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# Conceptual confusions in debating the role of NGOs for the democratic legitimacy of international law

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## ABSTRACT

This article revisits the debate on the contribution of NGOs to the democratic legitimacy of international law. While the primary focus of this debate seems to be on the question of whether or not NGOs are a justifiable source for the democratic legitimacy of international law, there is little consensus on the meaning, interpretation, and scope of democratic legitimacy. This is troublesome as their different—often-implicit—interpretations of democratic legitimacy influence the ways scholars validate NGOs. In this article I offer a threefold classification of the conceptions of democratic legitimacy that seem to underlie the debate: universalistic versus particularistic approaches, institutionalist versus non-institutionalist approaches, and uniform versus multiform approaches. The classification of these different approaches aims to invite scholars to first engage in the fundamental debate on how democratic legitimacy should be theorised in the context of international law in order to address each other's arguments at the same conceptual level.

**KEYWORDS** NGO; international law-making; democratic legitimacy

## 1. Introduction

The track record of NGOs contributing to the body of international law is impressive. The Geneva Convention of 1864,<sup>1</sup> the World Anti-Slavery Convention,<sup>2</sup> the Statute of the International Criminal Court,<sup>3</sup> the Convention

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<sup>1</sup> The Red Cross played a major role of importance in the formulation of the Geneva Conventions. Yves Beigbeder, *The Role and Status of International Humanitarian Volunteers and Organizations. The Right and Duty to Humanitarian Assistance* (Martinus Nijhoff Publishers, 1991) 63–65.

<sup>2</sup> Some examples of NGOs involved are Pennsylvania Society for Promoting the Abolition of Slavery, Society for Effecting the Abolition of Slave Trade and Société des Amis des Noirs. See Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1997) 18(2) *Michigan Journal of International Law* 191–2.

<sup>3</sup> See Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93(1) *The American Journal of International Law* 2.

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on the Rights of the Child,<sup>4</sup> the Convention on International Trade in Endangered Species,<sup>5</sup> and the Ottawa Landmine Convention<sup>6</sup> are but a few examples of treaties NGOs have influenced by the pressure exerted on international lawmakers. From the 1990s, both scholars and international organisations increasingly embraced the idea that the participation of NGOs in international law-making brings more democratic legitimacy to international law. I call this the ‘NGO democratic legitimacy thesis’. A decade later however, there was intensification in scholarly work that contested this thesis.

The type of NGOs that is the object of inquiry here exercises influence on international law-making processes. Notwithstanding this broadly shared mission, they are all organised in different ways and set up with different functions.<sup>7</sup> Nonetheless, all are understood here to be a collective of individuals who have voluntarily formed an organisation, not for profit, and independent from governments.

The participation of NGOs occurs in different phases of international law-making. One can distinguish roughly three phases: norm emergence, norm cascade and norm internalisation.<sup>8</sup> Most NGOs focus on the first two phases. First, NGOs, led by norm entrepreneurs, advocate for the emergence and adoption of a certain norm. Second, they intend to create the so-called norm cascade under the umbrella of international organisations. NGOs use different strategies in order to influence international law-making, including but not limited to agenda setting, problem definition, information provision, mobilisation, lobbying, direct participation in the formulation of new norms, and monitoring nation-state enforcement of principles and norms.<sup>9</sup> This is a multi-level game. Firstly, NGOs can push national governments to take certain positions or lobby for specific topics to be included in negotiations at the supranational level. Secondly, NGOs can internationally push for specialised international conferences or organise international counter conferences and summits leading to alternative norm setting. Thus, when referring to NGOs, one can focus on grass roots movements or on solely

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<sup>4</sup> Save the Children International Union has played a crucial role in the development of the convention. See Cynthia Price Cohen, ‘The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child’ (1990) 12(1) *Human Rights Quarterly* 137.

<sup>5</sup> International Union for the Conservation of Nature initiated the establishment of the convention. Philippe J. Sands and Albert P. Bedecarre, ‘Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Effective Enforcement of the Ivory Trade Ban’ (1989–1990) 17(4) *Boston College Environmental Affairs Law Review* 800.

<sup>6</sup> Two NGOs were of special importance: The International Committee of the Red Cross (ICRC) and the International Campaign to Ban Landmines (ICBL). See Nicola Short, ‘The Role of NGOs in the Ottawa Process to Ban Landmines’ (1999) 4 *International Negotiation* 483.

<sup>7</sup> Christine Bakker and Luisa Vierucci, ‘Introduction: a normative or pragmatic definition of NGOs?’ in Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law. Efficiency in Flexibility?* (Edward Elgar Publishing, 1st edn 2008) 16–17.

<sup>8</sup> Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 887.

<sup>9</sup> See Cecilia Albin, ‘Can NGOs Enhance the Effectiveness of International Negotiation?’ (1999) 4(3) *International Negotiation* 377–8.

internationally active NGOs. A large number of the NGOs that scholars generally refer to when discussing their merits for the democratic legitimacy of international law are transnationally organised. These NGOs function and participate in networks in ways that extend across the boundaries of two or more states, linking political systems, economies, and societies.<sup>10</sup>

In this article I examine the NGO democratic legitimacy thesis. In section 2, I start with an overview of the debate. This helicopter view on the assumed contributions of NGOs to the democratic legitimacy of international law, and the accompanying opposing views allows me to detect conceptual incompatibilities in the debate. These incompatibilities often remain hidden in the current debate, as scholars tend to single out one specific merit or weakness of NGOs.

In section 3, in an attempt to explain these conceptual incompatibilities, I will point out the lack of uniformity in the definitional concepts on which both sides of the debate seem to base their assessment of NGOs. The concept of democratic legitimacy is the central object of ambiguity. Democratic legitimacy is such a common term, that scholars scarcely explicitly address what they understand it to mean. This is problematic as their implicit but diverging views on what democratic legitimacy of international law entails, bar a constructive debate on what exactly the contributions of NGOs can be. In an attempt to facilitate future discussions on the NGO democratic legitimacy thesis, I distinguish three underlying causes of the variations on democratic legitimacy.

In section 4, I conclude with a classification of these variations of democratic legitimacy that characterise the debate. This classification is intended to function as an incentive for scholars to be more explicit about their conceptual starting points while advocating or dismissing the NGO democratic legitimacy thesis. In order to gain a deeper understanding of the alleged contributory roles of NGOs and on the persistent controversy around NGOs, one cannot but address the principled discussion on how democratic legitimacy should be adopted in the international legal order.

## 2. The debate—what to make of the NGO democratic legitimacy thesis?

In the past three decades, the idea that NGOs offer solutions to some of the democratic deficits of international law has gained popularity.<sup>11</sup> These

<sup>10</sup> Daphné Josselin and William Wallace, 'Non-State Actors in World Politics: A Framework' in Daphné Josselin and William Wallace (eds), *Non-State Actors in World Politics* (Palgrave Publishers, 1st edn 2001) 3–4.

<sup>11</sup> See for example the work of Anthony McGrew, 'Democratising Global Governance. Democratic Theory and Democracy beyond Borders' (1999) 94 *Theoria: A Journal of Social and Political Theory* 5; Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 1st edn 2009) 332; Maxwell Cameron, Robert Lawson, Brian Tomlin, *To Walk without Fear: The Global Movement to Ban Landmines* (Oxford University Press,

deficits are primarily caused, as the narrative goes, by the waning autonomy of states and by some intrinsic deficits of state consent, due to, among other reasons, limited parliamentary scrutiny and inequality among states. The generally acclaimed role of civil society to democratically legitimize domestic law is based on a long tradition in democratic thought.<sup>12</sup> However, for an understanding of what constitutes legitimate *international* law, the emphasis on non-state actors points towards a shift in thinking compared to the traditional doctrine of state consent.<sup>13</sup> Although there is no single, shared narrative that explains the significance of NGOs for the democratic legitimacy of international law, most scholars seem to rely on the ideal of an international participatory democracy in order to give individuals opportunities to express their views on international law.<sup>14</sup>

The NGO democratic legitimacy thesis has been challenged. According to its opponents the scholarly appreciation of NGOs as the saviours of democratic legitimacy is misleading. Although international organisations might allow NGOs to express their opinions, the opportunity for NGOs to enrich deliberations depends heavily on the—in their view naïve—assumption that international organisations (including states) truly function as a neutral mediator of all presented interests.<sup>15</sup> Additionally, the image of NGOs as representatives leads to criticism,<sup>16</sup> as does the indeterminacy of how, and whether the concept of civil society can be translated to the international level.<sup>17</sup>

This section categorises the main arguments that characterise the NGO democratic legitimacy thesis. First, it discusses the arguments, and counter-argument, that NGOs bring about voices, knowledge and social engagement.

1st edn 1998) 13; Christoph Görg and Joachim Hirsch, 'Is International Democracy Possible?' (1998) 5(4) *Review of International Political Economy* 605.

<sup>12</sup> See Theda Skocpol, *States and Social Revolutions. A comparative analysis of France, Russia and China* (Cambridge University Press, 1st edn 1979); Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Translated by Thomas Burger (Polity Press, 1st edn 1989); Seymour Martin Lipset 'The Social Requisites of Democracy Revisited: 1993 Presidential Address' (1994) 59 (1) *American Sociological Review* 2; Robert Putnam, *Bowling Alone, The Collapse and Revival of American Community* (Simon & Schuster, 2000) 337.

<sup>13</sup> Anne Peters, Lucy Koechlin, Till Förster, and Gretta Fenner Zinkernagel, *Non-State Actors as Standard Setters* (Cambridge University Press, 1st edn 2009) 513; Rüdiger Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer, 1st edn 2008) 9; Thomas Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1998).

<sup>14</sup> See for an overview on participatory democracy in the international legal order: Christiana Ochoa, 'The Relationship of Participatory Democracy to Participatory Law Formation' (2008) 15(1) *Indiana Journal of Global Legal Studies* 5.

