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GOVERNANCE WITHOUT GOVERNMENT: THE NORMATIVE CHALLENGE TO THE GLOBAL LEGAL ORDER*

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I. International Law and Democracy: A Classical Approach

The point of departure is rooted in three trite, even banal affirmations about classical international law and democracy.

I.1. *The Rule of Law and Democracy*

Despite widespread use, the concepts of both Democracy and the Rule of Law are under-specified terms in the vocabulary of political theory and social science. Different theories give different meanings in different contexts to both. But however defined, it seems to us banal to recognize that in *domestic* settings democracy and the rule of law have become at least since the second half of the 20th Century inextricably linked, indeed interdependent. In our modern practices, the Rule of Law encapsulates, among other things, the claim to, and justification of, obedience to the law. Such obedience can neither be claimed, nor justified, if the laws in question did not emanate from a legal system embedded in some form of democracy. Democracy, on this reading, is one (though not the only one) of the indispensable normative components for the legitimacy of a legal order. In a departure from previous understandings, if obedience, as a matter of fact, is secured without the legitimacy

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emanating from the practices of democracy, we are no longer willing to qualify such as the Rule of Law. A dictatorship that followed strictly its internal legal system, would be just that: A dictatorship following legal rules. It would not qualify as a system upholding the Rule of Law. The reverse is also true: It is to rules of law that we turn to define whether the practices of democracy have indeed been followed and, more generally, the Rule of Law, with its constraint on the arbitrary use of power, is considered an indispensable material element of modern democracy.[1] An attempt to vindicate even verifiable expressions of popular will outside legally defined procedures is regarded by us as the rule of the mob, rather than democracy.

I.2. *The Rule of International Law: A Chronicle of Indifference and Hostility*

This interdependence and symbiosis is not the case when describing the 'Rule of International Law'. In discussing the relationship between International Law and democracy, it is useful to examine two different facets: First, doctrinally, the extent to which democracy forms part of the primary, material rules of international law and/or is part of its various doctrines; and, second, in a more self-referential process-oriented notion, the extent to which democracy is integrated into the process of international *lawmaking* and forms part of International Law's own set of secondary rules of recognition.

Our second trite or banal observation is that traditionally, as regards both facets, for most of the 20th Century, generally speaking International Law has displayed indifference, even hostility, to the concept of democracy.[2] Certainly, its claims to, and justification of, obedience were not rooted in notions of democratic legitimation.[3] We do not propose here fully to

[1] Thus, typically in considering the requirements of "good government", judicial supremacy (as a manifestation of the Rule of Law) is considered an essential element for democracy like free and fair elections and the like. Cf. Thomas Franck, "Democracy, Legitimacy and the Rule of Law", (Unpublished paper, 2000).

[2] We feel a close affinity and acknowledge an intellectual debt to James Crawford, Democracy in International Law: Inaugural Lecture (Cambridge University Press, 1994). There has been a resurgence of writing on international law and democracy often with a somewhat less skeptical approach to our own. We have profited from and are indebted to Thomas Franck, "The Emerging Right to Democratic Governance", 86 Am. J. Int'l Law 46-91 (1992) and the vast literature it has spawned. For the most recent thinking of these issues see the contributions in G. Fox, B. Roth, Democratic Governance and International Law, (Cambridge University Press, 2000).

[3] See, e.g. Watts, *The International Rule of Law*, *GYBIL* 1993, 15-45.

demonstrate this claim but simply to illustrate it as regards both its doctrinal and its self-referential aspects.

As regards the former even a cursory survey of some of the fundamental doctrines of classical international law will illustrate the point.

- *Pacta Sunt Servanda*, the primordial norm of international law, has never depended for its validity on the internal democratic arrangements of its subjects – States.[4] Democracy or lack of it is not among the vitiating or exculpating factors from an international legal obligation.[5]

[4] The general rule of international law does not allow, except in the narrowest of circumstances, for a State to use its own domestic law, including its own domestic constitutional law, as an excuse for non-performance of a treaty. That is part of the ABC of international law and is reflected in the Vienna Convention Article 27. "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46". See too the more recent Art. 32 of the Draft Articles on the Responsibility of States for International Wrongful Acts, ILC 2001: "The Responsible State May not rely on the provisions of its internal law as justification for failure to comply with the obligations under this Part" (Official Records of the General Assembly, Suppl. no. 10 (A/56/10) ch. IV, E1, Nov. 2001) Doctrine demonstrates an equal constancy in this respect. Compare for example Verdross, *Le fondement du droit international*, *Rec. des cours*, 1927, tome I, vol. 16, 251-321 with Quadri, *Le fondement du caractère obligatoire du droit international public*, in *Rec. des cours*, 1952, Tome I, vol. 80, 579-633. The most authoritative of texts in the 'Anglo-Saxon' world, *Oppenheim's International Law*, is clear: "It is firmly established that a State when charged with a breach of its international obligations cannot in international law validly plead as a defense that it was unable to fulfill them because its internal law ... contained rules in conflict with international law; this applies equally to a State's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement ...". Oppenheim's International Law, Vol. I: Peace 84-85. Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. (1992 Harlow, Essex.). What is true for formal constitutional requirements would, a fortiori, apply to softer notions such as the general requirements of democracy.

[5] The 'hardness' of the 'pacta' has remained intact even in the post '89-90 epoch despite the widespread turn to democracy, formal or otherwise, in many countries previously hostile to such notions. Whether the turn to democracy could qualify under the doctrine of *rebus sic stantibus* was discussed recently by the ICJ in the Gabcikovo – Magymaros Project (Hungary-Slovakia) case. "Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above)... The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they

- In defining subjecthood, for most of the past century, it was the efficiency of government, and its effective control over national territory that were critical to acceptance of both new States and new regimes – almost penalizing the more messy emergence of democracy.[6]
- The complex norms of State succession are not about vindicating democracy but about vindicating identity. The new State, which invokes the *Tabula Rasa* components of the laws of State Succession, did not do this on the grounds that they were non-democratically approved by, say, a previous colonial regime. Indeed, the rule of the newly independent State could be, and often was, as undemocratic as the displaced Metropolitan power. Prior obligations were rejected because approval, democratic or otherwise, did not emanate from the right "Self".[7]
- In the law of State Responsibility, unlike traditional concepts such as attribution, *dolus*, *culpa*, necessity – democracy has classically had no status as such as affecting the responsibility of States vis-à-vis other international actors.[8]
- In the central area of Use of Force, until recently,[9] intervention to vindicate democracy and/or to combat its overthrow was condemned not

constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed, (ICJ, REP, 1997, par. 104). Two points are of interest: First the fact that Hungary itself did not expressly refer to the dictatorial nature of the previous regime as a reason, per se, to escape responsibility. More interestingly, though the Court's language suggests the possibility in principle that the nature of the "political conditions" could be relevant to the essential basis of consent (the classical condition for the doctrine of *rebus sic stantibus* to apply), it is hard to imagine where that would be the case in relation to most treaties.

[6] For classical treatment see J. Crawford, "Democracy in International Law", supra n. 2. Practice has in this respect changed, notably in the post '89 epoch.

