequacy of the scholarly work on the NGO democratic legitimacy thesis in protecting the main premise of democratic legitimacy: freedom from domination.

This all said, it is not an easy instruction to theorize the translation of institutional preconditions into the international legal order, which brings us to the second dimension of this impasse of institutional preconditions, that is the huge difficulties that arise when one seeks to theorize and implement the institutional preconditions necessary for the democratic legitimacy of international law to the international legal order. This second aspect of the impasse of institutional preconditions will be discussed in section 6.3. It will be shown that these difficulties can partly explain the current lack of reflection on them in the discourse on NGOs’ possible contributions to the democratic legitimacy of international law. On this occasion, two specific approaches to institutional preconditions in international democratic legitimacy theory will be identified and inventorized. As will be demonstrated, although these approaches reflect on institutional preconditions for democratic legitimacy, the solutions put forward give rise to many new unresolved problems, which on a more conceptual level emphasize the weakness of the NGO democratic legitimacy thesis.

This conclusion will not invalidate the general claim that NGOs could contribute to the democratic legitimacy of law. However, as will be explained in section 6.1.1, their contributions can only be evaluated as relevant for democratic legitimacy of law, \emph{ad hoc} or \emph{ex post}. In addition, before NGOs can contribute in any sense to democratic legitimacy, a
political governing system needs to be at place that fulfills both social and institutional preconditions. In this respect, our rejection of the thesis refers to the level of application of the thesis. In a domestic democracy, there is a complementary role to play for NGOs in democratically legitimizing law. NGOs, including those that are active internationally, remain relevant for the democratic legitimation of the state’s position towards proposals for international law back in domestic democracies. Section 6.4 concludes that the academic discussions in favour of NGO participation in international lawmaker might be understood solely as an attempt to democratize the international legal order rather than a quest for the democratic legitimation of international law.

6.1 A fragmented approach to democratic legitimacy

The methodological vagueness concerning democratic legitimacy discussed at the end of chapter 5, not only leads to implicit ambiguities in the debate, but also hides the general inattention paid by a large number of the scholars engaged in the discourse to democratic legitimacy’s necessary institutional preconditions. This disregard for institutional preconditions originates in a proclivity to focus selectively on specific elements, or on specific actors that supposedly have to live up to these elements, which in turn can be explained by the general scholarly tendency to break down the concept of democratic legitimacy into separate components.1443 A gradual approach towards democratic legitimacy is taken, in which a situation that has, for example, a high level of transparency is considered more democratically legitimate than a situation in which transparency has not been taken into account.1444 The scholarly review of the political opportunities of NGOs to participate is often limited to an assessment of the organization of a specific NGO, or of the attitude of the legislative authority in terms of commitment to norms such as openness and responsiveness.

While section 6.2 discusses the consequences of these fragmented approaches for the validity of the NGO democratic legitimacy thesis as a whole, this section describes the two types of fragmentation noticed in the debate on NGOs alleged contribution to the democratic legitimation of international law, which informs the disregard for the question of institutional preconditions. Section 6.1.1 discusses the selective focus on NGOs’ democratic legitimacy and explains the pitfalls of such a focus on their democratic legitimacy. Section 6.1.2 discusses the second form of fragmentation, namely the tendency to isolate democratic practices from an institutional framework. The presentation of these fragmented approaches allows us to carry through our general critique that the NGO

---

1443 Besson has also made this observation. See Besson 2011a. The focus on procedural values seems to be in line with the Global Administrative Law project (GAL). However, the main difference is that GAL’s reason for breaking down the concept of democracy into workable elements is that it perceive a democratic system of transnational governance as an impossibility, at least in its representative form, because representation cannot function accurately beyond a certain scale and size. What they find indispensable for democracy to flourish is a well-defined community, a demos, such that there can be said to be a collective public interest in and shared responsibility for the decisions and norms enacted in the name of that community. Scholars engaged in Global Administrative Law project predominantly refrain from using the notion ‘democratic’ and focus primarily on ‘good governance’. For that reason, De Búrca dubs this approach to single democratic elements the ‘compensatory approach’ to democratic legitimacy. De Búrca 2007-2008, p. 241. See for further reading on GAL: Kingsbury, Krisch, and Stewart 2005, p. 15-61; Krisch and Kingsbury 2006, p. 1-13; Kingsbury and Casini 2006, p. 319-358.
democratic legitimacy thesis as defended by scholars forfeits the essential principles of
democratic legitimacy, namely equality and freedom from domination.

6.1.1 A selective focus on NGOs’ democratic legitimacy
Critique on NGOs arises from many different grounds. The motives and actions of certain
NGOs are doubted.\textsuperscript{1445} Other critics argued that the information spread by NGOs distorts,
rather than enlightens, public opinion.\textsuperscript{1446} Others have claimed that the large number of
NGOs active in the international legal order creates an ‘excess of civil society: too many
competing interest groups with too little common space’.\textsuperscript{1447} NGOs are assumed to have an
inherently biased position, and the risk of NGOs forming dominant factions is considered to
increase with their participation in international lawmaking forums. Still others have
contended that the competition with each other for access to resources distracts most NGOs
from their social purpose.\textsuperscript{1448}

Notwithstanding these different focal points, both critics of and adherents to the NGO
democratic legitimacy thesis are primarily occupied with theorizing and criticizing the
internal democratic legitimacy of NGOs.\textsuperscript{1449} The tendency to require a democratic internal
organization of NGOs as a precondition for understanding their input into international
lawmaking as a contribution to the democratic legitimacy of international law in our view
falsely prioritizes NGOs’ democratization above a reflection on the democratic
characteristics of the political space for NGOs to partake in the exercise of lawmaking
authority. Above the incorrect prioritization, which consequences for the validity of the NGO
democratic legitimacy thesis will be addressed in the final subsection and further elaborated
in section 6.2, we question in this section whether the move to submit NGOs to government-
like expectations is justifiable in se. We question the normative desirability of formulating
democratic rules for the highly dynamic and unpredictable phenomenon of NGOs. In
addition, we question the merits of scholarly attempts to capture NGOs’ involvement in
content-independent, procedural terms. Before we substantiate our critique, a preliminary
remark will be made regarding the unpredictability of NGOs, which in general should lead to
reservations in theorizing pre-determined expectations concerning NGOs. Thereafter, the
specific democratic expectation concerning NGOs’ internal organization will be
problematized.

\textit{The scholarly tendency to focus on NGOs’ internal democratization}
As chapter 5 demonstrated, the internal democratization of NGOs plays a dominant part in
the NGO democratic legitimacy debate.\textsuperscript{1450} NGOs’ limited representativeness,\textsuperscript{1451} their elitist

\begin{footnotesize}
\textsuperscript{1445} Johns 2003b, p. 29.
\textsuperscript{1446} Simmons 1998, p. 82-96; Florini 2003.
\textsuperscript{1447} Teegen, Doh, and Vachani 2004, p. 472, referring to Florini 2003, p. 39.
\textsuperscript{1448} Dichter 1999, p. 38-58.
\textsuperscript{1449} A recent example of the tendency to prioritize NGOs democratic legitimacy is the article of Marxsen, 2014.
\textsuperscript{1450} Exemplary is the summary of Wheatley in which he dismisses the validity of the NGO democratic legitimacy
thesis: ‘First, it is not necessarily the case that NGOs are legitimate actors; second, NGOs are required on this
argument to undertake a function for which they were not constituted - the aim of civil society actors is to
influence debate, not to legitimate the exercise of political power; third, it is not clear whom international NGOs
and civil society actors represent, as opposed to whom they claim to represent.’ Wheatley 2012, p. 161.
\textsuperscript{1451} See chapter 5, section 5.4.; Cullen and Morrow 2001; Johns 2003a.
\end{footnotesize}
character, their lack of accountability, and the dependency of NGOs on states are assumed to preclude a positive reading of NGOs as democratic legitimizers. Scholars are skeptical about the possibility of NGOs making a substantial contribution to the democratic legitimacy of the international legal order if NGOs do not fulfill some democratic requirements themselves. The argument behind the democratic accountability requirements is often based on a certain urge for reciprocity. See for example Anheier’s statement: ‘[i]f a nonprofit seeks to promote democracy and the rule of law, must it not itself be democratically organized and soundly governed? Otherwise, the organization may face accountability deficits and risk losing [sic] its legitimacy.’ Also, Black’s statement is exemplary as to the type of reasoning that characterizes the NGO democratic legitimacy debate: ‘Enrollment can potentially enhance a regulator’s legitimacy within a legitimacy community, but if the actor enrolled is not considered legitimate, it may well erode it.’

Many of the critics of the lack of the democratic credentials of NGOs go on to require reorganization of NGOs’ households. The most obvious reason is that scholars seem to consider it necessary for NGOs to prove whether they are authentic intermediaries of the interests of the ‘people’ and whether this title really confers legitimacy on international organizations. It is also argued that the internal deficits of NGOs negatively affect the authority of governmental representatives, which leads to a degradation of the democratic process due to an over-representation of ‘an urban, middle-class minority of armchair radicals’, to the detriment of the people truly affected by global legal developments.

Equally resilient in academic discussions is the focus on NGOs’ independence. It is often argued that NGOs cannot function as a watchdog or have any other democratic effect as long as they are not capable of remaining independent of state organs. Further, in more general terms, scholars require civil society at large to be a transparent sphere in order to be able to create space for consultation, evaluation, and revision by interested and affected

\[1452\] See Anderson 2000, p. 117; Johns 2003a.
\[1453\] See chapter 5, section 5.5.
\[1454\] See chapter 5, section 5.1; Spiro 1996, p. 966.
\[1455\] See Vedder 2007.
\[1456\] Anheier 2009, p. 1090.
\[1458\] NGOs have to subject themselves to requirements of accountability, as all organizations have to obey existing laws and regulations, cannot engage in illegal activities, nor can they violate constitutional guarantees or rights without risking judicial sanctions. Peruzzotti 2010, p. 165. We understand this tendency in the broader political trend to value accountability. However, as we have stated in Part II, it remains elusive why we should keep NGOs to account. The accountability quest has the danger to turn into a hen-egg discussion. NGOs need to have accountability structures at place in order to be allowed to play a role in international lawmaking. However, accountability becomes only relevant when NGOs can actually participate. The current involvement of NGOs in international lawmaking is conditional. Why does an NGO need to show its support when it does not have the institutional ability to fulfill a political role? Two questions seem to intertwine and affect each other. 1) Why does one demand for public accountability to NGOs as they do not get institutional space to perform a public duty? 2) Can NGOs play a public role at all?
\[1459\] Anderson 2000, p. 117.
\[1460\] Edwards 2000, p. 2.
\[1461\] An interesting question in this regard is whether a tension arises between the endogenous precondition to remain independent and the requirements to internally democratize. The latter looses congruence with the former of course when it is not the NGO itself that chooses to democratize, but when peers, states or international organizations put the NGO under pressure to reform. One can question in the latter case whether that is not contrary with the NGO’s autonomy and self-identity.
people. In sum, critics question the democratic legitimacy of NGOs, which is considered necessary for them to play a role in democratically legitimizing international law.

Ungeneralizable objects of study
Underlying the claim that NGOs should be representative or accountable, there is a tendency to generalize ‘the NGO’ as an actor, capable of taking up a pre-determined role in democratic legitimacy theory. Understanding NGOs to be democratic legitimizers presupposes that a uniform image of NGOs ought to, and implicitly can, be determined in international legal theory as comparable but distinct from ‘states’ or ‘international organizations’.

It is not only the advocates of the NGO democratic legitimacy thesis but also its critics who, while raising doubts concerning the internal democratic legitimacy of NGOs, indirectly presuppose NGOs to be generalizable objects. A large number of studies have empirically examined the activities of global civil society, thereby assuming a broad and shared understanding of what a global civil society or an NGO entails. Lists of general expectations concerning NGOs have been developed based on the typologies or taxonomies of NGOs. The characterizations of NGOs vary according to the writer as well as the definitions held and the selection of NGOs as the subjects of their research. However, one can observe that the existing diversity of organizations that are covered by the notion ‘NGO’ is not perceived to be an obstruction to a general discussion of their pre-determined merits for international lawmaking. NGOs, under such a general account, are

1462 Scholte 2011, p. 333.
1463 As a reaction to that criticism, standardization on independent institutional footing or accountability of NGOs has been developed. Of course, the substance given to the internal requirements depend on the specific role in democratic legitimizing international law is prescribed by scholars. Proponents that focus on NGOs as part of and constituent of global civil society move away from an individual assessment of the qualification of a specific NGO. They treat the topic in an abstract way by looking at the position of NGOs within a broader search for democratic legitimacy’s necessary preconditions. Relations with the entire system initially determine their potential. See Görg and Hirsch 1998, p. 602. See also Buchanan 2004, p. 317. NGOs are seen as one of many in a system of international actors, which put their internal shortcomings in a different light. See Hirsch 2003, p. 257.
1464 As Macdonald states, ‘[b]ut irrespective of the extent of the organizational transformations required, focusing on NGOs in their current form as a starting point for theoretical analysis can help identify novel pathways to global democratization, which involve treating non-state actors quite differently from how traditional state-based democratic models have treated them.’ Macdonald 2008, p. 17. Comparable is the scholarly assumption that ‘young people’ embody an inherently progressive revolutionary potential making them the natural enemies of autocrats. See for a critical note Caryl 2014. Only some skeptics have disagreed the abstract attitude towards NGO involvement, stating that it is misleading to regard all intervention in international lawmaking by non-state actors as moving in the same direction. See for example, Boyle and Chinkin 2007, p. 60.
1465 Critics have continuously questioned the possibility to uphold the theoretical division between state, NGOs, and private profit seeking organizations. See Hopgood 2000, p. 1-25.
1466 Woodward 2010, p. 73.
1467 Spar and Dail 2002, p. 171.
1470 In the introduction, we illustrated the diversity in defining NGOs by giving a few examples, among others of Willetts 1996; Josselin and Wallace 2001, p. 3-4; Hirsch 2003, p. 239.
1471 As indicated in Part II, indeed scholars and international agencies speak in general terms about the merits of NGOs. We gave the example of World Bank who states that ‘NGOs and civic movements are on the rise, assuming an ever-larger role in articulating people’s aspirations and pressuring governments to respond’. World Bank 2000, p. 43. In Part II, we quoted another typical way of framing NGOs contribution is: ‘Governments working together with global civil society can achieve diplomatic results far beyond what might have been possible in the Cold War
assumed to be able to have a standard form and offer an organized will.1472 Interestingly, the same generality in expectations keeps on changing in terms of internal content.1473 The tendency to make generalizations with presumably strong predictive power with regard to NGOs involved in international lawmaking offers insight into one of the recurring tendencies in the NGO democratic legitimacy thesis: the assumption of structural systematics in global civil society.1474 The scholars engaged in the debate imply that the sum of all NGOs, although different from one another, can be defined as a coherent, bound, identifiable object of theory. In line with what Skocpol has argued in her study of the history of civil society in the United States, one can question the persuasiveness of considering NGOs as an object of a law-like generalization, due to their formlessness and variety of manifestations.1475 The argumentative power of the generalizations concerning NGOs that characterize the thesis is flawed by NGOs’ indeterminacy, by the fact that ‘NGO’ might mean anything, and more importantly, that tomorrow’s NGOs might be something other than they are today.1476

Three preliminary remarks can be made in this respect. First, it is clear that NGOs differ from one another.1477 This observation is in line with the most common critique of the concept of the NGO. Although there is a certain level of consensus regarding the importance of associations for democratic political processes as well as the virtuous role that citizens’ participation might have played in democracies,1478 the same consensus hides a significant disagreement over how to understand and select specific actors who are part of the broad term ‘associations’. As has been pointed out earlier,1479 the term NGO can be used quite freely to label any association of people. We have observed in the studies of the debate and the background of the thesis that there is a multitude of references to divergent types of NGOs, which may be operational, service providers, advocacy oriented, or protesting. An NGO can be formed by one or two active citizens or based on a large group of generally passive members.1480 NGOs might be large, small, rich, representing the voice of liberal or left wing activists. NGOs might be organized to attain goals beneficial to the self, such as

era. (…) The emergence of global civil society holds the promise of making existing international institutions more democratic, transforming them through innovation and experimentation, and anchoring them in world opinion.’ Cameron, Lawson, and Tomlin 1998, p. 13. 1472 Barnard 2001, p. 149, referring to Cole 1914, p. 158. 1473 See Amoore and Langly 2004, p. 89-110. 1474 We ran into a comparable tendency of generalization while there exists a multitude of interpretations with regard to the open characteristics of ‘international lawmaking’. Often scholars speak of ‘the international legal order’. However, Part II showed that the structure and consistency that it is suggested with the term ‘international legal order’ does not correspond with the diversity in ways in which the various international regimes function and the diversity of instruments they produce. See Introduction; Koskenniemi 2006b; Krisch 2013. 1475 Skocpol has criticized the systemic approach of, among others, civil society theorist Putnam. See Skocpol 2003. 1476 Jad describes the possible effects of general associations of NGOs. Jad 2007, p. 622-629. This adherence to generality presumably strengthens the credibility of the positions taken. Kennedy 2000, p. 373; Koskenniemi 2006, p. 589. 1477 In order to give analytical guidance for international organizations to clarify for what purpose civil society engagement is needed Perdrasa-Fariña offers a helpful taxonomy. See Pedraza-Fariña 2013, p. 655-656. 1478 See chapter 2, section 2.1.2 on social preconditions. Often the democratic developments in Eastern Europe and Latin America function as textbook examples of positive effects of associations. 1479 See chapter 4, section 4.1. 1480 Krut 1997, p. 14; Simmons 1998.
chess clubs or labor unions, or to strive for aims that are specifically beneficial to others, such as the World Wildlife Fund or Amnesty International.1481

Different NGOs have different levels of independence. An NGO’s donor structure might be made up of private companies, states, a few well-to-do individuals, or a large group of disadvantaged people.1482 In addition to the clear-cut financial support of members, most NGOs maintain donor relationships with philanthropic foundations, other NGOs, or governments. The financial dependence of NGOs on many actors with divergent institutional settings obfuscates thinking in general terms about how, to whom, and on the basis of which standards NGOs should be held accountable.

Notwithstanding the obvious variety of groups that are referred to by the term NGO, it is not so much the specific empirical fact of diversity that we consider problematic for their generalized contribution to the democratic legitimacy of international law. The fact that NGOs can change internally in terms of constituency, purpose, activity, and donor construction is more problematic. This brings us to our second hesitation with regard to the common move of scholars engaged in the debate to generalize the characteristics of the forms and functioning of NGOs. When one refers to NGOs, one refers to a body of organizations with a prismatic variety of content.1483 NGOs’ manifestations – their position taken towards other actors and roles in a society – are subject to unpredictable change.

One can envisage that an expectation concerning the representativeness of an NGO that was primarily based on individual donors as part of a marginalized group does not hold when the same NGO is flourishing five years later on the basis of a substantial gift from one individual donor. NGOs’ functioning might change according to context, which is sometimes aimed at cooperation with states and international organizations,1484 and sometimes in opposition, and sometimes on their own initiative, mobilizing the ‘excluded’ in order to give voice to topics that are otherwise neglected. Because of the fact that an NGO originates from a private initiative, there are no guarantees concerning the consistency of its policy, financial structure, or even its existence. This is not a bad thing per se, but it is problematic for the validity of the ante hoc theoretical expectations that underlie the NGO democratic legitimacy thesis.

Interrelated to the contentiousness of determining NGOs’ role in international lawmaking is the question of whether NGOs can be generalized as an equivalent for, or part of, (global) civil society is correct,1485 which takes us to the third aspect of our hesitation towards the generalization of NGOs that characterizes the debate on NGOs contributions to the democratic legitimacy of international law.

---

1481 Yaziji and Doh 2009 p. 5.
1482 See on the relationship between funding sources and NGO activities: Hulme and Edwards 1997. See for a few illustrative examples for the enormous differences between NGOs, Simmons 1998.
1483 This fact complicates the analysis of the impact of NGOs at local, national, and global levels. This complication is also acknowledged by: Carroll 1992; Fisher 1993; Fowler and James 1994.
1484 For example, Pedraza-Farina points out that a new governance conception of civil society understating strategies of collaboration and that views civil society as ‘partners’ of both government and business is often implicit but characteristic for the institutional design of U. N. General Assembly Declaration of Commitment on HIV/AIDS (UNGASS), Pedraza-Farina 2013, p. 654.
1485 Also Amoore and Langly detect and criticize ‘the tendency to equate GSC (red: Global Civil Society) with the practices of voluntary associations’. ‘In short GCS becomes defined as voluntary associations and vice versa.’ Amoore and Langly 2004, p. 54.
The collectivity of NGOs, often equated with civil society, is far from a constant and uncontested factor. As we have observed, many biases are hidden behind the seemingly ‘neutral’ connection between NGOs and global civil society. The analytical terms used in current writings on NGO involvement is permeated by a distinction between public and private actors in which public is state and private is non-state.\footnote{Macdonald 2008, p. 44-45. The distinction between public and private is formally acknowledged, as states have, contrary to NGOs, international legal personality, states have a vote, unrestricted access, and therefore actual political power.} For example, from a linguistic (and consequently political) point of view, placing the NGO within civil society prevents thinking of NGOs as participants in the exercise of public authority.\footnote{Macdonald 2008, p. 44.} In our study of the debate we detected three manifestations of the controversy surrounding global civil society and NGOs. First, the actual existence of an ‘international’ public or civil society is highly controversial. Second, there is debate concerning the alleged benefits that a global civil society might bring to the democratic legitimacy of international politics. Third, there is no agreement over the boundaries of the concept: whether the generally shared ideal or typical representation of global civil society can be perceived as an identifiable sphere, space, or ‘third system’.\footnote{Amoore and Langly 2004, p. 92, referring to Falk 1998 p. 100.}

To construct a suitable theory of democratic legitimacy with the NGO as the dominant building block, there is a risk that the selection of specific NGOs, while leaving out others, is instigated by a scholar’s theoretical mindset.\footnote{Pedraza-Farina has made a convincing point and theory to respond to the diversity of scholarly conceptions and scholarly expectations of civil society. Pedraza-Farina 2013, p. 654.} The reason for disagreement concerning the understanding of civil society is that concepts such as civil society and NGOs are, less than complex in terms of definition, inherently fluid and dynamic. The fragmentation in terms of what is implied by the term NGO excludes a priori conclusions with regard to the thesis. One cannot simply state that based on an assessment of the literature, NGOs do not contribute to the democratic legitimacy of international law in principle or that NGOs and democratic legitimacy do contribute to democratic legitimacy in general.\footnote{Macintyre argues that the studies of human behaviour cannot offer any general law-like observation, although they often assume to do exactly that. Macintyre 2011, p. 93-102.} Upholding a thesis based on whatever contribution of NGO to international law requires empirical studies to learn case by case what role is performed by which organization, and in what political setting.\footnote{However, case studies are complicated by the fact that the efforts of NGOs to change the law often spread out over more than two decades. Only at a reflexive moment after a culmination of interactions initiated and driven by NGOs, one might be able to indicate that NGOs did have actual impact on the law.} What is needed is a solid empirical study with reference to intentions, purposes, and reasons for actions of NGOs engaged in international lawmaking, to ‘purify its descriptive vocabulary’ of the current NGO democratic legitimacy debate.\footnote{MacIntyre 2011, p. 98.} However, notwithstanding its evident explanatory power, any empirical study will still inherently lack predictive power. Any law-like generalization with regard to NGOs that lacks predictive power should be regarded critically.\footnote{However, according to MacIntyre, studying NGOs role empirically will not do the trick. Predictability in human affairs is systematically obstructed. MacIntyre 2011, p. 98; MacIntyre 2011, p. 106; MacIntyre 2011, p. p. 109-114.} The fulfillment of the pre-determined responsibility,
which is assumed with the thesis of NGOs as democratic legitimizers, can be empirically tested ex post, or ad hoc, but the diffuse and ever-changing characteristics of NGOs in terms of structure, content, organization, and membership exclude any ante hoc conceptual expectation.\footnote{Notwithstanding the common statement that at least we know what NGOs are not, namely non-governmental, one should be aware of the increasing boundary problems between NGOs and the surrounding domains of market, state, and community. Brandsen, van de Donk and Putters 2005, p. 750; Frumkin 2002, p. 1. As Rosenblum states: ‘The moral uses of associational life by members are indeterminate’. Rosenblum 1998, p. 155.}

These observations concerning the barriers to ex ante qualifications of NGOs,\footnote{With one of the three roles of NGOs as democratic legitimizers specifically, NGOs as facilitator of social engagement, the existent indistinctness of NGOs, and therefore the dependence of an ad hoc review of their organization, and aims, does not match the reliance on conceptual expectations. The role of NGOs when formally admitted to lawmaking institutions, as representative or as knowledge contributor, is less problematic as their ability to contribute is inherently based on an ad hoc assessment of their organization or contribution.} raises a question that needs to be critically assessed before one can persuasively claim a positive relation between NGO involvement in international legislative practices and the democratic legitimacy of international law.\footnote{This is acknowledged by Charnovitz who himself takes part in a similar generalizing exercise. He warns us that the lack of common structures, roles of NGOs and levels of involvement complicates thinking about suitable governmental structures. Charnovitz 2005, p. 32.} Besides the questionable success of formulating general normative expectations with regard to NGOs, one can question the desirability of a specific and, in the NGO democratic legitimacy debate, dominant expectation concerning the democratic legitimacy of NGOs. It is debatable whether subjecting NGOs, which are primarily content-driven, to content-independent democratic norms does not negatively affect their contribution to international lawmaking. The next two sections aim to illustrate this objection by firstly focusing on the general problem of governing NGOs,\footnote{We borrowed the title from the Brooklyn Journal of International law, the Chicago Journal of International Law, and Chicago Kent Law School Symposium, ‘Governing Civil Society: NGO Accountability, Legitimacy and Influence’, Brooklyn Journal of International Law 36, 2011, p. 813-1074.} and secondly highlighting the questionable merits of describing NGO involvement in content-independent terms.

\textit{The problem of governing NGOs}

Not only do scholars prescribe NGOs’ internal democratization, but also some legal documents concerning the accreditation of NGO participation in international organizations suggest that NGOs’ democratic legitimacy is a prerequisite.\footnote{As already mentioned in chapter 4, international organizations prescribe NGOs’ internal democratic organization through accreditation mechanisms. It also showed an interesting difference between the European approach to not include democratic requirements for the organization of NGOs and the International UN approach to include democratic requirements.}

The reasons for including NGOs in international organizations are manyfold. The most obvious one is that the working area of NGOs and governmental actors often overlap. The values on which NGOs base their activities and their existence is often related to governmental activities in the light of the common good, which makes it mutually beneficial for NGOs and governmental actors to work together. As critical scholars have noted,\footnote{See chapter 5, section 5.4.2.} there is a fine line between NGOs maintaining their value towards governmental organizations, which increases their chances of participating in international lawmaking, and
maintaining their own identity and independence. To prevent NGOs from becoming the fourth arm of governmental organizations, one might argue that it is better to abstain from too many regulations. Any formulated requirement by the international organization concerning the internal organization of NGOs would lead to the undesirable situation in which the demand-identity of international organizations or states is unilaterally made a decisive factor for the form, function, and characteristics of an NGO. Consequently, social-political conceptions will start to function as a substitute for the specific purpose-relevant identity of an association initiated by citizens.

Apart from any requirements attached to a specific instance of the institutional involvement of NGOs in a particular international organization, one can detect is a move in the debate on the NGO democratic legitimacy thesis to develop and advocate standards for NGOs’ internal democratization in general. Also, many NGOs are themselves involved in such a general effort of independent standardization regarding their internal organization. The emphasis on NGOs’ internal democratization is understandable in light of any legitimate attempt to assess and ensure NGOs’ trustworthiness. As demonstrated in chapter 1, section 1.1, trust is a fundamental element of legitimacy, and therefore trust in international law, because NGOs are involved in the making of it, inherently implies trust in NGOs, which consequently must be grounded. There can be a tension between the influence that NGOs have on international lawmaking and the accountability in place to justify that influence. Logically, the perceived need for accountability may grow insofar as one perceives the legitimacy of NGO participation to be questionable. At first sight it seems perfectly valid to place requirements set by law or other rules on the organization of NGOs to prevent that, by their factual functioning, NGOs bar freedom from domination instead of support freedom from domination.

Notwithstanding the intuitively understandable tendency to scrutinize NGOs and assess their democratic legitimacy, the appropriateness and relevance of the tendency to impose requirements on NGOs such as transparency, accountability, and representativeness and to bind NGOs to certain rules and control should be critically assessed. There is evidently a difference between applying standards to prevent NGOs from engaging in wrongdoing, corruption, or illicit behavior, and requiring an NGO to be organized in the way ‘we’ think an NGO should be organized. We question whether it is in se justifiable to subject NGOs to democratic governance structures. When we impose our democracy-like standards on

---

1501 Hereby excluding NGOs own efforts to adhere internal democratic procedures.
1502 Legitimacy is based on the belief of broad sections of the population that political institutions and their equipage are worthy of trust. Weber calls it ‘Legitimitätsgläube’. Weber put forward a sociological account of legitimacy that focuses primarily on faith, and excludes normative criteria. Weber distinguishes three main sources of legitimacy: tradition, charisma and legal rationality. Weber 1964, p. 382.
1505 These standards are often part of the preconditions of NGOs to obtain legal personality at the domestic level.
1506 The complexity of the issue of for example demanding democratic accountability of NGOs is convincingly shown by Slim. “The question asked of Oxfam by The Economist – ‘Who elected Oxfam?’ – implies an assumption that only democratically elected organizations are truly accountable and legitimate. The easy retort to such a question is obviously ‘Who elected The Economist?’ But the democracy issue requires more thought than this because it will be a determining point for NGO legitimacy and requires NGOs to have a solid answer to it. There are perhaps two possible answers. Either NGOs could agree that only democratic structures are truly accountable and legitimate. This would require them all to transform themselves into democratic organizations. Or, NGOs could make a strong case for non-democratic accountability. This will require them to shape the case and prove it.
NGOs, we push them towards becoming particular organizations they might just not be, want to be, or have the intention of being. Prescribing and regulating their mode of decision-making and operation might undermine the specific purpose of and the values based on which many NGOs pursue their activities. An institutionalized private initiative should remain identifiable as an initiative by private persons, with its own identity.

Undeniably attached to, and reflected in NGOs’ work, is their vision of humankind and its place in society. Any adaptation of democratic decision-making leads to the arbitrary interchangeability of their content-dependent vision of life and politics. Such interchangeability is, in the case of governmental actors, the primary reason to democratize them because it gives individuals the opportunity equally to steer the course of government and to prevent them being subjected to unwanted domination. However, in the case of NGOs, one can argue that such subjection to democratic decision-making might, in effect, be more intolerant than accepting NGOs’ openly marketed signature. Our main aim here is to pay attention to the possible risks of ascribing content-independent standards to content-driven actors, which is what NGOs ultimately are. These remarks touch upon a whole complex of issues concerning the difficulty of striking a balance between integrity, independence, the financial support of NGOs, and interference by other actors that one can trace back to the NGO democratic legitimacy debate but, due to the limitations of scope, will not be further discussed at this stage.

**Questionable merits of describing NGOs’ contribution in content-independent terms**

The scholarly debate on the NGO democratic legitimacy thesis is characterized by other mismatches between content-independent expectations of NGOs and their inherently content-driven character. Not only do we discover a scholarly desire to place NGOs under content-neutralizing government-like procedures, we also notice a theoretical tendency to explain NGOs as actors that contribute to a detached conception of democracy, suggesting that NGOs’ involvement brings ‘more transparency’, ‘more inclusiveness’, and ‘better representation’. The proposed manifestations of NGOs as facilitators of the public sphere and as representatives are presented as content-independent roles that manifest the interests and the will of citizens. These concepts and manifestations are related to input legitimacy.