<sup>15</sup> Kenneth Anderson and David Rieff, 'Global Civil Society, a Skeptical View' in Helmut K. Anheier, Marlies Glasius, Mary Kaldor (eds), *Global Civil Society* (Thousands Oaks, 2004–2005) 2, available at SSRN: <http://ssrn.com/abstract=899771> (last visited November 2018).

<sup>16</sup> Oren Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law' (2003) 10(2) *Indiana Journal of Global Legal Studies* 42.

<sup>17</sup> Ruth W. Grant and Robert O. Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 (1) *American Political Science Review* 34.

Second, it examines one of the main criticisms on the thesis: the alleged lack of internal legitimacy of NGOs.

### 2.1. Voice, knowledge and social engagement

One can distinguish three generally acknowledged contributions of NGOs to the democratic legitimacy of international law: a voice, knowledge, and social engagement. The promise of giving the people a voice in international law-making by allowing NGOs to participate is based on the assumption that NGOs articulate their aspirations.<sup>18</sup> NGOs are perceived as political actors contributing to the democratic principle of self-rule.<sup>19</sup> They are supposed to offer the vital link between the local and the global.<sup>20</sup> The fact that many NGOs are transnationally organised allows them to complement the allegedly incomplete representation of citizens by states. Being privately organised and connected to a large network and constituency, NGOs are considered especially sensitive to outcast voices, whereas states are often criticised for disregarding these minority viewpoints.<sup>21</sup>

Besides giving voice to the marginalised peoples, NGOs also highlight issues to law-making institutions that are otherwise scarcely given any attention. Within a 'favourable political opportunity structure',<sup>22</sup> as it is stated, a pluralist model of interests contributes to opening up the agenda and formal communications of international law-making for the wider public, which in turn contributes to expanding the opportunities of affected peoples to get involved.<sup>23</sup> NGOs' institutional participation is framed as a specific instruction to the international legislator; law-making processes should be inclusive, with room for multiple perspectives.<sup>24</sup>

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<sup>18</sup> Jens Steffek, Claudia Kissling and Patrizia Nanz, *Civil Society in European and Global Governance. A Cure for the Democratic Deficit?* (Palgrave Macmillan, 1st edn 2008) 209.

<sup>19</sup> Klaus Dingwerth, *The New Transnationalism: Transnational Governance and Democratic Legitimacy* (Palgrave Macmillan, 1st edn 2007) 20.

<sup>20</sup> Daniel C. Esty, 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion' (1998) 1(1) *Journal of International Economic Law* 126.

<sup>21</sup> See Leon Gordenker and Thomas G. Weiss, 'Pluralising Global Governance: Analytical Approaches and Dimensions' (1995) 16 (3) *Third World Quarterly* 357; Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders, Advocacy Networks in International Politics* (Cornell University Press, 1st edn 1998); Victor Bekkers and Arthur Edwards, 'Legitimacy and Democracy' in Victor Bekkers, Geske Dijkstra, Arthur. Mr. Edwards, Menno Fenger (eds) *Governance and the Democratic Deficit. Assessing the Democratic Legitimacy of Governance Practices* (Ashgate Publishing Company, 2007) 51.

<sup>22</sup> See Hanspeter Kriesi, 'Political Context and Opportunity' in David A. Snow, Sarah A. Soule, Hanspeter Kriesi (eds) *The Blackwell Companion to Social Movements* (Blackwell Publishing, 1996) 67.

<sup>23</sup> Terry Macdonald, *Global Stakeholder Democracy. Power and Representation Beyond Liberal States* (Oxford University Press, 2008) 97–99, 220; Enrique Peruzzotti, 'Democratic Credentials or Bridging Mechanisms? Constituents, Representatives, and the Dual Politics of Democratic Representation', in Eva Erman and Anders Uhlin (eds) *Legitimacy Beyond the State? Re-Examining the Democratic Credentials of Transnational Actors* (Palgrave MacMillan, 2010) 162–3.

<sup>24</sup> Iris Marion Young, *Inclusion and Democracy* (Oxford University Press, 1st edn 2000), 121–2; Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, 2000) 113; Samantha Besson, 'The Democratic Legitimacy of WTO law – On the Dangers of Fast-food Democracy' (2011) *Working Paper* No 2011/72 available at <https://www.wti.org/research/>

Opponents find it more realistic to conclude that NGOs are primarily invited by international organisations to provide a certain form of window dressing. The accreditation of NGOs is seen as a strategic move of the relevant international organisation to strengthen the credentials of international law-making in order to justify pre-rationalized decisions.<sup>25</sup> The offered opportunities for NGOs to participate can only lead to a 'closed legitimization-circle between global civil society and international organizations'.<sup>26</sup>

Some proponents primarily emphasise the merits of the participation of NGOs for the knowledge base of both the international organisations and the governmental officials taking part in international law-making.<sup>27</sup> Their participation allegedly strengthens the deliberative practices internationally. NGOs provide a mechanism for filtering information and pooling resources, to bring in competing perspectives and information. This contribution is found to be essential for law-making processes, especially for those characterised by highly technocratic and specialised issues.<sup>28</sup>

These arguments primarily value the effects of NGOs on the output of the legislative processes. Instead of the earlier focus on the strengthening of political participation *in se*, which is related to a democratic right belonging to people individually, in this reading, NGOs' involvement has the more general purpose to strengthen the rationality of legislative procedures and therefore its democratic legitimacy. While NGOs are mostly kept on the sidelines when the final definition and adaptation of international legal texts occur, they are active participants in prior preparatory discussions.

Dryzek is one of the main proponents of deliberative practices for democratically legitimising international law. He focuses on international discourses that coordinate behaviour of individuals, and turn into social as well

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[publications/274/the-democratic-legitimacy-of-wto-law-on-the-dangers-of-fast-food-democracy/](#) (last visited November 2018).

<sup>25</sup> Bekkers and Edwards (n 21) 52; Marguerite A. Peeters, *Hijacking Democracy: The Power Shift to the Unelected* (AEI Press, 2001); James M. Sheehan, *Global Greens: Inside the International Environmental Establishment* (Capital Research Center, 1998).

<sup>26</sup> Kenneth Anderson, "'Accountability' as 'Legitimacy': Global governance, Global Civil Society and the United Nations" (2011) 36(3) *Brooklyn Journal of International Law* 846, 854, 884; Dianne Otto, 'Holding Up Half the Sky but for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women' (1996) 6 *Australian Feminist Law Journal* 7; Julie Mertus, 'Considering Nonstate Actors in the New Millennium: Towards Expanded Participation in Norm Generation and Norm Application' (1999) 32(2) *New York University Journal of International Law and Politics* 542; Claire Mercer, 'NGOs, Civil Society and Democratization, A Critical Review of the Literature' (2002) 2(1) *Progress in Development Studies* 17; Anderson and Rieff (n 15) 2.

<sup>27</sup> Esty (n 20) 145; Jens Steffek and Maria Paola Ferretti, 'Accountability or "Good Decisions"? The Competing Goals of Civil Society Participation in International Governance' (2009) 23(1) *Global Society* 37; Kal Raustiala, 'NGOs in International Treatymaking', in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press, 2012) 164; Peter Willetts, *The Conscience of the World: The Influence of Non-Governmental Organisations in the UN System* (Hurst & Company, 1996) 44.

<sup>28</sup> Hilary F. French, 'Reforming the United Nations to Ensure Environmentally Sustainable Development' (1994) 4(2) *Transnational Law and Contemporary Problems* 598; Joachim Hirsch, 'The States New Clothes: NGOs and the Internationalization of States' (2003) 15(2) *Rethinking Marxism* 250.

as personal sources of order.<sup>29</sup> Due to the lack of democratic institutions, of ‘institutional hardware’ as he calls it, Dryzek argues that the balance of discourses in the international legal order is important. The larger variety of perspectives increases the chances of succeeding in a rational exchange of arguments, in reaching compromises and consensus.<sup>30</sup>

Other proponents of the thesis argue that NGOs *are* to some extent the discourse.<sup>31</sup> They focus on their capacity to question and change discourses in order to contribute to the emerging, cascading and internalising of new international norms.<sup>32</sup> Compared to the sphere of states and their interactions, civil society is a realm of ‘relatively unconstrained communication’.<sup>33</sup> NGOs are therefore considered to be ideally suited for challenging the positions taken in the debates concerning international law-making, and thus for dissent to be heard.<sup>34</sup>

Closely related to these arguments is the contribution of NGOs to check executive powers. NGOs are considered to hold lawmakers accountable.<sup>35</sup> According to Scholte, NGOs can ‘provide a space for the expression of discontent and the pursuit of change when existing governance arrangements are regarded as illegitimate’.<sup>36</sup> NGOs are assumed to compensate for the lack of procedural rules and review mechanisms of the exerted international authority.<sup>37</sup> A part of their often self-imposed task is to check the legality of international law-making; whether the particular law-making authority is acting in line with its constitutive documents and stated policy positions. In addition, NGOs can assist those who suffer the consequences of international law in seeking redress.<sup>38</sup>

Besides, NGOs that are accredited to participate in international law-making are believed to be able to detect, criticise but also correct current exclusionary practices by demanding more transparency and accountability. Through political pressure, NGOs have the ability to expose who is taking what decisions in

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<sup>29</sup> John S. Dryzek ‘Transnational Democracy’ (1999) 7(1) *Journal of Political Philosophy* 45, 34–35.

<sup>30</sup> Dryzek (n 29) 37, 45.

<sup>31</sup> Mertus (n 26) 540.

<sup>32</sup> Gaëlle Breton-Le Goff, ‘NGOs Perspectives on Non-State Actors’ in Jean d’Aspremont (ed), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011) 260, footnote 49; Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff, 1995).