[7] Craven, The Problem of State Succession and the Identity of States under International Law, *EJIL* (1998), vol. 9, pp. 142-162 repays careful study.

[8] There is movement in this domain. Article 22 of the Draft Articles of Responsibility of States for International Wrongful Acts, ILC 2001 envisages legal counter measures those taken where "the obligation breached is owed to the international community as a whole (cf. Article 48.2.b). The ICJ has considered respect for Self-Determination as an *erga omnes* norm. (East Timor – Portugal v. Australia, ICJ, Rep. 1995, par. 29). To the extent that, say, toppling a democratic regime constitutes a violation of Self-Determination under modern law, one can see the concept creeping into the general law of State Responsibility.

[9] Haiti is considered the turning point. A careful reading of the relevant decision of the Security Council will however reveal that it was careful not to link the right to intervention directly with a lack of democratic legitimacy but rather with [un] "climat de peur, de persécution et de désorganisation économique, lequel pourrait accroître le nombre des Haïtiens cherchant refuge dans les Etats membres voisins". The Council also qualified the

> only as an interference with the internal affairs of a State, but also as a violation of Self-Determination.[10] Nowhere is the tension between International Law and democracy more noted than in the different understanding of self-determination. In democratic theory, democracy is almost ontological to the notion of Self-Determination: It is the only means for determination of (and by) the collective self. In International Law, democracy was considered an ideology,[11] one among others, the acceptance or rejection of which were part of the determination of the Self. Indeed, if we were to apply to this field the same methods which are applied in making claims about the existence of this or that human right protected under international law (e.g. the right to development; the right to a clean environment) it would be easy enough to demonstrate a right in international law *not* to be a democracy, the right to be an 'undemocracy'.[12]

Haiti circumstances as "uniques et exceptionnelles" and as part of a *humanitarian* crisis because of massive dislocation of persons. See SC.Res. 940. Compare, however, with the 1997 Sierra Leone situation where the Council declared to be "Gravely concerned at the continued violence and loss of life in Sierra Leone following the military coup of 25 May 1997, the deteriorating humanitarian conditions in that country, and the consequences for neighbouring countries...". And added that it "Demands that the military junta take immediate steps to relinquish power in Sierra Leone and make way for the *restoration of the democratically-elected Government and a return to constitutional order* (SC.Res. 1132) (Emphasis added)". But here, too, one may ask whether the essential was the loss of democracy or the deteriorating humanitarian conditions? And had the constitutional order been one of, say, an Islamic Sharia State (which is non-democratic) or a Communist State (which is equally non-democratic) would the Security Council Resolution have been any different? Would it not have equally demanded a return to "constitutional order" (democratic or otherwise) in the face of a deteriorating humanitarian condition? In other words was the operative part a return to constitutional order (whatever its nature?) or a restoration of democracy? Was democracy simply the contingent condition of the constitutional order?

[10] Earlier USA interventions in Granada in 1983 and Panama in 1989 were sought to be justified on many grounds of which restoration of democracy was only one. See UN. Doc, S/PV 2487 and UN. Doc S/PV.2902 The US avoided condemnation because of its veto. In the Nicaragua Case the ICJ was even careful in allowing intervention in case of violation of human rights, ICJ REP, 1986, par. 202-204.

[11] And not simply an ideology, but a Western, First World, ideology in competition with, and not superior to, Second and Third World competing ideologies. Détente was based on this premise and there was a tacit acceptance of the Brezhnev and Reagan Doctrines. Cf. G. Tunkin, Droit international public, Pedone, Paris, 1965, pp. 232; Fischer, Quelques problèmes juridiques découlant de l'affaire tchécoslovaque, AFDI, 1968, pp. 15-42; and spirited discussion of Schachter, "The legality of pro-democratic invasion", 78, AJIL, 1984, pp. 645-650.

[12] For the difficulty of classical International Law to come to terms with a consonance between democracy and a valid determination of the identity of the collective self, see

- Recent developments in the practice of Recognition of new States and in some form of a right to democracy and even an alleged right to intervene to protect democracy, only underscore the ambivalence of the system and provide a useful transition point from which to reflect on the second, self-referential, relationship between International Law and democracy.[13] There is a double irony in a system which has begun to insist that newcomers to the club pass some democratic entrance exam, however crude, and transitory, but which first, turns out to be like tenure for professors: Once you have proven that you can write, you can stop writing for the rest of your life. And where, second, the club in question contains dozens of vile dictatorships. It is equally ironic that the new so-called right to democracy (whatever its parameters) has emerged in a manner, which is difficult to reconcile with even the crudest understanding of what democracy means.[14] Put differently, if there is under the international legal doctrine of sources a sustainable claim to the emergence of a 'right to democracy', it is doubtful whether the rules which govern these sources, whether international lawmaking itself, represent a credible structure of democratic lawmaking.

What, then, of international lawmaking? It would be tempting to conflate the principle of Consent, so deeply rooted in the normative discourse of international law and its principal legitimating artifact, with democracy: A phrase such as: A customary law cannot emerge without the consent, active or tacit, of [all States bound by it]; [the principal legal families]; [those most affected by the norm] etc. sounds very much like democracy at the international level. But, in fact and in law, in theory and in practice, this is part

Salmon, *Internal Aspects of the Right to self-determination: Towards a Democratic legitimacy principle?* in C. Tomuschat, (ed.), *Modern Law of Self-Determination,* Kluwer, 1993, p. 253-282 and Koskenniemi, *National Self-determination Today: Problems of Legal Theory and Practice*, 43 *International and Comparative law Quarterly* 1994 (241).

[13] See, eg., Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' adopted by the EU on 16 December 1991. See Charpentier, *Les déclarations des douze sur la reconnaissance des nouveaux Etats*, in *RGDIP*, 1992, p. 343-355 where one can also find a text of the declaration. And one should always recall that even in the new epoch, recognition is still political and States which seem to correspond to the new conditions might still be denied recognition. Particularly embarrassing to the EU in this context was the case of Macedonia – cf. Conference on Yugoslavia, Arbiration Commission Opinion no. 3-6, in ILM (1992), pp. 1499-1507.

[14] In the literatures which have emerged and claim the right to democracy as part of international law, there is not even an attempt to claim that this right emerged in a manner which may be called democratic.

of a very different vocabulary, namely that of sovereignty and sovereign equality.[15] It is, in some ways, the opposite of democracy, since it is based on the legal premise, even if at times a fiction, that the collectivity has neither the power nor, certainly, the authority to impose its will on individual subjects other than through their specific or systemic consent, express or implied. Put differently, it is based on the premise, an extreme form of which claims that there is no collectivity with normative power, and, in less extreme form, claims that even if there is such a collectivity, there is an inherent power of opting out – through non-signature; reservations, persistent objector etc. This, of course, is the opposite of any functioning notion of democracy which is based on the opposite premise, however justified in political theory, that a majority within a collectivity, a demos, has the authority to bind its individual members, even against their will.

There are of course exceptions to these observations; we will return to these exceptions as part of a narrative of change.