Such a presentation of NGOs’ involvement leads to the assumption that regardless of what opinion is formed by individuals or groups, NGOs facilitate the formulation of opinions, the provision of information, and the mobilization of individuals to think, speak, and discuss, and enable the representation of opinions on the international stage. The extent to which

(...) A key part of this argument will be determined by the claims they make for themselves as to whether they speak as, with, for or about oppressed people. Slim 2002, p. 8.

1507 As Charnovitz states: ‘In my view, Pope Leo XIII was right when he warned that the state “should not thrust itself” into societies and citizens banded together in accordance with their rights. Governmental bureaucrats and politicians do not have any special competence to oversee NGO politics and guide them towards attainment of the common good.’ Charnovitz 2005, p. 33.

1508 See for a discussion on these liberal democratic expectations towards associations, Muñiz-Fraticelli 2014, p. 245, referring to Rosenblum 1998. Rosenblum considers the hope that ‘the character of all organizations could be reshaped to conform with principles of liberal and democratic legitimacy’ false and dangerous. Rosenblum has called these hopes of democratization the ‘logic of congruence and the liberal expectancy’. Rosenblum 1998, p. 36-42, p. 57-60.

1509 Dworkin 2000, p. 186.

1510 See chapter 5, section 5.2.
NGOs make the legislative process inclusive and contribute to the legitimacy of input, which one assumes to be neutral with regard to the interests and groups and individuals represented by NGOs, is in practice, however, often directly or indirectly associated with the content of the message of the NGO which, contrary to the suggestions made, implies a dependent conception of democratic legitimacy, focusing on the output of lawmaking.\footnote{1511}{See Kelley 2010.}

We observe a gap between these content-neutral, procedural democratic expectations and the practical reality of the motives of governmental actors to include NGOs in international legislative practices, which can be, in most cases, traced back to the primary value of NGOs’ substantive input. Although we have not undertaken any empirical studies to substantiate this assumption, we find support in, for example, the requirements of the accreditation procedure of ECOSOC that states that the work of NGOs should be in line with the objectives of the UN.\footnote{1512}{See chapter 4, section 4.2. ECOSOC, Resolution 1996/31, E/RES/1996/31, July 25, 1996 (Consultative relationship between the United Nations and non-governmental organizations), principle 2: ‘The aim and purpose of the organization shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations.’}

Further, notwithstanding content-independent terminology, the scholarly work in favor of the thesis reveals, as has been pointed out already several times by critics,\footnote{1513}{See chapter 5, section 5.4.1; Carothers 1999.} the tendency to connect NGOs with a subjective level of goodness.\footnote{1514}{In an attempt to explain the bias towards the ‘good’ in scholarly writing concerning NGOs, Amoore and Langly link this tendency to the ‘continuing relevance of Marxist thought. ’ Just as the proletariat is juxtaposed to the bourgeoisie under Marxism, scholars of GSC (red: Global Civil Society) position the ‘good’ of civil society against the ‘bad’ of state and capital.’ Amoore and Langly 2004, p. 96, referring to Keane 2001, p. 30.} An example is Charnovitz’s exploration of NGOs in which he focuses on the procedural democratic contributions of NGOs and at the same time views NGOs as correctors ‘for the pathologies of governments and IOs’.\footnote{1515}{The selection of seven main tasks or expectations of NGOs by Charnovitz is exemplary. See Charnovitz 2011, p. 894-895.} Other scholars envision the global civil society in which NGOs take part as a ‘solidarity sphere’, where all are working towards ‘progressive transformation through collective association’.\footnote{1516}{Amoore and Langly 2004, p. 92, referring to Alexander 1997, p. 115-133.} NGOs are ‘called upon to serve the “developmental” function of moulding the habits and attitudes of their members in the direction of overall cooperation’.\footnote{1517}{Barnard 2001, p. 149, referring to Cole 1915, p. 158.} NGOs are expected to be committed to finding acceptable terms of international political cooperation.

These scholarly expectations of NGOs require a consensus of reasonably comprehensive views, and there seems to exist a certain underlying bias in defining what can be understood as ‘reasonably comprehensive’. The terms and words used by the proponents of the thesis refer to value-laden perceptions of what is supposedly good or bad. This is difficult to rhyme with their inclination towards understanding NGOs’ participation as a contribution to the democratic legitimacy of international law that, to the contrary, suggests a preference for opening up the political space to individuals to decide for themselves what is good or bad. Besides, as critics have mentioned, not all NGOs are good.\footnote{1518}{See chapter 5, section 5.4.2.} Sometimes it seems that academics involved in the NGO democratic legitimacy debate have a blind spot with regard
to the miscellaneous manifestations of NGOs and civil society.\textsuperscript{1519} As briefly mentioned above, the content-dependent valuation of NGOs’ ‘goodness’ is also reflected in the accreditation of NGOs to international legislative practices. There is a strong connection between accepting or inviting NGOs to be active in international lawmaking and the subjective ‘goodness’ they purport to proclaim.\textsuperscript{1520}

Four grounds strengthen our assumption that a correlation exists between accepting NGOs and the content of their message. Firstly, as mentioned in section 5.4, any accreditation system indirectly encourages the involvement of the ones that are activists by nature, that feel engaged to influence international lawmaking.\textsuperscript{1521} Secondly, with regard to the legal framework for involvement, one discovers that the international governance seems to be conceptualized as ‘working together’ for the common good. Thirdly, NGOs that are predominantly active in what from a Western perspective would be labeled normatively desirable working areas, such as human rights and environmental law, seem to play a major role in the theory of NGOs’ contribution to the democratic legitimacy of international law. Fourthly, a link is often presumed between NGOs and democratic legitimacy when NGOs help specific minority groups with voicing their issues, for example indigenous peoples.\textsuperscript{1522} The participation of NGOs seems to be predominantly appreciated for their substantive contribution (expertise, standards of justice, ability to protect the minority interest). As Pasha and Blaney point out, ‘NGOs in their most exalted form (and there are many hybrid exceptions) exist to convince people of the rightness of their ideals and invite people to become constituents of those ideals, not to advocate for whatever ideals people already happen to have’.\textsuperscript{1523} NGOs’ wider legitimacy seems to be morally derived, more than politically derived, and has exclusive characteristics.\textsuperscript{1524}

Most NGOs are driven by specific values, the desire to work not-for-profit, voluntarily, and for, in their specific views, a better society.\textsuperscript{1525} A content bias towards NGOs’ ‘goodness’ is therefore in itself intelligible. However, such a bias should simultaneously be reflected in any understanding of NGOs’ contribution to international lawmaking. NGOs’ efforts to influence international legislative practices might in substantive terms be ‘good for democracy’ if their efforts are directed towards pushing the international legal order to enacting norms that stimulate a democratic order and substantive equality. However, the way NGOs have been presented suggests a type of neutrality towards content that is often hard to maintain in the practice of inviting NGOs to take part in the preparatory phases of international lawmaking, and is therefore vulnerable to criticism.

The observations discussed in this section allow us to question the empirical validity of having normative expectations of NGOs as democratic legitimizers on different grounds.

\textsuperscript{1519} As Klabbers states, ‘while we expect our statesmen to be democrats, and while we try to sell the blessings of it to those that have hitherto remained deprived of democracy, we simultaneously allow our spirits to be uplifted by the utterly undemocratic politics of civil society, conveniently ignoring the circumstance that civil society not only includes our noblest dreams, but may also include our worst nightmares’. Klabbers 2005a, p. 341.

\textsuperscript{1520} ECOSOC is explicit about the requirements of admission and accreditation; the aims of the NGO should be in line with the mission of the UN.

\textsuperscript{1521} Johns 2003a, p. 2.

\textsuperscript{1522} Cox states that the possible implication of a biased focus on goodness is that the ‘dark forces’ of extreme right, terrorists, organized crime, and intelligence service remain out of sight, while at the same time further enjoying their ‘covert power’. Cox 1999, p. 13-15.

\textsuperscript{1523} Anderson and Rieff 2005, p. 5.

\textsuperscript{1524} Pasha and Blaney 1998, p. 423.

\textsuperscript{1525} Brandsen, van de Donk and Putters 2005, p. 760.
First, it is questionable whether one can formulate *ante hoc* expectations of NGOs, due to their inherent dynamic and prismatic character, which underscores their unpredictability in organizational structure and behavior. Second, subjecting NGOs to democratic governing structures, which is often suggested as a response to the critique of NGOs’ lack of representation, can be questioned due to the fact that such an external standardization can negatively affect the inherent voluntariness of NGOs. Third, it is questionable whether it is convincing to describe NGOs in procedural content-independent terms such as representation, transparency, or inclusion, because practice and legal documents suggest that NGOs are primarily valued for their content-dependent contributions. There is a fourth objection to be made against the scholarly tendency to prioritize NGOs’ internal democratization. Prioritizing NGOs’ democratization over the democratization of the international lawmaking processes leads to the somewhat strange situation in which NGOs are required to be internally democratized, but there is little attention paid to the democratic legitimacy of the system in which they are active.

*The pitfalls of a selective focus on NGOs’ democratic legitimacy*

The scholarly attention to NGOs’ internal democratic credentials is accompanied by a weak emphasis on institutional preconditions for the political opportunities of NGO involvement in lawmaking. As indicated in the introduction of this section, we consider the critical assessment of NGOs’ democratic legitimacy to be a matter of erroneous prioritization: the question of the democratic legitimacy of NGOs can only become relevant when one is assured that the system in which NGOs are involved offers a political opportunity structure to democratically legitimize lawmaking.

We are not the first to question the relevance of imposing democratic governing norms on NGOs. Charnovitz retorted that ‘numbers matter when votes are counted but should not matter when ideas are weighted’. Also, Peruzzotti argued that the notion of political accountability in relation to NGOs loses its meaning in the absence of processes of formal authorization from a principal to an agent. Peters refuted the often-heard claim of opponents of the thesis that an undemocratic internal organization of NGOs should lead to the conclusion that they cannot contribute to the overall democratic legitimacy of international law. According to Peters, the relative uncertainty about the democratically legitimate character of NGOs should not lead to a strict appraisal of their internal legitimacy, but should lead to the conclusion that NGOs are limited to a voice in lawmaking processes, not to a vote, which is the case in practically all international organizations. A voice might be sufficiently justified by the reputational and moral legitimacy of NGOs, and does not need to be backed up by democratic procedures.

1526 Charnovitz 2005, p. 36.
1527 Peruzzotti 2010, p. 163.
1528 The ILO is an exception. See chapter 3, section 3.4.2.
1529 Peters states: ‘It is precisely a feature of pluralist lawmaking processes to offer interest groups the opportunity to participate and give input into the process without requiring any democratic mandate.’ Peters 2009a, p. 317. Peters compares the practice with the legislative process in Switzerland, which includes for all federal bills a mandatory hearing of associations in the relevant fields. See Art 147 of the Federal Constitution and the Law on Consultation of Interested Parties (Vernehmlassungsgesetz of 20 December 1968, SR 172.061.) Peters concludes that further democratization of the international legal order requires that the participation of NGOs in lawmaking and law-enforcement be strengthened. Peters 2009a, p. 318. As Peters conclude, ‘democratic legitimacy of NGO voice does not require representativity in terms of a democratic mandate conferred by a (more or less virtual) global society’. Peters 2009a, p. 316-317.
Imposing democratic norms on NGOs implies an understanding of NGOs as political actors. The critique on NGOs’ accountability is closely tied to an understanding of NGOs as democratic representatives of groups of peoples.\textsuperscript{1530} To question the democratic legitimacy of NGOs based on the lack of accountability mechanisms is really to ask whether NGOs are representative of those they claim (or once claimed) to represent and whether they merit the legitimacy that they claim such representativeness confers.\textsuperscript{1531} In this light, it seems obvious that NGOs need to prove the existence and support of their alleged constituency.

However, the concept of democratic accountability is related to a particular public status of democratically elected officials: it is an attempt to regulate the exercise of public authority by subjecting its exercisers to constitutional, legal, and administrative norms to ensure that the activities of representatives are both legally and politically accountable.\textsuperscript{1532} Demanding NGOs’ accountability as a precondition for their democratically legitimizing role suggests that there is a political role to play for NGOs in international lawmaking, as only a particular political conduct requires a relationship between a political actor and a forum (constituency): the democratic exercise of public authority.\textsuperscript{1533} To turn NGOs ‘into democratic agents they must be part of a legal political structure, which fulfills the conditions of political equality and political bindingness’.\textsuperscript{1534}

Thus scholars pleading for an internal democratic legitimation of NGOs should equally engage in theorizing institutional preconditions to ensure political space for NGOs to be able to function as political representatives (apart from the question whether such function would fit NGOs).\textsuperscript{1535} Remarkably, scholars who criticize NGOs for their lack of democratic accountability rarely address the question of whether NGOs have sufficient political space to be in the position to truly represent individuals. This is even more remarkable in light of the limited legal and political room for NGOs to influence international lawmaking. NGOs do not autonomously exercise public authority, they have no means to engage in decision-making, and any influence of NGOs on international lawmaking is conditional upon the goodwill of states.\textsuperscript{1536}

We should make a clear analytical distinction between what is desired and what is required of NGOs from a democratic legitimacy perspective. If room for political action by NGOs is non-existent, it seems unnecessary to subject NGOs to a strict, general appraisal of their democratic accountability structure.\textsuperscript{1537} Besides, as discussed earlier, even if the international legal order was a democracy, a democratic mandate for an NGO could actually run counter to NGOs’ function to pursue one single issue or a special interest of minorities and vulnerable groups, if representing otherwise voiceless entities, such as nature, is one of

\textsuperscript{1530} Peruzzotti 2010, p. 164.
\textsuperscript{1531} This is in stark contrast with the way accountability is a practical matter for states to participate. According to Spiro ‘Governments can get away with an awful lot before having to answer to their membership, and yet of course that has supplied no argument against their participation in international institutions. Spiro 2002, p. 164, referring to the fact that not even democracy is in practice seen as a precondition.
\textsuperscript{1532} Peruzzotti 2010, p. 159-160.
\textsuperscript{1533} De Wet 2010, p. 1988.
\textsuperscript{1534} Erman 2012, p. 16.
\textsuperscript{1535} See for a comparable argument: Peruzzotti 2010, p. 166-167.
\textsuperscript{1536} See chapter 4.
\textsuperscript{1537} This does not exclude the possible demand of members of specific NGOs to be accountable internally or externally. We do however in that respect not foresee a general obligation to be accountable, but a voluntary member based decision that its organization must fulfill certain requirements.
the values par excellence of NGOs. In most cases, NGOs have been founded precisely to counter the will of the majority, and to act as opposition.

6.1.2 A selective focus on specific democratic practices

While the essence of the previous section was the selective focus on NGOs’ internal democratization, this section observes that scholars also maintain a selective view when it concerns their conception of democratic legitimacy. Most scholars that partake in the debate on NGOs alleged contributions to the democratic legitimacy of international law, predominantly its proponents, tend to isolate specific democratic practices, thereby neglecting the need for institutional preconditions. Democratic legitimacy is separated into different components, and a positive or negative relationship between NGOs and one of these components is selectively emphasized. Scholars seem to conceive democratic legitimacy as a bundle of core values, practices, and procedural norms, and presume that international law enjoys more democratic legitimacy if the lawmaking process has respected (one of) these values, practices or norms.

This section briefly reviews the three elements of democratic legitimacy that predominate the writings of scholars engaged in the NGO democratic legitimacy debate: deliberation, control, and inclusiveness. The first two, deliberation and control, mirror familiar manifestations of participation, as discussed in Part I. The last, inclusiveness, relates to the set of procedural norms that the lawmaking authority must follow to succeed in democratic legitimacy’s operational aspects, as discussed in chapter 2, section 2.2.3. A caveat is warranted. The following considerations do not relate to the earlier discussed methodological variations of the concept of democratic legitimacy in general, as observed and discussed in chapter 5, but concentrate on the specific selective focus on democratic practices that characterizes the work of primarily the proponents of the thesis.

The most prominent democratic practice that is discussed in relation to NGO involvement in international lawmaking is deliberation. The deliberative model of democracy provides, for many proponents of the thesis, the basis for beginning to think about the necessary conditions for the ‘democratic exercise of political authority by international organizations and other non-state actors’. The recurring emphasis on the necessity of a ‘voice’ for NGOs, as demonstrated in chapter 4 and 5, can be traced back to

---

1538 See chapter 6, section 6.1.1.
1539 Peters 2009a, p. 316.
1540 De Búrca has most explicitly pleaded for such an approach, naming it ‘a democracy striving approach’. De Búrca 2007-2008.
1541 Take for example Dryzek’s statement: ‘I believe that it makes sense to examine the possibilities of democratization in connection with discursive sources of order already present in the international system that do not require any organization of international government.’ Dryzek 2000 p. 116. On the contrary, when Macdonald explains her model of ‘global stakeholder democracy’ that has as its main pillar deliberative practices without the incorporation of aggregative procedures, she admits the practical limitations in terms of reaching a decision. Macdonald indicates that when a final decision cannot be reached in deliberative practices, the procedure is complemented with traditional aggregation among state representatives. See Macdonald 2008, p. 162.
1542 In order to understand the inclination to focus on single democratic practices, we place this symptom in a broader context of academic discussions on democratic legitimacy, not specifically limited to work focusing on NGOs contributions to it.
1543 See chapter 1, section 1.3; chapter 2, section 2.1.2.
international deliberative theory, which equally corresponds with the emphasis on themes such as responsiveness, openness, and inclusiveness.

An approach to international deliberative democratic legitimacy is also dubbed as a ‘pluralized decentered non-territorial view’. The attractiveness of deliberation is based on the conceptual space that it offers beyond the familiar forms of state organizations, unlike proposals for state majoritarianism and global elections. Further, deliberative approaches to democratic legitimacy are receptive to the conception of a global civil society. It is believed that the democratic legitimacy of international law is not about constructing an institutionalized democratic system, but about how existing international governmental arrangements can be made more democratically legitimate in a meaningful way. With the emphasis on participation in deliberations, scholars try to steer a course between the ‘twin difficulties of arbitrary exclusion and implausible comprehensive inclusion, but which nonetheless remains more faithful to the democratic values of equal respect and the public interest’. This selective focus on deliberative practices demands of governing institutions ‘an equal consideration for the interests of all members of the community’. According to Dryzek, one of its main proponents, this can be done ‘without being committed to this particular institutional architecture, or even to the idea that more formal institutions are needed, or indeed to the idea that formal institutions matter very much’.

A second dominant focal point of scholars in favor of the NGO democratic legitimacy thesis is control. It is mostly republican democrats, such as Bohman and Pettit, who strongly insist on international practices of control, in Pettit’s words, ‘editorial’ legitimation, and contestation. As explained in Part I, control has an internal and external aspect. According to Krisch, popular influence in these accounts of democratic legitimacy with its strong focus on control primarily relies on ‘retrospective mechanisms of accountability, of a

---

1545 See Moore 2006, p. 21. As stated by Harding and Lim, it is characteristic of the phenomenon of international normativity to abstain from a reliance on hard-and-fast definitions and concepts and that the distinctive dynamic of the international legal order is by definition a doctrinal fluidity and flexibility. Harding and Lim 1999, p. 3.

1546 The fact that the same civil society has its origins in a heterogeneous group of people, contrary to what is supposed by a national civil society is not seen as an obstruction. A multiplicity of demoi of which the global civil society consists is accepted. Krisch readily acknowledges the multiplicity of demoi in multinational settings. At the same time he warns for a constitutional approach towards international civil society. ‘Federal approaches typically need to define some form of hierarchy among layers of governance and demoi, if only by distributing powers and defining rules for amending a common constitution, which is bound to create tensions with the socially unsettled character of these questions’. Krisch 2010, p. 269.

1547 The democratic qualification to the concept of democratic legitimacy is in this approach understood as a relative matter, instead of as a static institutional structure. See Dahl 1971, p. 9. De Búrca suggest that ‘rather than despairing at the difficulties of transposing our contemporary institutionalization of democracy from the domestic context, we can begin by identifying some of the basic component virtues and values of democracy with a view to translating the concept in a meaningful way to the international context’. De Búrca 2007-2008, p. 250.

1548 De Búrca 2007-2008, p. 250. We have seen in chapter 1, section 1.3.2, that models of deliberative democracy prescribe citizens to enjoy equality in the form of equal opportunity to participate in and affect the outcomes of decisions. Macdonald 2008, p. 112, referring to Knight and Johnson 1997. All should be given equal deliberative consideration in the process of reaching a final decision.


1550 Dryzek 2011, p. 225. Dryzek is one of the most outspoken scholars concerning the democratic character of international deliberations. See for Dryzek’s definition of deliberation: Dryzek 2011, p. 212, referring to Gutmann and Thompson 1996.

1551 See for a presentation of different types of participation, among which reflective participation: chapter 1, section 1.3.
formal or informal kind, through plebiscites as well as demonstrations, court action as well as non governmental organizations (NGOs) activism, oversight instruments as well as the vigilance of citizens’. Kuper, for example, suggests a move away from the perception that democratic legitimacy requires individuals to see themselves as proactive co-authors of the law. One should instead focus on the democratic practice of responsiveness of the political system as a whole. Governance should justify its actions on the question of whether it has decided in the best interests of the public.

Responsiveness is characterized by access to information and the existence of institutional channels to pressure authorities and voice opinions. Rosenau argues in a similar way that the assessment of whether democratic legitimizing practices are developing in the ‘globalized space’ lies in the degree to which control mechanisms guide politics in the direction of more checks on possible excesses of the exercise of authority, provide more opportunities for interests to be heard, and impose ‘more balanced constraints among the multiplicity of actors that seek to extend their command of issue areas’. Keohane and Grant argue, in relation to accountability requests, that due to the lack of a clearly defined public in the international legal order, the appropriateness does not flow directly from an analogue reading of national democracies. Grant and Keohane call for ‘abandoning the belief that global accountability, to be genuine, must conform to abstract, maximal principles of democratic organization’.

Besides deliberation and control, many of the selective accounts of international democratic legitimacy focus on inclusiveness. The concept of democratic inclusion should function as a principle that guides the elaboration, application, and invocation of international law. That principle should weave into the fabric of international law ‘a kind of bias in favor of popular self rule and equal citizenship, that is to say, a bias in favor of inclusory political communities’. In this version, democracy is similarly seen to entail an on-going call to enlarge the opportunities for popular participation in political processes and to end social practices that systematically marginalize some citizens while empowering others. Democratic politics is perceived as an affair of relationships and processes, with

---

1553 In contrast to the vertical and sometimes causal picture citizenship depicted in responsiveness, one could insist, as does Manin, that meaningful political agency in a representative democracy requires that citizens be capable of learning what their co-citizens think about important policy issues or events independent of the authorities. Horizontal communication between citizens appears as a necessary condition to their being capable of political action. See Manin 1997, p. 170-171. The thing that makes citizens political agents is their capacity to act independently of authorities and this ability, in turn, depends on whether they regularly act and communicate together, even if this interaction is often mediated through institutions like the electronic media.
1555 Responsiveness might be measured, through statistical correlation. Public opinion is the dependent variable and policy output is the independent variable. For an overview see, for example Page 1994, p. 25-29.
1557 Grant and Keohane conclude that ‘if governance above the level of the nation-state is to be legitimate in a democratic era, mechanisms for appropriate accountability need to be institutionalized.’ Grant and Keohane 2005, p. 29.
1558 See Marks 2000. Marks focuses on the principle of inclusion as a theoretical response to the ‘democratic norm thesis’ adhered by Frank and Slaughter. See chapter 3, section 3.2.2.
1559 See Marks 2000, p. 111.
1560 Held and Archibugi 1995.
an open-ended and continually recontextualized agenda of enhancing control by citizens of
decision-making that affects them.\textsuperscript{1561}

The principle of democratic inclusion serves to shift the focus from territorial sovereignty
to international political community, from relationships between peoples and territory to
relationships among individuals and groups. It provides reasons for widening the circle of
participation in international lawmaking. Thus it endorses calls for participation in norm
making of communities and identities of diverse kinds.\textsuperscript{1562} Although the idea of inclusive
lawmaking refers to the idea that all who are affected by a rule should have the right to a
say in law creation, and that systematic barriers to the exercise of that right should be
acknowledged and removed,\textsuperscript{1563} no specific political community seems to be needed to
strive for a lawmaking process as inclusive as possible. Anyone to whom the rules apply, or
who is ‘affected’ by a rule, is defined as a member.\textsuperscript{1564} The international legal order is
perceived as ‘expanding circles of interaction’ and a ‘series of arenas ranging in
comprehensiveness from the globe as a whole (…) to nation states, provinces and cities, on
down to the humblest village and township’.\textsuperscript{1565}

Besides inclusiveness, predominantly the features of transparency, information
provision, insight into events, open positions, and fair accreditation procedures are required
of the political opportunity structure of international lawmaking. The efforts of international
lawmakers to comply with one of these democratic practices or values are often seen, on
their own, as an advancement of the democratic legitimacy of international law.\textsuperscript{1566} Majone,
for instance, suggests that it is promising to focus on closely related aspects of democracy,
such as indeed transparency, equal treatment, or representation based on expertise and
interests, rather than concentrating on the establishment of ‘traditional’ democracy at a
supranational level.\textsuperscript{1567} Steffek, Kissling, and Nanz selectively highlight reflective

\textsuperscript{1561} See Marks 2000, p. 110.
\textsuperscript{1562} See Marks 2000, p. 112-113.
\textsuperscript{1563} See Marks 2000, p. 119.
\textsuperscript{1564} Thus being subject to the rules and decisions of the association is an essential characteristic of membership; it
is sufficient to distinguish members from non-members. Dahl 1979, p. 97.
\textsuperscript{1565} McDougal and Lasswell 1959, p. 7, 8.
\textsuperscript{1566} The most explicit example for his tendency is the attempt of De Búrca to capture these democratic values in
terms of democratic legitimacy. Based on De Búrca’s plea for a ‘democratic striving approach’, Bijlmakers makes a
comparable move. See Bijlmakers 2013, p. 288-301.
\textsuperscript{1567} Majone 1994, p. 1-29. Another textbook example of such an approach is the work of international
environmental legal scholar Esty. Esty underlines the importance of a right process in order to confer democratic
legitimacy on the exercise of political power. Following the right process will help to ‘clarify underlying issues,
bring facts to bear, promote careful analysis of policy options, and engage interested parties in a political
dialogue’. Esty 2006, p. 1520. Two of the fourteen elements are specifically mentioned with regard to the concept
democratic legitimacy: ‘representativeness’ and ‘accountability’. Three of them, ‘power sharing’, ‘legality,’ and
‘fairness’ are specifically related to the ‘Madisonian’ legitimacy, which focuses on checks and balances and shapes
the legitimacy of policy choices in the form of dispersing political authority as a way of protecting individual liberty
by which Esty refers to the political theory of Rousseau. See Rousseau 1968. What Dahl calls ‘Madisonian’ theorie
of democracy is ‘an effort to bring off a compromise between the power of majorities and the power of
minorities, between the political equality of all adult citizens on the one side, and the desire to limit their
sovereignty on the other. Esty complements these elements with values such as ‘deliberation’, ‘transparency’ and
‘participation and due process’ as benchmarks for assessing the legitimacy of governance. See Dahl 2006, p. 4.
According to this perspective, the best and most realistic way of tackling the existing democratic deficits at the
international level is by strengthening specific values, such as openness, accountability, responsiveness,
deliberation and reason-giving. De Búrca 2007-2008, p. 239. Not all values mentioned by scholars grouped under
legitimation: two forms of responsiveness of international lawmakers to make democratic legitimacy operational directly at the international level – justification and adjustment. Their presentation of democratic legitimacy concentrates on the justification of specific political proposals and decisions, and is accompanied by a process of reflection and adjustment. Other often-mentioned elements of democratic legitimacy primarily focus on the responsiveness of lawmaking institutions to NGOs’ input, such as relevant staff expertise, suitable procedures, and an overall receptive attitude towards NGOs’ contributions. A selective focus on these more fluid, non-institutional manifestations of democratic legitimacy has been perceived as a promising route to more democratically legitimate international law. Notwithstanding the apparent relevance of these mentioned democratic practices for democratic legitimacy, the next section examines the implications for the persuasiveness of the NGO democratic legitimacy thesis due the related lack of attention to institutional preconditions in these accounts.

6.2 The consequences of a lack of attention to institutional preconditions

Section 6.1. described some of the characteristics of the debate on the NGO democratic legitimacy thesis that inform the disregard of the institutional preconditions for democratic legitimacy. It specifically discussed the common fragmented approach to democratic norms, practices, and actors that are supposed to contribute to the democratic legitimacy of international law. Most arguments in favor of the thesis adhere to the idea that the more an international lawmaking practice has lived up to one of the mentioned values and practices, the more democratically legitimate are the resulting international laws. Scholars seem to

the compensatory approach, are specifically linked to the concept of democracy, such as independence, expertise, and efficiency.

See Gutmann and Thompson 1996. All proposals made in the deliberative process should be justified with a view to the common good of the constituency and/or in response to the specific concerns voiced by other participants. Steffek, Kissling and Nanz argue that justification, understood as giving reasons for positions taken or proposals made, is a major asset to the democratic quality of deliberation. However, the justification of a proposal can be (and, in fact, in politics, often is) an ex post rationalization of a fixed position in the light of the criticism that the proposal has received. If justification is merely an acknowledgement of criticism without the critical reflection and potential modification of an actor’s own position, it does not contribute much to the evolution of political debate. See Steffek, Kissling, and Nanz 2008.

See Steffek, Kissling, and Nanz 2008. Steffek, Kissling and Nanz recognize the difficulty of observing processes of reflection directly in their research, and use the observable transformation of the actors’ articulated positions as a proxy, instead. Therefore, they understand adjustment to mean that state actors actually adopt positions raised by NGOs, either in part or as a whole. An alternative manifestation of adjustment is an adjustment of the agenda. This is the case when new issues raised by civil society are specifically designated for future deliberation.

It is assumed crucial to invite NGOs to participate in an adequate stage of lawmaking that is, before key decisions about the final law have already been taken, to avoid that NGO involvement becomes part of a ‘public relations exercise’. Critical scholars that have been cited in this respect in Part II are: Cullen and Morrow 2001, p. 15, in relation to environmental lawmaking processes; Otto 1996b; Otto 1996a, p. 107-141; Mertus 1998, p. 542; Anderson and Rieff 2005, p. 2.

Deliberation is especially attractive to a democratic legitimation of international lawmaking processes because it can cope with fluid boundaries and allows for transnational communication, in each and every location whether national, transnational, international or supranational. See Gutmann and Thompson 2004.

Scholars seem to accept that the choice to consider the possibility that the concept of democratic legitimacy transcends national contexts means that continuous recontextualization is necessary. 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.
limit their conceptions of democratic legitimacy primarily to considerations related to process-specific evaluation of democratic legitimacy and, if engaged in discussions on democratic legitimacy’s necessary preconditions, they solely emphasize social preconditions.\textsuperscript{1573}

This section will now appraise three different, but interrelated, consequences of such fragmented approach towards democratic legitimacy. Firstly, it argues that the NGO democratic legitimacy thesis formulates an inadequate response to the conditionality of NGO participation in international lawmaking, due to the discretion of power holders. Secondly, it shows the underestimation of democratic agency in most conceptions of democratic legitimacy that underlie the arguments of the scholars in favor of the thesis. Thirdly, it observes that there is a general disregard of the importance of an all-encompassing political structure for a validation of NGOs’ participation in lawmaking as a contribution to the democratic legitimacy of law. As a result, as will be concluded in the fourth subsection, the principles of democratic legitimacy, freedom of domination and equality, are compromised.