<sup>33</sup> See Dryzek (n 29).

<sup>34</sup> Jan Aart Scholte, ‘Civil Society and Democracy in Global Governance’ (2001) No. 65/01 *CSGR Working paper 17* [http://wrap.warwick.ac.uk/2060/1/WRAP\\_Scholte\\_wp6501.pdf](http://wrap.warwick.ac.uk/2060/1/WRAP_Scholte_wp6501.pdf) (last visited November 2018); Steffek, Kissling, Nanz (n 18) 209.

<sup>35</sup> Peters (n 11) 338–339.

<sup>36</sup> Scholte (n 34) 18.

<sup>37</sup> Karin Bäckstrand, ‘Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development’ (2006) 12(4) *European Journal of International Relations* 467; Magdalena Bexell, Jonas Tallberg and Anders Uhlin, ‘Democracy in Global Governance, The Promises and Pitfalls of Transnational Actors’ (2010) 16(1) *Global Governance* 81; Jan Aart Scholte, ‘Civil Society and Democratically Accountable Global Governance’ (2004) 39(2) *Government and Opposition* 211.

<sup>38</sup> Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing, 2010) 85.

global governance, out of what options, on what grounds, with what expected results, and with what resources to support implementation.<sup>39</sup> This would encourage a wider public to proceed in public scrutiny activities.

In sum, proponents of the thesis argue that NGOs represent marginalised voices, provide expert knowledge to international law-makers, trigger debate, spread information, mobilise individuals, and contest states when they are not acting in congruence with international policy.<sup>40</sup> All these activities are supposed to improve international deliberations, which in turn are assumed to improve the quality of legislative texts and the democratic legitimacy of international law.<sup>41</sup> NGOs act as a surrogate for what is understood in a context of democratic states as the 'public' or 'counter publics'.<sup>42</sup>

According to the critics, proponents of the NGO democratic legitimacy thesis often underestimate the complexity of transnational participation, deliberation and checks and balances.<sup>43</sup> Although NGOs might correctly criticise law-making practices, the way NGOs employ their activities can be provoking and intrusive too, negatively affecting the willingness of other participants to listen and be receptive to persuasion. And even when NGOs are formally invited to participate, exclusive practices might also arise internally when dominant participants define the terms of a discourse that are not shared by others.<sup>44</sup> The fact that NGOs have fixed positions based on their mission might obstruct, rather than facilitate any open debate. Besides, international governance is often accused of having an inherent Northern bias by

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<sup>39</sup> Scholte (n 34) 17–18; Loren A. King, 'Deliberation, Legitimacy, and Multilateral Democracy' (2003) 16(1) *Governance: An International Journal of Policy, Administration, and Institutions* 35.

<sup>40</sup> See Mary Kaldor, Helmut K. Anheier and Marlies Glasius, *Global Civil Society* (Oxford University Press, 2003); Holly Cullen and Karen Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' (2001) 1(1) *Non-State Actors and International Law* 29; Barbara Woodward, *Global Civil Society in International Lawmaking and Global Governance. Theory and Practice* (Martinus Nijhoff Publishers, 2010) 73; Görg and Hirsch (n 11) 599; Dryzek (n 29) 44; Martin Shaw, 'Civil Society and Global Politics: Beyond a Social Movements Approach' (1994) 23(3) *Millennium: Journal of International Studies* 650; Brun-Otto Bryde, 'International Democratic Constitutionalism' in Ronald St. John Macdonald and Douglas Miller Johnston (eds) *Toward World Constitutionalism: Issues in the Legal Ordering of the World Community* (Nijhoff, 2005) 118; Daniele Archibugi, 'Cosmopolitan Democracy and Its Critics: A Review' (2004) 10(3) *European Journal of International Relations* 439; Helmut K. Anheier, Marlies Glasius, and Mary Kaldor, 'Introducing Global Civil Society' in Helmut K. Anheier, Marlies Glasius, and Mary Kaldor *Global Civil Society 2001* (Oxford University Press, 2001) 17; Scholte (n 34) 6, 17. Mercer (n 26) 7; Anthony Giddens, *The Consequences of Modernity* (Polity Press, 1990) 158–61.

<sup>41</sup> Environmental law-making is often taken as a textbook example. See Michael J. Bowman, 'The Global Protection of Birds. Part II' (1999) 11(1) *Journal of International Environmental Law* 298; David A. Wirth, 'Re-Examining Decision-Making Processes in International Environmental Law' (1994) 79(4) *Iowa Law Review* 802; Peters, Koehlin, Förster, and Zinkernagel (n 13) 516.

<sup>42</sup> Robert D. Putnam, 'Diplomacy and Domestic Politics – The Logic of Two-Level Games' (1988) 42(3) *International Organization* 427; Scholte (n 34) 18; Görg and Hirsch (n 11) 603; James Bohman, *Democracy across Borders, from Dēmos to Dēmoi* (MIT Press, 2007) 63.

<sup>43</sup> Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004) 36.

<sup>44</sup> Iris Marion Young offers an insightful essay that addresses the different approaches to civil society action and deliberative democracy theory. See Iris Marion Young, 'Activist Challenges to Deliberative Democracy' (2001) 29(5) *Political Theory* 670.

excluding 'Southern' NGOs.<sup>45</sup> Because of these structural inequalities that allegedly characterise international law-making processes, some NGOs do not engage at all in the more formal deliberations but voice their dissent outside the setting of international organisations, deliberately choosing other political forums, including in the media and the street.<sup>46</sup>

Besides, although in theory the requirement of an inclusive law-making process seems to be complementary to deliberative law-making, in practice it causes tension, as critics state.<sup>47</sup> The growth in numbers of NGOs seeking participation in the law-making processes of international organisations involves an 'openness dilemma': the more that international organisations are open to civil society, the more difficult it is to absorb the information channelled by NGOs and to benefit from their potential contribution in order to enrich the rationality of the debate.<sup>48</sup> The selection issue requires a constructive answer to the question of who should participate, why and how. As a result of the inefficiency in deliberations due to the growth in number of participants, government delegates have increasingly withdrawn behind closed doors.<sup>49</sup> Overcrowding equally causes a concern for NGOs, since allowing more participants implies a less substantive impact of their participation. Dealing with too much information might decrease the ability of lawmakers to focus on specific problems. This in turn creates space for strategic uses of information by participants and thus for new forms of domination.<sup>50</sup>

Moreover, some critics refer to the 'second bite of the apple' thesis.<sup>51</sup> These scholars deem it far from clear that there is a democratic imperative in giving individuals opportunities to participate in global governance, as they already could enjoy these opportunities in their domestic democracies.<sup>52</sup> On this view, the participation of NGOs internationally is considered even detrimental to the democratic legitimacy of international law because it influences the

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<sup>45</sup> Scholte (n 34) 21.

<sup>46</sup> Steffek, Kissling, and Nanz (n 18) 215–6.

<sup>47</sup> Jim Rossi, 'Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decision-making' (1997) 92(1) *Northwestern University Law Review* 211.

<sup>48</sup> Emanuele Rebasti, 'Beyond Consultative Status: Which Legal Framework for Enhanced Interaction between NGOs and Intergovernmental Organizations?' in Pierre Marie Dupuy and Louisa Vierucci (eds) *NGOs in International Law. Efficiency in Flexibility?* (E. Elgar, 2008) 41–42.

<sup>49</sup> Peter J. Simmons, 'Learning to Live with NGOs' (1998) 112 *Foreign Policy* 90; Kal Raustiala, 'The "Participatory Revolution" in International Environmental Law' (1997) 21 *Harvard Environmental Law Review* 570; Shamina Ahmed, 'The Impact of NGOs on International Organizations: Complexities and Considerations' (2011) 36(3) *Brooklyn Journal of International Law* 839.

<sup>50</sup> Rossi (n 47) 214.

<sup>51</sup> John R. Bolton, 'Should We Take Global Governance Seriously?' (2000) 1(2) *Chicago Journal of International Law* 217; Jagdish Bhagwati, 'After Seattle: Free Trade and the WTO' (2001) 77(1) *International Affairs* 29. See for a further explanation of the 'second bite of the apple' thesis, Raustiala (n 27) 170, 171.

<sup>52</sup> Steve Charnovitz, 'The Emergence of Democratic Participation in Global Governance' (2003) 10(1) *Indiana Journal of Global Legal Studies* 46.

state-based negotiations.<sup>53</sup> A biased representation by NGOs might negatively affect the current system of equality of states through state consent in international law-making.<sup>54</sup> Critics question if and how these different sorts of democratically legitimising forces should be combined.<sup>55</sup>

Another recurring concern is the dependent position of NGOs towards international organisations and states. Not only do the accreditation mechanisms of international organisations imply a certain form of dependency, but the existing donor constructions that foresee financial support of NGOs also do.<sup>56</sup> The involvement of NGOs mirrors state power structures by furthering the bias in favour of agendas of the North. This could lead to a self-fulfilling prophecy: the current Northern bias in international organisations and their procedures might affect what type of NGOs feel attracted to participate. Others argue that the participation of NGOs is only accepted to assist the operationalisation of the law-making activities of international organisations.<sup>57</sup>

Besides the emphasis on the formal access of NGOs in international law-making arenas, some advocates of the thesis argue that NGOs encourage norm setting enacted in private, social, economic, and cultural arenas. NGOs create new transnational social spaces.<sup>58</sup> They are driving forces of change, by challenging the authority of states and international agencies as well as orthodox definitions of the 'political'.<sup>59</sup> In these arguments, NGOs are not considered to represent the marginalised voices or to enrich formal deliberations prior to the enactment of new international norms, but to

<sup>53</sup> David Riggs and Robert Huberty, 'NGO Accountability: What the U.S. Can Teach the U.N.' (2003) *July Foundation Watch*; Kenneth Anderson, 'The Limits of Pragmatism in American Foreign Policy: Unsolicited Advice to the Bush Administration on Relations with International Nongovernmental Organizations' (2001) 2 *Chicago Journal of International Law* 383.

