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# *Globalization and Europe: How to Square Democracy, Globalization, and International Law*

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## **Abstract**

*Fundamental controversy reigns in Europe over how to understand globalization. This is particularly true with respect to globalization's impact on democracy. The spectrum of relevant diagnoses ranges from those which identify an extreme danger to democracy to others which find that democracy is undergoing a substantive strengthening. The spectrum of proposals is similarly divergent. Some recommend the acceptance of a loss of democracy, some call for national self-preservation, others advocate a global democratic federation. The paper provides a stocktaking from a European perspective of influential scholarly positions on the basis of categorized diagnoses and proposals, and examines their conceptions of the further development of international law. This project is carried out in three steps. The first step serves to outline the concepts of globalization and democracy. The second presents important conceptions relating to the impact of globalization on the reality of democracy in a world organized around statehood. The third step puts forward ideas for the protection and development of democracy in the process of globalization and relates them to conceptions on the future development of international law. The article concludes with perspectives for future research.*

## **1 Project**

Fundamental controversy reigns in Europe over how to understand globalization. This is particularly true with respect to globalization's impact on democracy. The question of the fate of democracy within globalization encounters a number of most divergent descriptive and normative responses. The spectrum of relevant diagnoses ranges from those which identify an extreme danger to democracy to others which find that democracy is undergoing a substantive strengthening. The spectrum of

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proposals is similarly divergent. Some recommend the acceptance of a loss of democracy, some call for national self-preservation, some advocate a global democratic federation. Whereas most theories and understandings of democracy concur now on the fundamental institutional requirements for achieving democracy within a state, there is no common line on how to respond to the challenge posed by globalization. On the contrary, influential analyses and proposals tend to conflict.

The traditional instruments for the treatment of problems transcending the national framework, such as the impact of globalization on democracy, are found in international law. Accordingly, the problem may be analysed from an international law perspective. By no means, however, has a consensus been reached that international law provides suitable solutions for the critical relationship between democracy and globalization. Some even argue that globalization will lead to the demise of international law.<sup>1</sup>

Against this background this paper provides a stocktaking from a European perspective (with a German bias) of influential scholarly positions on the basis of categorized diagnoses and proposals. In doing so, the focus is not on their ‘correctness’: all of the positions portrayed contain plausible accounts, observations and proposals that this article will not rate. Rather, the intention is to order these standpoints with a view to their conceptions of the further development of international law.

This project is carried out in three steps. The first step serves to outline the concepts of globalization and democracy (Section 2). The second presents important conceptions relating to the impact of globalization on the reality of democracy in a world organized around statehood (Section 3). The third step presents ideas for the protection and development of democracy in the process of globalization and relates them to conceptions on the future development of international law (Section 4). The article concludes with perspectives for future research (Section 5). This study will not discuss the phenomenon of European integration, although it is sometimes considered to be a part of the process of globalization.

## 2 Conceptual Clarifications

### A Globalization

The term *globalization* subsumes – similarly to the related terms ‘international integration’ or ‘de-bordering’<sup>2</sup> (*Entgrenzung*) – a number of highly disparate observations whose regular common denominator is the determination of a profound transformation of the traditional nation-state, at least in its European form. This transformation

<sup>1</sup> Zumbansen, ‘Die vergangene Zukunft des Völkerrechts’, 34 *Kritische Justiz* (2001), 1, at 46, 59 *et seq.*

<sup>2</sup> Albert, ‘On Boundaries, Territory and Postmodernity’, 3 *Geopolitics* (1998) 53; Wolf, ‘Die Grenzen der Entgrenzung’, in B. Kohler-Koch (ed.), *Regieren in entgrenzten Räumen* (1998), at 77, 81 *et seq.* Cottier, ‘A Theory of Direct Effect in Global Law?’, in A. von Bogdandy *et al.* (eds.), *Liber Amicorum Claude-Dieter Ehlermann* (2002), 99, Stein, ‘International Integration and Democracy: No Love at First Sight’, 95 *AJIL* (2001) 3, at 489.

affects the democratic principle, since the nation-state has so far formed the framework for its successful realization.

The traditional European understanding of the nation-state is based on the assumption of a fundamental congruence between a people integrated by strong economic, cultural and historic bonds and its state whose main task is to organize and develop this nation. The nation-state, visualized through borders, coloured areas on maps, symbols, buildings and persons, provides the all-encompassing unity in which human life finds its place and sense.<sup>3</sup> In the traditional understanding the nation-state is seen as the highest form of attainment of a people bound in solidarity. It is the source of all law and the foundation and framework of the national economy (*Volkswirtschaft*). Only through the nation-state can the national language, the national literature, the national system of science and arts, and the national culture in general realize their full potential. The space in which most human activity occurs is thought to be defined by a nation-state's borders. A further constitutive element is the supremacy of state politics over all other societal spheres. All of these spheres are subject to political intervention, whose legitimacy stems from the democratic principle.

This understanding of the nation-state finds its legal basis in the traditional concept of sovereignty. Under international law, sovereignty protects the state against foreign interference.<sup>4</sup> Under municipal law, sovereignty expresses the state's supreme power and therefore its supremacy over all other societal spheres.<sup>5</sup> Under a democratic constitution, *popular* sovereignty is nothing but the realization of democracy upon which the legitimacy of all public power rests.<sup>6</sup> On this basis the symbiosis of the nation-state and democracy was formed; it has determined most theories of democracy, and continues to do so.<sup>7</sup>

<sup>3</sup> F. Meinecke, *Weltbürgertum und Nationalstaat* (2nd ed., 1911), 7.