6.2.1 An inadequate response to power holder’s discretion on NGOs’ participation

The expectations that underlie the presented contributions of NGOs to international lawmaking, ranging from contributions to informal public discussions that can identify social problems that lie outside the agenda of formal politics and bring them into political decision-making, to critically examination of political rule-makers and their accountability,\textsuperscript{1574} seems rather optimistic given the restrictive legal frameworks for NGOs participation. Especially in the presentation of NGOs ability to represent the largely neglected voices, the impact of NGOs participation depends on the goodwill of states and international organizations.\textsuperscript{1575} Current accreditation mechanisms underline general international practice in which NGOs are asked to become engaged in political action but are not given any right to participate in the exercise of authority. This political fact is hard to reconcile with both the emphasis on NGOs’ democratization and the isolated emphasis on informal requirements, such as deliberation, inclusiveness, and contestation. The academic discussions on NGOs’ alleged contribution to the democratic legitimacy of international law leaves us puzzled with the question of how to proceed from the current conditional ‘voice’ of NGOs that might lead to ‘influence’ on international lawmaking processes, to democratically legitimate international law.

The observation that the scholarly work in favour of the NGO democratic legitimacy thesis seems to broadly neglect the lack of guaranteed impact in the final stage of decision-making on the formulation of a law, coincide with a large part of the discussed scholarly skepticism concerning the NGO democratic legitimacy thesis that has pointed towards the inadequate responsiveness of UN lawmaking agencies when it comes to NGO participation. To name just one, the governmental and non-governmental platforms for action of the Fourth World Conference on Women, presented by many as a textbook example of a great achievement for NGO involvement, was characterized by Otto as ‘shallow and even

\textsuperscript{1573} This is not only illustrative for the NGO democratic legitimacy thesis in international context. As Cohen argues, the same neglect of law and institutions is characteristic for theoreis of social capital and civil society in the tradition of Putnam. See Cohen 1999.
\textsuperscript{1574} Habermas 1996, p. 365.
\textsuperscript{1575} Bianchi makes a similar point. See Bianchi 2013.
Mertus stated that ‘the significance of social change activists is underscored by the ways in which states and non-state actors attempt to use them to further their own agenda’. Primarily Anderson, in his critique on the NGO democratic legitimacy thesis, focused on this misfit between the current international legislative constellation and the assumed democratic role of NGOs. Also, Mertus argued that a substantive empowerment of NGOs’ institutional position was required before an increase in democratic legitimacy could be expected from NGOs. The bottom line of the critiques is that NGOs’ participation cannot materialize independently from states into the exercise of public authority. The understanding of NGOs as representatives, as discussed in chapter 5, is the most evident example of the overestimation of NGOs’ impact and the underestimation of the need for institutional preconditions in international lawmaking processes in order to make that claim theoretically sound. Let us briefly recall the fundamental principle of democracy on which representative theory is based: each person ought to have (the possibility of) an equal say in the process of collective decision-making, or in Schumpeterian terms, in the process of deciding who will decide for them. In the reading of NGOs as political representatives, the essential duality of the role of political representation seems to be flawed. A representative must, first, mobilize the power that is granted to him or her, and second, a representative must make decisions. NGOs are expected to actualize the existential capacity of people to speak and act. NGOs are believed to represent both the articulated interests and individual interests in social relationships. Leaving aside the empirical questions of whether any title to represent individuals is granted to NGOs, and whether NGOs succeed in mobilization, the representative manifestation runs amok in the last part of the assignment of political representation, as NGOs do not have the actual and equal opportunity to participate in any formal decision-making process. Instead, NGOs’ contribution is limited to arbitrary forms of influence in different, often preparatory phases.
The contribution of NGOs to representation loses its democratic relevance due to the discretion of power holders regarding NGOs’ institutional involvement in lawmaking.

To illustrate the misinterpretation of NGOs as representatives, consider the following imaginary example. A group of inhabitants of Tuvalu\footnote{Perth Now 2008.} deeply care about the reduction of greenhouse gas emissions because they believe that such a policy might prevent their country from vanishing into the ocean. They see no options nationally to push policy towards an environmentally friendly strategy. Besides, the inhabitants of Tuvalu are well aware of the fact that their own government alone will not be able to make a change politically, due to its weak bargaining power internationally. Nor will the single arrangements of their government in terms of decreasing emissions have the desired effect, as this problem obviously requires international cooperation. They decide to support an internationally renowned NGO to represent them at the 2014 UN Conference on Climate Change in the hope that it will represent their case well and might be able to push for new international norms in line with their wishes. The chances to become involved in international lawmaking are, as elaborated upon earlier in Part II, conditional and out of the hands of both the NGO and the group of inhabitants of Tuvalu.\footnote{See for more information on the participation of civil society in the climate change process, ‘Guidelines for the participation of representatives of non-governmental organizations at meetings of the bodies of the United Nations Framework Convention on Climate Change, Jan. 20, 1994, U.N.T.S. no. 30822, and ‘Standard admission process for non-governmental organizations (NGOs)’ issued by the Climate Change Secretariat of the United Nations: http://unfccc.int/parties_and_observers/ngo/items/3667.php (last visited January 2016), http://unfccc.int/files/parties_and_observers/ngo/application/pdf/standard_admission_policy_ngos_english.pdf (last visited January 2016), and http://unfccc.int/files/parties_and_observers/ngo/application/pdf/coc_guide.pdf (last visited January 2016).} First of all, the group’s chances of representation might be blocked at the gate of the conference, when one-third of the parties present objections to the admission of this specific NGO.\footnote{Article 7, paragraph 6, of the United Nations Framework Convention on Climate Change (UNFCCC), provides that: “The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.”.} Second, even if the organization of the international conference decides to grant accreditation to the NGO, the ‘voice’ of the representative NGO will be limited to submission of information and views that will be published on the website of the conference, and will not be issued as official documents.\footnote{http://unfccc.int/files/parties_and_observers/ngo/application/pdf/20060328_can_ngos_provide_submissions.pdf (last visited January).} If the NGO nevertheless succeeds in convincing the members of the conference of the importance of a specific norm, and indeed the norm ends up in the final version of a new legal instrument, of course the Tuvalu inhabitants will be very pleased with the result, and would probably continue supporting this effective NGO.
It is, however, unreasonable to interpret these actions of NGOs and the relations between this NGOs and its supporters as a contribution to general feelings of trust in the authority of international law because of the NGO’s contribution to the law’s democratic legitimacy. The success of that specific NGO is primarily the consequence of convincing lobbying. It has nothing to do with the actual, equal, and continuous opportunity to participate in the making of international law. Although the group of inhabitants of Tuvalu, through the NGO, gained a voice they possibly did not have before, it is not the mere fact that that an NGO represented them in lawmaking which is valued, but the fact that the final result of the NGO’s involvement is in line with what that specific group of people seems to appreciate as the right result. The group has trust in the authority to rule because it is grateful for the outcome of the legislative process.

Suppose, further, the case of another individual who is opposed to the new standard, let us say an inhabitant of India. He or she suffers severe financial disadvantages due to the new norm. Although the inhabitant of India obviously ‘lost’ this time, in Waldron’s terms, he or she remains empty-handed in terms of the prospects of changing these standards, or of ‘winning another time’, because of the lack of any institutionalized guaranteed opportunity to reopen the debate on the terms of that specific agreement. This is not only the consequence of the conditionality of NGO participation in international lawmaking processes, but also, and primarily, the consequence of the lack of an overall democratic institutional structure internationally that guarantees actual, and equal opportunities for reopening that specific lawmaking process.

The discretion of power holders is often underestimated when discussing the successes of NGO participation in international lawmaking. Often scholars refer to the coming into existence of the Ottawa Landmine Convention as the example of what social engagement by NGOs can bring about. The organization of the International Campaign to Ban Landmines and its founding coordinator, Jody Williams, were instrumental in the passage of the Ottawa Treaty, and for these efforts they jointly received the 1997 Nobel Peace Prize. The Convention gained 122 country signatures when it opened for signing on 3 December 1997 in Ottawa, Canada. The initiative is considered an inspiring example of what the bundling of social power can achieve. However, it also demonstrates that it remains up to the states to decide if that social power has political effect. Thirty-five countries have not signed the treaty, including a majority of the permanent members of the United Nations Security Council: China, the United States, and Russia.

One can, however, make a case that the fact that NGOs facilitate social engagement leads to the democratization of foreign policy within the context of domestic democratic systems. However, from a perspective of international law’s democratic legitimacy, the change that is accomplished by NGOs as facilitators of the international public sphere without institutional preconditions is based on the de facto influence of NGOs. This de facto influence of NGOs...
influence might lead to a change in policy, but this change is not democratically achieved. To make NGOs’ pushes for change politically effective, states should first be willing to open up to their input, to pool their sovereignty to pursue the proposed changes in policy. In other words, at the international level, NGOs’ ability to change depends on the right circumstances: NGOs’ efforts need to coalesce with political agents of transformation, with the wishes of the states.\textsuperscript{1594} NGOs might raise the consciousness of political leaders by their activities that range from civil disobedience, convincing media campaigns, and protests.\textsuperscript{1595} Indeed as Florini states, ‘[t]he political effectiveness of such groups depends on their ability to persuade others – state actors, the general public, corporations, or intergovernmental organizations – to alter their policies or behavior.’\textsuperscript{1596}

For social engagement to have a democratically legitimizing effect, its resulting power has to flow from citizen activity to institutionalized decision-making and legislation.\textsuperscript{1597} There must be guaranteed interactions between the legally institutionalized will-formation and culturally mobilized publics. The NGO democratic legitimacy thesis seems to inflate the institutional dimension to the point of making informal social action, in our conceptual framework, understood as a democratic practice complementary to institutionally secured democratic decision-making,\textsuperscript{1598} the dominant yardstick of democratic legitimacy, thereby circumventing institutional demands derived from a more robust normative account of democratic legitimacy associated with rule of law principles.\textsuperscript{1599} The necessary counterweight of these social practices by formal politics is thereby often overlooked.\textsuperscript{1600} To apply persuasively a standard of democratic legitimacy to international law, one has to pay attention first to the way formal politics is designed internationally.\textsuperscript{1601}

In addition, the way deliberation is defined, when pointing towards the deliberative practices in the preparatory phases of international lawmaking, marginalizes the critical potential of democratic deliberative practices. The exploration of the legal construction of NGO participation in international lawmaking taught us that NGOs are invited to work together for the ‘common good’ alongside states and relevant international organizations. Specifically in the context of the UN, NGOs are required to underwrite the goals of the international agency in which they participate. The general aim of these ‘inclusive’ international lawmaking practices seems to be based on avoiding clashes of opinion. The ability of states to veto and block NGOs from participating underscores this observation. It is reasonable to assume that states and international organizations only tolerate NGOs when...

\textsuperscript{1594} Murphy stresses the historical interconnection of civil society and state. See Murphy 1994.

\textsuperscript{1595} As Habermas states, ‘The public opinion that is worked up via democratic procedures into communicative power cannot ‘rule’ of itself but can only point the use of administrative power in specific directions.’ Habermas 1996, p. 300.

\textsuperscript{1596} See Florini 2009.

\textsuperscript{1597} Habermas 1996, p. 375.

\textsuperscript{1598} See chapter 2, section 2.1.3 on the complementarity of institutional and social preconditions.

\textsuperscript{1599} Krisch makes a comparable point, see Krisch 2010, p. 274.

\textsuperscript{1600} Dryzek conception of democracy is exemplary. Dryzek states, ‘democracy, in the international system no less than elsewhere, is a quintessentially open-ended project, within boundaries defined by a subject matter pertaining to the collective construction, application, distribution and limitation of political authority’. Dryzek 1999, p. 48.

\textsuperscript{1601} One has to assess first whether there exists ‘[…] the type of politics that insists on rules relating to voting and decision-making, that knows an ultra vires decision when it sees one, and insists that the ends not always justify the means, precisely because, ultimately, we cannot agree on the ends and thus end up imposing our ideals, or at least superior techniques on others’. Klabbers 2005a, p. 341.
their mission aligns with the wishes of the executive power, consisting of both states and international organizations.1602 Such a cooperative practice of NGO involvement does not leave much political room for contestation, conflict, and struggle, which are understood to be principal characteristics of the democratic legitimacy of law. But even if there is room for contestation, without linking these contestative practices to rights and judicial safeguards that enable and guarantee proactive participation, the means to objections cannot lead to democratically established change.1603 The fact that the impact of NGOs’ input is not guaranteed makes them dependent on the authority they are actually expected to control.1604

6.2.2 Sidestepping democratic agency

It is striking that in most accounts of the NGO democratic legitimacy thesis, the addressing of the ‘profoundly troubling questions of democratic theory’ in the international legal order, which concern the rightful source of political authority,1605 seems to be elided.1606 While focusing on transparency, accountability, deliberative practices and responsiveness, questions that have predominantly remained out of sight are: who is left out of deliberations, consensus seeking, and decision-making; who should be included in contestative practices; and when can we hope for, or better, rely on responsiveness and reflexivity of the authority to rule? In more abstract terms, who has the right to evaluate and contest the rightfulness of lawmaking on democratic terms?21607 In this respect, it remains unanswered how the autonomy and possibility for self-rule can be secured under law.1608

This is something that states (notwithstanding the fact that state autonomy is assumed to be ‘waning’,1609 and provided that it is democratically organized) still offer us.1610 Regardless


1603 See chapter 1, section 1.3.

1604 See for a critical account of the premise that NGOs involvement furthers inclusion, while aggravating exclusion: Tucker 2014, p. 376-396.


1606 See for example, Wheatley 2011, p. 543. ‘In order to be effective regulators, non-state actors must demonstrate to sceptical domestic publics in democratic societies that they take seriously the requirements of democratic law-making: the inclusion of the interests and perspectives of those subject to the regime, with the conclusion of political deliberations representing a fair bargain in terms of the interests and perspectives of the subjects of the regime; institutionalized mechanisms to ensure the representation of a diversity of perspectives in legislative procedures; decision-making following reasoned deliberations; the adoption of regulations consistent with international human rights norms (human rights are understood to be integral to the practice of democracy); and a sense of epistemic humility, in that any absence of consensus within formal decision-making bodies and the global public sphere emphasizes the importance of formal mechanisms of review and challenge, and the need to allow issues to be brought back on the agenda where new evidence or arguments are adduced.’ Notwithstanding the relevance of the mentioned democratic elements for democratic legitimacy, what is missing here is the explicitation of democratic agency, the equal opportunity for everyone to participate in lawmaking.

1607 See Krisch 2013.


1609 See chapter 3, section 3.4.1.

1610 Higgot and Erman 2010, p. 458, referring to Cohen 2007, p. 596. Higgot and Erman emphasize that scholars primarily perceive sovereignty ‘as a fact of power and control, while neglecting the legal and normative category it also entails.’ Scheuerman is very critical about this move in international democratic scholarship where the role of states seems to be overlooked. Scheuerman 2008, p. 133-151.
of the importance of the many democratic norms and practices mentioned in relation to NGOs that often relate to the assessment of democratic legitimacy’s operational aspects. These norms and practices cannot independently democratically legitimize international law. In this light, the current single focus on democratic practices and values without taking into account institutional preconditions can be considered relatively ‘unambitious’, as Krisch points out, towards the ideal of input legitimacy; to democratic agency, and to the principle ideal of democratic legitimacy: self-rule.

This consequence is evidently related to the previous one. The insistence on single deliberative practices overemphasizes the critical merits of social practices of, among other civil society actors, NGOs, and underestimates the basic normative assumption that in order for decisions to be democratically legitimate, free, and equal, deliberative participation and decision-making must be guaranteed. In the same vein, Erman notes that ‘the proposed political agent, often conceptualized in terms of “stakeholder”, is not equipped to be a democratic agent insofar as the civil society view does not fulfill two basic requirements for an arrangement to qualify as minimally democratic, namely political equality and political bindingness’. Only when legal subjects have an actual, equal, and continuous opportunity to participate can final authority by the people, which forms the reason for the trust of legal subjects in the resulting laws based on its democratic legitimacy, be established. To enable NGOs to democratically legitimize international law, democratic practices and rights ‘must be knit to each other and to the same actors through political equality and political bindingness’, as Erman demonstrates. Without political equality and political bindingness, deliberative practices, control, transparency, inclusiveness, and responsibility cannot, simply put, lead to democratically legitimate law. Public influence is converted into political power only after it has passed through the filters of institutionalized procedures of democratic will-formation into legitimate lawmaking. There is an indirect effect noticeable as well: as long as the actors engaged in international lawmaking have no decision-making power, they lack any instrument to force the states to keep them informed of the state of play in negotiations.

The foundation of the thesis is primarily based on the appreciation of deliberative practices, of an open critical examination in an argumentative discourse in which the NGOs actively partake. Such a discourse should lead to a rational and therefore acceptable democratic outcome for all of us. As demonstrated in Part II, NGOs allegedly offer a contribution to the democratic legitimacy of international law because of their knowledge provision to both international lawmaking processes and individuals. NGOs are assumed to make deliberations more rational. The value of rationality for the democratic legitimacy of law, however, also strongly depends on the dialectic characteristics of democracy: electoral

---

1611 See chapter 2, section 2.2.
1612 See Krisch 2013.
1614 See Erman 2012.
1615 See chapter 1.
1616 Erman 2012, p. 10.
1617 Without institutionalized practices of decision-making we move to a conception of deliberation that focuses on its epistemic merits. See General Conclusions, section III.
1618 See chapter 2, section 2.1.
1619 This consequential effect of the lack of bindingness for the willingness of the executive to inform is borrowed from Van Mourik and Besselink 2009, p. 318.
and contestatory input, proactive and reflective participation, or, in Pettit’s words, authorial and editorial impact.  

The problem at the international level is that the input by NGOs to the knowledge base of a specific lawmaking procedure, which supposedly contributes to a deliberative democratic procedure, does not take place at the same level as the authorial democratic procedures themselves. As a result, the possibilities for any electoral or authorial correction to NGOs’ input are obstructed. Here we should remind ourselves of the criticism concerned with the ‘second bite of the apple’ thesis, as discussed in Part II. Without a direct democratic lawmaking process at the same level, the knowledge NGOs might provide can have a disproportionate influence on the content of the norm, to the detriment of the possible democratic procedures taking place at the domestic level for at least the position of the executive governmental official that influenced the establishment of the international norm. Regarding the ‘social engagement’ arguments that reflected on the contributions of NGOs to the knowledge base of individuals who consequently might have more informed deliberations in the public sphere, the democratic legitimizing effects of these contributions can only be redeemed at the level of domestic democracies.

An impasse in the debate on the democratic legitimacy of international law reveals itself: if states, with the intention to enlarge the opportunities of non-state actors to have an impact on the formation of law, do not retain a tight grip on lawmaking, the protection of equality and freedom from domination at the domestic level consequently suffers. Without an international institutional structure of rights to enable equal and actual political power to balance and create rules of hierarchy and subsidiarity, the results of these lawmaking processes that provide for opportunities for influence by NGOs will inevitably affect the protection of the principle of freedom from domination at the domestic level. This dilemma concerning two-level democracy is only occasionally raised in the academic discussions concerning the NGO democratic legitimacy thesis.

The obstacles for the underestimation of democratic agency are related to the inability to enable and ensure an equal representation of preferences, and the inability to foresee in a clear decision-making moment. Non-institutionalist deliberative approaches to international democracy struggle with the fact that a proposal for a new legal rule requires a final say, a final decision, to become law. There is no guarantee that the gap between the outcomes of deliberation and the authority to make binding rules will be closed in a democratic way. This is not considered decisively problematic when, as the original deliberative theory of Habermas prescribes, deliberations are complementary to institutional democratic decision-making procedures of elected representatives. Let us be reminded here of Habermas’ observation that “[n]ot influence per se, but influence transformed into communicative power legitimates political decisions”.

1620 See Pettit 2006. See chapter 1, section 1.3.2.
1621 We will discuss this possibility in section 6.4.
1622 See chapter 5; Bolton 2000, p. 217.
1623 See chapter 2, Part II.
1624 This shortfall of deliberation was already mentioned when explaining participation through deliberation, but becomes even more problematic when scholars solely rely on deliberative practices to uphold democratic legitimacy. See chapter 1, section 1.3.2; chapter 2, section 2.2.2.
1625 Habermas 1996.
In sum, deliberative practices cannot in themselves serve as an assured path consisting of equal possibilities to transform the aspired into the actual. Deliberation is vulnerable to political pressure by the more politically equipped, which requires recourse to correction enabled by judicial safeguards and individual rights. To ground democratic decision-making, deliberative practices require a strong link to the formal processes of lawmaking and regulation to enable and guarantee democratic agency.

6.2.3 A disregard of the need for an all-encompassing political structure

Our recurring insistence on the need for democratic legitimacy’s necessary preconditions could be criticized for being overly static. It could be argued that one should understand the scholarly focus on different democratic practices as a cumulative, gradual strategy. The more democratic elements that can be discovered in a lawmaking process, the more democratically legitimate an international law will be. However, the answer to the current discretion of power holders concerning NGOs’ involvement in different legal regimes does not lie in strengthening the democratic practices and principles of deliberation, control, and responsiveness, which are primarily related to democratic legitimacy’s operational aspects. Any strengthening of these elements would arguably only lead to more inclusive accreditation mechanisms for specific international organizations.

The main difference between the way democratic elements are presented in the NGO democratic legitimacy debate and what we referred to as necessary conditions for democratically legitimizing law is as follows. Most of the proponents of the thesis impose democratic practices internal to a specific lawmaking regime, which we categorized in chapter 2 as practices related to democratic legitimacy’s operational aspects. We aim to argue that a primary focus should be on the necessity of institutional preconditions functioning everywhere, that enable and guarantee actual, equal, and continuous participation, be it in the manifestation of deliberation, contestation, or otherwise, equally applicable to all legal regimes.

Here we touch upon an issue that relates to the observation that in terms of the democratic legitimacy of law, an international legal order cannot be separated into compartmentalized legal regimes, of which some will offer receptive accreditation mechanisms or participation procedures that facilitate inclusive deliberations, while other international legal regimes remain largely closed for any actor other than states. Accreditation mechanisms only provide opportunities to participate in selective legal regimes. However, there is no such a thing as sectorial democratically legitimate international law. International legal regimes are not isolated political communities, affecting exclusively their own legal subjects. Resulting laws and decisions of one

\[1627\] Barnard 2001, p. 76.
\[1628\] Bekkers and Edwards 2007, p. 53.
\[1629\] Lustig and Benvenisti also raise this point. They state: ‘Providing greater voice and participation cannot replace the lost vote of the community in affairs essential to its wellbeing. Participation with no vote positions the public in an inherently inferior position’. Lustig and Benvenisti 2014, p. 125.
\[1630\] Krisch 2010, p. 267, referring to Bohman 1998, p. 400-425; Young 2002. Therefore domestic theories of deliberative democracy typically place deliberation alongside elections as pillars of democratic governance and thereby ensure such a link. As Habermas states, ‘(n)ot influence per se, but influence transformed into communicative power legitimates political decisions’. Habermas 1996, p. 371.
international legal regime have impact on the other legal regimes.\footnote{1632} Exclusive regimes evidently affect other regimes, thereby construing a possible dominating situation over the subjects of a more inclusive international legal regime. In this light, the broadly shared gradual approach of focusing on isolated democratic elements, whether they should be applied to NGOs or to lawmaking regimes, does not constitute a convincing standard of democratic legitimacy.\footnote{1633}

If one aims to apply the standard of democratic legitimacy to evaluate the exercise of authority internationally, there should be an embeddedness of different international lawmaking processes in one single overarching institutional system. The need for an overarching political institutional system also relates to the discussed opportunities for, and pitfalls of NGOs having influence on a level other than where the democratic formation of will takes place. If an overall system consisting of right and judicial safeguards is at place, individuals can also touch upon second-order questions of democracy: questions about the very nature of democratic consociation.\footnote{1634} As discussed in Part I, when there is dissatisfaction about the ratio of, or the proportion between the rational input of actors and the democratic procedure, or in general about the way law is made, democratic procedures should offer individuals who are affected by these laws the possibilities to change the procedural conditions of lawmaking. As discussed in chapter 2, democratic legitimacy’s necessary preconditions require providing the opportunity to decide on these matters of procedure, on how lawmaking procedures are arranged. Democratic legitimacy’s necessary preconditions require that there should be guaranteed opportunities to democratically change the modes of decision-making procedures, to change second order rules, that are valid for all decision-making procedures equally. As we understood in chapter 2, ‘[l]egitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of all about matters of common concern’,\footnote{1635} which cannot be limited to one specific subject or type of international law. In other words, the application of democratic legitimacy to international law entails a heavy burden on an institutional structure consisting of rights and safeguards, which, as we are all aware, is non-existent in the international legal order at the moment.\footnote{1636}

It is obvious that a certain circularity of the NGO democratic legitimacy thesis arises here. It is precisely the lack of an overarching institutional system consisting of social and institutional preconditions in the international legal order that has instigated an informal, gradual approach towards international lawmaking. And it is precisely the lack of institutional preconditions for legal subjects to equally, actually, and continuously participate in the making of international law that has instigated scholars to focus on NGOs, because of their track-record of emphasizing more flexible democratic values such as transparency, responsiveness, and inclusiveness, their attempts to represent ‘the otherwise unheard voices’, and their general tendency to focus on the ‘common good’.\footnote{1637} However, there is a fallacy at the root. In a lawmaking process that offers isolated democratic elements but is not embedded in a system of rights and judicial safeguards, NGOs can provide no more

\footnote{1633} Cullen and Morrow 2001, p. 15.
\footnote{1634} See Bohman 2007a.
\footnote{1635} Benhabib 1996b, p. 68.
\footnote{1636} As Walker states: ‘What these highly diverse forms have in common is their lack of holistic attributes, their absence of claims to comprehensive authority in any register, whether legal, institutional, political or societal’. Walker 2010, p. 226.
\footnote{1637} If they actually do so, should be subjected to empirical studies.
than a quasi-democratic legitimacy to international law. A focus on the internal democratic legitimacy of NGOs would equally lead to a quasi-democratic legitimacy of their input. The impasse that characterizes the NGO democratic legitimacy thesis is clear. The expectations as voiced by scholars in favor of the NGO democratic legitimacy thesis do not match the required infrastructure to successfully apply the standard of democratic legitimacy to international law. However, the required infrastructure does not match the current international legal and political constellation. We come back to this impasse in subsequent section 6.3.

6.2.4 The principles of democratic legitimacy compromised

It is submitted here that a non-institutional conception of democratic legitimacy that is espoused by most scholars in favor of the NGO democratic legitimacy thesis ends up compromising the very principles of democratic legitimacy. Indeed, as it is argued here, such a position confronts us with the ever-troubling balancing questions of democracy: to what extent should democratic legitimacy as a concept develop and adjust to remain relevant in light of current exercises of authority that are inherently different in nature than found in the context of democratic states, and to what extent should one hold on to democratic legitimacy’s traditional features to remain relevant for critically evaluating the normative status of these current exercises of authority?

In general, when challenged by the fact that international lawmaking occurs in a non-hierarchical setting, where no supreme lawmaker or adjudicator and no institutional rights exist, scholars have essentially two options with regard to the conception of international democratic legitimacy. Or scholars choose to adapt the standard of democratic legitimacy, what we called in chapter 5, section 5.6.2 a multiform approach. A multiform approach to the characteristics of democratic legitimacy aims to secure applicability of the standard in the current political circumstances of international lawmaking. Or scholars can leave the conception of democratic legitimacy intact, taking a uniform approach to the characteristics of democratic legitimacy. However, this might lead to the conclusion that notwithstanding the desirability of applying democratic legitimacy, the standard of democratic legitimacy simply cannot be applied to evaluate the acceptability of international law. The risk of the first and most common route, to mould democratic legitimacy to the characteristics of international lawmaking, is a watered-down test of democratic legitimacy. Stepping aside from considering the need for democratic legitimacy’s necessary preconditions give primacy to practice, with the consequence of minimizing democratic legitimacy’s critical potential to reveal dominating situations. The latter conclusion does not pretend to cure, but is nevertheless still able to uncover the dominating features of international lawmaking.

As discussed in chapter 3, the scholarly criticism of the democratic legitimacy of international law is based on an understanding of international lawmaking in which the interests of certain individuals or groups are unfairly favored over others. In an ideal-type presentation of the thesis, NGOs step in to correct the experienced domination by powerful states and international organizations by democratically legitimizing international law.

---

1638 The current international legal constellation is characterized by the fact that ‘law is everywhere (…) but no politics at all; no parties with projects to rule, no division of power, and no aspiration of self-government beyond the aspiration of statehood – aspirations identified precisely as what we should escape from’. Koskenniemi 2007, p. 29.

1639 See Christiano 2011.
However, in light of the main features of democratic legitimacy, as discussed in Part I, one has to conclude that NGOs’ contribution to the prevention of legal subjects from domination is ambivalent. NGOs’ ability to instigate political change in international lawmaking processes depends on circumstances beyond the control of NGOs. The current legal frameworks that enable participation of NGOs seem to offer not much more than a tribute to the toleration of NGOs, for which critics already warned us in chapter 5. If any impact is established by NGOs, we can only argue in retrospect and empirically whether they were able to influence international lawmaking. This may lead to the conclusion that the influence of NGOs was hardly felt, and did not affect in any way the feared dominating power of international organizations or the informal lawmaking by the public and private actors that instigated the NGO democratic legitimacy thesis. Without enforceable tools applicable at the international level, individuals remain empty-handed in terms of exercising their democratic rights to participate.

Claiming that NGOs do contribute to the democratic legitimacy of international law leads to an overburdening of NGOs with normative aspiration. Due to the lack of conceptualizing institutional means to transform NGOs’ social power into political power, expectations concerning NGOs’ capacity to ‘bring about a degree of diversity and openness across existing political boundaries, working across borders to challenge unresponsive governments, trying to make them more accountable to a range of suppressed values and interests by ensuring that these voices finds some sort of public hearing’ cannot be substantiated. Without institutional preconditions NGOs cannot help to protect a minority against the tyranny of the majority.

A less strictly applied evaluation of law, based on its democratic legitimacy, in which NGOs are assumed to contribute, cannot expose international law’s deficits and dominating features. Besides the risk for relying on an actor that has no influence at all, an opposite consequence of the lack of institutional preconditions might also occur. Without theorizing institutional preconditions that enable democratic correction or counterbalance of the influence of NGOs, the arbitrary effect of NGOs on international lawmaking could lead to a disproportinate impact of NGOs, possibly becoming part of the democratically illegitimate domination by international public authority itself. As Venzke points out,

‘[t]he interaction with NGOs does not necessarily work to the institutions’ advantage and institutions are not themselves immune from the influence of NGOs. The institutions could lose in autonomy in relation to this capturing actor but gain in relation to others. To the extent that the bureaucracy’s actions can be reduced to the will of other powerful

1640 Scholte points out that ‘the onus for corrective action on such problems lies with official bodies rather than civil society.’ Scholte 2001, p. 20.
1641 See chapter 3, section 3.4.
1642 Any work on the NGO democratic legitimacy thesis characterized by a circumvention of theorizing mechanism for actual, equal and continuous participation, will, as Pedraza-Farina states, ‘undermine the very legitimacy it is designed to provide’. Pedraza-Farina 2013, p. 611.
1643 King 2003, p. 35.
1644 Our conclusion is in line with Anderson’s work. He concluded that NGOs do not make democracy, nor do they confer democratic legitimacy, least of all upon the profoundly undemocratic organs of the international systems. Even within domestic society, he further states, civil society and its organizations are not themselves the ‘democratic process’; they are part of the pressures brought to bear on the outcomes of the democratic process. See section 6.2.1.
actors, however, it could no longer be sensibly referred to as autonomous. (...) A mixture between autonomy and capture by powerful actors can be found.\textsuperscript{1646}

Domination not only refers to state authoritarianism or to uncontrolled exercise of authority by international organizations, but could also refer to powerful cooperations, uncontrollable markets, or to NGOs for that matter.\textsuperscript{1647}

Besides a loss of its critical potential to detect dominating power structures, in the long term a watered-down conception of democratic legitimacy could also arguably affect the normative force of international law.\textsuperscript{1648} Due to the adaptation of the standard of democratic legitimacy, international law is legitimized on weaker grounds than other forms of law, be they national, local, or regional, while evaluated under the same denominator. That seems to imply that the authority of international law is also weaker than the authority of domestic law. In the figure below is shown which elements of democratic legitimacy are not met by the NGO democratic legitimacy thesis.