<sup>54</sup> Gary Johns, 'The NGO Challenge: Whose Democracy Is It Anyway?' (2003) June 11 *A workshop sponsored by the American Institute* 14.

<sup>55</sup> Bekkers, Dijkstra, Edwards, Fenger (eds) *Governance and the Democratic Deficit. Assessing the Democratic Legitimacy of Governance Practices* (Ashgate Publishing Company, 2007) 5. See also Steven Wheatley, 'A Democratic Account of the Right to Rule in Global Governance' (2012) 18 (2) *Swiss Political Science Review* 170–3.

<sup>56</sup> Peter Spiro, 'New Global Potentates: Nongovernmental Organizations and the Unregulated Marketplace' (1996) 18 *Cardozo Law Review* 966; Marlies Glasius and Jill Timms, 'The Role of Social Forums in Global Civil Society: Radical Beacon or Strategic Infrastructure?' in Helmut K. Anheier, Mary Kaldor, and Marlies Glasius (eds), *Global Civil Society 2005/6* (Sage Publications, 2006) 231.

<sup>57</sup> Hirsch (n 28) 238–9; Jonas Tallberg, 'Explaining Transnational Access to International Institutions' (2008) *International Studies Association 49th annual convention, San Francisco, CA* 3.

<sup>58</sup> Dianne Otto, 'Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society' (1996) 18(1) *Human Rights Quarterly* 120, 127; Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge: Cambridge University Press, 1st edn 2005) 17; Helmut K. Anheier, 'What Kind of Nonprofit Sector, What Kind of Society?: Comparative Policy Reflections' (2009) 52(7) *American Behavioral Scientist* 1085, referring to James S. Coleman, *Foundations of Social Theory* (Harvard University Press, 1990) 300–21; Putnam (n 12); Giddens (n 41) 158–161; Paul Wapner, 'Politics Beyond the State: Environmental Activism and World Civic Politics' (1995) 47(3) *World Politics* 311, 337.

<sup>59</sup> Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (MIT Press, 1992); Anthony McGrew, 'Globalization and Territorial Democracy' in Anthony McGrew (ed), *The Transformation of Democracy? Globalization and Territorial Democracy* (Polity Press, 1997) 247.

support the political action of marginalised groups from a local level up, so that those groups become strong enough to claim their equal share in law-making processes themselves.<sup>60</sup>

Allowing NGOs to participate in international law-making is alleged to have a spill-over effect upon the knowledge base of concerned individuals who are part of their broader network of contacts outside the political realm of international organisations. From this point of view, NGOs have the capacity to pass on knowledge, information, and expertise that assist individuals and communities to contribute to democratisation and the growth of a healthy civil society.<sup>61</sup> Some NGOs do so by making it their mission to enhance the education system in many countries.<sup>62</sup> Other NGOs circulate information specifically focused on the importance of democracy and democratisation are interrelated at both the national and international level.<sup>63</sup>

Most of these scholarly writings reproduce the well-known premise that democracy needs a dynamic and independent civil society. NGOs, in this reading, help constitute a vibrant public sphere with a sufficient diversity of groups and opinions to generate public deliberation about different interests in international society. These arguments are in line with what is expected from civil society in national democracies: civil society is active in deliberation outside the state apparatus. They depend on political actors for possible influence on the political framework in order to be able to translate their spontaneous or 'communicative power' into political impact on decision-making.<sup>64</sup> The focus here is on the political action by civil society: the identification of collective problems and the influencing of political processes in order to translate public opinion into a legal rule. Whether the political action by NGOs occurs at a local, national, or regional level, it is considered to have positive effects for international democracy.

This line of reasoning implies a certain robustness of an international or global civil society that is critically assessed by opponents of the thesis.<sup>65</sup> They consider this concept of a global civil society extremely heterogeneous and fragmented and full of unequal relationships in terms of power and dependency. Besides, as is argued, one should critically assess if NGOs and

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<sup>60</sup> Boaventura de Sousa Santos and César Rodríguez-Garavito (eds), *Law and Globalization from Below. Towards a Cosmopolitan Legality* (Cambridge University Press, 2005) 6.

<sup>61</sup> William F. Fisher, 'Doing Good? The Politics and Antipolitics of NGO Practices' (1997) 26 *Annual Review of Anthropology* 444, referring to Alan Fowler, 'The Role of NGOs in Changing State-Society Relations: Perspectives from Eastern and Southern Africa' (1991) 9 *Development Policy Review* 53; Telmo Rudi Frantz, 'The Role of NGOs in the Strengthening of Civil Society' (1987) 15 *World Development* 121.

<sup>62</sup> Scholte (n 34) 17.

<sup>63</sup> Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003) 154.

<sup>64</sup> Jürgen Habermas, 'Hannah Arendt's Communications Concept of Power' (1977) 44(1) *Social Research* 3.

<sup>65</sup> Grant and Keohane (n 17) 34; Hirsch (n 28) 248.

civil society can be conceptually conflated.<sup>66</sup> Critics fear that the equation of NGOs and civil society often merely serves the supporters of politically progressive NGOs and social movements.<sup>67</sup> In addition, they point out a potential paradox in the alleged role of NGOs as facilitators of voices, knowledge and social engagement. Although interaction instigated by NGOs might lead to the desired empowerment of specific communities, it can also lead to a disempowering ‘dependency’ relationship between these communities and NGOs.<sup>68</sup>

## 2.2. Lack of internal legitimacy

The main criticism on the NGO democratic legitimacy thesis seems to concern the lack of accountability and representation of NGOs; what I call their ‘internal legitimacy’. To gain authority to speak for other individuals or groups of individuals, NGOs should be internally organised in a democratic way.<sup>69</sup> This assumption can also be found in the ECOSOC rules on accreditation that require from NGOs a democratically adopted constitution.<sup>70</sup>

The criticism concerning the internal legitimacy of NGOs partly derives from a sense of ‘practice what you preach’.<sup>71</sup> Most NGOs are particularly conscious of the lack of accountability and representation by states and international organisations. Therefore, they themselves should lead by example and are expected to prove that they have the authority to speak for those they intend to represent.<sup>72</sup>

By pointing out that NGOs generally are not fully membership based, governed or financed, scholars problematise the accountability of NGOs.<sup>73</sup> It is considered questionable how public disempowerment, as we are familiar

<sup>66</sup> Kenneth Anderson, ‘The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society’ (2000) 11(1) *European Journal for International Law* 110.

<sup>67</sup> David Rieff, ‘The False Dawn of Civil Society’ (1999) 268(7) *The Nation*; Thomas Kelley, ‘Wait! That’s Not What We Meant by Civil Society!: Questioning the NGO Orthodoxy in West Africa’, *Brooklyn International Law Review* 36(3), 2011.

<sup>68</sup> Patrick Kilby, ‘Accountability for Empowerment: Dilemmas Facing Non-Governmental Organizations’ (2006) 34(6) *World Development* 955.

<sup>69</sup> Here, the conventional democratic requirements set forth for public state-based institutions are equally applied to NGOs. Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters, Geir Ulfstein (eds) *The Constitutionalization of International Law* (Oxford University Press, 2009) 237; Anderson (n 26) 846; Hugo Slim, ‘By What Authority? The Legitimacy and Accountability of Non-Governmental Organizations’ (2002) *Paper for The International Council on Human Rights Policy International Meeting on Global Trends and Human Rights – Before and after September 11* <http://www.jha.ac/articles/a082.htm> (last visited November 2018) 4–5; Mercer (n 26) 13.

<sup>70</sup> ECOSOC, Resolution 1996/31, para. 22.

<sup>71</sup> I have criticised this type of argument elsewhere: Martine Beijerman, ‘Practice what you Preach? Limitations to Imposing Democratic Norms on NGOs’ (2018) 20 *International Community Law Review* 3.

<sup>72</sup> Anheier (n 58) 1090; Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2(2) *Regulation & Governance* 148.

<sup>73</sup> Kilby (n 68) 960, 952, referring to Alan Fowler, ‘NGOs as a Moment in History: Beyond Aid to Social Entrepreneurship or Civic Innovation’ (2000) 21(4) *Third World Quarterly* 637; Debora Spar and James Dail, ‘Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations’ (2002) 3(1) *Chicago Journal of International Law* 176; Raustiala (n 27) 171.

with in our parliamentary electoral systems, should take place.<sup>74</sup> The geographical scope of the constituency of NGOs is broad, scattered, and differently constituted than that of states or political representatives.<sup>75</sup> This makes critics question whether there is enough proximity of NGOs to the needs of the people whom they are supposed to represent. The detachment between NGOs and the people they purport to represent can in their view 'reinforce a global divide of wealth, mobility, information, and access to audience'.<sup>76</sup> NGOs allegedly act as self-appointed representatives.<sup>77</sup>

In short, it is questioned how NGOs could foster any inclusive and equal law-making process, when they fail to truly represent affected individuals. More specifically, NGOs are criticised for representing the will of organised interests, of factions.<sup>78</sup> It is feared that NGOs, by representing special interests, take advantage of open decision-making processes in order to distort policy outcomes.<sup>79</sup> This criticism seems to originate from the classic issue of the unbalanced influence of factions on the exercise of public authority. NGOs' capability to carefully weigh different interests is questioned, not least because of the considerable self-interest of the organisations in pursuing pre-selected goals.<sup>80</sup> Scholars fear that participation of NGOs may give too much power to those with strong views, leading to insufficient attention to the public interest at large.<sup>81</sup>

Besides, many of the NGOs that are engaged in international norm setting are often considered to represent states rather than affected individuals.<sup>82</sup> If

<sup>74</sup> Dana Brakman Reiser and Claire R. Kelly, 'Linking NGO Accountability and the Legitimacy of Global Governance' (2011) 36(3) *Brooklyn Journal of International Law* 1023; Slim (n 69) 2, 4; Cullen and Morrow (n 40) 10; Wheatley (n 55) 161; Peter J. Spiro, 'Accounting for NGOs' (2002) 3(1) *Chicago Journal of International Law* 162; Spar and Dail (n 73) 173; Steve Charnovitz, 'Accountability of Nongovernmental Organizations (NGOs) in Global Governance' (2005) Research Paper No.145 *GWU Law School Public Law* 1; Robert O. Keohane, 'Commentary on the Democratic Accountability of Non-Governmental Organizations' (2002) 3(2) *Chicago Journal International Law* 477.