Against this indifference or hostility, the concern for democracy of International Law has typically found expression outside international law – in the domestic foreign relations law of States through the so-called democratic control of foreign policy. From this perspective, even if international lawmaking itself does not follow any recognizable sensibility to democracy, its democratic legitimation could perhaps be sought at the internal level of the subjects which make it.

This, at best, would be a very problematic proposition.

First, as a matter of empirical observation, democratic control of foreign policy does not only remain an exception among States, but is often derided from an international legal perspective: Democratic control of foreign policy is good when it approves and ratifies new treaties (which are typically considered progressive and normatively positive.).[16] It is bad when it consigns such treaties to some graveyard.

[15] Kingsbury, Sovereignty and Inequality, AJIL, Vol. 9 (1998), n. 4, pp. 599-626 repays careful study as a fundamental text on these issues.

[16] In the classical tradition of political theory, foreign policy is often excluded as a domain which whould be subjected to normal democratic controls, Cf. Alexis de Tocqueville, *De la démocratie en Amérique*, Flammarion, Paris, 1981; J.S. Mill, Considerations on Representative Governement in Three Essays, Oxford University Press, 1981, pp. 211-212. Also great contemporary democrats are cautious. Thus Aron explains: “Les relations entre les Etats ont un caractère singulier, pour ainsi dire paradoxal: d’une part, il s’agit de relations globales, macroscopiques, puisqu’en cas de guerre les Etats sont aux prises les unes avec les autres comme des entités de dimensions considérables, mais, d’une autre part, les décisions d’où résultent les événements sont souvent prises par des personnes. Il y a donc une

Second, even when democratic control exists, it is never accompanied by an enquiry whether the Treaty that is democratically debated and approved in country A, was also democratically debated and approved in country B. The assumption of the democratic discourse in, say, the German Bundestag or the US Congress or the European Parliament is that if consent is given, the Treaty will be binding independently of the democratic quality of consent given in another State. In other words, democratic control of foreign policy at the level of the State, is not only formally but substantively part of the foreign relations law of the consenting State and not part of the validating matrix of international law itself.[17] There is simply no norm, not even an alleged norm, that the 'bindingness' of an international treaty or customary law, or general principle, or "new source" should depend on internal democratic validation by the subjects and objects of such norms. Indeed, the great enthusiasm in the 60s and 70s for "Soft Law" and "New Sources" was result, rather than process, oriented. These were mechanisms which, *inter alia*, enabled international legal authority to be given to a variety of progressive norms which the traditional methods with their greater insistence on express consent were unable to do. But the oft-justified celebration of human rights, ecological norms and other such truly noble causes which the "Soft Law" and "New Sources" occasioned, was accompanied by a willful blindness to, even contempt of, any notion of democratic legitimation of these norms either at the international level or within the States that became subject to these norms. Equally, the typical critiques of "Soft Law" and "New Sources" were either result oriented, based an hostility to the content of the proclaimed norm, or systemic, usually challenging, as a matter of legal doctrine, the *consent* basis of the alleged new norm and hence its legal validity. We have already argued that to root international legal validity or legitimacy in consent has little to do with a democratic sensibility and might, indeed, be the opposite of such a sensibility. In the critique of New Sources there has been, with few exceptions, little concern for democratic legitimation. And, indeed, why should there have been? "New Sources" are not less democratic or more democratic than "Old Sources".

espèce de contradiction interne dans ce monde de relations interétatiques, dans la mesure où il existe souvent en apparence une disproportion entre le rôle qui jouent les individus et les conséquences de leurs actions", R. Aron, Leçons sur l'histoire, Ed. de Fallois, Paris, 1989, p. 334.

[17] For a characteristically down to earth, realistic approach to foreign affairs and democratic control see Dahl, Can International Organizations be Democratic? A Skeptical View, in I. Shapiro, C. Hacker-Cordon, Democracy's Edges, Cambridge University Press, 1999, pp. 23-28.

What makes them worthy of observation is the ironic dissonance between their progressive content and their regressive method of adoption.

I.3. *International Law Vindicated: Evaluating the Indifference and Hostility*

In describing the relationship of International law to a democracy we have deliberately used an affective, anthropomorphic terminology – indifference, hostility, contempt – in order to provoke a normative reaction of censure or even outrage. Isn't that how one is meant to feel in the face of a legally binding norm adopted with little concern to the very vocabulary of democracy, let alone its habits and practices? Yes it is. And is one not justified in using an anthropomorphic terminology in order to counter the typical reification of law thereby ascribing responsibility to those behind the law – the real human beings, flesh and blood, who ultimately make international law? Yes it is.

And yet the outrage or censure would be out of place and one should not be overly scandalized by the indifference and hostility.[18] For here is our

[18] Indeed, there is a growing critical literature skeptical of the very use of democracy in international discourse – both dogma and praxis. See, e.g., Carothers, "Empirical Perspectives on the Emerging Norm of Democracy in International Law", *ASIL Proc*, 84 (1992). Koskienniemi, "Intolerant Democracies: A Reaction", Harv. Int'l.J, (1996), p. 231. Marks, The End of History? Reflections on Some International Legal Theses, *EJIL* vol. 8, (1997), 449-478 which is in part a response to the optimistic "progress" vision seen in the writings of, say, Franck and Slaughter, which Marks qualifies as 'liberal millennialism'. There are two strands to this literature. Part of it belongs to the more general reaction against classical liberal pluralism of the J.S. Mill or Isaiah Berlin variety. J. Gray articulates this strand well: "Liberalism was the political theory of modernity. As we enter the closing phase of the modern age, we confront the spectre of renascent atavistic barbarisms, which threaten to ruin the modern inheritance of civil society. Our task, as post-moderns no longer sustained by the modernist fictions of progress, rights and the universal civilization or by classical conceptions of natural law as embodied in Greco-Roman and Judeo-Christian traditions, is to preserve the practice of liberty that is transmitted to us by inherited institutions of civil society" (J. Gray, Postliberalism, Studies in Political Thought, Routledge, London and New York, 1993, p. 328). A second strand of the literature is more pragmatic in nature and is rooted in a critique of the use democracy has been put to in international law. In this essay we premise democracy as a positive "good". It is not our intention fully to work out this position – but it is rooted in our belief that democracy with all its imperfections and with the need always to attend to these imperfections, is the best chance of political organization of the social which will honor the dignity of man created in the image of God, and equally the best chance of a political organization of the social to vindicate liberty consistent with that dignity. "Progress" not least in the world of ideas may well be a fiction, but we find nothing fictive in the conceptions of human dignity embodied in the Judeo-Christian tradition with their attendant consequences to political organization.

third banal affirmation: Democracy is premised on the co-existence of demos, polity and government, and the relationships among them.

The *indifference* of International Law to democracy emanates from the absence of those elements in international life: There is International Law but traditionally there has been no 'international demos', no international polity and no international government. You cannot be concerned with tonality or rhythm if there is no music. If traditional international law understands itself as a series of autonomous sovereigns, all equal, contracting legal obligations on a more or less enlightened Adam-Smithian notion of liberalism, so as to maximize the interests of each with minimum friction to the interests of others, democracy is, indeed, no more relevant to international law as it is to the law of contract in domestic law. We may be concerned, both in a domestic or international contractarian universe, with inequalities of bargaining power, but that concern goes to notions of consent, coercion and, perhaps, fairness to which democracy or its absence are neither part of the problem nor part of the remedy. International law is maybe a response to a Hobbesean brute world, but it is not a democratic Lockean response.