Our critical assessment of the academic debate concerning the thesis seeks to prevent that, under the guise of NGOs’ commonly assumed democratic potential, the exercise of public authority that international legislative practices involve is not further object of scholarly scrutiny regarding the content, reach, and consistency with the essential principles of democratic legitimacy: equality and freedom from domination.

Presenting NGOs as democratic legitimizers of international law without conceptualizing institutional preconditions seems to pay lip service to the politics in current international lawmaking.\textsuperscript{1649} International law remains, notwithstanding possible support for its content and necessity, authoritarian in the sense that it’s making is not congruent with the foundation of democratic legitimacy, as explained in Part I. Even if the often-mentioned

\textsuperscript{1646} Venzke 2008, p. 1421.

\textsuperscript{1647} Ehrenberg illustrates the possible dominating aspects in which market dynamics and civil society intertwine in his exploration of the history of the idea ‘civil society’. ‘The ways in which civil society is affected by economic inequality has particularly important implications for the US since our recent history has been marked by widening material disparities and the largest transfer of wealth from the poor to the rich in human history.’ Ehrenberg 1999, p. 247.

\textsuperscript{1648} See General Introduction.

\textsuperscript{1649} We conclude in this regard in line with the critique of Anderson on the NGO democratic legitimacy thesis. See chapter 5.
democratic practices such as responsiveness, openness, and inclusiveness are taken seriously by international lawmakers, these soft requirements for political opportunities will not suffice to prevent state actors retaining a tight grip on when and what will be decided at the international level, and deciding unilaterally if and what they do with NGOs’ input, ‘which put[s] “democratization” in danger of being the captive of the self-serving dynamics of power’. In sum, these conditions for democratic legitimacy, notwithstanding their undisputed necessity, on their own are not sufficient for the involvement of NGOs to contribute to the effort of turning international lawmaking into democratically legitimate lawmaking. And, these conditions alone cannot prevent the involvement of NGOs perhaps inversely protracting, delaying, distorting, or even preventing the coming into being of international law.

As a consequence of the negligence of scholars engaged in the NGO democratic legitimacy debate towards the evaluation of democratic legitimacy’s necessary preconditions in the international legal order, their evaluation of the operational aspects of a specific lawmaking procedure becomes irrelevant for a validation of the democratic legitimation of international law. Here, the necessary hierarchy between these two levels of evaluation, as presented and discussed in Part I, reveals itself.

6.3 The stalemate of international institutional preconditions

Our conclusion has brought us to a challenging theoretical issue: how to conceptualize institutional preconditions in an international lawmaking context that makes international democratic agency possible? In this section we aim to introduce and revisit two proposals that have been made in the literature on international democratic legitimacy to offset the lack of attention paid to institutional preconditions in the current debate on the NGO democratic legitimacy thesis. These two approaches have been briefly mentioned in the introduction of this chapter: a multiform institutionalist approach to democratic legitimacy of international law, often called the ‘two-track approach’, and a uniform institutionalist approach to democratic legitimacy of international law, often called the ‘cosmopolitan approach’.

Section 6.3.1 explores these two alternative approaches to the global deliberative perspective that conceptualize democratic legitimacy including institutional preconditions. A brief outline is given of the main characteristics and vantage points of these approaches that might function as a stepping-stone for further studies. After the introduction to both approaches, section 6.3.2 lists substantial practical and conceptual difficulties. The scope of our study does not allow us to formulate any conclusive evaluative remarks on the question of whether or not these approaches to the application of the standard of democratic legitimacy internationally are persuasive. However, it observes the most eye-catching dilemmas attached to any effort to conceptualize international institutional preconditions. These dilemmas concern both feasibility and conceptual hurdles, and both require more contemplation that can be offered at this stage.

1650 Coicaud 2010, p. 19.
1652 See chapter 2.
1653 Krisch states ‘[E]ven if we relax expectations to some extent – how to conceptualize democratic standards in the post national sphere, and how to realize them institutionally, has so far remained elusive’. Krisch 2010, p. 266.
1654 That would require a comprehensive analysis of existing theoretical approaches to international democratic agency. See Karlsson 2008.
6.3.1 An introduction to two approaches to institutional preconditions

The discussion concerning international institutional preconditions to enable the democratic legitimation of international law is far from new. The assumed shortcomings of the legitimizing effect of state consent, as discussed in chapter 3, have led, apart from a specific focus on NGOs’ assumed contribution to the democratic legitimacy of international law, also to many broader theoretical debates concerning alternative routes to establishing democratic legitimacy internationally that extend from cosmopolitan theories, a two-track model composed of institutionalized democracy at the domestic level and global public deliberations, an emphasis on international justice and domestic democracy, to global deliberative democracy.

Although the strategies that scholars have developed to theorize democratic legitimacy differ, the approaches share a monistic approach to the necessity to democratically legitimize international law. They share the belief that if one aims to consider democratic legitimacy on a scale beyond the nation-state, one is inherently forced to reconsider the traditional approach to international democracy, which is based on a classic Westphalian reading of international lawmaking. Their shared dominant concern is the current gap between the exercise of international authority and the possible control of international lawmaking by states. It is argued that democratic legitimacy requires that where norms, generated by an international institution, entity, or set of processes, have a clearly public quality in terms of their impact and scope, and where they enjoy or have acquired authoritative effect equivalent to that of national laws and policies, these norms have to derive from the people. International law should be able to be justified to those to whom they apply on ‘grounds of global justice and cosmopolitan ethics’. The need to engage in politics and the significance of doing so are considered omnipresent, and should not be limited to certain territorial spaces.

Two approaches specifically meet our central objection, formulated in the previous chapter, concerning the general lack of attention paid to institutional preconditions by scholars involved in the NGO democratic legitimacy thesis: the cosmopolitan approach and the two-track approach. Notwithstanding the fact that these two approaches have in common an institutional perspective towards democratic legitimacy, they take diverging views on the type of manifestations of democratic legitimacy. The two-track model adheres to a multiform approach, in the sense that its conception of international democratic legitimacy differs from its conception of domestic democratic legitimation, whereas the

---

1655 See Buchanan 2003; Buchanan 2010; Buchanan and Keohane 2006, p. 405-437.
1657 See chapter 5, section 5.6.2. They all focus on the public character of international governance, although it does not fall easily in conventionally or nationally defined categories. Their monist perception of the necessity is in line with Murphy’s statement that ‘any plausible overall political/ moral view must, at a fundamental level, evaluate the justice of institutions with normative principles that apply also to people’s choices’. Murphy 1998, p. nr 253-254.
1658 See Introduction; Chapter 1, section 1.2. As Besson illustrates; ‘The deterritorialisation of law should therefore be matched by the progressive deterritorialisation of democratic processes themselves.’ Besson 2009b, p. 70.
1660 Bryde 2005, p. 109. The research efforts seem to adhere the repeatedly resonated claim that law is legitimate ‘only if all who are possibly affected persons do in fact participate’, whether the claim is made in the context of the nation-state or in the context of international lawmaking processes. Wheatley 2009, p. 231.
cosmopolitan approach takes a uniform approach as to where, how, and what institutional preconditions must be materialized, irrespective of the level of application.

Two-track approach
The ideal of the two-track model, predominantly defended by Habermas, Besson, and Erman, is based on domestic democracy with an extension to deliberative practices of cosmopolitan citizens. The two-track model can be characterized by the attempt to construe an account of international democratic legitimacy that does not conflict with, but complements, domestic democracy. The fact that international democratic legitimacy does not stand by itself, in contrast to national democratic legitimacy, is taken as the starting point. International democratic legitimizing practices do not have to provide for ‘full’ democratic legitimation, as they ‘must connect up with the existing, though inadequate, modes of legitimation of the constitutional state, while at the same time supplementing them with its own contributions to legitimation’. Arrangements might appeal to elements of democratic legitimation other than what the traditional democratic legitimacy doctrine offers us, but it certainly should not conflict with national democratic legitimation. States are still considered the dominant forces in determining international law and as actors; they have obligations to be organized in a democratically legitimate way. Institutions at the domestic level primarily cover the enabling and ensuring of actual and equal exercise of political power. Habermas states that ‘even without the backing of state sovereignty, the arrangement sought for must connect up with the existing, though inadequate, modes of legitimation of the constitutional state, while at the same time supplementing them with its own contributions to legitimation’. The required complementation of domestic democracy rests on a functional global public sphere. The deliberations in the global public sphere create ‘a new kind of political constituents or subjects, i.e. moral-political constituents, besides electoral or formal political constituents in each territorial entity’. The benefit of focusing on deliberative practices lies in its reflexivity. Deliberative democracy allows for widespread disagreement and deliberation

1662 Habermas argues that, ‘nation-states (...) represent the most important source of democratic legitimation for a legally constituted world society. From this follows, in particular, the requirement that the transfer of legitimation must not break off within the regional regimes.’ Habermas 2008, p. 447.
1664 As Habermas states, ‘nation-states (...) represent the most important source of democratic legitimation for a legally constituted world society. From this follows, in particular, the requirement that the transfer of legitimation must not break off within the regional regimes.’ Habermas 2008, p. 447.
1665 According to Besson, one should acknowledge the importance of transnational deliberation but should be aware of possible detrimental effects on domestic democratic accountability. An underestimation of domestic democracy ‘is deeply counterproductive given the pivotal role national processes still play in the ratification, reception and implementation of post-national legal norms and hence should have in their legitimation process; the national forum is the place where the plurality of legal norms applicable to an individual in a globalized world converge and hence the place where they can be made normatively coherent’. Besson 2009b, p. 78 referring to Archibugi 1993, p. 313, 314. Habermas himself does not translate his deliberative theory fully to the international legal order, as he argues that such a translation is obstructed by the lack of a shared identity and degree of solidarity what facilitates deliberation in states are seldom found in the international legal order. Habermas 2006, p. 143.
1667 Besson 2009b, p. 71-72, referring to Gutmann and Thompson 2004, p. 37-38; Thompson 1999, p. 120.
over the legitimacy of the polity and its regime. It is based on a long-term process in which discussions may constantly be re-opened.\textsuperscript{1668}

The effect of international civil society actors is to enable national citizens to shape a well-informed opinion about global issues. These opinions, offered through their national delegates, have effect on the lawmaking processes of international organizations, most clearly on the General Assembly.\textsuperscript{1669} In line with the familiar arguments concerning the increase in ‘inclusive practices’ through NGO involvement,\textsuperscript{1670} adherents of the two-track model argue that transnational or international deliberations offer a forum for barely represented interests, so that they can have some influence internationally that they might be lacking nationally.\textsuperscript{1671}

Negotiating powers, including regional regimes, that have the political power to decide about what law will be enacted, are only legitimate to the extent that internally and transnationally a process of political opinion- and will-formation is created ‘concerning the parameters of global domestic politics’, ‘among the citizens who are in a position to influence the delegating authorities’.\textsuperscript{1672} Besides the indirect democratic legitimation by national citizens through state delegates, cosmopolitan citizens influence the negotiating partners directly.

‘The first of which (read: ‘path of legitimation’) would lead from cosmopolitan citizens, via an international community composed of member states responsive to their citizens, to the peace and human rights policy of the world organization; whereas the second would lead from national citizens, via a corresponding nation-state (and the relevant regional regime where one exists), to the transnational negotiation system that would be responsible, within the framework of the international community, for issues of global domestic politics, so that both paths would meet in the General Assembly of the world organization, for the latter would be responsible for the interpretation and further development of the political constitution of world society, and hence for the normative parameters of both peace and human rights policy and global domestic politics.’\textsuperscript{1673}

In this reading of democratic legitimation, the legitimizing power of civil society, although enabling the construction of ‘hypothetical consent’,\textsuperscript{1674} should be complemented by international institutional reforms that make international cooperation fairer:

‘To be sure, a diffuse world public opinion armed solely with the weak sanctioning power of “naming and shaming” could at best exert a weak form of control over the

\textsuperscript{1668} Besson 2009b, p. 75, referring to Gutmann, and Thompson 2004, p. 6.
\textsuperscript{1669} See for a critique on Habermas: Scheuerman 2008, p. 133-151.
\textsuperscript{1670} See chapter 5, section 5.1.1; Chapter 6, section 6.1 for the elaboration on the tendency to focus on inclusion as democratic practice.
\textsuperscript{1671} Besson argues that ‘[[i]s a straightforward way in which foreigners, whose interests cannot actually be included in national deliberations, may still exercise some influence over national decisions; public officials are indeed often to some degree more accountable to representatives of those foreigners’ interest in international for a than they would be in national debates’. Besson 2009b, p. 79-80, referring to Gutmann and Thompson 2004, p. 39.
\textsuperscript{1672} Habermas 2008, p. 452.
\textsuperscript{1673} Habermas 2008, p. 448.
\textsuperscript{1674} Higgott and Erman 2010, p. 460.
interpretive, executive, and judicial decisions of the world organization. But couldn’t this deficiency be made good through internal controls, namely through enhanced veto rights of the General Assembly against resolutions of the (reformed) Security Council, on the one hand, and rights of appeal of parties subject to Security Council sanctions before an International Criminal Court equipped with corresponding authority, on the other?\textsuperscript{1675}

Besson develops a demo-critic version of the two-track model and emphasizes the importance of mutual openness of domestic, regional, and global democratic practices. The transnational deliberations of citizens of different demo constitute one demos along different functional lines in each case. Democracy as a political regime is conceptualized at the domestic level, as long as the democratic subject remains the domestic people.\textsuperscript{1676} The prescribed accumulation of democratic processes, however, takes place within and beyond the domestic and transnational legislative practices in ways that link national democratic processes to other transnational, international, or supranational democratic processes.

‘The functional and territorial inclusion (pluralistic) in national, regional and international lawmaking processes, and at different levels in those processes (multilevel) of all states (and groups of states) and individuals (and groups of individuals) qua pluralistic subjects of the international political community (multilateral), whose fundamental interests are significantly and equally affected by the decisions made in those processes’.\textsuperscript{1677}

In the two-track account, democracy is a pluralist model that recognizes different levels of democratic legitimation.\textsuperscript{1678} The closeness of national institutions to individuals makes nation-states the primary forum of direct legitimation.\textsuperscript{1679} To strengthen the democratic

\textsuperscript{1675} Habermas states that ‘Where it is not a matter of constraining authoritarian state power but of creating political decision-making capabilities, those subjects who already control the legitimate means of violence ad can make them available to a politically constituted international community are indispensable’. Habermas 2008, p. 449.

\textsuperscript{1676} Besson 2011a, p. 21.

\textsuperscript{1677} Besson 2010, p. 177. Being ‘affected’ is a normative and not only factual. The line must be drawn somewhere. Besson argues that the first criterion must be one of degree of affection of the interests, which must be comparable to a de facto obligation. A second criterion besides the quasi-normative character of affectedness is that the interests affected must be basic or fundamental interests, i.e. interests in the conditions for self-development or self-determination. A third element relates to the degree of affectedness of the interests; the normative or quasi-normative impact on the interest must be direct and unmediated. Besson 2009b, p. 72-73, 204.

\textsuperscript{1678} Besson 2009b, p. 67. Besson does not offer a concrete overview of what the complementary democratization of international lawmaking processes should entail. She admits that international lawmaking ‘will not always be substantively democratic legitimate in practice’, but she finds it sufficient that in conditions of moral disagreement international law ‘can make an acceptable claim’ to be democratic legitimate. In her view, this is the case if lawmaking processes are procedurally legitimate and respect the political equality of all participants. Besson 2010, p. 177.

\textsuperscript{1679} See Habermas for a justification; ‘However, the political empowerment of a pre-political global civil society composed of citizens from different nations is a different matter from imposing a constitution on an existing state power. In classical political theory the thought experiment of “leaving the state of nature” which reconstructs state power as if it proceeded from the rational will of free and equal individuals, is appropriate for taming the absolutist state. But given our present dilemma, it is not appropriate to ignore the legitimacy of nation-states under the rule of law and to return to an original condition prior to the state.’ Habermas 2008, p. 448.
legitimacy of international law, the representation of foreign interests in national deliberations needs to be enhanced. According to Besson, this is the primary step to be taken before one should start working on the inclusive quality of other lawmaking forums beyond the state. Erman and Higgott complement the two-track model. Their two-track model correspondingly relies on domestic political communities for effective and actual participation by individuals. However, formal decision-making by states internationally should also, besides its basis in state consent, be informed by striving towards three democratic values: justice, equality, and accountability. Their two-track approach accepts a relatively weak form of democratic legitimation of international law.

A cosmopolitan approach

A cosmopolitan perspective on international democratic legitimacy is based on the belief that humankind is bound together morally. Compared to the taxonomy as offered in chapter 5, section 5.6, it is inherent to cosmopolitanists to take a monist approach to values. This requires an expansion of concepts traditionally bound to the territory of the nation-state. Not only to our fellow citizens do we owe the duties of fairness and equality; we owe them to every human being. The moral basis for the requirements of democratic legitimacy is consequently universal in scope. As Pierik and Werner summarize cosmopolitanism: ‘[I]n short, cosmopolitanism emphasizes the moral worth of persons, the equal moral worth of all persons and the existence of derivative obligations to all to preserve this equal moral worth of persons’.

Cosmopolitans question the capacity of nation-states independently, or in cooperation with other nation-states, to address adequately the most pressing transnational political issues. Most notions of cosmopolitan democracy therefore involve simultaneous efforts to deepen democracy within nation-states and extend it to international and transnational decision-making. As Nagel states, ‘the cosmopolitan conception points us toward the utopian goal of trying to extent legitimate democratic governance to ever-larger domains in pursuit of more global justice’. Nagel 2005, p. 119, referring to Singer 2002; Pogge 1989, p. 24-80; Pogge 2008; Beitz 1979. Held 1998, p. 3.

1680 Besson 2009b, p. 78.  
1681 Higgott and Erman 2010, p. 460.  
1682 For our statements of both the two-track model and the cosmopolitan approach is true that the generalizations used do no justice to the existing variety of interpretations. For works that give an overview of the cosmopolitan debates, differences and nuances in cosmopolitan thinking see Archibugi, Held, and Köhler 1998; Archibugi and Held 1995; Archibugi and Held 2011.  
1683 McGrew 1997b, p. 249-250. Constitutionalists share elements of the cosmopolitan perspective. Constitutionalism recognizes in international law a source of legitimacy higher than the individual states. Their basic idea is the ‘legal codification of the relation between the governors and the governed, who are conceived as parts of an overarching common polity’. Preuss 1996, p. 24.  
1684 It is presumed that, among other things, citizens can develop an identity as world citizens. See Wolf 2000, p. 192-195.  
1685 We focus here on institutional cosmopolitanism. As Nagel states, ‘the cosmopolitan conception points us toward the utopian goal of trying to extent legitimate democratic governance to ever-larger domains in pursuit of more global justice’. Nagel 2005, p. 119, referring to Singer 2002; Pogge 1989, p. 24-80; Pogge 2008; Beitz 1979.  
1686 Pierik and Werner 2010, p. 3.  
The extension of democratic practices exceeds the two-track account in terms of what cosmopolitans expect institutionally from international and transnational settings. Cosmopolitans aim at the ‘creation of a democratic community which both involves and cuts across democratic states’. Cosmopolitans do not by definition entail a complete centralization of authority. There are different graduations in terms of proposals for federalization. Some require the abolition of states, while others opt for a replacement of states with regimes relegating functional issue-areas. Other cosmopolitans add layers of authority on top of the authority of existing democratic states. They aim at democratizing various international institutions, creating ‘multiple and overlapping networks of power’. The fulfillment of a cosmopolitan democracy would deliver the ultimate victory of democracy, for it seeks ‘the recovery of an intensive and participatory model of democracy at local levels as a complement to the public assemblies of the wider global order: that is, a political order of democratic associations, cities and nations as well as of regions and global networks’.

A cosmopolitan approach to democratic legitimacy emphasizes a monist approach to the necessity of ensuring individual democratic rights. The ideal of self-determination, the principle of congruence, and values such as participation and inclusiveness are found equally relevant at the supranational level. The primary claim is that global governance institutions cannot be legitimate unless they are democratic in the individual-majoritarian

---

1688 The internationalization of institutional preconditions requires an institutional reform that establishes a comprehensive international democratic system. Scholars rely on ideas inherited from national democratic practice, that is, on elements of majoritarian democracy and on the establishment of some form of government. To make international law more democratic, cosmopolitan scholars promote popularly elected international bodies with general or limited decision-making powers, and a central global government. As suggested by Held, one could create an independent assembly of democratic peoples. Held formulates a model of cosmopolitan democracy that provide the conditions for and to give shape to ‘the successful entrenchment of legitimate political power’. Held 1995, p. 22; Held 1992. Another proposal is made by French, in which representatives of national parliaments compose a decision-making body. French 1994, p. 3.

1689 Held and Archibugi call this twofold agenda the project of cosmopolitan democracy. Held explains that ‘the term cosmopolitan is used to indicate a model of political organization in which citizens, wherever they are located in the world, have voice, input and political representation in international affairs, in parallel with and independently of their own governments’. Archibugi and Held 1995, p. 13. Cosmopolitanists differ in their perception of the role of states: for some, states have only instrumental value, others consider the role of states as independent value, as long as they do not act contrary to cosmopolitanist ideals. Pierik and Werner 2010, p. 4-5.

1690 In the cosmopolitan approach the issue at stake determines the optimal level of democratization, and strongly relies on the ‘all affected’ principle. See Scheuerman’s critique; Scheuerman 2002; Scheuerman 2008.


1692 Held 1993, p. 269.

1693 Many scholars criticize the way cosmopolitans have defined rights. See Scheuerman for a general critique on cosmopolitan thinking on rule of law: Scheuerman 2002, p 439-457. Erman, while referring to Christiano states that the mere recognition of human rights is inadequate, when ‘a man is not recognized as a citizen’. Erman 2012, p. 7 referring to Christiano 1996. Besides, the linkage of the individual and universal values is contested. As Koskenniemi argues, ‘[t]odays human rights, environmental and trade law, seeks to break through the ‘artificial’ boundaries of sovereignty so as to realise the promise of world unity articulated as the (hegemonic) universalization of the values underlying human rights, environment or trade.’ Koskenniemi 2011, p. 223, referring to Koskenniemi 1995, p. 22-29. However, Barnard states that a monistic approach towards democratic legitimacy, ‘would need be no bar to political plurality, provided it gave scope for political differentiation’. Barnard 2001, p. 15.

1694 Dingwerth 2007, p. 20.
sense. Cosmopolitanism inherits its normative framework from the classic twentieth-century democratic theory in which the engagement of individuals in the diverse forms of political affairs has a central position. This is based on key insights offered by enlightenment philosophers that ‘naturally free individuals have to create a good order by their own limited means’. The ratio is the restriction of the lawmakers’ omnipotence, as the lawmaker should be bound to general principles of higher law. Lawmakers, among which are predominantly states and international organizations, are bound not only to procedural rules about lawmaking and adjudication, but also to substantive principles, laid down in the rule of law and human rights.

Democracy is seen as an institution or set of institutions closely linked to the ideas of political community and political equality. An extensive constitutional structure divides political power among different decision-making jurisdictions, and guarantees the observance of global democratic norms.

6.3.2 Limitations to current approaches to international institutional preconditions
Both approaches respond differently to the issue of institutional preconditions to enable and ensure democratic agency. Both, in contrast to global deliberative democracy, introduce the individual as a bearer of political rights, enabled to participate in decision-making. The approaches, though, differ in theorizing the level at which individuals can exercise their political rights. In the two-track model the political constellation of nation-states remains the central forum for individuals to actually, equally, and continuously participate, and consequently require institutional preconditions at the domestic level. The cosmopolitan approach, on the other hand, theorizes the individual as the international bearer of political rights and therefore requires democratic legitimacy’s necessary preconditions to be established in the international legal order.

Both approaches entail different conceptual and practical hurdles. As a matter of introduction to these difficulties, we will mention a few of the most obvious dilemmas. A cosmopolitan approach seems at first sight to be consistent with the rationale of democratic legitimacy: it conceptualizes direct opportunities and rights to participate for individuals. However, it is questionable whether a cosmopolitan approach pays enough attention to the

---

1695 Buchanan 2010, p. 93.
1697 Bryde 2005, p. 106. Seen the similarities between the rationale of cosmopolitanism and international constitutionalism we have included hints to constitutionalist thinking in this overview. For further reading on constitutionalism in international law, see Krisch 2010; Dunoff and Trachtman 2009.
1698 De Búrca 2007-2008, p. 239.
1700 Scheuerman summarizes cosmopolitanist roots in the democratic tradition as follows: ‘insofar as it aspires to realize both the principles of self-determination and limited government. It promises protection from arbitrary power as well as meaningful possibilities for self-determination, individual self-development, and economic opportunity, and its commitment to upholding “cosmopolitan democratic public law” is essential to its liberal-democratic credentials. Scheuerman 2002, p. 444. See also Held 1995, p. 150. Only by exercising political power in accordance with a legal “structure that is both constraining and enabling” can transnational liberal democracy, like its nationally-based cousin, realize both self-determination and a commitment to the ideal of rule of law.’ Held 1995, p. 147. However, Held’s approach deviates from our model of law that functions at the base of institutional preconditions, in his account of the basic rights needed: he selected seven types of rights that exceed our principally procedural approach. Held includes health, social, cultural, civic, economic, pacific, and political rights. See Held 1995, p. 190-201.
effects of a cosmopolitan international system on the functioning of domestic democracies.\textsuperscript{1701} Extensive institutionalization and federalization are required to ensure that different spheres of democracy, globally, nationally, and locally, do not bite each other.\textsuperscript{1702}

Based on this argument one might be inclined to opt for the two-track approach, in which states are not required to give up state sovereignty to achieve an international democratic legal order. The strong orientation towards domestic democracy, however, implies that the sum of democratic states, harboring independently institutional preconditions, is able to maintain freedom from domination internationally.\textsuperscript{1703} The same conceptual dilemma occurs, as we mentioned, in relation to the democratization of different international legal regimes. In order to democratically legitimize international law, the establishment of an international system that offers direct opportunities to actually, equally, and continuously participate should be prioritized.\textsuperscript{1704}

However, the most obvious problematic issue is the practical feasibility of reforms in the international legal order that are in line with a cosmopolitan approach or a two-track approach to democratic legitimacy’s necessary preconditions. One might argue that in light of existing international lawmaking processes,\textsuperscript{1705} theoretical approaches to international democratic legitimacy run amok in the first place because of the fact that these are proposals for future international democratic legitimation and do not offer an actual and existing legal political structure for political participation.\textsuperscript{1706} In pragmatic terms, one can state that considering our conceptual framework of democratic legitimacy, international democratic legitimation is hindered by the fact that the two selected approaches rely on institutional and social preconditions that are simply not put into place in the international legal order.\textsuperscript{1707}

While the cosmopolitan approach, seen from a feasibility perspective, has often been criticized, the two-track model is equally hard to reconcile with current international legislative practices that are characterized by the fact that state authority is waning as a
result of framework resolutions, public-private partnerships, informalization, fragmentation, and multipolarity.1708

In these conflicting spheres between what is conceptually necessary and what is realistically feasible we introduce an analysis of the normative desirability of the two approaches to international democratic legitimacy. We start with existing feasibility dilemmas.1709 Thereafter, we introduce conceptual hurdles to both approaches while assuming a receptive political situation. The main purpose of this section is not to offer any definite judgments as to what should be done with regard to these complex issues, but rather to show that both selected routes towards international democratic legitimacy, although receptive to institutional preconditions, are not devoid of political and conceptual implications.

**Political unfeasibility of the necessary reforms**

In the NGO democratic legitimacy thesis one seldom finds a reference to the condition that the proposed cosmopolitan ideal should be translated internationally or that states need to be democratized before NGOs could contribute to the democratic legitimization of international law.1710 Most proponents of the thesis specifically oppose institutional, formal approaches to an overarching global political order and believe in democratization through the amelioration of democratic practices.1711 The most obvious explanation is the fact that both approaches, in terms of predictability, lie far beyond current political feasibility.1712

The institutional reforms suggested by cosmopolitans, especially, are often criticized for being too idealistic or far-fetched.1713 The proposals concerning a democratic world government are of such an institutionally challenging caliber that we, in the short term, probably have little to expect from them. Although at first sight the cosmopolitan approaches seem to match the main features of democratic legitimacy, at least three reasons complicate this reading of international democratic legitimacy. First, given that we have a state system, to make sense of the idea that individuals have an equal say in global governance requires us to think of the latter as the global counterpart of a democratic federal state; yet in the current international system the chances of changing it in this direction seem negligible for the foreseeable future.1714 It is highly questionable whether states would ever be willing to give up their autonomy. It seems improbable to expect that international reforms for referendums or elections of international parliamentary deputies, or majority voting, will be established within the international legal order in the near future.1715

---

1708 See chapter 3, section 3.4.2. As Cox argues, is liberal democracy is not doomed to be subordinated by the ‘uncontrollable, inflexible force’ of economic globalization? Cox 1997, p. 51.
1709 See for an exploration on what can be understood by political feasibility, Gilabert and Lawford-Smith 2012, p. 809-825.
1710 See the introduction of chapter 6, in which we sketched the possible perspectives on the relationship between NGOs, institutional preconditions and democratic legitimacy.
1711 See chapter 5, section 5.6.2.
1712 Buchanan and Keohane state that ‘the social and political conditions for democracy are not met at the global level and there is no reason to think that they will be in the foreseeable future’. Buchanan and Keohane 2006, p. 416.
1714 Falk and Strauss 2000, p. 212.
Second, the problem of achieving ‘an equal say’ or political participation ‘as equals’ for all in a system of global governance is even more daunting than achieving domestic democracy.\(^{1716}\) Size and the numbers of people governed might ultimately matter.\(^{1717}\) The distance between citizens and international legal processes is often assumed to be too large. As mentioned in chapter 5, in a modern standard approach of democracy applied on a large scale, Dahl and Tufte proved the ambiguity of political influence and control. Influence, on the one hand, is built upon effective citizen participation because active participation measures the individual impact on decision-making. Proximity of the citizen to the decision-making process positively influences the individual impact of a citizen. On the other hand, influence is measured by the degree of control of the system of an effective government.\(^{1718}\) Participation and system capacity are from a traditional point of view indissoluble in relation to each other and to the size of an area. Participation decreases when size increases. This is in contrast to system capacity, which increases together with size. Any federalization should therefore include a theory of subsidiarity, as it is called in the European context, in order to constantly balance proximity and size by making choices between centralization and decentralization.