<sup>75</sup> James N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge University Press, 1997) 64. NGOs are arguably more accountable to global citizenry than states are. Paul Wapner, 'Defending accountability in NGOs' (2002) 3(1) *Chicago Journal of International Law* 204–5. However, Mercer problematizes the account giving by NGOs. Mercer (n 26) 13.

<sup>76</sup> David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 121.

<sup>77</sup> Anderson and Rieff (n 15) 5. Kilby (n 68) 952, referring to Paul J. Nelson, *The World Bank and NGOs: The Limits of Apolitical Development* (MacMillan, 1995); Michael Roose, 'Greenpeace, Social Media, and the Possibility of Global Deliberation on the Environment' (2012) 19(1) *Indiana Journal of Global Legal Studies* 347.

<sup>78</sup> Laura Pedraza-Fariña, 'Conceptions of Civil Society in International Lawmaking and Implementation: A Theoretical Framework' (2013) 34(3) *Michigan Journal of International Law* 663. See also Loren E. Lomasky, 'Classical Liberalism and Civil Society' in Simone Chambers and Will Kymlicka (eds), *Alternative Conceptions of Civil Society* (Princeton University Press, 2002).

<sup>79</sup> See Martin Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2000) 8(2) *Indiana Journal of Global Legal Studies*; Rossi (n 47) 196–208; Bolton (n 51) 206.

<sup>80</sup> Hirsch (n 28) 256; Anderson (n 66) 118.

<sup>81</sup> Rossi (n 47) 196–208; Bolton (n 51) 206.

<sup>82</sup> See Kim D. Reimann, 'A View from the Top: International Politics, Norms and the Worldwide Growth of NGOs' (2006) 50(1) *International Studies Quarterly* 45; Tallberg (n 57) 4. Anderson (n 66) 117; Johns (n 54) 2.

independent, like the NGOs that are critical of their own state practices, or entirely eschew state-centric views, NGOs could pluralise the debate, detect exclusionary practices, and control governmental practices.<sup>83</sup> However, according to the critics, this independent position of NGOs is severely hindered by the cooperative nature of the relationship between some of the larger NGOs, states, and international organisations.<sup>84</sup> Being dependent on an accreditation before being able to participate in international law-making contradicts the assumption that NGOs form an independent opposition to governmental power and therefore establish a system of checks and balances at the international level.<sup>85</sup> NGOs are primarily considered to function as service providers, as policy analysts and expert advisors beneficial to governments.<sup>86</sup> These arguments relate to the fluid line between being invited to challenge the international exercise of authority, based on its possibly exclusionary law-making process, and being invited to support the international exercise of authority.<sup>87</sup> This fluidity is considered to limit the ability of NGOs to criticise the international law-making system from the outside.<sup>88</sup>

In addition, a culture-related argument is often made in relation to the internal legitimacy of NGOs. Better organised, more powerful, and mostly Northern NGOs are considered to benefit from a geographical imbalance of interest representation in international law-making.<sup>89</sup> International NGOs in particular are criticised as representing elite groups exclusively.<sup>90</sup> Their international norm creating efforts are not vertical, as suggested by supporters of the thesis, but merely horizontal, taking place primarily among influential non-profit organisations.<sup>91</sup> In order to correct this imbalance, 'weak' and 'underdeveloped' civil societies necessitate measures to breathe life into

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<sup>83</sup> See Olivier de Frouville, 'Domesticating Civil Society at the United Nations' in Pierre-Marie Dupuy and Louisa Vierucci (eds), *NGOs in International Law, Efficiency in Flexibility?* (Elgar, 2008) 71.

<sup>84</sup> Spar and Dail (n 73) 180 referring to Michael Edwards and David Hulme, 'Too Close for Comfort? The Impact of Official Aid on Nongovernmental Organizations' (1996) 24(6) *World Development* 961; Fowler (n 73); Michael Bratton, 'Non-Governmental Organizations in Africa: Can They Influence Government Policy?' (1990) 21 *Development & Change* 87.

<sup>85</sup> Richard Falk and Andrew Strauss, 'On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty' (2000) 36(2) *Stanford Journal of International Law* 215; Math Noortmann, 'Who Really Needs Article 71? A Critical Approach to the Relationship between NGOs and the UN', in W. P. Heere (ed) *From Government To Governance: The Growing Impact of Non-State Actors on The International and European Legal System*. Proceedings of the sixth Hague Joint conference held in The Hague, The Netherlands 3–5 July 2003 (T.M.C. Asser Press, 2004) 118.

<sup>86</sup> Esty (n 20) 129; Rebasti (n 48) 37.

<sup>87</sup> Felicity Anne Vabulas, 'What Is a Seat on the ECOSOC NGO Committee worth? Exploring the State Motivations and Benefits of Granting UN Access to NGOs' (2011) *Paper prepared for the American Political Science Association Annual Conference*, Seattle, September 1–4, 11.

<sup>88</sup> Perez (n 16) 44; Hirsch (n 28) 258.

<sup>89</sup> Peters (n 11) 318. See also Jan Aart Scholte, 'A More Inclusive Global Governance? The IMF and Civil Society in Africa' (2012) 18(2) *Global Governance* 185. Vabulas (n 87) 12–17; Tallberg (n 57) 4.

<sup>90</sup> Anderson (n 66) 117; Johns (n 54) 2.

<sup>91</sup> Glasius and Timms (n 56) 225.

local NGOs, often through donor practices.<sup>92</sup> However, this democratisation of domestic civil society groups through the support of international NGOs is criticised as being the experience of only a handful of countries.<sup>93</sup> The crux of the criticism on NGOs is that they claim to represent people without having received a form of authorisation from them.<sup>94</sup>

### 3. Democratic legitimacy as object of ambiguity

Standing alone, most arguments of both opponents and proponents of the thesis have merits. However, considered in conjunction, they confront us with irreconcilable differences in underlying conceptions of democratic legitimacy. This makes the divergence in the validation of the participation of NGOs in international law-making inevitable, at least to a certain extent.

The explanations of scholars as to how to conceive of NGOs in the international legal order are prompted by their incorporated theoretical mind-set. Some scholars take a moral, and others a more systematic stance towards democratic legitimacy. Some focus on the practical barriers to establishing democratic legitimacy by NGOs in international law-making practices. Others seem to doubt the value of the discussion entirely, given the ‘intrinsic’ democratic deficiencies of the international legal order itself. One can detect idealist solutions versus realist proposals, sovereignty proponents versus community thinkers, and ideas influenced by constitutional thinking versus pluralist thinking.

Compare for example the work of Kamminga and MacDonald on NGOs, with Anderson’s opposition to the NGO democratic legitimacy thesis. Kamminga relies on a conception of democratic legitimacy based on pluralist interest representation,<sup>95</sup> whereas Anderson largely bases his criticism on the thesis on a conception of democratic legitimacy in which representation by NGOs is perceived in a political, liberal individualist sense.<sup>96</sup> Macdonald, on the other hand, explicitly rejects a narrow traditional approach to representation and broadens the scope of what she calls ‘jurisdictional representation’ with ‘constitutive representation’.<sup>97</sup> These diverging conceptions of key elements of democratic legitimacy range from authority, representation, civil society, and participation, and evidently guide the validation of the role of NGOs and complicate the commensurability of the thesis.

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<sup>92</sup> David Lewis, ‘Civil Society in African Contexts: Reflections on the Usefulness of a Concept’ (2002) 33(4) *Development and Change* 574.

<sup>93</sup> Anderson (n 66) 118; Johns (n 54) 7.

<sup>94</sup> Peruzzotti (n 23) 162–3. See for a response to this criticism, Laura Montanaro, ‘The Democratic Legitimacy of Self-Appointed Representatives’ (2012) 74(4) *The Journal of Politics* 1094.

<sup>95</sup> Menno T. Kamminga, ‘The Evolving Status of NGOs under International Law, a Threat to the Inter-State System?’ in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford University Press, 2005) 110.

<sup>96</sup> Anderson and Rieff (n 15) 5, referring to Anderson (n 66).

<sup>97</sup> Macdonald (n 23) 99–100, 182–220.