The classical *hostility* of International Law to democracy emanates from the fact that the absence of those three elements was (and in many cases still is) normatively desired. The essential language of modern democracy, its grammar, syntax and vocabulary, revolves not only around people, nation and State, but also about a shared self-understanding of authority, legitimacy and the relationship of people to each other and to their government institutions. Thus, even to accept that democracy is merely relevant to international law, would not be an organic extension of an evolving normative sensibility from a domestic setting to the international system. It would seem to imply a contested new self-understanding of that very international system. The breathtaking radicalism of the French Revolution was surely not simply in changing the structure and process of government, but in changing the very way society was to understand itself. A turn to democracy by and in International Law would be every bit as revolutionary.

Given the rootedness of democratic discourse in a Statal setting, if a turn to democracy would imply a corresponding turn to a Statal self-understanding of the international legal system, within the classical premises of international law, it could appear to many, and rightly so, as a very undesirable revolution.

II. A Methodological Excursus: The Geology of International Law – A Differentiated Response to a Non-Monolithic Legal Universe

International law and the international legal system are not static and have changed over time. No less importantly, the understanding of legitimacy and democracy has not been static and has changed – both as an empirical social phenomenon and as a normative concept. How does one relate these two moving targets to each other? As noticed from our title, we employ the metaphor of geology. This is not just a cutesy affect but represents a serious methodological commitment. It signals our particular approach for dealing with time, with history.

First, our approach to the past is instrumental. We are interested in the past not per se but primarily in the sense that it can illuminate the present.

Second, and more importantly, whereas the classical historical method tends to periodize, geology stratifies. Typically, a geological snapshot is taken and then the accumulated strata of the past are identified, analyzed, conceptualized. By stratifying geology folds the whole of the past into any given moment in time – that moment in which one examines a geological section. This method turned out to be crucial for our understanding of the international legal system.[19] For the proverbial reasons of time and space we are unable to provide here the full empirical apparatus on which our analysis is based. But we can provide an illustration.

We took, to give but one example, a snapshot of international treaty making and more generally international lawmaking in 1900-10, in the 1950s and 60s and in 1990-2000.

In the first decade of the 20th Century we discovered a predominance of bilateral, contractual treaties and a very limited number of multilateral lawmaking treaties. We also discovered, in that earlier part of the century a very sedate, almost 'magisterial,' and backward looking practice of customary law typified by a domestic case such as *The Paquette Habana* which

[19] Inspired by Nietzsche's genealogy, we are less interested in a chronicle of events nor in a sophisticated historiography as a way of interpreting and explaining the past. Our interest in the past is in a true sense driven by our attempt better to understand the present. Cf. A Genealogy of Morals, trans. W. Kaufmann and R.J. Hollingdale, New York, Random House, 1967 and see, too, Foucault, Nietzsche, Genealogy, History in The Foucault Reader, P. Rabinow, (ed.) Pantheon Books, New York 1984, pp. 76-100) We do not want to stretch the comparison too far. The genealogical approach is mostly interested in discontinuities, instabilities, incoherence – in the pathological. We privilege exactly the opposite – ours is above all a physiognomy of international law.

leisurely takes in four hundred years of State practice in order to affirm the existence of a binding rule. A case such as *The Lotus* is also typical as an illustration of the typical use of the methodology of custom to privilege the status quo and chill change.

In mid-century we discovered a huge enterprise of actual and in-the-making multilateral lawmaking treaties ranging from the Law of the Sea to Human Rights and even what may be called "constitutional" treaties. Customary law reincarnated itself into the so-called New Sources. The New Sources, though often using (indeed, piggy-backing on) notions of classical custom to justify the emergence of a binding norm, were the opposite of custom in that the sedate, backward looking and magisterial were replaced by an aggressive, cheeky and forward looking sensibility, privileging change and transformation and in which both treaty and "custom" often prized the communal and universal over the particularistic.[20]

Towards the end of the century, in addition to the bilateral, multilateral and constitutional layers of lawmaking, we detected the emergence, or thickening, of a fourth layer, which has perhaps been less discussed. This is a regulatory layer. It is notable in the fields of trade with the explosion of Regional Economic Agreements (whose numbers are in the hundred) as well as the new WTO and associated agreements, and in other similar fields: Environment, Asylum, Finance. In terms of content the regulatory layer addresses issues associated with the risk society in which we live.

The regulatory layer is distinct from its predecessors in a variety of ways: Its subject matters tend to be away from what traditionally was considered high politics and more towards what was traditionally considered low politics (They are typically neither about Security nor even about Human Rights). The obligations created are often positive in nature, not simply negative interdictions. Certain things have to be accomplished – note for example Article 16 of the WTO or the "conditions" imposed by the IMF and World Bank. The regulatory regime is often associated with an

[20] The literature is immense. We particularly profited from Jiménez de Aréchega, Custom, in A. Cassese, J.H.H. Weiler, Change and stability in international law-making, European University Institute, Berlin, New York, De Gruyter, 1988, pp., T. Meron, Human Rights and Humanitarian norms as Customary Law, Claredon Press, Oxford, 1989; Lillich, The Growing Importance of Customary International Law, 25 GA.J. Int'L &Comp. L, 1, 8 (1995-1996), Reisman, The Cult of Custom in the late 20th Century, 17 Cal. W.Int'L.J. 133 (1987), Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, AJIL, vol. 95, 2001, pp. 757-791. G.H.F. Van Hoof, Rethinking the Sources of International Law, Kluwer, 1984.

international bureaucratic apparatus, with international civil servants, and, critically, with mid-level State officials as interlocutors. Regulatory regimes have a far greater "direct" and "indirect" effect on individuals, markets, and more directly if not always as visibly as human rights, come into conflict with national social values.

We noted, too, in that period a much higher index than before of a new kind of "Practice" – not the old style State practice but "International Practice" of a variety of bodies ranging from well established international organizations to allusive entities such as the Group of Seven – a practice covering even classical fields such as security and human rights which can best be described as international management. Couple the regulatory layer of treaties with the international practice of management and a new form of international legal command may justifiably be conceptualized as governance.

Analogies to domestic law are impermissible, though most of us are habitual sinners in this respect. We can present the geology of international law as replicating to some extent the geology of domestic law – the turn from the 19th Century very contractarian emphasis, to the interventionist State of the Mixed Economy, to the Constitutional State (which is mostly a post World War II phenomenon) to the Administrative State of the 70s, 80s and beyond.