Third, if states were to be thought of as the units of a global democratic federation, many of them would have to be radically transformed. When undemocratic, they cannot serve as intermediate links between the individual and the global governance institutions in a democratic global federation. Thus the democratization of states, to make them representative of their citizens, seems to be a precondition for democratization of the international legal system, at least so long as states play an important mediating role between individuals and global governance structures. The need for decentralization, due to subsidiarity considerations, is however contradictory to the common trend to seek close external cooperation through international networks to take on international challenges. For these reasons it is not unreasonable to think that institutional democracy cannot be achieved for the planet as an entirety, but only in its particular parts.\(^{1719}\) The emphasis placed on states in the two-track approach seems a better fit for international democracy because it expects states to be democratically organized and publically accountable and requires from international practices only that they are adequately inclusive and egalitarian.\(^{1720}\) However, the emphasis on the democratic organization of states does not reflect the reality of global politics either.\(^{1721}\) What is needed for a two-track model of international democratization is first of all that all states are democratically organized. That might then lead to a voluntary association of democratic states. The precondition that all states must be made democratic, however, is highly problematic as that entails forced democratization, which is, according to Christiano, a contradiction in termine. Christiano argues that if we opt for democratization of all states, we need powerful international institutions to hold the states in check and to ensure background conditions for fair negotiations. But then the international organization that monitors domestic

\(^{1716}\) Buchanan 2004, p. 323. However, others might argue that globalization, especially the growing worldwide access to electronic communications, may eventually provide the basis of at least a limited sphere of global individual democratic decision-making. Buchanan 2004, p. 324.

\(^{1717}\) See Dahl and Tufte 1973.

\(^{1718}\) See Dahl and Tufte 1973.

\(^{1719}\) Christiano 2006b, p. 81-107.

\(^{1720}\) Besson 2009b, p. 63-64.

\(^{1721}\) Undemocratic states participate too in international lawmaking. See D’ Aspremont 2011c, p 549-570.
democracy requires strong democratic legitimation itself: the democratic legitimation burden shifts to the international organization. Further, democratization of all states does not provide an answer to the fact that some democratic states will still have so little bargaining power that their consent in international lawmaking could hardly be called free and informed. The other option is the exclusion of states that are not democratically organized from international lawmaking. Exclusion would, however, strongly affect the cogency of the two-track model, as large parts of the world’s population do not get represented at all. Besides domestic democratic reforms, one has to find an answer to the fact that currently, there is a lack of correlation between the democratic representation of individuals and state-majoritarianism, due to the immense differences between the sizes of different populations of states. To recall, China represents around 1.3 billion inhabitants with its one vote, while Denmark represents with its one vote roughly 6.5 million inhabitants.

These political hurdles have fuelled our presumption that the required institutional reforms of the international constellation offered by both approaches seem difficult to reconcile with the current political receptiveness towards these reforms. The political reality of international lawmaking confronts us with a considerable number of undemocratic states, international lawmaking practices that are non-egalitarian, and an unlikelihood that states would be willing to move towards a federalist system. Above all, we are confronted with the political reality of the non-exclusiveness of state-made law.

Mismatch between institutional preconditions and international authority

Due to its diversified and fragmented character, international lawmaking presents itself as a complex body of different actors, products, and activities. If international lawmaking continues to make progress in empowering individuals and groups to help shape international law without being dependent upon representation by states, then any presented solution that strengthens a state-based system of international lawmaking becomes consequently less significant. The lack of insight into the exact form and nature

1722 See Christiano 2010.
1723 Buchanan 2004, p. 320.
1724 Buchanan therefore rejects the emphasis most scholars put on consent, voting and state-majoritarianism with regard to the concept of democratic legitimacy and argues instead that consent and democratic legitimacy are two separate concepts, which are not interdependent. Buchanan 2004.
1725 As set out in section on state consent in chapter 3, section 3.4.2, the domestic chain of democratic legitimacy toward the people is considered weak. See Wolfrum 2008, p. 20. National parliaments are of limited significance in terms of determining the content of international law. Non-state sites for the production of global norms that regulate social, economic and political life emerge within and outside the state. See Wheatley 2010; Fenger and Bekkers 2007, p. 28.
1726 See Christiano 2010.
1727 Territoriality though is no longer central to social geography in a way comparable to six decades ago. See Scholte 2001, p. 9. Tomuschat confirms that the system of international law ‘is a man made product, and should be understood as such.’ Tomuschat 1993, p. 235.
1728 See chapter 3, section 3.3.
of international public governance\textsuperscript{1730} complicates the search for the right practice and locus of democratic legitimacy and its preconditions.\textsuperscript{1731}

Primarily the two-track model is complicated by the current fragmentation and ‘liquidity’ of international authority that characterizes international lawmaking.\textsuperscript{1732} The focus on the state and its derived consent of states’ citizens through parliaments does not capture the dynamic characteristics of international law and its formation.\textsuperscript{1733} The proposal for complementary institutional reforms suggested by Habermas, related to the enhancing of the quality of state majoritarianism,\textsuperscript{1734} depends for its cogency on how important states are in the international lawmaking system. As the two-track model relies on the perception that the democratic agency by states covers the political authoritative power exercised, it does not seem to formulate an adequate answer to the problems posed in chapter 3, which showed that the rise of the NGO democratic legitimacy thesis came about as a reaction to the recognition of the fact that state consent does not cover all international legislative developments.

The Catch-22 of conceptualizing democratic legitimacy in the international context is that to uphold the purpose of democratic legitimacy - that is, to protect individuals’ freedom from domination - one is obliged to have recourse to institutional preconditions. However, at the same time, any theory of these institutional preconditions does not seem to offer a solution to the fact that current international governance is characterized by a plurality of actors and spaces, and by an inexistence of a normative institutional frame of authority.\textsuperscript{1735} Given the informalization of many global interactions, and the plurality of sites, topics, and actors producing many different types of instruments, from standards to recommendations, to frameworks and treaties,\textsuperscript{1736} one can strongly question the appropriateness of applying an evaluation standard of democratic legitimacy to international law that requires institutional safeguards, unity, shared democratic values, and more.\textsuperscript{1737}

While the global deliberative account results in a mismatch with the rationale of democratic legitimacy in theoretical terms, both the cosmopolitan answer as well as the two-track approach to the democratic legitimacy of international law (although relying on a ‘reappraisal of the formal – the formal basis of ethical and purposive politics’, in order to provide for ‘the legal constructions constituting a space for politics’\textsuperscript{1738}) cause a mismatch between their ideas and the political characteristics of the object that needs to be democratically legitimized: namely the fluidity of the exercise of international authority.

\begin{itemize}
\item[\textsuperscript{1730}] Warning 2009, p. 62.
\item[\textsuperscript{1731}] As Weiler states: ‘The fox we were chasing in the traditional model was the executive branch – our state government. In the universe of international regulation, even governments are no longer in control.’ Weiler 2004, p. 560.
\item[\textsuperscript{1732}] See Krisch 2013.
\item[\textsuperscript{1733}] Chapter 3, section 3.4.1 has shown the, what are believed to be, first cracks in the persuasiveness of a state-based system of international lawmaking. Not all of the international lawmaking dynamics seems to be controlled by, or controllable by states See McCorquodale 2010, p. 304.
\item[\textsuperscript{1734}] See section 6.3.2.
\item[\textsuperscript{1735}] See Krisch 2013.
\item[\textsuperscript{1736}] See chapter 3, section 3.3.
\item[\textsuperscript{1737}] See Krisch 2013.
\item[\textsuperscript{1738}] Venzke 2008, p. 1425.
\end{itemize}
is problematic because democratic legitimacy cannot be conceptualized without thinking through the concept of public authority, which is necessary to structure society. 1739

**Persisting conceptual dilemmas – An array of unanswered questions**

As a result, a dead end is created for which we have four challenging escapes with regard to the application of democratic legitimacy to international law. First, we might perceive international lawmaking efforts based on a public-private partnership level, framework conventions whose further elaboration is left to the relevant institutional organizations, and rules delegated to non-state actors as not having the same authoritative power as domestic law such as to require democratic legitimation. 1740 Second, we might choose to persistently theorize and advocate for global institutional reforms. Although these reforms seem to lack political support, there is, in principle, no normative reason to attach a necessity to that result. Political barriers, such as the fact that not all states are democratic and that states represent a very divergent number of citizens, just like other institutional barriers such as veto procedures in the Security Council, could be solved. If power on different sides looks to be even roughly balanced, then that may create a space where the international order can interfere in the affairs of different states under the equal and effective control of terms that are accepted on all sides. We may be very far from that ideal, as things currently stand, but there is no evidence that institutional design might not prove capable of removing political hurdles. Third, we might theorize a complementary account of democratic legitimation for those more liquid forms of legislative authority that respects both informality of authority and formality of safeguards to enable individual political power. Fourth, we might rule out the possibility of applying the standard of democratic legitimacy to international law, as it is doubtful whether ‘we know enough about the structure of global arrangements, whether legal or political, economic, cultural, to be confident that what we know domestically as “democracy” is a good idea for the globe’. 1741 Consequently, a new set of terms is needed to comprehend the contribution of the participation of NGOs in international lawmaking to international law.

The first escape requires a theoretically complex discussion on the normativity of international law. Building on the remark made in section 6.2.4 concerning the importance of protecting the integrity of the concept of democratic legitimacy, we raise a conceptual difficulty with regard to the multiform conception of democratic legitimacy, among which the two-track model is one. We detect in both Habermas’ and Buchanan’s account this multiform tendency to perceive international law as a different type of authority that needs less democratic legitimation compared to domestic law. In Habermas’ account of international democratic legitimacy we observe a mitigation of the urge to place the same

1740 Non-state governance is perceived as an inappropriate subject for political theory. The international legal order is from this (neo-)realist point of view characterized by power relations. See De Búrca 2007-2008, p. 238, p. 225. International lawmaking is in this regard ‘devoid of any central authority or rule of law; dominated by great powers and power struggles; riven by entrenched hostilities and insecurities; and permeated by irreconcilable cultural particularities and civilizational differences’. McGrew 1997a, p. 233. Wheatley leaves in the middle and up to the relevant legal communities to decide whether or not an international rule has ‘authority’. See Wheatley 2012, p. 171.
burden of democratic legitimation that applies to domestic law to every international legal instrument, as these instruments are supposedly less political. Habermas states that

‘[t]his missing link in the chain of legitimation would have to be balanced off against the nature of the need for legitimation. The General Assembly, as the legislator under international law, (already) observes the logic of an internal elaboration of the meaning of human rights. In so far as international politics takes its orientation from this development, therefore, the resulting tasks at the supranational level would be more judicial than political ones’. Habermas 2008, p. 451-452.

Buchanan, while engaged in a broader enquiry on what concept or conceptions of legitimacy at large are relevant for international law, also distinguishes a different standard of democratic legitimacy for international law as for national law. As briefly discussed in Part I, these multiform approaches to democratic legitimation weakens the normative burden attached to the authority to rule for international law compared to domestic law. Tasioulas has already problematized this tendency in light of the principled variation between monist and dualist thinkers:

‘[G]iven that there is a plausible univocal account of the focal meaning of legitimacy, an especially persuasive case must be made for rejecting it in favour of dualism. This is all the more so given the threat dualism poses to PIL (read: Public International Law) status as fully-fledged law. If it belongs to the essence of law to claim authority, and if the authority claimed by PIL is a diluted version of that claimed by domestic law, PIL’s status as the poor relation of domestic law is confirmed.’ Tasioulas 2010, p. 99.

The consequential deteriorating critical potential of the standard of international democratic legitimation leaves us with a difficult issue: in what ways does such an under-theorized and uneffectuated international democratic system, lacking institutional and social preconditions to ensure freedom from domination, affect international law’s authority? What is the status of international laws enacted by non-democratically legitimized authority? Formulating a solid answer to this question requires a theoretically complex investigation that would take this research assignment beyond its intended scope.

---

1742 A comparable observation is made by Wheatley. Wheatley 2012, p. 165.
1743 Buchanan argues that the demands for global democracy are unreasonably strong given two conditions; 1) The benefits that global governance institutions provide are quite valuable and not likely to be reliably provided without them. 2) The key values that underlie the demand for global democracy can be reasonably approximated if these institutions satisfy other more feasible conditions, including what we call Broad Accountability. Buchanan 2010, p. 80.
1744 See chapter 5, section 5.6.2 for an exploration of the monist-dualist variation that informs the NGO democratic legitimacy debate.
1746 See Dworkin 2013; Buchanan 2010. Buchanan states that, ‘[w]hether the current democracy deficit is sufficiently serious to deprive the existing international legal order of legitimacy, is a further question, and one which in my judgment has not been adequately addressed’. Buchanan 2010, p. 87.
At this stage we will leave aside the question of international law’s normatively acceptable authority without institutionalized possibilities for democratic legitimation.

The second and third escape will, after a closer look, reveal conceptual issues that constitute a myriad of political and normative problems concerning democracy’s boundaries, addressees, and requirements internationally. Although these issues remain largely unaddressed by the scholars that apply the analytical terms of democratic legitimacy in relation to NGO participation to discuss and assess the authority of international law, they require further contemplation before we are able to construct a convincing application of the standard of democratic legitimacy to the exercise of international authority. As we cannot aim to solve any of these puzzles adequately at this stage of the study, what remains is a very brief summary of often-cited problems and references to the scholars who have posed them. By pointing out these conceptual dilemmas, we intend to justify our choice for the fourth escape, which will be introduced in chapter 7.

The problematic issues are the following: the already-mentioned interaction of different democratically legitimized governance levels; the definition of the (boundaries of) political community and the related issues of membership; whether or not a constitutive moment for a political community is necessary; whether or not a constitution for democracy is necessary; whether or not a shared identity or ‘common world’ is indispensable; the impact of the lack of a shared language for democratically making law; the indispensable nature of the ‘state’ construction; the absence of a

---

1749 The meaning of participation in domestic process is undermined as international law limits the realm in which national self-government can take place. See Besson 2011a, p. 8, referring to Besson 2009a; Besson 2009b, p. 66. See also Habermas 2008, p. 447: ‘There is a major gap in the proposed architecture, which primarily concerns the legitimate expectations and demands of citizens in their contrasting roles as cosmopolitan and national citizens.’ See also Walker 2010, p. 223-227.

1750 See Wheatley 2011, p. 541-542. See also Näsström 2003, p. 808-834. Most scholars use the lack of a community as a yardstick for the non-applicability of the concept of democratic legitimacy beyond the nation-state; the community being a conditio sine qua non for a democratic nation-state. See Habermas 2001, p. 107. ‘Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. The self-referential concept of collective self-determination demarcates a logical space for democratically united citizens who are members of a particular political community. (…) This ethical-political self-understanding of citizens of a particular democratic life is missing in the inclusive community of world citizens.’ See on the issue of constituting a demos, Goodin 2007, p. 40-68. See for an opposite view: Besson 2009b, p. 69.

1751 See Christiano 2010; Agné 2006. Agné shows in this respect the difficulty of the distinction what is good for democracy and what is democratic, with an example of Sweden and Finland in times that Finland was threatened by totalitarian pressures of the Soviet Union. Sweden, ‘supported’ Finnish democracy with loans and the participation of voluntary corps, which in itself is not a democratic move but might be a democracy improving move. Agné 2006, p. 444.

1752 See for an overview on what constitutions mean for democracy: Sunstein 2001. Sunstein remarks ‘In my view, the central goal of a constitution is to create the preconditions for a well-functioning democratic order, one in which citizens are genuinely able to govern themselves’. Sunstein 2001, p. 6.

1753 Christiano 2006a, p. 81-107.

1754 Sceptics of global democracy have worked to identify basic background conditions to democratic institutions and procedures while showing that they cannot be satisfied beyond a certain threshold. Kymlicka, for example, insists that linguistic/territorial political associations are the primary forum for democratic participation, rather than higher-level political associations that cut across linguistic lines. Kymlicka 1999, p. 121.

1755 A political community is by some scholars understood as the undeniable historical achievements of the nation-state. See Smith 1995, p. 24. As Scheuerman argues, the state construction enables the traditional virtues of Rule of Law, which are in many cosmopolitan theories of international democracy, badly preserved. Scheuerman 2002, p. 439-457.
coordinated coercive authority; the issues of equal stakes, persistent minorities, and reciprocity; the issue of the scope of democracy, and the working of the delegation model of individual-state-international law, to name but a few. The overarching challenging dilemma is how to define the subjects of international law, the issue how, and by whom, it can be decided who is entitled to participate, or who should be entitled to participate, and the reach/persuasiveness of the ‘all affectedness’ principle. If we cannot find a convincing account of affectedness, or of determining the different political communities, there is a considerable chance that inclusion into ‘indefinite cooperative schemes’ is non-voluntary, as agents might have developed laws that include them without giving them the opportunities to provide their cooperation or consent freely, which leads in some cases to forms of domination.

These persisting conceptual issues raise the question whether international democratic legitimacy is in se possible. We should not take the current lack of institutional preconditions on international democratic legitimacy and the possibilities for changing these constraints lightly. These are ‘institutional facts that are deeply entrenched in some historically contingent, specific social order rather than as universal normative constraints on democratic institutions’. However, this situation does not have to be permanent. Scheuerman states in this regard:

1756 Christiano 2011, p. 69.
1757 Political actors ought to become democratic agents if and only if they have interdependent interests and roughly equal stakes. Christiano has called this the ‘commonworld condition’. In domestic democracies, citizens are deeply interdependent and as a result are connected in multiple ways, both legal-politically and institutionally. They have roughly equal stakes in the world in which they live. This in contrast to arrangements such as organizations and associations in which people have a very different stakes and are differently affected. Christiano 2006a, p. 97; Erman 2012, p. 15-16.
1758 See Dahl and Tufte 1973. Democratic decision-making or legislation has, according to many democracy theorists, an inevitable spatial dimension attached to it. See Arendt 2005; Lindahl 2010 p. 30-56.
1760 These questions, and many more have (such as: ‘Is it possible for moral cosmopolitanism to become institutionalized and still to retain its critical stance towards power? What are the effects of institutionalizing moral cosmopolitanism on power politics? Will cosmopolitanism help to civilize politics or will it end up as yet another justification for imperialistic designs?’) have instigated Pierik and Werner to edit a book on how cosmopolitanist ideals are translated in the context of specific international legal regimes. Pierik and Werner 2010, p. 3.
1761 Besson 2009b, p. 72. According to Dewey, the people who believe that they have been affected must organize themselves into a visible community: a public. Where there is law; people subject to it have a legitimate claim to be included in the making of it. See Dewey 1988.
1762 Besson is critical towards the neglect of the issue of subjects for democratic legitimation by international democratic legitimacy theorists. Besson 2011a, p. 3. Determining the demos, delineating the community, drawing political boundaries, appointing who is subject of law are in itself exercises of political power. Whelan explains in this context the ‘hen-egg’ paradox: before a democratic decision could be made on a specific issue (by those affected) a prior decision would have to be made, in each case, as to who is affected and therefore entitled to vote on the subject – a decision, that is again, on the proper boundaries of the relevant constituency. And how is this decision, which will be determinative for the ensuing substantive decision, to be made? It too should presumably be made democratically – that is, by those affected. Whelan 1983, p. 13-47.
1763 Most scholars find a way out in the ‘all affected’ principle: which leads to empirically testing whether individuals are affected, as individuals are not directly addressees of international law. Karlsson Schaffer 2012, p. 321-342. However, with embracing the all-affected principle, which is inherently subjective in nature, we are back at the question of how to draw proper boundaries of political communities. Agné 2006, p. 453.
‘let’s not pretend (...) that we can have our cake and eat it too: if we opt to pursue “stronger transnational and supranational mandates for governance,” as we very well may need to, let us not claim that we can do so without dramatically expanding relatively familiar forms of state power in arenas where they hitherto have been relatively limited. The inevitable result will be more global government, and not simply “multilayered governance”. Only if we face this fact head-on we can realistically consider the full range of tough intellectual and political challenges we face.’

Our conclusions in this respect should be considered as a plea for rethinking the democratic legitimacy of international law, while maintaining the integrity of a democratic qualification of law: the proof that the potential of every legal subject’s capacity to act and speak in concert for public political purposes in order to together equally take part in the decision-making concerning the law, is enabled, and guaranteed. At this stage of the study we are unable to present a satisfying answer to these questions of how to create equilibrium between the ideal of democracy and the conditions of its feasibility in an intermingling and interdependent polity, with which current international legislative practices confront us.

6.4 Democratization instead of democratic legitimacy?

Let us conclude this chapter with a brief exploration of the possible motives of scholars to support the NGO democratic legitimacy thesis and to espouse a conception thereof that disregards institutional preconditions. This section also briefly points out that notwithstanding the mentioned dilemmas of institutional preconditions internationally, NGOs might still be of relevance for the democratic legitimacy of domestic law, provided that they complement existing democratic institutional and social structures.

As the thesis is constructed in a context that does not offer automatically institutional preconditions to enable and protect democratic legitimation, a lack of attention to institutional preconditions is both remarkable and understandable. It is remarkable because it is precisely the apparent lack of institutional preconditions internationally that means that scholars cannot automatically fall back on, or take for granted, an existing institutional political structure that might be complemented by NGO activities. It is understandable because the current political landscape of international lawmaking does not offer any reason to assume that in the short term, rights or judicial safeguards for actual, equal, and continuous participation by individuals in international lawmaking will be enacted. And yet, as was argued in this chapter, because the debate concerning the thesis does not involve an elaboration of some of the necessary conceptual preconditions of democratic legitimacy, the NGO democratic legitimacy thesis overlooks some essential principles of democratic legitimacy. As a result, the ideal construct of democratic legitimacy used by scholars to assess NGOs’ involvement in international lawmaking is flawed.

---

1768 Besides the NGO democratic legitimacy thesis, there are other, more institutional proposals developed, that might be worth exploring. An example is Kuyper’s approach towards two flexibility instruments that might be developed for treaty making: escape clauses and sunset provisions. See Kuyper 2013, p. 195-215.
1769 See chapter 3, section 3.1. Besides, as we have outlined in chapter 3, section 3.4, also the more ‘traditional’ idea that state consent as practice upholds, though indirectly, the actual and equal opportunity for individuals to participate is for multiple reasons problematic.
The tendency to overlook institutional preconditions while focusing on the internal democratization of NGOs or on specific democratic practices and characteristics in isolation of institutional preconditions leads to the impression that scholars are, on the one hand, in favor of connecting democratic theory-building with international lawmaking, but on the other hand are hesitant to mirror familiar institutional preconditions that have hitherto more or less succeeded in generating democratic legitimation within domestic democracies. One finds an interesting dynamic of demanding democratically legitimate international law, i.e. ensuring that everyone affected by the law should have influence in the making of the law, and demanding democratically accountable international actors, while at the same time dismissing the contemplating on what is needed for democratic legitimation to uphold its necessary critical potential to trace and address dominating exercises of authority. This approach is characteristic of the ‘now theoretically fashionable view that we can realize global governance without substantial elements of global government’.

Notwithstanding the current unsuitable institutional characteristics of international lawmaking for any democratic legitimation of international law, it seems difficult for scholars to dissociate from entrenched democratic intuitions, which is, to a certain extent, understandable. The activity of NGOs in international lawmaking practices is obviously a manifestation of individuals’ desire for political change. However, neither the desire itself nor the organization that facilitates and offers a platform for such desire is democratically legitimizing law in se. To democratically legitimize law, the actions of individuals require conversion into political actions. Institutional safeguards to guarantee conversion of NGOs’ actions into political actions are necessary to make possible and ensure an actual, equal, and continuous political opportunity to democratically legitimize law.

Although the concept of democratic legitimacy is often an explicit part of the terminology used, one can question whether the literature concerning NGOs’ position in international lawmaking is related to the evaluative tool of democratic legitimacy. It might be more appropriate to qualify the scholarly debate concerning NGOs’ involvement in international lawmaking as a mindset towards democratization. The selective focuses on democratic practices such as deliberation, contestation, transparency, and accountability could be part of a broader trend in the literature concerning international ‘democratization’, which is

---

1770 See for example Habermas 2008. Habermas warns us for the counter productivity to ‘cling to the state-centered tradition of modern political thought’. As mentioned earlier, the reason for that is possibly the fear of false analogism, and for Western conceptual imperialism. See Stoter and De Jong 2009.


1772 The main focus of our critique is related to the lack of consideration of institutional preconditions. It is however also questionable to what extent the complementary social preconditions are, or can be established at the international level. An interesting contribution to the debate of what is required globally in order to establish international democratic legitimacy has been made by Dingwerth, who focuses on the current social inequality and the necessary empowerment of the weaker members of the international society by a focus on health, education and subsistence in order to reach democratic legitimacy. Dingwerth 2014, p. 1125.

1773 As is commonly and explicitly done by scholars, see, for example, Boyle and Chinkin 2007. An example of understanding civil society groups active at the international level as part of a democratization process is Slaughter 2014, p. 310-337. Kleinlein draws a comparable conclusion with regard to the academic discussions on international constitutionalism. Kleinlein 2011b, p. 48.

1774 It is contestable if we ever can truly discover ‘seeds for programs for future democratic development’, because arguably it is only possible to explain in retrospect, after the democratic minimum is reached, whether what element has contributed to the preceding ‘democratization’. Held 2006, p. 279-280.
not bound by institutional preconditions in an international context, given the lack of, or perhaps the undesirability of, institutional international frameworks.\textsuperscript{1775}

A democratization theory, in terms of aims and perspectives, is fundamentally different from a conception of democratic legitimacy. A theory of democratization provides an answer to how a transformation of a non-democratic system to a democratic constellation occurs, and what factors, processes, and actors play a role in that.\textsuperscript{1776} Where theories of democratization might provide a detailed analysis of democratization as a process that is to be carried out in a particular order, comprising identifiable steps of which the formation and participation and other activities of associations may be one, democratic legitimacy is an evaluative tool of the exercise of the authority to rule.

Democratization is seen on the global level as being a series of socio-political changes that alter global politics in a democratic direction.\textsuperscript{1777} This implies that various ways can be taken to reach more democratic global governance. Among others, Omelicheva states that democratization is fostered by ‘Global Civil Society organizations [which] can enable participation’.\textsuperscript{1778} Placing NGOs in a democratic configuration responds to a pragmatic path to global democratization, which can be accommodated within the existing institutional structures of global politics. Instead of seeing the creation of a ‘closed’ or ‘constitutionalized’ framework of public power as a necessary first step in a project of global democratization, it seeks to democratize the framework of global power in its current pluralistic structure.\textsuperscript{1779}

Distinguishing democratization from democratic legitimacy is important, again to protect the integrity and critical potential of the concept of democratic legitimacy. Contrary to democratization, legitimacy provides an ad hoc evaluation of the basis of the trust of the legal subject in the authority of the lawmaker. Legitimacy is an evaluative tool of the current exercise of authority; legitimacy has no future perspective; and is binary: authority has democratic legitimacy or it does not have democratic legitimacy. It gives us an actual account about the relationship of trust between the rulers and the ruled and consequently about the chances that the exercise of the authority to rule leads to actual compliance.\textsuperscript{1780} Democratization theory, on the other hand, which concerns a constellation that has not (yet) been transformed into a democratic constellation, relies heavily on the probability of its predictions.

If we want to start imagining an international democratic system, and if we refer to NGOs as the instigators of that imagined democratic system, only after the establishment of that (yet still imagined) democratic system could we determine whether NGOs were decisive

\textsuperscript{1775} We perceive institutional preconditions necessary to enable and ensure democratic agency. See chapter 2. Pettit makes a distinction between electoral and contestatory aspects of democracy. Pettit 2006; See Pettit 1997; in most accounts one witnesses a shift towards contestatory democracy, thereby largely neglecting the self-governmental side of democracy. Krisch criticizes this tendency. See Krisch 2013.
\textsuperscript{1776} See for an overview on what different theories of democratization have been developed at state level: Mazo 2005.
\textsuperscript{1778} Omelicheva 2009, p. 116.
\textsuperscript{1779} Macdonald 2008, p. 33.
\textsuperscript{1780} See chapter 1, section 1.1.
actors in its development. Possibly, the NGO democratic legitimacy thesis predominantly reveals an expectation towards a move to collectively use every individual’s political power, the dynamics of which is captured by Arendt:

‘When revolutions seize the power that lies in the streets; when a populace committed to passive resistance confronts alien tanks with their bare hands; when convinced minorities contest the legitimacy of existing law and organize civil disobedience when the “pure desire for action” manifests itself in the student movement – these phenomena confirm again that no one really possesses power; it springs up between men when they act together and vanishes the moment they disperse’.

This study has not articulated a plea against the importance of civic engagement for a democratic system. However, as emphasized in section 6.1, it is important to take into account the possibility that the inherent dynamics of NGOs resist an \textit{ante hoc} theory building of NGOs. This, together with the lack of (theorizing) institutional prerequisites that enable and guarantee actual, equal, and continuous participation by legal subjects, has weakened the NGO democratic legitimacy thesis.

At this stage, it is important to stress that the abovementioned impasse of institutional preconditions internationally does not necessarily invalidate all elements of the thesis completely. It is primarily the application of the thesis to international law that fails. Opportunities for NGOs to be of democratically legitimizing value remain relevant at the state level if states offer an institutional framework to translate NGOs’ social power into political power. NGOs rely on national political communities and their formal institutions for the materialization of their contributions to the democratic legitimacy of national law.\textsuperscript{1785} The international influence of NGOs can be converted into democratic control back at the democratic state level,\textsuperscript{1786} assuming that at the domestic level there are institutional preconditions such as the accountability that periodic elections provide, and the free operation of NGOs that can guarantee actual impact on democratic deliberation.\textsuperscript{1787}

The actions of NGOs that are internationally active can trigger a movement that might have democratic effect on a domestic level, for example when, as a result of an NGO’s

\textsuperscript{1781} When explaining the transformative characteristics of political power in chapter 1, we discussed Arendts’ theory on human action. Action is unpredictable because it is a manifestation of freedom, of the capacity to innovate and to alter situations by engaging in them; but also, and primarily, because it takes place within the web of human relationships, within a context defined by plurality, so that no actor can control its final outcome. As Arendt puts it: ‘The reason why we are never able to foretell with certainty the outcome and end of any action is simply that action has no end’. In Arendt’s words, ‘only when action has run a certain course, and its relationship to other actions has unfolded, can its significance be made fully manifest and be embodied in a narrative, whether of poets or historians’. Arendt 1958, p. 231.

\textsuperscript{1782} Arendt 1958, p. 200. See also Habermas 1977, p. 15.

\textsuperscript{1783} The importance of civic engagement for democratic legitimacy is explained in chapter 2, section 2.1.2.

\textsuperscript{1784} As Habermas states: ‘[t]aken together, […] form a “wild” complex that resists organization as a whole’. Habermas 1996, p. 307.

\textsuperscript{1785} We agree with Kymlicka that ‘the weak transnationalism of advocacy networks is predicated on, even parasitic on, the ongoing existence of bounded political communities’, Kymlicka 2003, p. 291.

\textsuperscript{1786} Pettit 2012, p. 153.

\textsuperscript{1787} Buchanan, and Powell 2008, p. 331. A parallel can be drawn with Walker’s suggestion that non-democratic constitutional values can be relevant not only within one site, but also across sites, when reconnected to a democratic source. Walker 2010, p. 230.
campaigns and provision of information, foreign policy standpoints of governments are politically better scrutinized and changed accordingly. Domestically, NGO influence can make its way ‘via the surprising election of marginal candidates or radical parties, expanded platforms of “established” parties, important court decisions, and so on’. A national political community (or communities) and its formal institutions can act as the addressees of claims made by NGOs. NGOs, including the ones that are internationally active, might improve in this respect vertical complications in the current state-consent model, as discussed in chapter 3. That would lead to, and is also limited to, a democratic legitimation of the standpoint of that specific government.