The first and preliminary incompatibility refers to the level of application of the standard of democratic legitimacy. Most critics seem to be of the opinion that the application of democratic legitimacy as a standard should be limited to the political spectrum of the state. Democratic legitimacy is suggested to require a democratic system: a democracy.<sup>98</sup> This normative starting point questions if democratic features such as the expression of the will of the people are compatible with the international legal order.<sup>99</sup> As is argued, only at the state level can one find a *demos*, a people. And only when one can speak of a people, democratic legitimacy is relevant for testing the acceptability of authority.<sup>100</sup> In relation to international law-making this means that consent of states is a clear indicator for knowing that international laws, accorded by states, are based on the will of the affected people.<sup>101</sup>

The second incompatibility in perspectives relates to the issue of normativity of international law. First, proponents of the thesis who identify problems with the democratic legitimacy of international law often contextualise international law in a very broad way. International law includes international agreements, statutes of international organisations, and standards set by a conglomerate of states, international organisations and private, non-governmental organisations. Some of these types of law-making exercises exceed the boundaries of the traditional doctrine of state consent. This seems to be the main motivation to reconsider the democratic legitimacy of international law. However, their opponents argue that these 'softer' forms of international rules do not require such a strong evaluation test.<sup>102</sup> The very justification of using democratic legitimacy is in their view exclusively related to the interfering and dominating characteristics of law, being binding and coercive upon its subjects. Second, other critics seem to even question the relevance of approaching international legal interactions as a political institution.<sup>103</sup> While they underline the

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<sup>98</sup> Eva Erman, 'Why Adding Democratic Values Is Not Enough for Global Democracy' in Eva Erman and Anders Uhlin (eds) *Legitimacy Beyond the State? Re-Examining the Democratic Credentials of Transnational Actors* (Palgrave MacMillan, 2010) 179, referring to Robert A. Dahl, 'Can International Organizations Be Democratic? A Skeptic's View' in Ian Shapiro and Casiano Hacker-Cordón (eds) *Democracy's Edges* (Cambridge University Press, 1999) 22–25. See also Görg and Hirsch (n 11) 606; McGrew (n 11) 12.

<sup>99</sup> Martin de Jong and Suzan Stoter, 'Institutional Transplantation and the Rule of Law: How This Interdisciplinary Method Can Enhance the Legitimacy of International Organisations' (2009) 2(3) *Erasmus Law Review* 311.

<sup>100</sup> Peter van Ham, *European Integration and the Postmodern Condition: Governance, Democracy, Identity* (Routledge, 2002) 156. Kymlicka insists that linguistic/territorial political associations are the primary forum for democratic participation. Will Kymlicka, 'Citizenship in an Era of Globalization: A Commentary on Held', in Ian Shapiro and Casiano Hacker-Cordon (eds) *Democracy's Edges* (Cambridge University Press, 1999) 121.

<sup>101</sup> Pierre Manent, Paul Seaton, Brian C. Anderson, Daniel J. Mahoney, 'Democracy without Nations?' (1997) 8(2) *Journal of Democracy* 92.

<sup>102</sup> Andrew Guzman and Jennifer Landslide, 'The Myth of International Delegation' (2008) 96(6) *California Law Review* 1693, 1696; Thomas Nagel, 'The Problem of Global Justice' (2005) 33(2) *Philosophy & Public Affairs* 122, referring to Liam B. Murphy, 'Institutions and the Demands of Justice' (1998) 27(4) *Philosophy and Public Affairs* 253–4.

<sup>103</sup> Anderson (n 26) 841.

importance of democratic legitimacy as a concept *in se*, their conception is inseparably related to the type of exercise of public authority that is exclusively found at the domestic level. Here it is not so much the characteristics of the law, but the characteristics of the nation state that are considered decisive for not applying the standard of democratic legitimacy to international law. These two perspectives share a basic trust in state-based institutions and conceptually disagree with the rise and relevance of the thesis in the first place.<sup>104</sup> Besides the alleged irrelevance of democratic legitimacy of international law, the participation of NGOs is therefore considered a disruption of the functioning of nation-state democracies themselves.<sup>105</sup>

Consequently, discussants rarely meet substantively on the different issues that constitute the thesis, as it first requires an unlikely adaptation of their basic conceptions of democratic legitimacy. Any attempt to live up to one of the dominant points of criticism concerning NGOs' inadequate accountability and representation, for instance by strengthening the accountability structures and instruments of NGOs, is fruitless when the conception of representation to which critics adhere is based on a constituency relationship between the actor and the represented in a state-based democracy.<sup>106</sup> In addition, given the fact that most NGOs are neither membership-based organisations nor elected bodies, any discussion concerning their accountability requires fundamental reforms of their organisational structure in line with the critics' perception of representation, or an adaptation of the critics' conception of representation, and of democratic legitimacy fundamentally, which are both unlikely to happen.

Underlying the different appreciations of the NGO democratic legitimacy thesis one can detect three variations that might explain the principled disagreements concerning democratic legitimacy: universalism versus particularism, institutionalism versus non-institutionalism, and multiform approaches versus uniform approaches to democratic legitimacy.

### **3.1. Universalism versus particularism**

The NGO democratic legitimacy thesis relies on the idea that democratic legitimacy is relevant wherever and whenever authority is exercised. Just like national law, international law has to derive from the people,<sup>107</sup> as it affects the capacity of individuals and groups to determine the conditions

<sup>104</sup> Johan Karlsson Schaffer, 'Affected and Subjected – The All-Affected Principle in Transnational Democratic Theory' (2006) Discussion Paper SP IV 2006-304 *Wissenschaftszentrum Berlin für Sozialforschung* 13.

<sup>105</sup> Raustiala (n 27) 170, 171; Bhagwati (n 51) 29; Bolton (n 51) 217.

<sup>106</sup> Kilby (n 68) 951; Patrick Kilby, 'Is Empowerment Possible under a New Public Management Environment? Some lessons from India' (2004) 7 *International Public Management Journal*; Poonam Smith-Sreen, *Accountability in Development Organizations: Experiences of Women's Organizations in India* (Sage, 1995).

<sup>107</sup> Bryde (n 40) 109.

of their lives.<sup>108</sup> The difference in territorial level is relativised.<sup>109</sup> Here one detects an often implicit but strong and influential divide between scholars involved in the thesis, the universalism versus particularism divide. This divide relates to the perception that specific democratic norms have universal value versus the perception that democratic values are inseparably related to certain institutions or territorial spaces.<sup>110</sup>

From a universalistic point of view, individuals, rather than peoples, states, or societies, constitute the basic ground for morality, regardless of the institutional character of an organisation that makes the laws. Any social construction needs to be justified with regard to individuals, irrespective of whether it consists of a small group of individuals or a large and institutionalised one. It implies an analysis in which the jurisprudence of democratic legitimacy is universal and applicable to all levels.<sup>111</sup>

A positive reading of the NGO democratic legitimacy thesis requires such a universalistic outlook on the necessity to democratically legitimize international law. The need to engage in politics, and the significance of doing so, are considered omnipresent. Therefore, the interest of an individual in influencing decision-making could not be limited to certain spaces, but is defined by the impact of an authoritative decision on his or her life. A global democratic community should be acknowledged, and heard, that both includes and cuts across national democratic communities. The legislative work of UN agencies is compared to the exercise of public authority at the domestic level and is therefore considered an appropriate object of democratic legitimation. This approach relativises the importance of a sense of national belonging, which in the traditional doctrine of state consent is seen as a decisive condition for the existence of democratic legitimacy.<sup>112</sup>

From the way they build up their arguments one can derive that critics seem to contest this claim of universality that presents democratic rights as rights for everyone, applicable everywhere.<sup>113</sup> They take a rather particularistic approach towards rights and values,<sup>114</sup> often based on a holistic view on democracy. Democracy is considered an institution, or set of institutions,

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<sup>108</sup> See Marks (n 24) 104; Samantha Besson, 'Institutionalizing Global Democracy' in Lukas H. Meyer (eds) *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009) 65.

<sup>109</sup> Charnovitz (n 74) 12.

<sup>110</sup> See Armin von Bogdandy and Sergio Dellavalle, 'Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms' (2009) 10(1) *German Law Journal* 5.

<sup>111</sup> Nagel (n 102) 124; Myres S. McDougal and Harold D. Lasswell 'The Identification and Appraisal of Diverse Systems of Public Order' (1959) 53 (1) *American Journal of International Law* 32.

<sup>112</sup> From this point of view, one considers the individual who uses the NGO as an instrument of voluntary association as the source of legitimacy for an NGO. See Charnovitz (n 74) 13.

<sup>113</sup> Martti Koskeniemi, *Politics of International Law* (Hart, 2011) 223, referring to Martti Koskeniemi, 'The Wonderful Artificiality of States' (1994) 88 *Proceedings of the American Society of International Law* 22–29.

<sup>114</sup> Rawls is well known for taking a dualist perspective that insists on the application of different principles to different types of entities. See John Rawls, *A Theory of Justice*, rev. ed. (Harvard University Press, 1999) 25.

achieved through electoral processes, and is closely associated with the ideas of a defined political community. This perspective rests strongly on the idea of a *demos*, and on the identification of international law as a voluntary association of democratic states.<sup>115</sup> The state, with its monopoly of force, establishes a unique institutional relationship between its citizens.<sup>116</sup> The existence of sovereign state power entails exceptional demands and exceptional obligations, which cannot be applied to any institution other than the state.<sup>117</sup>

Underlying the different arguments made by critics one can sense a belief that that democratic legitimacy is not applicable to the world as a whole, unless one unified sovereign power would govern the world. As this is not the case, the sovereign state defines and delimits the people on whose behalf representatives act, and to whom they are accountable.<sup>118</sup> Only state authority, with its claim to a monopoly of coercive force, lends itself to an analysis in terms of democracy and democratic legitimacy.<sup>119</sup> This approach to states as primary lawmakers insists on the application of different principles to different types of entities.<sup>120</sup>

The underlying assumptions of most critical work on NGOs seem to be based on such a particularistic approach. The necessary conceptual move of applying democratic legitimacy to another legal order than that of the nation-state is simply not supported. Although hardly acknowledged or discussed in the debate, the universalism-particularism divide is fundamental and preliminary to the NGO democratic legitimacy thesis. It concerns the question of the right level of application of democratic legitimacy as a standard for evaluating public authority.<sup>121</sup>

### 3.2. Institutionalism versus non-institutionalism

When a universalistic approach is taken towards the applicability of democratic legitimacy to international law—in other words, when scholars seem

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<sup>115</sup> See for a critical view, Thomas Christiano 'A Democratic Theory of Territory and Some Puzzles about Global Democracy' (2006) 37(1) *Journal of Social Philosophy* 85. Christiano relativises these assumed interdependencies of persons across borders, by mirroring them to the interdependencies that exist within political societies and remarks that these interdependencies are far greater.