Similar results emerged from our soundings in the area of dispute settlement. We can afford to be even more synoptic here, for this story is even better known than the lawmaking story: Here too we saw an initial strata of horizontal, dyadic, self-help through mechanisms of countermeasures, reprisals and the like. This is still an important feature of enforcement of international legal obligation. Then, through the century we saw a consistent thickening of a triadic stratum – through the mechanisms with which we are all familiar – arbitration, courts and panels and the like. The thickening consisted not only in the emergence of new areas subject to third party dispute settlement but in the removal of optionality, in the addition of sanctions and in a general process of "juridification". Dispute Settlement, the hallmark of diplomacy, has been replaced, increasingly, by legal process especially in the legislative and regulatory dimensions of international lawmaking.[21] And there is, here too, a third

[21] See, e.g. Slaughter & Helfer, Toward a Theory of Effective Supranational Adjudication, 107, Yale Law Journal, 1997; Stone Sweet, *Judicialization and the Construction of Governance*, 31 Comp. Pol. Stud. (1999); Kupfer Schneider, *Getting Along:*

stratum of dispute settlement which may be called constitutional, and consists in the increasing willingness, within certain areas of domestic courts, to apply and uphold rights and duties emanating from international obligations. The appellation constitutional may be justified because of the "higher law" status conferred on the international legal obligation.[22]

Based on these findings, our initial temptation was to characterize the turn of the last century as a period of transactional legal relations, to look at the mid-century, especially the decades following World War II as one characterized by emergence of Community and the fin-de-siècle as the period of international governance. (We will, in short order, give more thickness to these labels – transaction, community and governance). But on closer look at the data we stumbled on the obvious. Even in the early part of the 20th Century there were, alongside the thick stratum of bilateral, transactional treaty making, already thin strata of the multilateral and even of governance style of international command. Equally, we noted that mid-century, and fin-de-siècle, along side the constitutional and lawmaking treaties there continued a very rich practice of the bilateral and transactional, that for every assertion of the New Sources and Communal values there was an old style *Texaco*, a dignified late century heir to *The Lotus*. Change, thus, would not be adequately described as a shift from, say, bilateralism to multilateralism. What had changed was the stratification. Bilateralism persists and even thrives as an important stratum of international law throughout the century till this day. Thus, geology allows us to speak not so much about transformations but of layering, of change which is part of continuity, of new strata which do not replace earlier ones, but simply layer themselves alongside. Geology recognizes eruptions, but it also allows a focus on the regular and the quotidian. It enables us to concentrate on physiognomy

The Evolution of Dispute Resolution Regimes in International Trade Organizations, 20 Mich. J. Int'l L. 697 (1999); Reich, *From Diplomacy to Law: The Juridicization of International Trade Relations*, 17 Nw. J. Int'l L. & Bus. 775 (1996-1997) Weiler, The Rule of Lawyers and the Ethos of Diplomats, Reflections on the Internal and External Legitimacy of WTO, http://www.jeanmonnetprogram.org/papers/2000/001901. Generally see the special issue of International Organization Legalisation and World Politics, International Organization, no. 54, vol. 3, 2000.

[22] Cf. Cass, The Constitutionalization of International Trade Law: Judicial Non-Generation as the Engine of Constitutionalization, *EJIL*, n. 13, n. 1 (2001), pp. 39-77. Petersmann, *Constitutionalism and International Organizations*, 17 Nw. J. Int'l L. & Bus. 398 (1996-1997).

rather than pathology. As is always the case, the vantage point, the prism through which the subject is examined determines in no small measure the picture which emerges. The geology of international law is, thus, both the window and the bars on the window, which frame and shape our vision.

Against this background we develop our current theses. The ideas behind these theses are conventional enough and we hope, of course, that they will appear persuasive to the reader. They do, however, involve multiple strands and require keeping several balls in the air simultaneously. Here then is a little nutshell.

Firstly, and put bluntly, we believe that classical approaches, such as the one we ourselves developed in the introductory passages of this essay, which examine democracy in relation to "international law" or the "international legal system", are less than optimal because of the monolithic assumption on which they are typically based. The ways and means of international norm setting and lawmaking, the modes in which international law 'commands', are so varied, sometimes even radically so, that any attempt to bring them into the laboratory of democracy as if belonging to a monolithic species called "international law" will result in a reductionist and impoverished understanding of international law, of democracy and of the actual and potential relationship between the two.

We suggest that much can be gained, in this context, by conceptually unpacking international law or the international legal system into different 'command' modes which the "geological" survey reveals: International law as Transaction, International law as Community, and International law as Regulation. Each one of these modes presents different normative challenges, entails a different discourse of democracy and legitimacy, and, eventually, will require a different set of remedies.

Second, and put simply, we believe that democracy, too, cannot be treated monolithically. In this case it does not require unpacking but the opposite – repacking as part of a broader discourse of legitimacy. In municipal settings the absence of "democracy" (at least in the narrow sense of the word) in all aspects of domestic governance, is not always a lacuna, nor even a 'necessary evil' and does not in all situations per se delegitimate such domestic systems. Legitimacy encompasses other elements too.

What complicates the matter is, as mentioned above, that notions of, and sensibilities towards, the legitimacy of international law have changed too.[23]

[23] See Franck, "Legitimacy in the Legal System", AJIL, vol. 82 (1988); Georgiev, *Politics of Rule of Law: deconstruction and legitimacy in International Law*, EJIL, 1993;

Transactionalism was a prominent layer of early 20th Century international law. It was legitimated by reference to that old world and its prevailing norms. Transactionalism persists to early 21st Century international law and is a prominent layer also today. But to the extent that its old world legitimating features still accompany it, we have the makings of the legitimacy crisis in this respect. Communitarianism is most prominent as in mid 20th Century international law and finds its original legitimating features in that epoch. It is still an important layer in the universe of 21st Century international law, but its legitimacy raises new Questions. And finally, Governance, though present in earlier epochs emerges as a thick and critical layer towards the end of 20th Century international law. It requires an altogether new discourse of legitimacy.

III. Transaction, Community, Constitution and Regulation and the Emerging Legitimacy Crisis of International Law

III.1. *Interpreting Transactionalism as Governance*

Historically transactional international law was the predominant command mode. It is still a large and important part of the overall universe of international law. In its purest form it is dyadic and represented best by the bilateral transactional treaty. It is premised on an understanding of a world order composed of equally sovereign States pursuing their respective national interest through an enlightened use of law to guarantee bargains struck. There can be multipartite expressions and even international organizations which are an expression of dyadic transactional international law. The Universal Postal Union to give an ancient but still extant and relevant organization and the GATT in its 1947 incarnation of examples. Although multipartite in form (and suggesting, thus, a more multilateral communitarian self-understanding of the international legal order), they are in substance just more efficient structures enabling their parties to transact bilateral agreements. Many other examples abound.

How then to view the transactional command mode as a phenomenon of Governance? Is it not on its face precisely the opposite: The expression of private, bilateral contracting?

Weiler & Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?* 8th European Journal of International Law 545 (1997) and literature cited therein.

It often is, and when it is calling it governance would not be illuminating. If every instance of norm creation is to be regarded as part of international governance the term would lose any explanatory and normative significance as compared with international law generally.