The appreciation of the contribution of NGOs that are active in international lawmaking processes is in this limited reading of the thesis understood as a complementary exercise. The practices contribute to the democratic legitimacy of domestic law and are assumed complementary in the sense that they do not stand alone. NGOs offer complementary perspectives that strengthen deliberation, complementary means of accountability, and complementary pressures on governmental structures to comply with norms such as transparency, complementary to guaranteed democratic decision-making procedures. This understanding of NGOs’ contribution is congruent with the traditionally complementary role of civil society as sketched in Part I, notwithstanding the fact that they are internationally active. Perhaps superfluously to the state, the contribution of NGOs, whether active domestically or internationally, cannot, standing alone, provide indirect democratic legitimation to international law. It can only ensure the democratic legitimacy of national executive action, of its own law and of the position of its own governmental representatives in international negotiations concerning the formation of new international rule.

Arguably, one can be cynical about the democratic changes possible in domestic democracies. It is often stated that the changes made possible through these institutional

---

1788 Habermas 1996, p. 381.
1789 The coming into existence of the Ottawa Landmine Convention often functions as the example of what social power can bring about. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 17, 1997, I-35597 U.N.T.S. 2056. The organization of the International Campaign to Ban Landmines and its founding coordinator, Jody Williams, were instrumental in the passage of the Ottawa Treaty, and for these efforts they jointly received the 1997 Nobel Peace Prize. The original international citizen’s initiative launched in 1997 by the International Campaign to Ban Landmines gained 855,000 signatories worldwide. The Convention gained 122 country signatures when it opened for signing on 3 December 1997 in Ottawa, Canada. Thirty-five countries however have not signed the treaty, including a majority of the permanent members of the United Nations Security Council: China, the United States and Russia. See https://treaties.un.org/pages/showDetails.aspx?objid=0800000280006d60 (last visited January 2016). Although the initiative is an inspiring example of what the bundling of social power can achieve, it will nevertheless not lead to political change, as long as these major powers will remain reluctant to change their policy.

1790 This is precisely the role that Habermas has in mind for associations that enrich global public opinion. He illustrates the functionality of such a global public sphere: ‘For the mobilizing power that an alert global opinion acquires at critical moments of world history and transmits to governments through the channels of the national public spheres can have major political impact, as is shown by the worldwide protests against the invasion of Iraq in violation of international law.’ Habermas 2008, p. 445. The complementarity of NGOs is sketched well by Anderson: ‘In a genuinely democratic society, civil society organizations are free to advocate, organize, argue, debate, and cajole. Ultimately, however, political authorities are accountable not to civil society organizations, but instead to citizens who vote in the privacy of the voting booth. The legitimacy of the democratic system depends, ultimately, upon the free and unconstrained political power of the citizen, often encapsulated in a vote.’ Anderson 2011, p. 868.
means of parliamentary democracy are too minimal to speak of ‘true’ democracy.\footnote{1791} However, one can hardly ignore the fact that at least there are ensured and equal routes to change. Maybe the fact that possible change is restricted to choosing one’s government instead of choosing the content of a decision can be criticized, but no matter how small that change might look, it is an immense sort of power that distinguishes democracy from authoritarian systems.\footnote{1792} This small, but tangible way of translating someone’s power into decisionmaking power, open for every legal subject equally, stands in sharp contrast to current international lawmaking processes.

\footnote{1791}{See for a critical account on the democratic characteristics of electoral representative democracy, Van Reijbrouck 2013.}

\footnote{1792}{Jennings, a British constitutional scholar and lawyer, has illustrated this in his, still relevant, exposition on the role of the British Parliament in a democracy: ‘In truth, what the democratic system does is to harness a man’s ambitions, if they lie in the right direction to the national dog-cart. The horse will go of his own volition because he wants to get somewhere, and perforce the cart will follow; by choosing the right horses the nation will arrive at its chosen destination. The horse chooses the destination, but the nation chooses the horse; and – it is here that a dictatorship differs – the horse can always be changed, in mid-stream if necessary’. See Jennings 1969, p. 521.}
7 Moving towards a change of the terms of the debate

The previous chapter has shed light on the current limitations of the debate on the NGO democratic legitimacy thesis. It primarily focused on the consequences of the common disregard of institutional preconditions. As said, revealing such limitations does not invalidate all elements mentioned in the NGO democratic legitimacy thesis. Indeed, the studies discussed in the previous chapters provided insight into NGOs' various strengths and weaknesses, and their multifocal activities and types of input into international lawmaking processes, ranging from offering their expertise to advocating on behalf of neglected groups of individuals and values, and facilitating social engagement.\(^\text{1793}\) To overlook these contributions all together, due to the mismatch between international lawmaking and democratic legitimacy, would lead to an underestimation of what NGOs can offer international lawmaking.\(^\text{1794}\) This final chapter seeks to propose new terms for addressing and interpreting the contributions of NGOs, in order to provide a more satisfying explanation for the continuous resort to NGOs by international lawmakers.

As will be argued in this chapter, the most promising route to continue the debate on the possible contributions of NGOs for international lawmaking is to leave aside the terms of democratic legitimacy and to change them for the terms of quality justification.\(^\text{1795}\) As the term suggests, such a justification sees on the quality of law. The quality of law is understood here in a broad sense, concerning the quality of the output and the quality of the procedure of international lawmaking processes.\(^\text{1796}\) The general assumption on which this proposition of new terms is based is that to make a qualitatively good law (notwithstanding the apparent pitfall related to defining when a law can be qualified as ‘good’, which will be discussed) lawmakers need to be sufficiently well informed. Being well informed constitutes a qualitatively justifiable lawmaking process, and therefore a qualitatively justifiable rule. Information provision is understood as the core contribution of NGOs to the justificatory act of international law. Thanks to this pragmatic escape, as we called it chapter 6, to this alternative framework of analysis based on quality justification, both the problems of the existing scholarship concerning the lack of attention to institutional preconditions has been sidestepped, as well as the inherent problems with the application of democratic legitimacy.

\(^\text{1793}\) See Part II; Simmons 1998, p. 83. These conclusions therefore do not affect the observation that ‘civil society is showing remarkable creativity at keeping elements of undemocratic global power on the defensive and continually raising the issues of equity, justice, human rights, sustainable development, community empowerment and health’. Krut 1997, p. 37.

\(^\text{1794}\) If we do not expand our interpretation of NGOs contributions to international legislative practices in new terms we might miss, as Kennedy states, ‘the significance of the informal and customary world’. Kennedy 2005, p. 6.

The question of what civil society can bring to the table of international lawmaking remains a point of particular attention. There are of course many other roles thinkable for NGOs, not the least important the role NGOs play in effectuating international policy. We limit ourselves, let it be clear, to NGOs involvement in international lawmaking, not taking into account the fact that NGOs carry out vital work that government and the private sector are ill-equipped and disinclined to do. So our understanding does only a partial explanation, strictly related to lawmaking.

\(^\text{1795}\) We are not the first to present the merits of this contribution of NGOs to international lawmaking in this way. The idea that the quality of NGO participation would improve if the discursive interface improves can be found at the analyses of Wapner, Spiro and Edward.

\(^\text{1796}\) Primarily in the procedural connotation of ‘goodness’ we discover a certain overlap with democratic values as discussed in Part I, and Part II.

275
in the context of international lawmaking. This pragmatic move will come at a price, as will be discussed later.

The argument is presented as follows. Section 7.1 first explains the standard of justification and its distinctive conceptual characteristics in relation to legitimacy. Section 7.2 discusses two perspectives on quality justification: a functionalist approach that focuses on the substantive quality of a law, and a procedural-rationalist approach that focuses on the quality of the process of making a law. In section 7.3, the focus shifts to the specific merits of NGO participation in respect of these justificatory acts of international lawmakers, and discusses three different categories of information input NGOs commonly provide: expertise, testimonial knowledge, and values. In a lawmaking context that lacks the preconditions for democratic legitimate law, these contributions might be better appraised on their substantive merits, rather than on their democratic merits. This brief exposé is followed by in section 7.4, which gives some introductory insights into the normative value of a quality justification of international law. Notwithstanding the fact that the terminology of quality justification better fits current international lawmaking practices and the lack of international institutional preconditions, from a normative point of view it has considerable limitations. The pitfalls of a justification, instead of a legitimation of international law will be discussed. Section 7.5 concludes these tentative considerations with an outline of the methodological challenges that arise by further exploring quality justification of international law by NGOs. Different themes that could feed into a research agenda are introduced.

It is important to highlight that, at this stage, our attempt to redefine the terms of the debate about NGOs’ participation remains largely exploratory. The alternative understanding offered here is based on the materials gathered in the context of studying the NGO democratic legitimacy thesis. The subsequent proposal for a better understanding is therefore limited to NGOs’ participation in international lawmaking processes, and to their contributions to these processes that have already passed in review. Consequently, many other possible understandings, based on the different tasks that NGOs fulfill in the international legal order (for example, related to their ability to provide services to contribute to the enforcement of international rules, or their contribution to international adjudication), are not taken into account. Besides, the study on the NGO democratic legitimacy thesis made us aware of the obstructed ante hoc generalizability of NGOs’ contributions. A predictive general account of NGOs’ contribution would not be persuasive in light of the inherent dynamic characteristics of NGOs. Therefore, this exploratory proposal for understanding NGOs contributions in terms of quality justification requires, in addition to further studies on its inherent normative pitfalls, empirical confirmation of NGOs contributions during their participation in specific international lawmaking processes and afterwards.

1797 Our preliminary steps towards an alternative presentation of the value of NGOs for international lawmaking has been made by some other legal scholars. See Koskenniemi 2005b, p. 61, 92; Esty 2006, p. 1490; Kingsbury, Krisch, and Steward 2005, p. 17.
1798 See chapter 6, section 6.1.1.
7.1 From democratic legitimacy to justification

Our search for a change of the terms of the debate is confronted with the question of what we search for in non-ideal circumstances. The current limitations in democratically legitimizing international law, do not exclude other grounds to justify the existence of international law, nor the making of it.\textsuperscript{1799} Let us reiterate briefly the main characteristics of legitimacy. As explained in chapter 1, legitimacy can be approached from two different angles.\textsuperscript{1800} One is sociological, which requires an evaluation that takes place between the individual that is subject to the law and an institution that makes the law. As discussed in chapter 1, relationships of trust between a lawmaking authority and a legal subject enable rules to be accepted, which enhances the chances of compliance of these rules. Trust is obtained, for example, when the laws secure, or strive to secure, the well being of the legal subject, but also when the authority of a specific leader is accepted, based on religious or charismatic grounds. As a consequence of the reliance on the act of accepting, a law or a lawmaking authority can be fully legitimate towards one individual and fully illegitimate towards another individual.\textsuperscript{1801} From a sociological perspective, the significance of legitimate order and authority is, as Weber famously clarified, that the most stable ordering of conduct is achieved when the ordering principles are held to be binding by the actors subject to them.\textsuperscript{1802} As discussed in chapter 1, democratic legitimacy is, notwithstanding the normative assumption that it is the most desirable ground for trust in the legislative authority, from a sociological point of view not considered an exclusive ground for accepting authority.\textsuperscript{1803}

In general, as discussed earlier in chapter 1, being illegitimate does not exclude the exercise of de facto authority, or a claim to authority. Besides, it is not per se the case that without being democratically legitimate, international lawmaking serves the well being of the ruled less duly. Although a dominating situation by the international authority to rule cannot be prevented, these acts of authority might be considered beneficial for legal subjects when valued on their own merits. Theories of alternative grounds for justifying the authority of international law can be found in the work of many international legal and political scholars. Christiano, for example, pleads for a standard to assess the fairness of a non-democratic association of democratic states.\textsuperscript{1804} In line with Christiano, Besson focuses on individual general equality across different states, at least to the extent that fairness in interstate relations reflects their demographic size and the population’s interest in the negotiation and hence contributes to protecting transnational individual equality.\textsuperscript{1805} Habermas too does not refrain from a moral connotation in his proposition of an assessment standard of international lawmaking practices, proposing that international organizations should develop a juridical framework of human rights with which states should be obliged.

\textsuperscript{1799} See chapter 1.
\textsuperscript{1800} See chapter 1, section 1.1.
\textsuperscript{1801} See Simmons 1999 p. 747-750, for an explanation of this ‘attitudinal’ legitimacy and a critique.
\textsuperscript{1802} Spencer 1970, p. 124.
\textsuperscript{1803} See section 1.2.2.
\textsuperscript{1804} See Christiano 2010.
\textsuperscript{1805} Besson 2011a, p. 19. As Besson states in this respect, ‘[s]upranational political integration is also progressively calling for political equality and, hence, for more than international human rights guarantees’. Besson 2011b, p. 33.
Pettit’s conception of a justification for international authority is based on equal, effective control of states over international bodies. Pettit suggests, with some reservations however, that the only plausible path to justifiable international lawmaking is, ‘by frameworking and networking those organizations so that they are more or less forced in their decisions to honor terms of association and argument that command allegiance on all sides. If this is right, then there has to be an international discourse among states that parallels the discourse of a domestic democracy. That discourse has to give rise to a currency of considerations that are recognized as relevant considerations that any state may reasonably invoke in assessing one or another international initiative’. Pettit 2008, p. 20-21. Pettit refers for an extension of the Rawlsian idea of public reasons to the international forum on global public reasons. Cohen 2004, p. 190-213.

There should be a strong connection between the different international agencies and their officials to enable such an international discursive practice. Further, according to Pettit, the agencies ‘will be subject to conditions that favor acting on such considerations; they will have to justify their decisions on the basis of the considerations; and those justifications will be exposed to public, potentially effective challenges from non-states as well as states: say, from the non-governmental organizations that operate in a global context’. Pettit relativizes his approach to discourse compatibility with referring to Christiano’s explanation of the political international culture of ‘asymmetrical bargaining’. Christiano 2010.

Although these scholars expound on possible justifications of international law differently, Pettit, Habermas, and Besson, like many others, underscore the value of a procedural justification of international law in which lawmakers should demonstrate that they act in line with ‘good lawmaking practices’.

As mentioned in the introduction to this chapter, and as discussed in chapter 1, section 1.1.2, the content of the rule itself constitutes another possible justification for the authority of law. Legal subjects might be more likely to accept law when they consider the laws effective, or in line with justice considerations, or when the result of a lawmaking process is characterized by a high level of expertise. Rules could be justified as qualitatively ‘good’, or efficient. Tasioulas hints in this respect towards a related justification of the exercise of authority of international lawmakers, which is the cognitive advantages international lawmakers have over domestic lawmakers.

---

1806 See for example Habermas who states: ‘The negative duties of a universalistic morality of justice – not to commit crimes against humanity and not to engage in wars of aggression – are anchored in all cultures and fortunately correspond to the legally elaborated standards in terms of which the organs of the world organization would also have to justify their decisions internally. The confidence in the normative power of judicial procedures is nourished by a “credit” of legitimation that is “extended” to the collective memory of humankind by the exemplary histories of proven democracies.’ Habermas 2008, p. 451-452.


1808 Pettit relativizes his approach to discourse compatibility with referring to Christiano’s explanation of the political international culture of ‘asymmetrical bargaining’. Christiano 2010.

1809 A combination of these law-following values is often theorized as basis for the legitimacy of law. Rosanvallon specifically pleas for a reconsideration of complementing democratic representation with experts engaged in issues related to how to protect the future common good: ‘The academies would have the right to intervene and be consulted systematically on issues within their range of competence, and they would issue public opinions to which government officials would then have to respond.’ Rosanvallon 2011, p. 149-150.
lawmakers have over their subjects in determining what the latter have reason to do, which is based on ‘a time tested collective wisdom’.1810

The question arises as to what such justificatory acts based on the quality of both process and rule brings us in terms of the legitimacy of international law. We learned in chapter 1 that legitimacy, from a normative perspective, means as much as recognizing the ‘right to rule’, with the consequential obligation for legal subjects to be normatively bound by these rules. The normative account of democratic legitimacy was, contrary to the abovementioned sociological account of legitimacy, not based on proved acceptance of law by legal subjects, but on a hypothetical acceptability by the legal subjects of the authority of law. Because of its democratic legitimacy, a law ought to be accepted by its legal subjects. Although it might well be that, based on empirical studies, one can conclude that legal subjects accept international law on grounds other than democratic grounds,1811 we have reservations in concluding that international lawmakers have the ‘right to rule’, without a democratic basis.1812 At this stage we cannot take a conclusive stance in the conceptual discussion on whether or not there are other grounds why legal subjects ought to accept the exercise of authority. This is why we follow the conceptual distinction between justification and legitimacy, as proposed by Simmons.1813

The most important distinguishing factor between justification and legitimacy is that justification does not entail an evaluation that leads to a judgment of whether the relationship of a public authority to its individual subjects is acceptable.1814 Legitimacy is based on the interaction between legal subject and public authority ‘in a way that we normally suppose gives one party a moral right to expect something of another – will seem to “legitimate” its imposition and / or enforcement of duties on you’.1815 Consequently, the legitimacy of law depends on its addressee. Legitimacy implies an evaluation of public authority that, when assessed negatively by its legal subjects, gives a reason not to accept the law.1816 Legitimacy has the characteristics of a binary on/off status, as authority cannot be partially acceptable. The fact that democratic legitimacy protects legal subjects against the arbitrariness of the exercise of public authority illustrates the inadequacy of a gradual approach to democratic legitimacy: an authority cannot be perceived to be a bit more authoritarian or a bit less. Only when, as explained in chapter 2, the requirements of a basic

---

1811 History demonstrates that many other grounds of legitimacy are accepted. Indeed, democracy as dominant ground for legitimacy is in this respect a relatively young phenomenon. In chapter 1, we referred to Weber and his sociological account on legitimacy, based on charismatic leaders or on the legality of the authority to rule.
1812 This hesititation seems contrary to most scholarly reasoning. The scholarly tendency to assume other grounds of legitimacy is exemplified by Besson who states that ‘[i]n any case, since democracy is incremental and rarely fully realized, this account of coordination based authority does not exclude less or non-democratic forms of legitimate coordination’. Besson 2009a, p. 354, referring to Raz 2006, 1031 fn 20, 1037-1040. See also Erman and Uhlin 2010b.
1813 See Simmons 2001. Although Simmons elaborates the distinction between justification and democratic legitimacy in nation-state context, we find his basic ideas of similar relevance to our discussion here.
1816 Legitimacy as a principle, responds to the idea that legal subjects ‘are not required to do whatever the legislature says, but that they are entitled to disobey or in extremis rebel when it goes beyond its limits’. Waldron 1999a, p. 309. Waldron explains the ideas of Locke concerning the tension between limits and supremacy of legislature’s powers, which was discussed in chapter 2. However, it seems to capture very well the actual rationale of democratic legitimacy. If there was no such a room for personal consideration to comply or not to comply with law any consideration of legitimacy would be redundant.
infrastructure consisting of social and institutional preconditions for the application of democratic legitimacy are fulfilled, a gradual approach considering the ‘thickness’ of the democratic legitimacy of law is possible, leading to a richer or poorer assessment of a law’s democratic legitimacy. Some manifestation of consent remains of fundamental importance to the democratic legitimacy of law to confer rights and obligations to legal subjects.\textsuperscript{1817}

Justification, on the other hand, is an act that stands on its own and is not related to the acceptance, or consent of the legal subject. In a justificatory act itself, the legal subject is simply not involved. Its addressee can consider a justificatory act unconvincing or unsatisfactory, but the explanatory act itself does not depend on legal subjects to be a justification in se. The independence of a justificatory act of its addresses obviously weakens its normative attractiveness, an issue to which we will return in section 7.4.

In a democratic context, the act of justification of one specific law and the democratic legitimacy of law can coexist. However, in an international context which is lacking institutional preconditions, instead of assuming that the basis on which lawmaking is conducted is acceptable to each individual, because we are equally and actually binding ourselves through a democratic process of legislation, we need to figure out on what basis international law can be justified, while acknowledging that some people are given a privileged position in the exercise of lawmaking authority to decide what is best for other subjects. A positive evaluation of a justification of international law might lead to the conclusion that international law merits our support, but such a conclusion does not allow us to infer the claim that international law, on that ground, has ‘the right to direct us and coerce us, which we are bound to honor’,\textsuperscript{1818} as is the case when a law is considered democratically legitimate.\textsuperscript{1819} When international lawmaking is justified, understood in the way Simmons has defined justification, it means ‘on balance a good thing’, which is inconclusive regarding the question of whether international law is normatively acceptable, or whether international lawmakers have the right to rule.\textsuperscript{1820} Nevertheless, a justification implies that the exercise of authority gives ‘us moral reasons to refrain from undermining it and will typically give us moral reason to positively support that state [read: lawmaking institution]’.\textsuperscript{1821}

A conception of justification involves an ad hoc explanation of a law or lawmaking process, and therefore only offers a specific account for a specific exercise of authority. A focus on ad hoc justificatory acts seems to fit international rules, for they make demands upon individuals for compliance without violent enforcement mechanisms, and sometimes without the clear consent by the its legal subjects.\textsuperscript{1822} Although not democratically

\textsuperscript{1817} Our emphasis on some moment of consent-giving is in line with Lockean thinking. For the Lockean, the justice or goodness - the justifiability of the exercise of public authority gives us a moral reason not to undermine it, and perhaps to positively support it. But we only have an obligation to obey directives, and public authority only has an exclusive moral right to direct and coerce us, if either (a) we have directly interacted with public authority in some way that grounds a special moral relationship of that sort, or if (b) accepting membership in a state is the only way we can fulfill one of our other moral obligations or duties. See Simmons 2001, p. 135-155.

\textsuperscript{1818} Simmons 2001, p. 156.

\textsuperscript{1819} The standard of justification cannot tell us anything conclusive as to whether the specific authority has the right to rule, because it ‘is not obvious that the mere unsolicited provision of benefits (and good treatment) would ground a right to direct and coerce’. Simmons 2001, p. 139.

\textsuperscript{1820} Important to note here is that this type of justification is often also understood, for example by Besson, Buchanan and Christiano, as being a part of a standard of legitimacy as well.

\textsuperscript{1821} Simmons 2001, p. 137.

\textsuperscript{1822} See for complications of state consent, chapter 3, section 3.4.
legitimized, international law, the process, and its makers may be justified by reference to the ‘good’ they do. Justification is understood as an evaluation standard ‘justifying an act, a strategy, a practice, an arrangement, or an institution [that] involves showing it to be prudentially rational, morally acceptable, or both (depending on the kind of justification at issue)’. Just as in our day-to-day use of the term, justification has the connotation of being a defensive concept. With justifying a certain act, result, practice, or institution, we defend our choices based on the presumption that someone can raise some type of objection. In the context of international lawmaking processes, this perspective might be relevant because, as demonstrated in chapter 3, international lawmakers are consistently the subjects of criticism, not in the least because they work on the strong presumption of the non-democratically of their ruling.

By distinguishing legitimacy from justification, a conceptual distance is created between the fundamental, and yet unresolved, issue of legitimacy of the exercise of international authority, including the underlying theoretical quest of whether the lack of democratic legitimacy affects the authority of international law, and the issue of justification of the present exercise of the de facto exercise of international lawmaking authority.

7.2 A justification based on substantial quality and procedural quality

In outlining current scholarly criticism on the democratic deficits of international law, it was recognized that international lawmaking practices exceed the traditional image of international organizations as simple tools in the service of their principals: the states. International lawmakers allegedly function as autonomous actors exercising public authority in a broader governance process. Notwithstanding the democratic legitimacy concerns regarding the types of lawmaking processes and the diversity of processes, actors, and locations, international lawmaking can still be assumed to be at least an instrument that attempts to manage common transboundary problems. The issues that require international cooperation are political, and they refer to questions of justice and the common good. They involve questions about property, economy, what aid we owe to one another personally and collectively: the basic terms of social and economic coexistence. International lawmakers, in all their diversity, play a decisive role in not only making proposals for legally solving common problems, but also in defining the problems that need

---

1823 Simmons 2001, p. 123.
1824 Against this background, they need to justify the policy or actions, as Simmons states, ‘by showing them to be true or valid, to defeat the objections of the skeptic or nihilist; we justify coercion against a background general presumption in favor of liberty; we justify our actions in legal settings against concerns about apparent or prima facie illegality; and so on’. Simmons 2001, p. 124.
1825 Reflecting on a justification of international law cannot give us normative guidance to what extent it ought to lead to more acceptability of international law. When the standard of justification is applied one is not engaged in the normative discussion whether, based on the justification, an authority has the right to rule, and the legal subjects should accept the lawmaking authority. As Simmons states a strict Lockean perception on the difference between justification and legitimacy is that ‘the mere justifiability of an arrangement need not give us any moral reason at all to support that arrangement’. Simmons 2001, p. 138.
1826 Chapter 3, section 3.4.
1827 See Venzke 2008.
to be solved internationally. Reasonably, the identification of problems and formulation of answers to these problems should be justified.

7.2.1 A functionalist approach
Quality, in terms of a law’s ability to provide the right answer to an existing problem, could be understood in pragmatic terms. Workable solutions, in this respect, prevail over theoretical concerns, taking a functionalist approach to international law. Law is accordingly seen as the instrument with which the purpose, derived from a policy choice, should be reached as effectively and efficiently as possible. The well-known comparison between sausages and law (‘it’s better not to see them made’) leads in general to an emphasis on the evaluation of the quality of the outcome of a lawmaking procedure.

Such a functionalist approach to legislation cannot be separated from an instrumental view on law, in which law in general is considered as a managerial tool. Law is supposed to serve a specific aim or to help realize a particular policy, whether that is the aim of giving effect to our responsibility to mankind or, less stiltedly, of resolving a practical issue that troubles its legal subjects. In the relationship between law and policy, policy in this understanding is prioritized: legislation is the vehicle by which a certain policy is implemented. The content of the law is in this respect considered to be ultimately a matter of policy, a choice of how to organize society and the values that are associated with it. What law should deliver depends on specific policy aims. In the evaluation of legislative projects and programs, functionality and efficiency are often some of the first requirements mentioned. A (proposed) action is allegedly efficient when the corresponding effort actually contributes to the realization of the purpose and when the costs of the proposed action are in proportion to the revenues. There is evidently no clear-cut guide on how this standard of judgment is to be used. As expected, and emphasized by Bittner, there is a crucial gap between the generalized conception of ‘efficiency’ and any actual criteria that are precise enough to be usable in particular situations to judge the quality of law on its efficiency.

The search for efficient law to achieve a particular goal, reminds us of the bureaucratization theory of Weber. The primary justification of bureaucracies is their efficiency. Bureaucratization, in Weber’s view, means a move from the particularism of traditional justice to systematized, rational, and calculable lawmaking. Characteristic of bureaucracies is the tendency of bureaucratic authority to lean heavily on its technical superiority. Its expert knowledge and specific information enables a bureaucracy to be ‘more precise, unambiguous, flexible, smoothly operating, and cost-efficient than other forms’. Bureaucratization processes are dependent on administration by formally independent

---

1830 See Waldron 2012.
1831 Marleen Wessel drew our attention to this statement.
1832 MacIntyre 2011, p. 76.
1833 For further reading on conceptions of efficiency, and efficiency as a political norm, Postema 2011, p. 181-206.
groups such as the clergy, jurists, and court nobility. Interest representation instead of society representation takes a central position.

The diffuse constellations in which international lawmaking by international organizations occurs, could be similarly characterized by attempts to develop in functional terms effective answers to international problems. Venzke states for example that international lawmaking processes could be interpreted to endorse calculating, rationalized forms of organization. The expertise to formulate a ‘good response’ to an international problem is considered a strong ground for justifying the making of international rules. In their strategy to justify their legal proposals, international organizations strongly rely on sources of knowledge.

The way quality is determined varies per lawmaking arena, per function, and per role. Whether or not a law meets quality requirements, ranging from efficiency, effectiveness, enforceability, functionality, or justice, can in practice sometimes only be determined many years later. Besides, any fixed determination of what a qualitatively good law is, conceals the inherent tensions regarding different ideals and values that are enshrined in legislation. Although it sometimes seems that in retrospect or from a distance one is able to distinguish the ideals or sources of expertise that led a lawmaker to opt for specific rules to serve a specific society, formulating ideals and values when you are part of that society is one of the most difficult and constant struggles with which lawmakers have to deal. The problem is an everlasting one of reaching the level of abstraction when you are ‘inside’ or part of a society. As MacIntyre states, ‘[t]here is no rational way of deciding which type of claim is to be given priority or how one is to be weighed against the other.’ This ‘moral incommensurability’, as MacIntyre calls it, is only magnified in global contexts. Therefore, substantive quality arguments related to the content of a law cannot always provide strong arguments for the justification of law.

---

1837 Weber 1968, Economy and Society, p. 753-760. The influence of bureaucratic organization on lawmaking was, according to Weber, ‘the disappearance of the old natural law conceptions’. Thereby bureaucracy ‘has destroyed all possibility of providing the law with a metaphysical dignity by virtue of its imminent qualities. In the great majority of its most important provisions, it has been unmasked all too visibly, indeed, as the technical means of a compromise between conflicting interests’. Weber 1968, p. 875.
1839 The bureaucratic character of international organizations is recently explained by, a.o. Venzke, Koskeniemi and also MacIntyre. As MacIntyre calls it, is only magnified in global contexts. Therefore, substantive quality arguments related to the content of a law cannot always provide strong arguments for the justification of law.
1840 For example, De Wet has argued that the ILO’s promotion of the developed labor standards was grounded ‘on the assumption that increased awareness, knowledge and expertise are the critical pathways for changing government policies and behaviors’. De Wet 2010.
1842 Pound has well illustrated this struggle: ‘[a]n idealized community of the rural agricultural America of our formative era, in which neighborhood and individual were economically self-sufficient, was near enough to the facts and accorded with the received ethical and economic views of the public. Today no such clear and definite picture of American Society is possible. That the received ideal must be replaced by one nearer to the facts is evident and admitted. That redrawing of the whole picture of the ideal community is called for is conceded. But we have not as yet been able to redraw it. We are not satisfied with the received nineteenth century measure of values. A new measure for this time has not yet been formulated.’ Pound 1939, p. 17-18.
1843 MacIntyre 2011, p. 85.
1844 Veerman 2004, p. 15.
7.2.2 A procedural-rational approach

Consequently, quality, in terms of a law’s ability to provide the right answer to an existing problem, is in our tentative approach primarily interpreted in a procedural-rational sense. In contrast with a functionalist approach as described above, a procedural-rational approach to justification of law refrains from formulating content-dependent values that assess the quality of the outcome. It does not formulate any substantive requirements on the product of lawmaking. Instead, it places requirements on the lawmaking process itself. It assumes a relationship between the quality of the law and the rationality of the lawmaking process.

In a procedural-rational approach to the quality of lawmaking, law is assumed to be the expression of a balancing of interests of a multiplicity of viewpoints. Opening up a lawmaking process to more and diverse sources of knowledge is considered fundamental for the quality of a lawmaking process and consequently for the quality of law. In this respect, a quality justification of the legislative process resembles common justification patterns of governance we know as technocracy, epistemology, and meritocracy. When more information is available about the context in which the law should be applied, interests can be determined and weighed more profoundly. In other words, the lawmaking process can be justified by the well informedness of its makers.