<sup>116</sup> One can parallel this perspective, which is evidently critical to the transplantation of democratic legitimacy to the international legal order, with the 'political conception' of that other ideal that is often pleaded for internationally: justice. Nagel (n 102) 116.

<sup>117</sup> Nagel (n 102) 130; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) 6.

<sup>118</sup> Martti Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with a New Epilogue* (Cambridge University Press, 2006) 584.

<sup>119</sup> Gráinne De Búrca, 'Developing Democracy Beyond the State' (2007–2008) 46(2) *Columbia Journal of Transnational Law* 230, referring to Abner S. Greene, 'Civil Society and Multiple Repositories of Power' (2000) 75 *Chicago-Kent Law Review* 480–87.

<sup>120</sup> This is in line with Rawls' reasoning, which states that 'the correct regulative principle for a thing depends on the nature of that thing'. Rawls (n 114) 25.

<sup>121</sup> Neil Walker raised a similar point: Neil Walker, 'Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms' (2012) 3(1) *Transnational Legal Theory* 65.

to consider applying democratic legitimacy to international law coherent—another variation in approaches to democratic legitimacy manifests itself: the institutionalist versus non-institutionalist approach. At this stage, the scholarly perspectives seem to diverge on the manifestations of democratic legitimacy, instead of on the level of application.

In the work of proponents of the thesis one can find many references to non-institutional characteristics of democratic legitimacy such as a vivid democratic culture, a well-functioning public sphere and an active civil society. They seem to share a distinctive preference for more dynamic and informal approaches to democratic legitimacy and towards the international legal order at large, as opposed to a formal, institutional conception of democracy, law, and a legal order based on political rights and judicial safeguards. One can appreciate these non-institutional readings of democratic legitimacy as counter reactions to state-centric formalism that has dominated the international democracy debate for decades.

Take for example the discussion about international legal personality and NGOs. Proponents of the NGO democratic legitimacy thesis do not show any objection to theorising a role for non-state actors in international law-making despite lacking international legal personality.<sup>122</sup> However, more formal, institutionally oriented scholars perceive international legal personality as a determining factor in stipulating rights and duties of actors involved in international law-making. Given the asserted importance of international legal personality, these institution-oriented scholars perceive only states as relevant subjects and actors of international law-making. Any theory of a global public sphere leads to scepticism, as no juridical public exists internationally, nor a real public as we are familiar with in domestic democracies.<sup>123</sup>

Another example of the institutionalist versus non-institutionalist variation is the importance that is attached to the role of consent to the determination of international law. Institutional scholars are sensitive to the clarification of consent for understanding international obligations, while their non-institutionalist critics argue that law should be perceived as a matter of principle. In their view law is dependent on a particular reading of it; it is a matter of judgment or expertise.<sup>124</sup> This argumentation line brings us back to the discussed differences of perspectives towards the normativity of international law and the consequential need for democratic legitimate international law, as mentioned in the introduction of section 3.

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<sup>122</sup> David Kennedy, 'When Renewal Repeats: Thinking Against the Box' (2000) 32 *New York University Journal of International Law and Politics* 361.

<sup>123</sup> Especially legal scholars engaged in the debate on NGOs often take a formalistic approach. See James Boyle, 'Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form Private Jurisprudence of Substance' (1992) 78(3) *Cornell Law Review* 394; Woodward (n 40) 143 referring to Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 (6) *Southern California Law Review* 1165; Charnovitz (n 74) 10, referring to Grant and Keohane (n 17).

<sup>124</sup> Kennedy (n 122) 366.

With regard to democratic legitimacy, a formal, institutional approach seems similar to the above-mentioned particularistic approach to democratic legitimacy. In an institutionalist approach to democratic legitimacy, scholars also often appreciate the sovereignty of states as the spill-over of liberal legal theory. However, instead of questioning the validity of applying democratic legitimacy outside the boundaries of a state, they emphasise the institutions such as political rights and judicial safeguards that states have at their disposal as necessary preconditions for any application of democratic legitimacy.<sup>125</sup>

Proponents of the thesis seem to question whether such a formal conception of the international legal order does not shift too much from the basic unit of the public, which is the individual.<sup>126</sup> The international legal order is understood as a global community that both includes and cuts across national democratic communities.<sup>127</sup> Since the late 1990s onwards, scholars have come to perceive individuals as active participants, on occasion united in the formation of an NGO. In this reading, international law-making is far from static, with separate functional or territorial spheres in which actors have institutionalised positions.<sup>128</sup> A focus on less formal characteristics of the international legal order is favourable to their aim to restore missing dimensions of democracy that cannot be captured by 'one dimensional' approaches to democracy, characterised by a focus on nation-state electoral majorities.<sup>129</sup> International governance is considered to exercise public authority, although it does not fall easily into conventionally or nationally defined categories, and notwithstanding its 'soft' or 'liquid' appearances.<sup>130</sup> Such a non-institutionalist approach to the international legal order with a focus on informal elements related to democratic legitimacy, such as a vibrant public sphere, deliberation, and an active global civil society, seems to be primarily motivated by universalistic concerns regarding the lack of connection between those who establish international legal norms and individuals who are considered affected by the implementation of those norms.<sup>131</sup>

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<sup>125</sup> De Búrca (n 119) 230.

<sup>126</sup> See Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press, 2004); Charnovitz (n 74) 11; Marks (n 24) 113. See also David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, 1995); Jürgen Habermas, *The Postnational Constellation. Political Essays* (MIT Press, 2001); Besson (n 24) 11–12.

<sup>127</sup> See McDougal and Lasswell (n 111) 7; Kennedy (n 122) 352, 368.

<sup>128</sup> McDougal and Lasswell (n 111) 7, 8.

<sup>129</sup> For a critique on this 'one-dimensional' approach to democracies: See Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press, 2001); Christopher L. Eisgruber, *Constitutional Self-Government* (Harvard University Press, 2001).

<sup>130</sup> De Búrca (n 119) 230.

<sup>131</sup> See Frederick S. Dunn and Alwyn V. Freeman, 'The International Rights of Individuals' (1941) 35 *Proceedings of the American Society of International Law at Its Annual Meeting 1941* American Society of International Law 14; Simone Gorski, 'Individuals in International Law' *Max Planck Encyclopedia of Public International Law* 2013 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e829?rskey=HRQ1pf&result=3&prd=EPIL> under 52 (last visited November 2018); Rosalyn Higgins, *Problems and Process. International Law and How We Use It* (Oxford University Press, 1994); Allen E. Buchanan, *Justice, Legitimacy and Self-Determination, Moral Foundations for*

### 3.3. Uniform versus multiform approaches

One can also notice a difference in scholarly rigidity on the appearance of democratic legitimacy. This is in my view the third cause of variation in the NGO democratic legitimacy debate: some take a uniform approach to the appearance of democratic legitimacy and others a multiform approach.

Mostly the critics of the NGO democratic legitimacy thesis seem to adhere to a rigid conception of democratic legitimacy. The same standard of democratic legitimacy, with the same preconditions and manifestations should be used to whatever level of governance democratic legitimacy is applied. I call this the uniform approach to democratic legitimacy. This approach primarily contrasts with the view of proponents who rely on the idea that the way one applies democratic legitimacy to evaluate international law differs from the way one applies the democratic legitimacy to evaluate domestic law. I call this the multiform approach to democratic legitimacy. A multiform approach upholds a variable conception of democratic legitimacy, whose appearance might change according to the characteristics of the setting to which it is applied.

Scholars upholding a multiform approach conceive democratic legitimacy as a bundle of core values, practices, and procedural norms. There is a tendency to isolate these individual democratic practices and to presume that international law enjoys more democratic legitimacy if the law-making process has respected one of these values, practices or norms. A positive relationship between NGOs and one of these components is selectively emphasised.<sup>132</sup>

Both approaches offer a different way out to a certain circularity that we are confronted with when discussing the democratic legitimacy of international law. As we are all aware, institutional democratic mechanisms, such as direct rights to participate or vote or an international parliament are non-existent in the international legal order.<sup>133</sup> It is this lack of political rights and judicial safeguards internationally that probably has instigated proponents to conceptualise democratic legitimacy differently in terms of its manifestations. Most of the critics on the other hand, are fundamentally convinced that democratic legitimacy as a concept cannot change its appearance according to the level of governing, and therefore have no choice but to dismiss the NGO democratic legitimacy thesis entirely.

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*International Law* (Oxford University Press, 2004) 314–5; Habermas (n 126) 88; Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Law?' (1999) 93(3) *American Journal of International Law* 606.

<sup>132</sup> See John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000) 116. See for a comparable, but more institutionalist approach: Macdonald (n 23) 162.

<sup>133</sup> Neil Walker, 'Constitutionalism and the Incompleteness of Democracy: An Iterative Relationship' (2010) 39(3) *Rechtsfilosofie en Rechtstheorie* 226.