But there are instances, past and present, where whilst the form of norm creation is indeed private and bilateral, the resultant phenomenon may usefully be thought of as in the category of international governance. Transactionalism may/might manifests itself as governance in two distinct ways:

The first is indeed in the realm of private, bilateral arrangements like so many bilateral riparian treaties or, say, bilateral treaties for management of bridges which span a border. The governance element in such treaties rests in the fact that they extend beyond an 'executory' type of contract terminated upon completion of the transaction and they extend beyond a 'normative' type of contract which leaves the parties freedom to act but which will place curbs on such freedom and define certain actions of the parties as unpermitted. Instead here we would have a regime of management – creating longer term obligation of care, and in fact putting in place an administrative apparatus for maintenance and management of a common resource. Both parties can be seen as involved, albeit bilaterally, albeit privately, albeit modestly *rationae materiae,* in a governance regime. The practice is not exceptional. It is mainstream. Its importance to us is not so much in the normative challenge it raises but in the understanding it gives us to the phenomenon of governance. Not only, important as this may be, in the historical and conceptual sense of trying to understand all principal forms of international governance, but also in a phenomenological sense. Bilateralism may have been the laboratory, the exercise ground, the test tube whereby States (and other actors) assume in gradual sense the habits of international governance.

In its second mode, bilateral transactionalism should be understood as governance in that it results in a general regime of both legislation and management. The phenomenon is not exceptional. Consider first the following examples: The old US Friendship, Commerce and Navigation Treaties, many still extant, or the modern Free Trade Area Agreements of which the European Union has an enormous practice. Bilateral Investment Treaties are a third example.

In all these cases we have what is in form bilateral, private agreements. In the first two examples (unlike the BITs) there is no internationally approved template. If we look at the modern FTA, we will also note that it

is of very considerable socio-economic significance involving culture and hence identity defining choices. Microscopically these are, indeed, bilateral private contracts among States. But telescopically, taken in aggregate they define a multilateral regime. In all instances the US and the EU use a template. The negotiating room for their "bilateral" partners is extremely narrow – very often limited to the temporal dimensions such as entry into force but not touching the material obligations, the regime of responsibility, dispute settlement and sanctions. They are in many respects the international equivalent of domestic Standard Form contracts. They are characterized by the same inequality of bargaining power familiar from domestic settings and raise, *mutatis mutandis*, similar normative issues.

Interesting variants of this phenomenon are indeed, as mentioned above, those treaties, such as the WTO/GATT which in form are multilateral but certain dimensions of which, like the all-important setting of bound tariffs, are simply an aggregate of bilateral arrangements – extended universally through the principle of Most Favored Nation. The current WTO, resultant from the Uruguay Round, is often criticized as having been unfair or unjust in the balance between developed and developing countries. Often this critique is but the expression of general frustration with globalization and the inequality in the wealth of nations – phenomena which should be associated with international regimes with certain care. (Oftentimes the international regime is not the cause, but should more appropriately be thought of as the response to the problem).

In the case of the WTO/GATT the claim of unfairness and injustice can be linked to the phenomenon under discussion, namely the bundling of bilateral agreements in the context of a multilateral "Single Undertaking". For therein lies a hard kernel of critical truth. It is the imbalance between the overall normative, organizational and administrative umbrella provided by the Single WTO Undertaking accepted by all Members, developed and developing, which extends to, legitimates with the aura of multilateralism, and enforces a series of often mean spirited, ungenerous packages of bilateral tariff agreements. This imbalance is compounded of course by the huge economic differentials among the parties. The only veritable arms length negotiations are among the giants – EU, USA and a handful of others. For the rest it is mostly a take-it-or-leave-it affair.

This goes beyond the metaphor of the domestic Standard Form Contract. It would be the equivalent of a Standard Form Contract given the legitimacy and force of a legislative act approved by a parliament without, however, that parliament ever reading its actual content.

It is interesting to explore the legitimacy, both internal and external, of the dyadic, transactional international legal obligation. The key interlinking concepts underlying this mode of command were Sovereign Equality, Consent and *Pacta Sunt Servanda*. Sovereign Equality is critical for the transactional world view since in it is encapsulated the rejection of a community which can impose its will on its members. Consent is, in similar vein, not just a technical condition for obligation, but a reference to status and a signifier of the self-understanding of the (non)system. And *Pacta Sunt Servanda* is not just the indispensable and tautological axiom of obligation, but a signifier of the world of honor in which the equally sovereign understood themselves to be in. Indeed, in our view, the transactional mode of international law in its early historical context owed its deepest roots and claim to legitimacy to the pre-state chivalrous world of feudalism. Although transformed to the State, the vocabulary, rhetoric and values of sovereign equality, consent and *Pacta Sunt Servanda* were picked up almost intact.

There were huge pay-offs for this rootedness of international legal obligations in that pre-modern world of chivalry. There was, first, a confluence of internal and external authority of the State, the legitimacy of each feeding on the other. It was also, paradoxically, a way of actually legitimating war against and subjugation of other States. As in chivalry where only other knights – peers – were legitimate targets for force (subject to ritualistic challenges, etc) the elevation of all States to the formal category of Sovereign and Equal is what allowed the playing out of the real life inequality among States.[24]

The principal legitimacy concern of this "slice" of the international legal system concerns on the one hand the continued centrality of dyadic transactional international law which is situated, on the other hand, within a "normative environment" to which the old formal legitimacy has little traction.

We will only hint at some of the normative problems. One major problem is the confluence between external and internal sovereignty exhibited in the very notion of national interest. There may be some continued currency to national interest in matters of, say, war and peace and consequently in their reflection in things like mutual defense pacts and the like. But no one can today credibly argue that bilateral treaties of the

[24] We do not expect that all will agree with this interpretation. We find some support in Quentin Skinner, "The Foundations of Modern Political Thought", vol. 2, (The Age of Reformation) Cambridge University Press and Quentin Skinner, Liberty before Liberalism, (Cambridge University Press, 1998).

'Friendship, Navigation and Commerce' type of which, say, the United States continues to have a plethora, or the bilateral 'free trade areas' which the European Union has with more than half the countries of the world are a non-contested manifestation of the "national interest". They are agreements rooted in a certain worldview, which vindicate certain internal socio-economic interests. This, in turn, presents two delicate issues: One is the measure of democratic scrutiny, which treaties such as these receive, in developed democracies such as the USA or the EU. We contend that often they receive far less democratic scrutiny than domestic legislation with the same socio-economic redistributive impact. This is certainly quite commonly the case in Europe and not at all infrequent in the USA. The second problem is that Economic giants such as the USA and the EU can impose such Treaties on lesser States not only leaving them with little or no margin of negotiation, but with even less concern to *their* (the would be partner's) internal democratic scrutiny.

III.2. *The Constitutional and Legislative: International Law as Community*[25]

An interpretation of the legislative and constitutional strata of the geological map yields the much noted, and positively commented upon phenomenon of the emergence, in certain areas, of some form of international community. There are both structural and material hallmarks to the emergence of such community. Structurally we detect the emergence of new types of international organization. Some international organization, say, the International Postal Union, is mostly a mechanism to serve more efficiently the contractarian goals of States. At the other extreme, you take the UN or the EU and you find organizations whose objectives articulate goals a part of which is independent of, or distinct to, the specific goals of its Member States. They are conceived, of course, as goals which are in the interest of the Member States, but they very often transcend any specific transactional interest and are of a "meta" type – i.e. the overall interest in having an orderly or just international community.