Well informed lawmaking is based upon a clear appreciation and understanding of the facts, implications, and future consequences of an action. If the legislature decides to deal with a problem through specific rules, it expresses its confidence that it has sufficient information to solve a social problem by law. Therefore, a pragmatist case for respecting diversity and for inclusive epistemic practices is based on a consequentialist focus on problem-solving by law to maintain a well-ordered and secure society. It is obvious that a perfectly rational procedure does not exist. The determination of the rationality of the procedure is therefore a matter of degree. Whether a procedure can be determined as rational is an empirical question that does not need to be addressed here.

Lawmakers commonly rely not just on information from the inside but from the outside as well, either by outsourcing an initiative, ordering a hearing, or requesting some specific information to be evaluated. Procedural practices that are considered to facilitate a procedural-rational law by legislatures are: openness to the views of affected persons and groups, a focus on factual information subjected to expert and critical scrutiny, and public deliberation through which the benefits and disadvantages of a specific legislative proposal are thoroughly discussed. A procedural account of quality justification leans heavily on deliberative practices. Deliberation is well equipped to address some of the qualitative problems of international lawmaking. Deliberation as such expressly refers to a substantive ground of justification rather than a democratic one.

---

1845 Flores 2005, p. 9; See chapter 2, section 2.2.1.
1846 As Pedraza-Farina states, ‘Rather than focus on defining the common good, or finding areas of agreement, the key functions of deliberation should be to expose participants to multiple perspectives often not reducible to a single common good.’ Pedraza-Farina, 2013, p. 636. Farina here summarizes one element of critique of feminist, minority and third world critics on Habermasian Critical Theory that aims at finding consensus through deliberation about the common good. See work of Fraser, Young and Mansbridge.
1847 The resemblance with an epistemic interpretation is closest, in the sense that decision-making processes are valued at least in part for their knowledge-producing potential and defended in relation to this. Cohen 1986, p. 26-28
1848 Higgot and Erman 2010, p. 449.
A strong informational dimension sounds familiar; the resemblance of rational-procedural quality justification to deliberative democratic legitimacy theory is evident. In deliberative democratic theory, however, contrary to justification as presented here, the principle of equal concern is understood to require that lawmakers enable an opportunity for participation in the deliberation for all, that laws pay heed to the interests of each ordinary person and to the impact of public measures of law and policy on the life of each ordinary person as that life is actually lived or experienced.

Although a quality justification might include characteristics of democratic legitimacy, such as a demonstration of transparency, openness, and responsiveness to a multiplicity of values, expertise, and experiences, the difference between a democratic legitimation and a justification is that in the latter account the input offered by epistemic agents does not intrinsically aim at protecting these democratic characteristics. While democratic lawmaking is based on public reasoning and political equality, qualitatively justified lawmaking is only concerned with the first feature: public reasoning. Inclusive public deliberation in this respect is considered valuable not for the ideal of political equality or freedom from domination, but for its epistemic contribution. It values epistemic diversity because of the fact that the expression of dissent can lead to an evaluation and transformation of qualitatively ‘bad’ laws. A quality justification based on the process of lawmaking has as its primary aim to reach a certain level of rationality to formulate what is ‘good’ for society based on a certain calculation, instead of why the individuals of society think something is good for them. It is not about aiming for a reflection of all individual equal interests. It is about reflecting the range of individual preferences as diversely as possible. The rational-procedural approach does not strive for impartiality of the content of the input and does not rule out self-interest. In addition, a quality justification by lawmakers focuses on the demonstration of taking into account and weighing different factors and perspectives, without the democratic burden of showing consensus. It does not share the objective of democratic deliberation that the participants in a rational debate should be willing to be convinced by others and leave their own standpoint behind in order to reach consensus. The exercisers of de facto authority take up the burden of reaching consensus on the correct answer, whether these are states, of civil servants of international organizations.

A procedural-rational approach to lawmaking is considered important for the justification of international law. As Charnovitz argues, ‘authoritative decision makers need a constant infusion of competitive ideas and values in order to make complex decisions in

---

1849 See Waldron 2012.
1850 Peter 2005, p. 126.
1851 As Pound argued, ‘In each case the social interest in general security requires that it be guided and regulated by reason; that it conforms to principles and standards formulated dispassionately in advance of controversy upon weighing of all the interests to be affected, in insisting on the supremacy of law. (...) law is not bound of necessity to stand always against the popular will in the interest of the abstract individual. Rather its true position is one of standing for ultimate and more important social interests as against the more immediately pressing but less weighty interests of the moment by which mere will unrestrained reason is too likely to be swayed.’ Pound 1921, p. 80-81.
1852 Probably Pauwelyn, Wessel and Wouters will contest this, as it might be possible to categorize the proposed quality justification under the in their view developing ‘thick consensus’ practices, consisting of an emerging code of good practice for the development of standards, characterized by more inclusiveness, more transparency, and better predictability, or new forms of cooperation outside international law, which they consider ‘normatively thicker’. Pauwelyn, Wessel and Wouters 2012, p. 17.
the best interest of the global community’. Diversity may result from differences in scientific approaches, different types of expertise, different institutional affiliations, or contrasting opinions on the fundamental assumptions underlying the issue. The multi-pluriformity and multi-perspectivism of the body of input should be up for evaluation regarding the extent to which the views taken into account were multi-disciplinary, multi-sectoral, minority and non-conformist, to majority and conformist.

The advantage of such an approach to quality, compared to a functionalist approach based on the substance of the law, is its sensitivity towards the plurality of social norm systems. The information itself does not have to be rational; nor the agent, nor the outcome; only the procedure in which the information is gathered. The process of inquiry – not its outcome – is the source of epistemic value. An investigation into a diversity of sources of information, allegedly necessary to prepare rationally ‘good’ laws, is based on the presumption that the observer can confront a fact face-to-face without any theoretical interpretation interposing itself.1854 This internalization of multiple values and views on morality, on a just society, and scientific views in a lawmaking process is far from a mechanical exercise. In a justificatory act the lawmakers have to demonstrate that enough room is offered for multiple perspectives, and for a multiple set of sources such as expertise, values, and testimonial knowledge by a multiple set of actors. Further, they have to show that their information sources are well scrutinized and well-balanced. In addition, lawmakers need to justify the sources they have taken into account, based on what they have formulated their legislative proposal, in order to be able to justify the quality of the relevant law.

A rational-procedural approach to quality defends a set of practices in which agents critically engage with each other under conditions of transparency and reciprocity as the root of an account of the knowledge-producing potential of deliberation,1855 with the aim of arriving at sustained critical interaction. A quality justification requires an evaluation-oriented approach to ensure the correct use of scientific methodology and the degree to which it is influential in the legal process and its final product.1856 In practice, this means that the legislature must keep its eyes open to societal needs and wishes and be a good listener.

7.3 New terms to understand NGOs’ contributions to international lawmaking

With the proposed understanding of quality justification, we seek to offer a more suitable tool for coming to grips with NGOs’ prominent role in substantiating the knowledge base of international legislative procedures.1857 A quality justification evidently fits NGOs’ earlier discussed contributions to deliberation because of their knowledge.1858 Besides, a substantive approach regarding NGOs’ merits does not contradict their dynamic and

1853 Charnovitz 2005, p. 39. Charnovitz quotes Tocqueville, “A government, by itself, is equally incapable of refreshing the circulation of feelings and ideas among a great people, as it is of controlling every industrial undertaking.’ De Tocqueville, Democracy in America (Vol. 2, Part II, Chapter 5).
1854 This possibility is strongly refuted in MacIntyre 2011, chapter 7. Our argument builds on his account of facts, explanations and expertise.
1855 Peter 2009, p. 128.
1858 See chapter 5, section 5.1.2.
prismatic characteristics. In addition, understanding NGOs in terms of quality justification suits also the characteristics of international lawmaking: the existing multipolarity in lawmaking instruments, institutions, and actors in international legal order, and the conditionality that characterizes NGOs' legal frameworks. Moreover, although all in a slightly different way, the legal frameworks for NGO participation in general, and the accreditation procedures specifically, typically follow rather rationalist conceptions of the benefits of NGOs' actions: providing knowledge and the capability to contribute to the body of instrumental or problem-solving knowledge. Paragraph 20 of ECOSOC Resolution 1996/31 states, for example, that NGOs are invited to provide expert information or advice, or to represent important elements of public opinion. A causal relation between more information and better laws is assumed.

The incentive for international organizations to include NGOs based on a quality justification are probably comparable to the ones discovered when studying the debate on the NGO democratic legitimacy thesis, boiling down to the increasing critique of the lack of legitimacy through established procedures that are usually primarily based on participation by member states. Criticized for being biased towards powerful actors, international organizations have attempted to organize lawmaking in ways that include the voices of weaker actors by improving participative practices, increasing transparency, deliberation, and including local actors. From a strategic point of view, Olsen explains this tendency as follows: 'Typically, an institution under serious attack reexamines its pact with society; its rationale, identity, and foundations; and its ethos, codes of behavior, and primary allegiances and loyalties.' These reforms to include more voices and a diverse range of actors are assumed to contribute to a justification of their international legislative efforts. An NGO is considered to fill the gap, as they have 'a real and legitimate role in the education of political society on issues in which it has expertise'. Ad hoc arrangements are set up according to the nature and urgency of the state of knowledge of the issue to be addressed. Given the ever-increasing numbers of NGOs at the gates of international legislative conferences, NGOs are clearly pleased to provide their expertise to international organizations.

A quality justification of international law seems to fit current characteristics of NGO participation in international lawmaking. As we have emphasized in chapter 6, the discretion of power holders concerning NGOs' influence limits us to ex post and ad hoc evaluations of contributions and political opportunity structures. Although the latter observation did not rhyme easily with the need for guaranteed possibilities of democratic political power, it does not stand in the way of the evaluation of whether NGOs have contributed to the quality of the norm or the quality of the procedure. Equally, the inherently dynamic process of justifying the quality of both norms and processes, given the changing demands of

---

1858 See chapter 6, section 6.1.1.
1859 See chapter 3, section 3.3.
1860 See chapter 4, section 4.5.
1861 See chapter 4, section 4.3.
1862 In section 7.4, we come back to the complications of this assumption.
1863 See chapter 3, section 3.4, and chapter 5.
information and value judgments concerning information, better fits the dynamic manifestation of NGOs, as there are no pre-determined characteristics of NGOs required for a quality justification based on their input.

The social initiation of NGOs to formulate norms and bring in knowledge to international forums is rewarded with their inclusion in a rationalized system. NGOs become in this respect service providers. Their service consists of bringing to the table relevant information that is needed for international lawmakers to prepare new regulations. What has often distinguished NGOs from other partners consulted by states and international organizations is that they are, generally speaking, committed to a public cause. NGOs often engage both their supporters and their constituency on the basis of values or some shared interest or concern, and often have a public benefit purpose. According to the studies of the scholars that presented the NGO democratic legitimacy thesis, a large number of the NGOs accredited by international organizations claim to aim at finding common, shared solutions, or compromises perhaps, to transnational problems by actively offering a strong knowledge base of values, scientific expertise, and testimonial knowledge. The acceptance of the involvement of NGOs by international organizations based on NGOs’ expertise can be understood as an affirmation of the assumed risk that was mentioned by critics of the NGO democratic legitimacy thesis in chapter 5, of NGOs becoming the ‘fourth arm’ of government.

As was shown by the historical observations made in chapter 4, NGOs often have attempted to shape the content of the agendas of states and international organizations by forming alliances that advocate the adoption of a new rule or standard. NGOs exert pressure on institutional actors to incorporate standards in many other international legal fields, such as refugee law, environmental law, and human rights law, which are issues often neglected by states. One of the instruments NGOs have at their disposal to achieve their goals is the formulation of proposals about what a law should look like. As discussed in chapter 5, the input of NGOs was argued to enhance the knowledge base of international lawmakers ranges from values, testimonals, scientific expertise, and contestatory opinions to interest representation. Let us briefly look into these three quite different types of input: scientific expertise, testimonial knowledge and values.

1869 NGOs become part of the ‘staff’ in a Weberian bureaucratic way, in order to make international lawmaking more rational. Faríña categorizes this way of theorizing civil society the New Governance, state – society synergy theories. Pedraza-Fariña 2013, p.637-641.

1870 Take for example the WHO’s accreditation requirements that provide that NGOs must be free from “concerns which are primarily of a commercial or profit-making nature” screens out a number NGOs whose nonhealth interests might lead to a lack of mission alignment with the WHO. WHO Principles Governing Relations with NGOs.


1872 Kleinlein 2011a, p. 47. Kleinlein equally argues that the ‘global constitutional community’ of which NGOs are part, ‘provides legitimacy through common values, but it is not a source of democratic input’. Referring to Von Bogdandy 2006, p. 714.

1873 See chapter 5.

1874 Joachim 2003, p. 247-274. The example of the UN Fourth Conference on Women shows, that, although they had restricted ways of securing their impact, NGOs did seize the opportunities to change the law. See chapter 4, section 4.2.

1875 NGOs contribution to the knowledge base of international lawmakers was one of the three alleged contributions of NGOs to democratic legitimacy as discussed in chapter 5, section 5.1.2. NGOs contributions to representativity, as discussed in 5.1.1. are understood devoid of democratic connotation and is included in
First, it can be derived from the presentation of NGOs’ contributions in earlier chapters that NGOs could contribute to a quality justification by international lawmakers on the basis of the expertise they bring into the lawmaking process. The complexity of world affairs underlines the dependence of international organizations on often-external sources of expertise in their attempts to manage them. One of the explicitly mentioned expectations of international organizations is that NGOs can offer a contribution to the required expertise by finding proper legal answers to these problems. In chapter 5, section 5.2, the contribution of NGOs to deliberative practices was discussed. NGOs are often part of, or arguably are independently forming, an epistemic community, defined by Haas as ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’. NGOs generally seek to acquire information and gather the resources and the will to contest doubtful claims and to promote alternative options. NGOs have recognized that scientific knowledge is potentially one of their strongest advantages and best instruments for gaining influence to achieve their goals.

The involvement of NGOs in the environmental legal regime offers a good example. On issues as divergent as whaling, oil spills, ocean dumping of chemical or radioactive waste, the safety of nuclear power, river valley development, or climate change, disputes among environmentalists, industry and, frequently, states have centered on dissimilar appraisals of the probability and magnitude of adverse environmental effects. In such exchanges, NGOs have been considered useful for opening up the debate either by questioning prevailing expert opinion or by expanding the available information base with relevant bodies of local knowledge. As scientific fact-finding is not objective and scientific experts always end up producing diverging accounts, NGO could function as platforms where diverging scientific reports are discussed and debated. Standing outside the peripheries of official, usually state-sponsored, knowledge production, NGOs could be particularly well-situated to observe the limitations of dominant expert framings, to question unexplained assumptions, to expose tacit value choices, and to offer alternative interpretations of ambiguous data. As mentioned earlier as an obstruction to the NGO democratic legitimacy thesis, NGOs often present only one specific interest, and consequently gather their knowledge by focusing on a specific theme, resulting in sector-specific expertise.

Second, besides technical expertise, NGOs might also offer testimonial knowledge, if indeed, as often presented in relation to the NGO democratic legitimacy thesis, NGOs are able to translate populations’ personal experience into policy language. Including these stories of victims in order to get better informed might be effective as might help framing issues in terms of right and wrong, and in attributing responsibility. Chapter 5, section 5.1.1 made us familiar with the bridging function of NGOs and local communities. However, in the interpretation of NGOs as knowledge providers for a well-informed lawmaking process, it is not about representing these local communities, but about NGOs informing the lawmaking process about the characteristics, contexts, and needs of local communities.

---

1876 Haas 1992, p. 3.
1879 Jasanoff 1997, 582.
NGOs are in this respect invited to share with international lawmakers their knowledge about local problems, usages, and systems derived from their relationships with local populations. This information could be important for a justification of the quality of international law as appropriate legislation that affects the peoples of these areas.

Third, the earlier-mentioned desire to express and push for certain values internationally fuels the motivation for a specific group of ‘advocacy’ NGOs to be involved in international lawmaking. These NGOs often claim to express a certain moral rightness, and advocate in this respect a perception of what is just. This function reminds us of the work of Spinoza and Fuller that was cited in chapter 1, section 1.1.2, when the distinction and relationship was clarified between legitimacy and content. In chapter 2, we familiarized ourselves with the work of theorists who have traced relationships between knowledge based on values and NGOs to the role of civil society for the democratic legitimacy of law at the nation-state level. In line with this typically Western ideal type of civil society, NGOs also at the international level appear to be engaged in thinking about a desirable organization of international society. A considerable number of NGOs find it their essentialist responsibility to contribute to justice, global ethics, and norm-regulated action at the international level. NGOs can be considered in this respect as certain ‘moral agents’. Moral values can be context-specific and related to one legal regime, for example in the World Trade Organization to ‘fair trade’, or in the World Health Organization to ‘healthcare accessible for everyone’. NGOs often point to the duties and obligations the international society has, whether they refer to marginalized groups, the ozone layer, or endangered species, to name just few. But NGOs’ moral claims can also be of a general character, related to peace, freedom, democracy, prosperity, and equality. It is important to note here the ability of NGOs to express values that are contrary to the views of governmental actors.

Some values advanced by these NGOs, are similar to the values that are constituent of democratic legitimacy theory. Advocacy NGOs might promote values such as accountability, transparency, inclusion, and equality. Moreover, the principle of democracy itself is a value that might be advocated by NGOs. The lack of a democratic constellation does not obstruct NGOs from pursuing values related to the rule of law, justice, or democracy in other ways, by proposing new norms. Here again, the divergence of the understanding of NGOs in relation to quality justification and democratic legitimacy theory becomes clear. NGOs might promote the value of accountability, but cannot force international lawmakers to resign. NGOs might promote the value of transparency, but cannot impose it independently on international lawmakers. NGOs might promote the value of inclusion, but cannot enforce participation in international lawmaking. Nevertheless, these democracy-related values can be part of the input of NGOs in international lawmaking processes and might warrant a justificatory exercise by international lawmakers.

---

1881 This has been the object of huge criticism and probably does not survive the critique of hegemony.
1882 See for an exploration of ‘what it means to treat NGOs as a moral agent’, Obrecht 2011.
1883 According to Whaites, this is primarily the contribution NGOs, being part of civil society, can make. ‘[t]he special contribution of civil society has often been the art of critique or the negative campaign rather than the promotion of a real vision for change. Landmines, debt, slavery… civil society, particularly in the rich world, usually knows more clearly what it wishes to abolish than to build’. Slim 2002, referring to Whaites 2002.
1884 As Bohman has explained, ‘[d]omination is possible without the total absence of justice, in mixed circumstances in which institutions may provide for some, but not all, conditions instrumental to justice’. Bohman 2005, p. 105.
The proposed tool for reassessing NGOs’ involvement in international law leaves intact some merits of deliberation: public debate and public expression provide a rational basis for law and political authority. The procedure should have the capacity to be justification generating. A well-informed lawmaking process leading to ‘decisions which are the due result of those [institutional] processes must, by that fact alone, have a moral claim to acceptance’.1885 On a case-by-case basis one might argue, and the lawmaker might justify, that the outcome of the lawmaking process is arrived at by taking into account a wide variety of sources, perspectives, and standpoints, which together provide enough information to reasonably conclude the adopted texts. The appeal of a quality justification is to a type of consideration that presupposes the existence of impersonal criteria – the existence, independently of the preferences or attitudes of speaker and hearer, of ‘standards of justice or generosity or duty’.1886 In the words of Koskenniemi, ‘the agreement that some norms simply must be superior to other norms is not reflected in any consensus in regard to who should have the final say on this’.1887

Whether or not the lawmaking process or its result can be qualitatively justified by reference to the contribution of NGOs will become clear in the external accountability of lawmakers with regard to the legal process and outcome. As discussed in section 7.1, international lawmakers do not have to prove the equal consideration of voices of all who are affected, as this is directed to the action of NGOs in terms of knowledge provision. Nevertheless, a quality justification will invite lawmakers to account for the selection of consultants, their interests, the scientific evidence the input is built upon, the organizational intelligence of the consultants, and their conceptions of the public interest.1888

7.4 Limitations of quality justification: a ‘second best’ evaluation tool

While exploring the opportunities to change the terms of the debate from legitimacy to justification, we need to acknowledge that this shift does not come without problems. A presentation of NGOs’ participation in terms of the quality justification of international law is primarily a pragmatic turn. Our understanding is based on a descriptive presentation that remains closest to current legal texts on accreditation mechanisms and current lawmaking practices. This move to quality justification confirms the status quo of international lawmaking, not out of ideology, but based on an attempt to remain closest to what we understand is happening. There are objections to be made with regard to the normative power of such a move.

As indicated in section 7.1, we cannot derive an ‘ought’ theory from this ‘is’ analysis for at least two reasons. The first reason is methodological: This proposal depends on assumptions that should be substantiated by empirical studies on how a justification of international law and the contribution of NGOs to it works out in practice, which have not yet been carried out.1889 The second reason is normative: this proposal provides a reading of NGOs involved in international lawmaking mainly based on functional considerations. No

1885 Hart jr. and Sacks 1958, p. 166.
1886 Macintyre 2011, p. 11.
1888 De Beus has stated the importance of account giving in European Context. De Beus 2001, p. 302.
1889 See subsequent section 7.5.
A normative account or proposal of how to legitimize international lawmaking authority is offered.\footnote{1890} This section focuses on some of the related normative challenges that a resort to quality justification brings along. There is a risk that quality justification gives leeway to a managerial, technocratic conception of lawmaking. What we arguably need most is a normative narrative that might prevent us from giving in to such a bureaucratic reading of the international legal order.\footnote{1891} The interpretation of NGOs’ participation in terms of quality justification will not remedy, instead, it might arguably aggravate the fact that international law is made in a context in which there are ‘only the most marginal opportunities for engaged political contestation’.\footnote{1892} A resort to quality justification cannot alter any current imbalance in the representation of interests in international lawmaking.\footnote{1893} In this respect, a resort to quality justification of international law is relatively unambitious. As mentioned above, quality justification does not enter the field of acceptability of the authority to rule in general, it only refers to the way de facto authority has been exercised and accounted for.\footnote{1894} No normatively satisfactory answer is formulated to the question of whether a justification of international law, based on the quality of the process or the quality of the norm, can be a ground for the acceptability of international lawmakers’ authority.\footnote{1895}

From a normative perspective there is a clear hierarchy between a quality justification and legitimacy: a quality justification of international law is only considered to be a plausible evaluation tool on the assumption that the international legal order cannot, independently from states, preserve people’s freedom.\footnote{1896} Estlund clearly explains why acceptability is not implied with mere justification based on the quality of the norm:

\footnote{1890} Although international law might be successfully justified on the basis of its quality, this type of non-tyranny, as Bohman calls it, is ‘insufficient to establish the potential reflexivity about normative powers necessary for rectifying injustice’. Bohman 2005, p. 106.

\footnote{1891} As Keane explains, ‘Weber is in principle opposed to Beamtenherrschaft, the dominating rule of senior civil servants without a calling, precisely because their authority, in his view must (and can only) be limited to the conscientious execution of the orders of political leadership. The expertise of technically trained officials has no rightful place in politician’s ultimate decisions about political goals and strategies. For the same reasons, a “leaderless democracy” – the rule of civil servants supplemented with the rule of professional politicians without either a calling or charismatic qualities – is equally to be despised’. Keane 1984, p. 56.

\footnote{1892} Kennedy 2005, p. 2.

\footnote{1893} As Olsen points out: ‘Because administrative theory and practice are closely linked to the history and culture of specific states and regions, and as long as definitions of “good administration” and “good government” hinge on specific definitions of ends, purposes, and values, there can be no truly universal generalizations about public administration without a profound knowledge about the varying political, social, cultural, and economic characteristics that impinge on the administration.’ Olsen 2005, p. 18.

\footnote{1894} Spencer 1970, p. 126.

\footnote{1895} No adequate answer is formulated either, to the question if democratic legitimacy is the exclusionary reason to obey authority. Weber proposed that societies behave cyclically in governing themselves with different types of governmental legitimacy. In the outline of the conception of political legitimacy of Fabienne Peter, Peter points towards the opinions of Beetham and Habermas, that both find a strict normative approach towards legitimacy too narrow. They state that the normative focus of philosophers ‘neglect the historical actualization of the justificatory process’. Peter 2010. In other words, no satisfactory answer is formulated whether the concept of quality justification might lead to a normative ground for legitimacy. Many scholars see a democratic foundation for the exercise of authority as an exclusive foundation. To the extent that this is true, global governance is doomed to illegitimacy. See Held 1995, p. 17-18; Rubenfield 1971, p. 2020-2022.

\footnote{1896} Or, as Pettit states, ‘[It] would hardly make sense to invoke an epistemic, pragmatic, egalitarian or meritocratic feature – or the goodwill that Dworkin invokes – in arguing for the legitimacy of a freedom-denying regime, if there were an alternative regime available that could claim to preserve people’s freedom’. Pettit 2012, p. 148.
‘[F]rom the fact, even granting this it is a fact, that you know better than the rest of us what should be done, it certainly does not follow in any obvious way that you may rule, or that anyone has a duty to obey you ... To the person who knows better, the other might hope to say, “you might be right, but who made you boss?”1897

With the shift from a content-independent reason to accept the imposed authority of international lawmaking to an ad hoc content-dependent justification of specific exercises of authority, we descend to a ‘second best’ evaluation, looking at how relatively ‘good’ the laws are that are created by the - in democratic legitimacy terms - unacceptable international legal order.1898

Two shortfalls of quality justification underline this general statement. The most obvious one is the contested understanding of what quality as such entails.1899 A quality justification appeals to qualitatively ‘good’ law, implying that one could construct a valid rational justification based on objective and impersonal moral standards.1900 There is no set of normative principles that can guide us in the evaluation of the quality of lawmaking. The search for a standard of ‘good quality’ is fraught with difficulties. Effectiveness, as mentioned in section 7.2.1, does not autonomously offer a way out: judging the significance of a norm through a determination of its implications or consequences in a social context is a highly subjective undertaking.1901

The air of neutrality around expertise, knowledge, and information, assumed by a reference to quality, can be easily contested. Expertise is used in order to formulate an answer in the form of law that should be beneficial in light of a certain general interest. However, it is difficult to determine objectively what a general interest or ‘the common good’ entails.1902 It is even questionable if such a thing as ‘the common good’ exists.1903 The formulation of what is in our general interest is based on a certain perception of underlying

1897 Estlund 2009, p. 40.
1898 See Pettit, UCL Quain lecture: Legitimacy and justice 2012.
1899 As Barnett and Finnemore state, ‘effectiveness or dysfunction is often in the eye of the beholder’. Barnett and Finnemore 2004, p. 168.
1900 See Macintyre 2011, p.11.
1901 According to Macintyre, this last step however is severely obstructed by the fact that the existence of a socially established set of rules come into existence only under particular social circumstances and at particular historical periods. They are not under any condition universal features of the human condition. See Macintyre 2011, p. 80-81.
1902 Weber also rejected the idea of a ‘general will’. A collectivity is an abstraction, not a real entity, and to impute a will to it is to indulge in myth-making. Titunik 2005, p. 156, referring to Weber, Gesamptausbabe, vol. II/5 Briefe 1906-1908 p. 615.
1903 Waldron has explained some of the dynamics that occur. ‘As for the general interest, we should not think of this as anything separate from the interests of individuals. Talk of the general interest (like talk of the common good) is a way of considering the interests of individuals taken together. If we adopt a social welfare function—such as the principle of average utility or Rawlsian maximum—to determine what shall count for us as the general interest in circumstances where our interests as individuals diverge, we are still not attributing an interest to a thing called “the people.” A social welfare function is justified by some account of what is appropriate in circumstances where the interest of large numbers of individuals point in different directions. It is not justified by any principle of moral consideration for something called “society.” (...). They are not meant to preclude altruism or social justice or solidarity within a society, but they involve the frank acknowledgement that these are ways of considering the interests of persons (large numbers of them); they do not shift us away from either methodological or ethical individualism.’ Waldron 2012, p. 190. For different forms of individualism, see Lukes 1973.
values. A quality justification implies that international lawmakers, if well informed, can independently determine these values, which can be translated into legal norms. Here we touch upon the complex relationship between values and law that is a dominant feature of legal theory in general. Apel speaks in this respect about an ‘apparent contradiction’: the necessity and at the same time the impossibility of a universal meaning of a value. The paradox is that, although we are in need of a universal understanding of values and, we are confronted with the difficulties to be found in such an ethical intersubjective validity in terms of a scientific type. Although the need to provide an answer to common transnational dangers, harms, and problems can be demonstrated scientifically, technologically, or objectively, universal values on which we can base our solutions to these dangers seem simply not to be at our disposal. The necessity to take the responsibility to solve problems on a worldwide scale does not easily match with the impossibility of finding and formulating an answer that is universally considered acceptable.

The second, closely related shortfall of a quality justification is that the reference to the seemingly neutral activity of collecting multiple sources of information obfuscates the ‘politics’ that is involved in selecting and using this information. Politics is understood to refer to these activities of the actors involved of law-making organizations, who try to influence the way authority is exercised. We have learnt from public choice theory that we cannot assume that public officials, when selecting their information sources, are objective and public-spirited, impartially pursuing the intent of the legislation they are charged to administer. It involves the inherently subjective, and political exercise of weighing different interests is involved. While this statement is more easily accepted in relation to the contributions NGOs make to knowledge based on values and interests, it becomes a more destabilizing thought when we accept the same biases in NGOs’ contribution to the needed scientific expertise knowledge base of international lawmaking. Expertise is in itself perspective-bound, as well as co-dependent on institutional and technological infrastructure.

Although international lawmaking requires expertise and calculations of data in order to decide what might be the best outcome, in gathering and selecting the different sources of

\[1905\) Apel 1987, p. 43.
\[1906\) As MacIntyre states, ‘But our pluralist culture possesses no method of weighing, no rational criterion for deciding between claims based on legitimate entitlements against claims based on need. Thus these two types of claim are indeed, as I suggested, incommensurable, and the metaphor of ‘weighing’ moral claims is not just inappropriate but misleading.’ MacIntyre 2011, p. 285.
\[1907\) Therefore, as d’Aspremont states, ‘[t]he driving forces of international lawmaking are not immutable and are subject to constant and contingent changes, (…) it plays down the importance of global values and zeroes in on common interests’. D’Aspremont 2007, p. 225.
\[1908\) The myth of neutrality of science was one of the motives for Habermas to propose deliberative democratic lawmaking, based on an enlarged knowledge base. He found it unrealistic to assume that: ‘[o]ne can separate the professional knowledge of specialists from values and moral points of view. As soon as specialized knowledge is brought to the politically relevant problems, its unavoidably normative character becomes apparent, setting off controversies that polarize the experts themselves. (…) Therefore, it is counterproductive, not only from the viewpoint, for attunement processes between governmental and societal actors to become independent vis à vis the political public sphere and parliamentary will-formation. From both viewpoints it is advisable that the enlarged knowledge base of a planning and supervising administration be shaped by deliberative politics, that is, shaped by the publicly organized contest of opinions between experts and counterexperts and monitored by public opinion’. Habermas 1996, p. 351.
\[1909\) I thank Marleen Wessel for raising this point in our discussions.
expertise, international lawmakers coin particular conceptions of development, good governance, or what constitutes a good economy. Consequently, an international lawmaker cannot refer neutrally to a diligent balance of facts and interests, facilitated by NGOs’ input that has enabled the lawmaker to find the most equitable solution. Just as with the formulation of the ‘right’ legal norm as an answer to an international problem, the underlying sources of expertise cannot be considered objective. As Koskenniemi states:

‘[W]hat might be “reasonable” for an environmental expert is not what is “reasonable” to a chemical manufacturer; what is “optimal” to [a] development engineer is not what is optimal to the representative of an indigenous population; what is proportionate to a humanitarian specialist is not necessarily what is proportionate to a military expert.’