#### 4. A classification

The three variations, as discussed in section 3, challenge the sentiment of genuineness and commensurability linked to the positions taken and set out in section 2. Skepticism towards a positive relationship between democratic legitimacy and NGO involvement is often instigated by a particularistic approach to concepts like democracy, justice, or legitimacy that rejects any universalistic approach to morality, or by a universalistic but institutionalist approach towards the manifestations of democratic legitimacy. At the other end of the spectrum, the 'social capital' arguments of scholars that adhere to a non-institutionalist approach to democratic legitimacy already hint at the shortcomings of state-centred approaches to democratic legitimacy.<sup>134</sup>

The different conceptual starting points discussed often remain implicit in the debate on the NGO democratic legitimacy thesis. Participating scholars seldom explicitly acknowledge the fact that the assumptions informing their different stances in the NGO democratic legitimacy debate do not match.<sup>135</sup> The discourse is characterised by isolated discussions on related themes such as whether NGOs represent people, whether a global civil society exists, whether NGOs are sufficiently accountable or whether international organisations offer sufficient space for Southern NGOs. In other words, the central issue often concerns whether or not NGOs are themselves defensible sources for the democratic legitimacy of international law. With this exclusive focus on NGOs, the meaning and appearance of democratic legitimacy as a concept is often presented as a given. This is problematic as it blurs the debate on the specific contributions NGOs may make, but it primarily distracts us from the main challenge of contemplating on how democratic legitimacy is, or should be, defined in the international legal order, necessary to uphold its critical potential to trace and address dominating exercises of international authority.

In order to facilitate any future discussions on the NGO democratic legitimacy thesis, and to push it towards the more fundamental discussion on international democratic legitimacy, let me conclude with a classification model of possible conceptions of democratic legitimacy of international law that might clarify the conceptual starting points of the scholars involved.

The different variations as explained in section 3 are not mutually exclusive. A universalistic approach towards the necessity for the democratic legitimation of international law does not exclude an institutionalist approach

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<sup>134</sup> Jeremy Waldron, 'All We Like Sheep' (1999) 12 *The Canadian Journal of Law & Jurisprudence* 355; William E. Connolly, *Identity, Difference: Democratic Negotiations of Political Paradox* (Cornell University Press, 1991) 219.

<sup>135</sup> An exception is Fisher (n 61) 447.

towards the types of manifestations of democratic legitimation focusing primarily on participation through votes, or on the identification of equal, individual, political agents that sporadically have the opportunity to decide who will represent them.<sup>136</sup> In contrast, other universalist-oriented scholars might look at specific informal elements of democratic legitimacy in isolation.<sup>137</sup> Furthermore, a non-institutionalist scholar, with a focus on engagement, inclusiveness, and deliberative democracy, relying on the permanent opportunity to participate by all who are affected by the public decisions made, does not need to embrace an international (universalistic) account of democratic legitimacy. **Model 1** illustrates the different possible syntheses between these three variations.

Let me apply this model to the debate on the NGO democratic legitimacy thesis. Given the arguments they use, one can conclude that most critics of the thesis feel disinclined to theorise democratic legitimacy in a context other than domestic democracy. This particularistic approach towards democratic legitimacy dismisses the NGO democratic legitimacy thesis in principle and insurmountably divides this group of scholars from the universalistic-minded scholars (A/B). However, instead of acknowledging their particularistic mind frame in which no democratically legitimate international law exists, these critics often point towards the malfunctioning of NGOs, the fact that they are not representative, cannot be held accountable and not be allowed to disrupt international law-making in any way. Apart from this group of scholars which from a very fundamental level do not agree with the thesis, one can categorise four approaches to the democratic legitimacy of international law that are relevant in understanding the differences in scholarly appreciation of the validity of the NGO democratic legitimacy thesis.

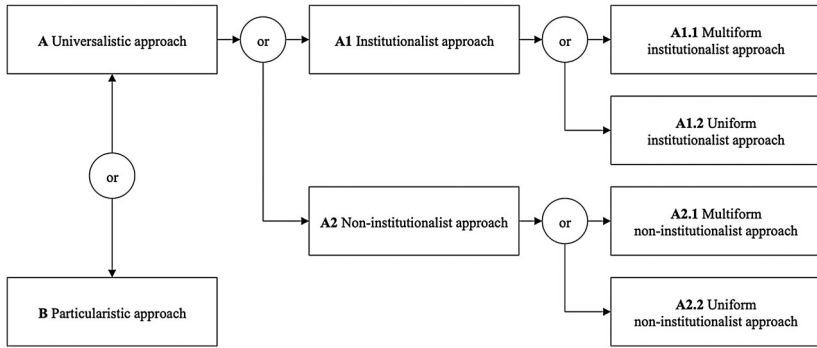
As discussed, a multiform institutionalist approach (A1.1) proceeds from the idea that international law requires a different conception of democratic legitimacy than domestic law. State consent and state autonomy both remain the dominant pillars of the democratic legitimacy of international law. The contribution of NGOs to the democratic legitimacy of international law is considered complementary to the democratic legitimacy offered by the consent to new international norms of democratic states, thereby constituting a so-called 'two-track approach'.<sup>138</sup> In light of the debate as discussed in this

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<sup>136</sup> Van Ham, for example, notes that we should strive to the establishment of a postmodernist democratic system, with a better fit to the current requirements of a larger and more diverse political environment. Peter van Ham, 'Europe's Postmodern Identity: A Critical Appraisal' (2001) 38(2) *International Politics* 229.

<sup>137</sup> See Allen Buchanan, 'Political Legitimacy and Democracy' (2002) 112(4) *Ethics* 689; Buchanan (n 131); Allen Buchanan, 'Democracy and the Commitment to International Law' (2006) 34(2) *Georgia Journal of International and Comparative Law* 305.

<sup>138</sup> Habermas, Besson, Higgot and Erman predominantly defend the two-track approach to democratic legitimacy of international law. See Jürgen Habermas, 'The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15(4) *Constellations*



**Model 1.** Variations in approaches to democratic legitimacy.

article one can conclude that not many advocates of the NGO democratic legitimacy thesis feel attracted to this approach. Their inclination towards NGOs as contributors to the democratic legitimacy of international law has primarily been fuelled by criticism on the waning of state autonomy and by the normative weakness of state consent as a democratic tool.

A uniform institutionalist approach (A1.2) to the thesis starts from the position that in order to democratically legitimize international law, the same institutional preconditions we are familiar with at the domestic level should be implemented in the international legal order. This approach is embedded in cosmopolitan democracy theory.<sup>139</sup> It shares its roots with the previous two-track approach, but it takes a uniform and institutionalist approach to democratic legitimacy's necessary global institutional manifestations for the democratic legitimacy of international law. This cosmopolitan approach requires the international legal order to be transformed into a political constellation, based on political rights, democratic institutions such as parliaments, and judicial safeguards, comparable to domestic democracies. Again, only a minority of the scholars engaged in the NGO democratic legitimacy thesis shares the ambition to establish a cosmopolitan democracy.

Whereas most critics take the particularistic approach (B) towards democratic legitimacy, the arguments presented by scholars favouring the NGO democratic legitimacy thesis predominantly point towards reasoning in line with universalist, non-institutionalist approaches to democratic legitimacy (A2).<sup>140</sup> Scholars whose work implicitly relies on a multiform non-institutionalist approach (A2.1) assume that the characteristics of international

444; Besson (n 110); Richard Higgot and Eva Erman, 'Deliberative Global Governance and the Question of Legitimacy: What Can We Learn from the WTO?' (2010) 36(2) *Review of International Studies* 449.

<sup>139</sup> See Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Stanford University Press, 1998); Daniele Archibugi and David Held, 'Cosmopolitan Democracy: Paths and Agents' (2011) 25(4) *Ethics and International Affairs* 433; McGrew (n 59).

law-making require fundamentally different manifestations of democratic legitimacy than we are familiar with at the domestic level. Although at the domestic level institutional preconditions such as political rights and judicial safeguards might be necessary and suitable, at the international level, NGOs contribute to a non-institutional manifestation of the democratic legitimacy of international law. The concept of democratic legitimacy here is tailored specifically to the non-institutional characteristics and norms of the international legal order, such as transparency, deliberation, accountability, and inclusiveness. The difference with the multiform institutionalist approach (A1.1) is that this conception of democratic legitimacy of international law does not rely on state consent or domestic democracy.

When scholars engaged in the NGO democratic legitimacy debate take a uniform non-institutionalist approach (A2.2), they argue that just as at the domestic level, non-institutional preconditions such as a well-functioning public sphere, and civil society, and democratic practices as deliberative practices, inclusion and openness are necessary and sufficient for the democratic legitimacy of law. In this respect, the activities of NGOs, presented as part of global civil society, form independent sources of democratic legitimacy. This approach is embedded in global deliberative democracy theory.<sup>141</sup> The impression is given that NGOs can directly democratically legitimize international law by contributing to global deliberative practices, transparency, accountability and control. Global deliberative practices are considered to enable democratic legitimation internationally, without requiring the backing of specific democratic institutional preconditions.

The classification offered here functions as an incentive for the scholars engaged in the debate on the NGO democratic legitimacy thesis to be more explicit about their theoretical assumptions. In addition to the intrinsic importance of a transparent discussion, this model would lead to a more fundamental discussion on what is expected of the democratic legitimacy of international law. This should, notwithstanding its complexity, precede any debate in which the NGOs and their actions form the centre stage or contention. Otherwise, the normative validations of NGO participation in international law float uneasily on conceptions of democratic legitimacy whose classification is always in flux between the participants. More importantly, if we do not share the same standards while assessing the acceptability of the exercise of international authority, democratic legitimacy as an evaluative tool loses its distinctive critical capacity. Ultimately, a watered-down conception

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<sup>140</sup> Jean Cohen, 'Trust, Voluntary Association and Workable Democracy: The Contemporary American Discourse of Civil Society' in Mark E. Warren (ed) *Democracy and Trust* (Cambridge University Press, 1999) 213.

<sup>141</sup> See John S. Dryzek, 'Global Democratization: Soup, Society or System?' (2011) 25(2) *Ethics and International Affairs* 225.

of democratic legitimacy risks being captured by the dynamics of current power plays.

### **Disclosure statement**

No potential conflict of interest was reported by the author.