Materially, the hallmark of Community may be found in the appropriation or definition of common assets. The common assets could be material such as the deep bed of the high sea, or territorial such as certain areas of space. They can be functional such as certain aspects of collective security

[25] See generally the comprehensive study of Simma, *From Bilateralism to Community Interest in International Law*, *Rec. des cours* 1994, tome IV, vol. 250, 217-384.

and they can even be spiritual: Internationally defined Human Rights or ecological norms represent common spiritual assets where States can no more assert their exclusive sovereignty, even within their territory, than they could over areas of space which extend above their air-space.

Explaining these common assets in contractarian regimes is, at best, unconvincing and at worst silly. One has to stipulate a community which is composed of, but whose objectives and values may be distinct from the specific objectives of, any one of its Members.

It is easier to understand the constitutional and legislative as forms of governance. After all, when we speak of governance we do not refer only to the administrative phenomenon. There is, however, limited explanatory added value, if all we do is to say that international norm setting, through treaties or otherwise, should be adorned with the semantic mantle of governance.

The added value is I believe in a different focus notable in understanding how multilateral lawmaking treaties often impinge on functions of domestic governance, or in turn, lead towards the setting up of international regulatory or management regimes in a way familiar from domestic setting – general legislation creating a logic which ends up with an administrative and regulatory Agency or Department of government.

For examples of the impact on government, one of the most fruitful areas is always derogation regimes. I think the phenomenon is generic: The legal regime itself is "legislative" in nature creating certain obligations for the State which may be implemented through the State's legislative regime. The derogations involve huge entanglements with domestic governance and administration. The impact of international law here is not in a direct regime of governance taking over from the State but in the impact on the governance functions of the State.

The process from Treaty to Agency is described in the next section of this paper.

In the area of Community, too, there are a myriad of legitimacy problems. We will list briefly only four: the fictions of consent, the closure of exit, the unpacking of the State and, finally, the existence of "Community" without Polity.

The growth in the number of States and the complexity of international legal obligations makes the forms of consent as a means of justifying norms increasingly fictitious, requiring the invocation of presumptions, silence, meta consent and the like. Many of those very norms which were the hallmark of community are often the very ones for which mean-

ingful consent is little more than a fiction. This is particularly true for norms, the validity of which depends on some employment of "custom" or "general principles".[26]

But this is also the case in relation to many multilateral treaties. Increasingly international regimes, such as, say, the Law of the Sea, the WTO, are negotiated on a Take-it-or-leave-it basis. WTO officials are always ready with the 'what do you want: sovereign governments signed and ratified this' pleas. But for most States both the Take it is fictitious and the Leave it is even more. The consent given by these "sovereign" States is not much different to the "consent" that each of us gives, when we upgrade the operating system of our computer and blithely click the I Agree button on the Microsoft Terms and Conditions. One cannot afford to be out, and one cannot afford to leave. The legitimation that comes from sovereignty is increasingly untenable. The ability to chose one's obligations has gone: The Single Undertaking; the No Reservations Treaty are today increasingly the norm, rather than the exception. It is either all, or nothing, and nothing is not an option, so it has to be all. So even those States where there is a meaningful internal democratic control of foreign policy are obliged, democratically, to click the I Agree button of, say, the WTO or the Law of the Sea.

Further, classical consent was based on a conflation of government with State. That conflation is no longer tenable. As noted, the breakdown in terms of subject matter between what is "internal" and what is "international" means that most international normativity is as contested socially as domestic normativity. The result of international law continuing to conflate government with State is troubling: You take the obedience claim of International Law and couple it with the conflation of government and State which International Law posits and you get nothing more than a monstrous empowerment of the executive branch at the expense of other political estates or an empowerment of those internal special interests who have a better capture of the executive branch.

Finally, despite the "progressive" values with which the turn to Community is normally associated – notably human rights and the environment – the absence of true polity is highly problematic.

Few areas of contemporary international law have been presented as challenging the past and have excited as much rhetoric about transformation as human rights. The "turn" to the individual, the "valorizing" of the

[26] Cf. Tomuschat, *Obligations Arising for States Without or Against their. Will, rec. des cours*, 1993, Tome IV, vol. 241, p. 195-374.

individual, the "piercing of the statal veil" et cetera. That international law has taken an interest in human rights as it has in the environment is of course an important material development. That it has defined them as common assets is an important structural development. Situating human rights alongside the environment is helpful. For, seen through the prism of political theory, international law deals with humans the way it deals with whales and trees. Precious objects which require very special regimes for their protection. The surface language of international legal rights discourse may be neo-Kantian. Its deep structure is utterly pre-modern. It is a rights notion that resembles the Roman Empire which regards individuals as objects on which to bestow or recognize rights, not as agents from whom emanates the power to do such bestowing. It is a vision of the individual as an object or, at best, as a consumer of outcomes, but not as an agent of process. In one respect the international legal system is even worse than the Roman Empire: International law generates norms. But there are not, and cannot be, a polity and citizens by whom these norms are generated. The individual in International law seen, structurally, only as as an object of rights but not as the source of authority, is no different from women in the pre-emancipation societies, or indeed slaves in Roman times whose rights were recognized – at the grace of others.

And, of course, what gives a sharper edge to these issues is the frequent situation of all forms of international obligation in a far more effective and binding enforcement mechanism.

III.3. *The Regulatory: International Law as Governance*

Finally, interpreting primarily the regulatory dimension of international law, points at the end of the century not to the emergence of World Government (a horrible thought in itself) but something no less otiose: Governance without Government.[27]

[27] Cf. J. Rosenau & E.O. Czempiel (eds.) Governance without Government: Order and Change in World Politics" (Cambridge University Press, Cambridge, 1992) " ... [T]he concept of governance without government is especially conducive to the study of world politics inasmuch as centralized authority is conspicuously absent from this domain of human affairs even though it is equally obvious that a modicum of order, of routinized arrangements, is normally present in the conduct of global life. Given an order that lacks a centralized authority with the capacity to enforce decisions on a global scale, it follows that a prime task of inquiry is that of probing the extent to which the functions normally associated with governance are performed in world politics without the institutions of gov-

What are the hallmarks of international governance?