The lack of a normative standard of quality opens up space for competing claims, possibly under the guise of competing sources of expertise, but often encapsulating other substantive value preferences. The suggestion, implied in referring to a quality justification, that in handling these different and contesting inputs international organizations act like bureaucratic agencies following abstract general rules to operate as effectively as possible has been often, and persuasively, relativized.

The fragmentation into different functional international regimes provides decisional space for the legal and technical experts appointed by the supervisory organs. The risk attached to the increasing decisional space for these experts is that it enables bureaucratic practices rather than limits it. The problem of these regimes in particular is the limited space for political control. The work of experts, which is, according to Kennedy, part of the ‘background’ of lawmaking processes, dominates in many instances the ‘foreground’ of lawmaking that is considered to be political, due to the knowledge gap that exists between political leaders and its bureaucratic apparatus. The ‘foreground’ of lawmaking appears to be becoming increasingly a mere ‘spectacle – a performance to which we attribute agency, interest and ideology’. Instead of clarifying and strengthening the much needed politics, a strong focus on quality justification seems to further obfuscate the underlying political processes related to the preparation of laws by different actors. Experts working in the

1910 The separation of technical issues from political issues is at least doubtful as a categorical premise. Venzke 2008, p. 1417.
1911 Koskenniemi 2007, p. 10.
1912 Boswell points out that ‘[w]hile participants may accept the relevance of technocratic modes of justification, they will seek to deploy competing knowledge claims to substantiate preferences generated by non-technocratic considerations’. Boswell 2009, p. 102.
1913 This image of international organizations is acknowledged to be a misrepresentation of practices in which the ‘formal rationality of these organizations, it must be emphasized, is chronically obstructed by vested interests – a most important reason why bureaucracies have a tendency to perpetuate themselves in power and scope, if not to expand continuously’. Keane 1984, p. 62. Keane expressly addresses the difficult impasse of subjectivity of rationality by referring to Weber: ‘Which of the warring gods should we serve?’. Keane 1984, p. 69.
1914 An overview and a discussion of positions can be found in Koskenniemi and Leino 2002, p. 553-579; Koskenniemi 2006b. Koskenniemi describes the work of legal experts in particular working for ‘private or public-private institutions, national administrations, interest groups or technical bodies, developing best practices and standardized solutions – ‘modelisation’, ‘contractualization’ and mutual recognition –as part of the management of particular regimes.
‘background’, including invited NGOs, influence and steer international lawmaking, often lacking political control.

7.5 A research agenda

As the discussion above has demonstrated, the presentation of quality justification assumes a causal relationship between the involvement of NGOs and an increase in the knowledge base of the lawmaker. Knowledge of NGOs, based on testimonies, values, and expertise, would consequently make the law qualitatively ‘better’, the meaning of which can be stretched from ‘more rational’ and ‘more effective’ to ‘more fair’. This justification rationale requires from lawmakers to base their selection of NGOs on their contribution of qualitatively good sources of information that cover different perspectives amounting to a competition of ideas. Lawmakers should carefully hear and choose groups and that they exercise the selection of groups with the greatest possible balance. Lawmakers are supposed to have a sufficient level of knowledge in-house to be able to estimate the value and nature of the input.

Empirical studies are indispensible for testing these aforementioned assumptions. Comparative empirical studies into the lawmaking practices of different international organizations are relevant for understanding how a quality justification is often used by lawmakers and how it should be used.\textsuperscript{1917} These empirical studies should equally be able to clarify the appropriateness of bureaucratic means for the realization of various desired ends.\textsuperscript{1918} We can group the relevant empirical questions into five main questions that have many sub-questions, of which a few examples are given.

1. Who is selected? What interests are given a chance to be heard? And equally importantly, what interests are not heard? How many sources inform the lawmakers? What is the assumed threshold of the necessary multiplicity of perspectives? Is a (perceived) overload of information reached?
2. How is a selection made? Are the sources offered by consultants perceived to be reliable? What is the relation between information gathered by states and information gathered independently by international agencies?
3. Upon what grounds is a specific selection of sources of information made? Where does the information come from? Is there a certain bias in terms of destination and type of information? Which lawmaking actors balance the different sources of information? How do they do this? With regard to the experts, what vocabulary is used? If contestation arises between the experts, are there any terms for disagreement? Are there underlying schools of thought that impact upon the position taken by the NGOs? Are there underlying shared assumptions?\textsuperscript{1919}

\textsuperscript{1917} The OECD for example has formulated guiding principles for regulatory quality: http://www.oecd.org/fr/reformereg/34976533.pdf, (last visited January 2016). Comparative studies to national and local justificatory practices might be insightful. The United Kingdom considers itself a ‘best practice’ with regard to the formulation of principles of regulation. These principles are formulated as legal rules in the Legislative and Regulatory Reform Act 2007, No. 3544, 18 December 2007.
\textsuperscript{1918} Keane 1984, p. 51, referring to Weber 1949, p. 52 ff.
\textsuperscript{1919} Kennedy 2005, p. 13.
4. What are the intentions of the NGOs involved? (An inquiry to the motivations is necessary for a complete understanding of NGOs’ participation in international lawmaking. As MacIntyre argued, the linkage between context and intentions makes action understandable to both the agents and others).\textsuperscript{1920}

5. What is the effect of the selected input? Are the knowledge contributions of the NGOs influential? Do we see any reflection of the input in the lawmaking agenda? What type of information is most influential: scientific input, values, or testimonial information? How is impact brought into effect; are coalitions formed? Are these coalitions effective? What is the result of this information process, and how well informed is the lawmaker?

Mapping exercises of actual lawmaking procedures are needed in order to discover why and how NGOs were involved. Openness seems to be the most promising defense to enable a check on lawmaking procedures. Experts should clearly highlight the evidence upon which they based their advice, as well as any persisting uncertainty and divergent views.\textsuperscript{1921} More insight is required to analyze the motivations of lawmakers to include NGOs, how NGOs’ input was used, the extent to which the result of a lawmaking process has been informed by multiple perspectives, how much room for contestation was created, and if, and how, feedback loops were organized. These studies are necessary to open up, and enable a politicization of international lawmaking procedures.

Further exploring and testing the proposition that NGOs contribute to the quality justification of international law requires studies of three different types. First, in general, we must gain insight into the politics of quality justification. Second, we are confronted with the challenge of finding ways for a justifiable balance of interests. Third, virtues such as counter-balance, control, and responsibility need to be defined to strengthen the standard of evaluation of quality justification in normative terms.

7.5.1 Gaining insights in the politics of justifying international law

Our approach to NGOs’ contribution to quality justification tries to avoid engaging in the discussion on ethical objectivism, due to the irreducible contingency of what NGOs, lawmakers, and any other actor consider normatively valid. It acknowledges that both international lawmakers and NGOs are driven by values, motives, and desires.\textsuperscript{1922} Future studies should investigate the motivations of international agencies to seek information, including the underlying opinions of the international lawmakers that prepare and guide

\textsuperscript{1920} MacIntyre 2011, p. 241. As MacIntyre explains; ‘To identify an occurrence as an action is in the paradigmatic instances to identify it under a type of descriptions, which enables us to see that occurrence as flowing intelligibly from a human agent’s intentions, motives, passions and purposes. It is therefore to understand an action as something for which someone is accountable, about which it is always appropriate to ask the agent for an intelligible account. When an occurrence is apparently the intended action of a human agent, but nonetheless we cannot so identify it, we are both intellectually and practically baffled.’ MacIntyre 2011, p. 243. This works obviously also the other way around. When actions of NGOs are understood in a certain way that does not link nor correspond with the intentions of the actors themselves, the account offered can only be partial at most.

\textsuperscript{1921} COM Communication, COM (2002) 713 final, Dec. 11, 2002 (Communication from the commission on the collection and use of expertise by the commission: principles and guidelines, Improving the knowledge base for better policies’), p. 12.

\textsuperscript{1922} Butler 2012, p. 106-107.
these lawmaking processes.\textsuperscript{1923} There should be investigation into who decides what input is valuable to ensure the pluriformity of the process; who determines what expertise is required; and who checks the selection procedures related to the gathering of relevant information. In addition, insight into the possible struggles between the different actors involved in offering their knowledge has to be gained.

Reflection on these processes is paramount as there is a real risk that political power and the power of experts will merge. As the critics argued in chapter 5, the consultation of stakeholders by international organizations often depends on their links to states and governments.\textsuperscript{1924} Such tendencies are currently criticized by a number of states, especially from the South. According to these states, the invitation of NGOs to participate is yet another manifestation of Western power, exercised through the means of private agencies within which Western civil society is considered to be disproportionately represented. Besides the imbalance in representation, these agencies are claimed to foster secular and rights-based agendas at variance with communal values that, so some would claim, only the local state can protect.\textsuperscript{1925}

Besides, domination by expertise, precisely because of the dependence of governmental actors on expertise, looms large.\textsuperscript{1926} Just as international law, as a set of rules, reflects the preoccupation of its creators, as critical legal scholars take pains to demonstrate, the selection of consultants equally reflects the preferences and interests of states and international organizations. A purely functionalist account of international lawmakers, resting on the belief that one can separate practical issues that are aimed at implementing uncontroversial welfare goals and political activities on the other, has been challenged.\textsuperscript{1927}

International lawmaking is subject to struggles, not only of class,\textsuperscript{1928} but also to numerous power struggles and resistance inside and outside the sphere of the office. Informal and formal debates and deliberations that are part of lawmaking processes also form the stage for protest movements, countercultures, and political movements that, although often marginalized, seek a share of social power.\textsuperscript{1929} In other words, knowledge provision cannot be decoupled from the strategies of both lawmakers and information providers. Investigating these political aspects of international lawmaking and its justification is in line with what Australian philosopher John Anderson has urged us to do. We should ‘not … ask of a social institution: “What end or purpose does it serve?” but rather “of what conflicts is it the scene?”’.\textsuperscript{1930}

Besides the general assumption that knowledge is used to rationalize the result of a lawmaking process, Boswell points out that there are many motivations for the use of

\textsuperscript{1923} These are considered the ‘blind spots and biases, which skew their choices’. Our proposal to investigate the political side of expertise is in line with Kennedy’s plea for a scholarly focus on mapping the work of experts involved in international lawmaking. Kennedy 2005, p. 18. Although Kennedy’s focus was primarily on the role of legal experts being part of governmental institutions, Kennedy’s identification of ‘apolitical self-presentation of much expert work’, could be equally relevant to the role and position that we attribute here to NGOs.

\textsuperscript{1924} Heiskanen 2001, p. 10-11.

\textsuperscript{1925} See, for example, O’Brien, Goetz, Scholte and Williams 2000, p. 29; Clark, I. 2003, p. 78.


\textsuperscript{1928} Lukács 1972, p. 395.

\textsuperscript{1929} Keane 1984, p. 64-65.

\textsuperscript{1930} MacIntyre 2011, p. 191, referring to Passmore 1962, p. xxii.
knowledge. International lawmakers could also be motivated to use knowledge as a ‘symbolic resource for underpinning the risky decisions of politicians, and bolstering the authority of embattled public authorities’. In the latter case, the organization adopts rational or fair procedures because such processes conform to external expectations about appropriate lawmaking behavior. Especially when the effects of laws are hard to measure, such as is the case with many political organizations, and when international lawmakers are unable to generate support through pointing to the effects of their output, such organizations could be inclined to resort to demonstrating that their decisions are well informed, pointing towards the organization’s research capacity or to its recent commissioning of new research.

The latter motivation of lawmakers reminds us of the argumentation of some skeptical scholars towards the NGO democratic legitimacy thesis, as discussed in chapter 5. They have made us aware of the dynamic that international organizations primarily invite NGOs in response to perceived pressure from their environments, in which case the NGO’s involvement at international organizations would constitute a mutual auto-legitimation. International organizations might do this by emulating the rhetoric or structures of organizations that appear to be doing a better job of meeting external expectations. Knowledge as a means of substantiating policy preferences is most likely to occur in highly contested areas, where the organization is looking for ways of injecting scientific authority into its policy proposals. Based on insights gained in Part II, we can conclude that notwithstanding the fact that the differences between agencies are considerable, what they have in common is that international organizations work in highly unstable, constantly changing constellations, without a formal superior constitutional framework that guides lawmaking processes. These factors might intensify the need to justify lawmaking on rational grounds. Where an organization’s preferences are contested, it may seek to win backing for them through technocratic modes of settlement.

Another motivation could be the expansion drift of international organizations. Characteristic of specific bureaucracies is the tendency to strengthen their position by keeping their own knowledge secret. Information that underpins the successes of an organization is made available, while the possibly negative information is kept back. Venzke has mentioned this type of ceremonialism. The involvement of NGOs might be used as an attempt to seek the support of NGOs to increase their own autonomy towards states. A study of the politics of justifying international law should pay attention to these possible auto-legitimation practices. However, these strategic and political aspects of the background practices of policy-making or standard-setting are difficult to investigate due to the tendency to understand the processes in which norms and ideas are shaped as neutral exchanges of expertise. The power dynamics are difficult to trace, not in the least

1932 See chapter 5, section 5.4.1.
1933 Boswell 2009, p. 61.
1934 Technocratic modes of substantiation are likely to involve drawing on expert knowledge where decision-making involves a high degree of risk, or where it revolves around problems of societal steering. Boswell 2009, p. 62.
1936 Venzke 2008, p. 1420, referring to Keck and Sikkink 1998; Hawkins and Jacoby 2006, p. 99, 208-210, 210-212. 1937 Kennedy explains ‘…it is tempting to return to the centres of political action in the foreground of our consciousness, demanding resolutions, regulations and funds. We should expand our ability to act through the
because of the necessity to be able to investigate these processes independently of knowing what experts know. Further, studies on the justification of international lawmaking to gain insight into the political side of expertise provision are complicated by the fact that, as chapter 3, section 3.4 demonstrated, many forms of international regulatory lawmaking escape formal political processes and agree upon standards contextually. Notwithstanding these obstructions, especially these practices should be subjected to thorough investigation.

7.5.2 Finding ways to balance interests
As demonstrated in chapter 5, opponents of the NGO democratic legitimacy thesis were concerned that politicians focus primarily on the demands of well-organized, vocal interest groups and give in often to their interests. Given the existing information surplus, privileging the opinions of any putative experts over others seems to be inevitable. Any privileging, however, requires justification.

To prevent self-fulfilling dynamics, if they can be prevented at all, moments of account giving for the selection of information sources should be regularized. Therefore we need a theory for how to balance different interests. Normative studies are required to find answers to how, in the current non-ideal situation of quality justification, we can approach a normatively desirable situation leading to a lawmaking process characterized by openness to a multiplicity of perspectives, and a justifiable balance of interests. Familiar concepts such as transparency, accountability, and publicity recur as central points of attention. It remains open for study to understand if and how competition and diversity of ideas, values, and information can be organized and how competition and balance of information can be ensured at the international level. Already in 1939 Roscoe Pound issued a request for a strong theory of how to settle competing interests. Such a theory is based on

capillaries of private quality standards or investment guidelines, through consumer boycotts, property regulations and all the other norms and institutions which affect the use of force or the incidence of disease. We should expand our capacity to do so. Nevertheless, it remains all too easy, even comforting, to overlook opportunities to contest and reshape the background because we do not readily comprehend its power to distribute resources in society, nor do we have a clear view of how its terms might be contested. Kennedy 2005, p. 10. As Bauman states, ‘[t]he essence of expertise is that doing things properly requires certain knowledge, that such knowledge is distributed unevenly, that some persons possess more of it than others, that those who possess it ought to ve in charge of doing things, and that being in charge places upon them the responsibility for how things are binging done’. Bauman 2000, p. 196.

Boswell 2009, p. 98. Boswell refers to Gusfield who points to two aspects of knowledge utilization in public debates that have distorting effects. First is the ‘transformation of partial, qualified, and fragile knowledge into certain and consistent fact’. Politicians often attribute far more certainty and coherence to research findings than may be warranted. Second is the ‘transformation of abstract fact into facts of dramatic significance, implying attitudes and commitments, arousing images and values, having poetic rather than semantic meaning’. Gusfield 1981, p. 76.

Mansbridge conceptualizes ‘interest’ as including ‘identity-constituting [.] ideal-regarding commitments as well as material needs.’ Mere preferences, she suggests, are unreflective, but interests are “enlightened preferences,” refined dialogically in light of not just “simple cognition” but “experience and emotional understanding”. Mansbridge 2003, p. 517, n. 6.

In many respects this research agenda can be linked to the research program of Global Administrative Law Project.

Pound identified that ‘[a] theory of interests must be at the bottom of any system of law’. Pound 1939, p. 18.
‘an inventory of those which are recognized and of those which have been pressed or are pressing for recognition and a classification of them. They must be compared and valued, and by applying the measure of values it must be determined which shall be recognized and within what limits. Then it must be determined how to secure those, which are recognized according to the received measure of values. This has to be done in view of other competing interests and of the practical limitations of effective legal action. To do this thoroughly for the law of the next generation is one of the great juristic tasks ahead of us.”

According to Pound, a theory on a balance of interests has to deal with different ends of social control. The challenge is to conceptualize how to consider and find an equilibrium between for example the end of justice and the end of security, between the ideal relation between men, and the maintenance of a peaceable social order. Finding ways to justifiably balance interests should deal with the existence of competing claims and opposite purposes such as individual life and general security, stability, and change. The formulation of a convincing balance of interest is not an easy task. Paradoxically, the difficulties of selection and justification of selection is one of the driving forces for the normative acceptability of democratic decision-making as a legitimizing factor. It is often argued that because of the difficulty of an acceptable theory of balance of interests, it cannot be thrust on a people as an alternative to democracy. Therefore, it is argued that the rule of the experts must be made legitimate if it is to work politically, implying that there must be popular consent giving or popular appeal at some level.

At this stage one could argue that at least a type of openness is necessary as a precondition for a formulation of balancing interests and multiple perspectives. There is a certain inclination built into the standard of quality justification towards the assumption that values and ideals are formed in the midst of contestatory practices in which the ideal clashes with other ideals. Openness in this respect could facilitate supervision and ensure public access to information, which the administration might otherwise try to monopolize.

---

1943 Pound 1939, p. 18.
1944 ‘If we put too much stress upon the ideal relation, upon the individual life, and up to change, we impair the general security and in particularly the stability upon the economic order must rest.’ Pound 1939, p. 17.
1945 Public choice theory has provided us with interesting insights into problematic dynamics for a true representation of multiple interests, such as free-riders dynamics, and the fact that a large part of society is not organized and has diffuse interests. References to public choice theory: Arrow 1963; Black 1958; Buchanan and Tullock 1962; Downs 1957; Niskanen 1971; Olson 1965; Riker 1962.
1947 Weber’s defense of bureaucracy is exemplary for the paradox we just mentioned. Keane states that ‘[t]he principle of polytheism (of which his polemic against substantive democracy is one instance) contains the imputation of democratic, public life. This principle preserves a special type of institutional form about whose validity actors must already have come to agreement – it presumes, in other words, the availability of actually existing forms of public life, to which speaking actors can have recourse, and only by means of which they can express their opposition to (or agreement with) others’ ideals. Spheres of autonomous public life, in short, serve as counterfactual, as a condition that must be established if value relativism of the type Weber defend is to obtain’. Keane 1984, p. 68-69.
7.5.3 Defining lawmakers' virtues

A shared fear of scholars is that bureaucratic rationalization processes become an end in themselves, thereby lifting functional interests to a decisive position to reach an ‘optimal result’. Common lawmaking practices are characterized by an ‘intense circulation of reports and memoranda, the multiplication of paperassie, the proliferation of meetings, the trend toward corporatist mediation of conflict, the phenomena for “participation”, decentralization, and joint consultations, the media campaigns’.1949 A pressing concern, as stated above, is how to restrict and control the possibly dominating power of expertise. As discussed in the previous section, the most structurally recurring theme is the transparency necessary to check whether the procedural norms, already mentioned in the NGO democratic legitimacy debate, are fulfilled: openness and responsiveness. The international lawmakers should be transparent and explain its use of expertise to the public at large,1950 as a counter balance for their discretion to use external participants when needed.1951

The contradiction is clear. After this preliminary reflection on the characteristics of quality justification, we indicated that the fusion of NGOs’ activities with international organizations is in need of more reflective participation, of public control. This seems to be surprising given the fact that the basic premise was that NGOs could offer this type of public control, which premise was refuted earlier in chapter 6, because of the absence of the necessary preconditions for such public control. Paradoxically, at this stage we suggest that NGOs, involuntarily perhaps, and due to the lack of institutional preconditions internationally, might help establish an impenetrable bureau of internationally organized legal action. This fear has been stated before. As chapter 5 demonstrated, many opponents of the NGO democratic legitimacy thesis have seen NGO involvement as such as fascinating and irrelevant, but also detrimental to domestic democratic practices. Factions were feared, just as domination by Western groups over other affected groups of individuals.1952

These dynamics might turn ‘those interests into winners that usually prevail in the relevant functional context’.1953 These processes require scrutiny and control, in which room for contestation is as fundamental as difficult.1954 In relation to international legal practices, Koskenniemi most explicitly expresses this fear: ‘When the floor of statehood fell from under our feet, we did not collapse into a realm of global authenticity to encounter each other as free possessors of inalienable rights. Instead, we fell into watertight boxes of functional

---

1950 A paradox again occurs to what further studies should pay attention as well, namely that it is questionable to what extent bureaucratic lawmaking focused on quality of law is consistent with democratic practices. Let us again refer to Weber who noted that the striving towards democratic, public life would produce “technically irrational obstacles” for any bureaucratic organization. Weber 1978, p. 138.
1951 See chapter 4, section 4.5 and chapter 6, section 6.2.1.
1952 Koskenniemi describes a ‘deference to contextual deal-striking (…) [that] emphasizes the role of stakeholders’ organizations and technical experts, lifting functional and economic arguments to a decisive position’. Koskenniemi 2011, p. 236.
1953 Koskenniemi refers to Weberian thesis of deormalisation as a prologue for ‘[t]he attempt to bring together technocrats rather than politicians, and seek only such legitimacy as is required to solve particular problems and presume only such legitimacy as is required — only to make a limited set of global trains run on time for the sake, especially, of very poor people about whom no else really very much cares — seems like it must be less disfavored, at least, even in a competitive multipolar world. (…) there is no grander structure’. Koskenniemi 2011, p. 236.
1954 As Kennedy states, ‘[t]he difficulty is finding opportunities for politically contesting the results it generates’. Kennedy 2005, p. 9.
specialization, to be managed and governed by reading our freedom as the realization of our interest. 1955

A partial answer could be found in the way experts, as part of the bureaucratic lawmaking process of an international organization, act themselves. A start would be for these experts to consider themselves and their work as political. 1956 Although they work in the ‘background’ as Kennedy calls it, these experts and advisors are making many impactful choices of which they should be aware. In a functionalist approach to bureaucratic lawmaking the primary question is ‘whose understanding of it should be authoritative, or more concretely, which experts should possess jurisdiction?’ 1957 The seemingly small-scale decisions lawmakers make, based on the input they gain from NGOs and other private actors, often turn out to have more impact than expected. 1958 Experts should be aware of, and take responsibility for, the political discretion they have and create. A form of responsibility, as an ethical counterpart of accountability, should be developed that focuses on, along with the obligation that rests with political leaders to account for their actions to others, the moral obligation to take responsibility for their political influence.

The problems and the assumptions mentioned lead to a conclusion that in further studies we should map the selection, uses, and results of expertise. 1959 Besides, a further study of quality justification is required that pays attention to issues such as publicity, reflexivity, transparency, opportunities for multiple perspectives and contestation, and accountability in order to develop a theory of balancing interests. And, especially because of the lack of democratic legitimacy, virtues such as responsibility should be defined for international lawmakers as a partial compensation for the dominating power they exercise.

1955 Koskenniemi 2007, p. 15.
1956 Kennedy 2005, p. 24. ‘The goal would be to encourage a form of expertise, which could experience politics as its vocation.’
1959 Notwithstanding his attempt to underscore the importance of a mapping exercise, Kennedy also outline the attached complexity of doing so: ‘Mapping the knowledge of experts is complex and technical work raising all sorts of methodological issues – who are the experts, what is their vocabulary, what is the relationship between disputes among experts, and agreement on the terms for disagreeing, or between different schools of thought within a profession and broadly shared assumptions?’ Kennedy 2005, p. 13.
Part III – Conclusions

Part III critically assessed the persuasiveness of the NGO democratic legitimacy thesis and put forward alternative analytical categories to pursue the debate in more meaningful terms. It was shown that the NGO democratic legitimacy thesis is characterized by some inherent weaknesses. Contrary to the majority of critical scholars, we suggested that these weaknesses are not caused by the internal characteristics of NGOs, but primarily by the lack of scholarly attention to the indispensability of institutional and social preconditions for the democratic legitimacy of international law.

Two tendencies were observed that both weakened the validity of the NGO democratic legitimacy thesis. On the one hand, we noted a relatively strong but fragmented focus on both the internal democratic legitimacy of NGOs. On the other hand we saw a fragmented focus on isolated democratic practices when conceptualizing democratic legitimacy. Both tendencies were characterized by a relatively weak emphasis on democratic legitimacy’s necessary preconditions, which are, as discussed in chapter 2, necessary to make possible any democratic legitimation of law. An informal reading of international democratic legitimacy seemed to accept the paradoxical situation in which the opportunities to democratically legitimize international lawmaking are conditional upon the goodwill of the exercizers of authority. This is contrary to our understanding that NGOs are inherently dependent on the existence of an institutionalized democratic system to act as democratic legitimizers, and therefore, in most democratic theories, they fulfill a complementary democratic role.

We subsequently elaborated on the obstacles created by this lack of consideration of institutional preconditions, which obstructs an affirmative answer to the question whether NGOs contribute to the democratic legitimacy of international law. We argued that to give content to the distinctive characteristics of democratic legitimacy, one must guarantee that freedom from domination is ensured by legally guaranteed rights and judicial safeguards as control mechanisms. We argued that without democratic legitimacy’s necessary preconditions at place, we can only argue in retrospect and empirically whether or not NGOs have been able to have political effect. We criticized scholarly work engaged in the NGO democratic legitimacy thesis for reducing democratic legitimacy to democratic practices, and for marginalizing the indispensability of political rights and judicial safeguards. We found that without a consideration of democratic legitimacy’s necessary preconditions, the normative thrust of the concept of democratic legitimacy is being obscured.

Our evaluation of the NGO democratic legitimacy thesis has led us to a contentious issue, which was central to chapter 6: whether democratic legitimacy in itself is a meaningful notion in the context of the international legal order. We touched upon two approaches to substantiate the democratic legitimacy of international law by looking at international institutional preconditions: the two-track model and the cosmopolitan approach. We demonstrated that notwithstanding the fact that these approaches theorize the necessary institutional preconditions, there are many, still unresolved, conceptual and practical obstacles to applying the standard of democratic legitimacy to international law. These pressing conceptual and feasibility issues that have been raised require us to address the problem of the democratic legitimacy of international law more extensively before we are able to offer any solution.
It was nevertheless shown that internationally active NGOs might contribute to revitalizing and strengthening domestic democracy, when they open up deliberation, push for more transparency, create awareness of the fact that important decisions of respective governments are taken at the international level, and provide information concerning international law and legislative proposals to citizens who can thereby steer and check their own governments. NGOs might be understood as a vehicle, as part of the public sphere, as a manifestation or even a symbol of a democratic system. Indeed, as explained in chapter 3, a well-functioning democracy relies on both a democratic culture as well as a democratic institutional framework of rights and judicial review; the activities of NGOs might contribute to upholding the authority of nation-state democratic governments. To ensure the democratic legitimacy of international law, however, the normative justification of the thesis is limited, without theorizing international institutional means to protect freedom from domination by international law.

It was acknowledged that our study has not brought us any further in terms of solving the pressing theoretical and practical issue of how to establish preconditions of democratic legitimacy in the international legal order. However, the indication of the difficulties and pitfalls of establishing the institutional preconditions internationally – in other words, by demonstrating that we cannot simply state that international law can be democratically legitimized by anyone – offered a justification for looking beyond the specific interpretation of NGO participation in international lawmaking as a contribution to the democratic legitimacy of international law. In chapter 6 we touched upon the possibility that the scholarly work in favor of the NGO democratic legitimacy thesis could be better understood as a contribution to a theory of democratization of the international legal order than as a proposal for a contribution to the democratic legitimacy of international law.

Chapter 7 suggested a possible alternative interpretation of NGO involvement. We argued for a decoupling and recoupling between normative expectations and institutional frameworks. It demonstrated that the NGO democratic legitimacy thesis encounters a democratic expectation towards NGOs’ involvement in international legislative processes and no formal institutional international framework of rights and safeguards is available to underpin that expectation. It further stated that although NGOs cannot contribute to the prevention of domination by international law, the involvement of NGOs has the potential to contribute to qualitatively ‘good’ domination, which might be valued on its own merits, as ‘bad laws are the worst sort of tyranny’, as Burke famously stated. NGOs’ input into lawmaking, consisting of testimonial knowledge, values, and expertise, can contribute to the quality of a lawmaking process. In this light, an alternative standard of evaluation for international lawmaking other than democratic legitimacy was presented: a quality justification of international law. A quality justification refers to the substantive quality of a law, or to the rational quality of a lawmaking procedure.

As discussed in chapter 7, quality justification differs conceptually from democratic legitimacy. Quality justification should be considered as an instrument used by the exercizers of authority to explain and defend the choices made that were constituent to a new law. A quality justification of law is independent of its legal subjects. We argued that a quality justification offered therefore a ‘second best’ evaluation tool to assess the exercise of authority. Two issues were considered specifically problematic with regard to the normative force of quality justification. First, a quality justification leads to a marginalized reading of the politics engaged in international lawmaking. Second, there is obviously a lack of a normative standard of quality. We demonstrated that notwithstanding its ‘neutral’
appearance, a quality justification standard cannot escape the political side of the international legal order. Equally, dismissing the applicability of a democratic legitimacy standard does not dismiss the political; instead it reveals the political, and its lack of current democratic control. The identified lack of opportunities to democratically legitimate international lawmaking pushed the political and the dominating power structures to the fore even more.

It was made clear that our tentative proposal for an alternative understanding only offers a partial solution for the scholarly quest of how to interpret NGOs’ participation in international lawmaking. It cannot offer an answer to the underlying fundamental problem that instigated the thesis in the first place: what is required in normative terms to legitimate the exercise of international authority? With our attempt to provide a better explanation of the relationship between NGOs’ involvement in international lawmaking and the justification of international law, we did not make claims as to whether a quality justification offers a full justification of international lawmaking authority or whether quality justification is sufficient for international law’s authority to be accepted. Our proposal was not a normative proposal about how international legislative practices ought to be organized.

Rather, what the alternative understanding of NGO participation in international put forward was a tool to analyse current lawmaking practices, the actors involved, the motivations of both private actors to get involved and of public lawmakers to take into account their input. The proposed resort to quality justification has shed light on the necessity to further empirically study the politics of justifying international law: who decides what input is valuable to ensure the pluriformity of the process; who determines what expertise is required; and who checks the selection procedures related to the gathering of relevant information. In addition, insight into the possible struggles between the different actors involved in offering their knowledge has to be gained. Normative study is needed to finding ways to justifiably balance interests and to define the lawmaker’s virtues. The gained insights, when studying these lawmaking processes in terms of quality justification, could facilitate clarification of the appropriateness of the contributions of NGOs to international lawmaking for the realization of justifiable international laws, and could reveal some of the dominating power structures that inform international lawmaking.