- The increasing importance of the administrative or regulatory strata of Treaties. There is now increasingly international regulation of subject matter which hitherto was not only within the domain of States but within the domain of the administration within the State.
- There are increasingly new forms of obligation:
  - Direct regulatory obligation where international norm replaces the domestic one. What is interesting here is also to note new forms whereby increasing the obligation of international law is positive in nature, rather than a negative interdiction. Also, increasingly it requires not only obtaining certain results but insists on a specific process in working towards that result.
  - Indirect regulatory norms where the international norm does not replace the government regulatory regime but seriously limits it. The most common example is the discipline of non-discrimination in trade regimes.
  - Governance incentives, transforming to the international regime the US Federal invention of Grants-in-Aid. These can be financial – as is often the case with World Bank or IMF conditions or regulatory – as in the case of the Codex Alimentarius which promises material and procedural advantages to those who follow its norms. The State is free to follow, but it stands to lose a lot if it does not. All but the very rich and powerful can ill afford to say No.
- The emergence of International Civil Service and International Management
- International Proceduralization and international insistence on domestic proceduralization

ernment" (p.7). The Governance without Government is associated with the literature, at times overstated, about the "disappearance" or weakening of the classical Nation-State or in the most minimalist version, its loss of total domination of international legal process. We have profited from and acknowledge a debt to, H. Spruyt, The Sovereign State and its Competitors, *Princeton U.P., 1995;* Spruyt, *The Changing Structure of International Law Revisited, EJIL* 1997, p. 399-448; Schachter, *The Decline of the Nation State and Its Implications for International Law, Columbia Journal of Transnl. L. 7 (*1997); Ruiz-Fabri, *Genèse et disparition de l'Etat à l'époque contemporaine, AFDI* 153 (1992).

[28] The "Regulatory" does not fully overlap with International Organizations as such. Nonetheless, some of the burgeoning literature on the legitimacy and democracy of inter-

- An invasion or subtle reversal of internal order of values – especially in the law of justification, burdens of proof and legal presumptions

Here, too, what gives a sharper edge to governance, and to the normative problems that we will shortly explore, is the situation of these obligations and regimes and a much more effective enforcement regime.[28]

There is, thus, governance, but critically there is no government and no governed. It is Governance without government and without the governed – i.e. polity. At the international level, we do not have the branches of government or the institutions of government we are accustomed to from Statal settings. This is trite but crucial. When there is governance it should be legitimated democratically. But democracy presumes demos and presumes the existence of government. Whatever democratic model one may adopt it will always have the elements of accountability, representation and some deliberation. There is always a presumption that all notions of representation, accountability, deliberation can be grafted on to the classical institutions of government. Likewise, whatever justification one gives to the democratic discipline of majority rule, it always presumes that majority and minority are situated within a polity the definition of which is shared by most of its subjects. The International system form of governance without government and without demos means there is no purchase, no handle whereby we can graft democracy as we understand it from Statal settings on to the international arena.

Moreover, the usual fall-back position that this legitimacy may be acquired through democratic control of foreign policy at the State level – loses its persuasive power here even more than in relation to international community values. Meso – and micro – international regulation is hardly the stuff of effective democratic control by State Institutions. The fox we were chasing in the traditional model was the executive branch – our State government. In the universe of transnational regulation, even governments are no longer in control.

Democratic theories also creak badly, be they liberal or neo-liberal, consociational or even Schumpeterian elite models when attempting to

national organizations is most helpful in understanding the democratic and legitimacy challenges to which the regulatory stratum gives rise. See Eric Stein, International Integration and Democracy: No Love at First Sight, 95 Am. J. Int'l Law 489 (2001); Esty, The World Trade Organization's Legitimacy Crisis, 1 World Trade Review (2002); Howse, "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence" in Joseph H.H. Weiler ed., *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* (2000).

apply them to these forms of governance. Who is Principal, who is Agent? Who are the stakeholders? We may define demos and demoi in different ways. But there is no convincing account of democracy without demos. Demos is an ontological requirement of democracy. There is no demos underlying international governance, but it is not even easy to conceptualize what that demos would be like. Network theory and constructivism are helpful in describing the form of international governance and explain how they work. But if anything they aggravate the normative and legitimacy dilemmas rather than solve them.

The "democracy" issue for International Law is no longer whether there is a right to democracy – which would, for example justify denial of recognition, or even intervention to restore a denial of democracy through a coup. Instead the issue is how in the face of International community which "appropriates" and defines common material and spiritual assets and in the face of international governance increasingly appropriates administrative functions of the State, it can establish mechanisms which, in the vocabulary of normative political theory, would legitimate such government. If an answer is not found to this, the huge gains attained in the systemic evoluton of lawmaking and law enforcement may be normatively and even politically nullified.

IV. Conclusion: The Tragedy of Democracy and the Rule of Law in the International Legal Order

We end by returning to our point of departure: The nexus between the Rule of (International) Law and Democracy.

Over much of the 20th Century there has been a considerable widening and deepening in the scope of the international legal order. We tried to capture such widening and deepening by our reference to the transactional, the communitarian and the regulatory dimensions of international command modes buttressed by a similar widening and deepening of compliance mechanisms. We argued that the concept of international governance in important, if discrete, areas of international life is fully justified, albeit governance without government. We further argued that both a change in sensibility towards the legitimation of power generally and the turn to governance of international law create a considerable normative challenge to the international legal order in its classical (transactional) and more modern forms (communitarian and regulatory). And yet, we

also argued that in all these spheres the challenge has been neither fully appreciated nor fully met. What's more, given that the vocabulary of democracy is rooted in notions of demos, nation and State, there is no easy conceptual template from the traditional array of democratic theories one can employ to meet the challenge. A simplistic application of the majoritarian principle in world arenas would be normatively ludicrous. It is not a question of a adapting national institutions and processes to international contexts. That could work in only limited circumstances. What is required is both a rethinking of the very building blocks of democracy to see how these may or may not be employed in an international system which is neither State nor Nation and to search for alternative legitimating devices which would make up for the non applicability of some of the classical institutions of democracy where that is not possible.

We speak about the tragedy of the international legal order in an altogether non-sentimental way. On the one hand, as a matter of our own values, we believe that much of the widening and deepening of international law over the last century, especially in the accelerated fashion of the last few decades, has been beneficial to mankind and has made the world a better place in which to live for a large number of persons.[29] We also believe, as indicated in the premises of this essay, that as in domestic situations where the rule of law is a necessary element and a condition for a functioning democracy, the same, *mutatis mutandis*, would be true for the international system. From this perspective we would regard as regressive a call for a wholesale dismantling of the international legal regime.

On the other hand, we believe too that in the international sphere as elsewhere the end can justify the means only so far. That a legitimacy powerfully skewed to results and away from process, based mostly on outputs and only to a limited degree on inputs, is a weak legitimacy and sometimes none at all.

The first sentiment would be a call for States, their internal organs (notably courts) and other actors to embrace international normativity. The second sentiment would be a call to the same agents to treat international normativity with considerable reserve. The traditional opposition to "internationalism" came from nationalism and was conceptualized as a tension between national sovereignty and international law. The

[29] There is, of course, much to qualify this statement. There are many international regimes, notably in the economic area, which overlook, compromise or even damage the interests and claims for justice of many people and groups. Universal justice, however it may be defined, is still far from being achieved.

opposition we are alluding to is, instead, not a concern with sovereignty – at least not with the classical sovereignty of the State. It takes the international legal order as an *acquis* – but it is unwilling to celebrate the benefits of that *acquis* when gained by a disenfranchisement of people and peoples. There is, thus, in our view a deep paradox in the spread of liberal democracies to an increasing number of States and populations around the world. This spread does not automatically go hand-in-hand with a normative call for a respect for international norms and for various degrees of constitutionalization of international regimes at least among and within the group of liberal States. It also means calling into question of those very norms by those very States in the name of that very same value, liberal democracy.