<sup>4</sup> 'International law governs the relations between independent States. The rules binding upon States emanate from their own free will as expressed in conventions or by usages . . . in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed': *The S.S. 'Lotus' (Fr. v. Tur.)*, 1927 PCIJ, (ser. A) No. 10, 18.

Whether this understanding can still be viewed as current law is disputed. See in this sense Hillgruber, 'Souveränität – Verteidigung eines Rechtsbegriffs', 57 *Juristenzeitung* (2002), 1072 *et seq.*, 1075; however this differs from more authoritative positions in international law scholarship, cf. G. Dahm, J. Delbrück and R. Wolfrum, *Völkerrecht* (2nd ed., 1989), vol. I-1, at 218 *et seq.*, Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', *General Course on Public International Law* (1999), Rd.C. 281, at 9, 168 *et seq.*

<sup>5</sup> Randelzhofer, 'Staatsgewalt und Souveränität', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts* (2nd ed., 1995), vol. 1, § 15, paras. 25 *et seq.*, 35 *et seq.*; C. Möllers, *Staat als Argument* (2001), 291 *et seq.*

<sup>6</sup> Heller, 'Die Souveränität. Ein Beitrag zur Theorie des Staats- und Völkerrechts', first published in 1927, in H. Heller, *Gesammelte Schriften* (1971), vol. 2, at 31 *et seq.*

<sup>7</sup> Volkman, 'Setzt Demokratie den Staat voraus?', 127 *Archiv für öffentliches Recht* (2002), at 575, 577, 582; M.G. Schmidt, *Demokratiethorien* (1995), 13.

The term globalization indicates developments which might undermine this symbiosis.<sup>8</sup> The common ground among the different understandings of globalization is the observation of a massive global increase of interaction between the same spheres of different nations, especially since the beginning of the 1990s. Globalization goes beyond the phenomenon of the interdependence of states, because it is said to lead to a partial fusion of once separate national realms, in particular the fusion of national economies into a single world economy. However, it has rarely been argued that globalization in its present form entails a development towards a fully borderless world.<sup>9</sup> If state borders become less important or easier to overcome in some respects and for some individuals, there is little evidence to suggest that they will ultimately become obsolete for everybody, as billion dollar profits in migrant smuggling show.

The term globalization was first used mainly by authors who critically observed the enhanced possibilities for economic actors and the emergence of global markets. However, the term made its way into the parlance of free-traders and gained favour in business circles to describe diverse forms of global contraction and the phenomenon of 'de-bordering'.

Global contraction and the decrease of the importance of borders are often ascribed to the revolution in communications and transport technologies, a development already identified by Karl Marx and Friedrich Engels.<sup>10</sup> The multi-faceted developments brought together under the term globalization are not, however, simply the result of a quasi natural evolution of technical inventions and applications alone. They are also the fruit of conscious political decisions which have contributed to the dismantling of various borders.<sup>11</sup>

Strengthened transnational bonds and partial fusions have led to a 'de-nationalization', which is manifested in various ways.<sup>12</sup> Many people have daily contact with individuals outside their nation; increasing numbers even migrate outside of their original cultural spheres in search of a better life; national economies are becoming more and more bound to a global economy; national cultures are placed in a context of a globally operating entertainment industry; and in numerous academic fields a career depends

<sup>8</sup> For more detail see the report of the German federal parliament's (Bundestag) committee on 'Globalisation of the World Economy – challenges and strategies', Enquête Commission, *Globalisierung der Weltwirtschaft – Herausforderungen und Antworten*. Final Report, BT-Drucks. 14/9200, at 49 *et seq.*; see *ibid.*, Summary of the Final Report (24 Jun. 2002), available at [http://www.bundestag.de/gremien/welt/sb\\_glob\\_kurz.pdf](http://www.bundestag.de/gremien/welt/sb_glob_kurz.pdf). See U. Hingst, *Auswirkung der Globalisierung auf das Recht der völkerrechtlichen Verträge* (2001), 69 *et seq.*; M. Ferrarese, *Le istituzioni della globalizzazione* (2000), at 11 *et seq.*; Hobe, 'Die Zukunft des Völkerrechts im Zeitalter der Globalisierung', 37 *Archiv für Völkerrecht* (2000), 253, at 257 *et seq.*; Dicke, 'Erscheinungsformen und Wirkungen von Globalisierung in Struktur und Recht des internationalen Systems', 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2000) 13; most influential are numerous books published in U. Beck's series 'Edition Zweite Moderne' from 1997, in particular U. Beck, *Was ist Globalisierung?* (3rd ed., 1999), 48 *et seq.*

<sup>9</sup> Möllers, 'Globalisierte Jurisprudenz', 79 *Archiv für Rechts- und Sozialphilosophie beiheft (ARPS)*(2001), 41, 46 *et seq.*

<sup>10</sup> Marx and Engels, 'Das Kommunistische Manifest' (1848), in K. Marx and F. Engels, *Das Manifest der kommunistischen Partei* (2nd ed., 1980), at 40, 47.

<sup>11</sup> The details of which are much disputed, *cf. infra* Section 3.

<sup>12</sup> M. Zürn, *Regieren jenseits des Nationalstaats* (1998), 65 *et seq.*: 'De-nationalisation'.

on being published in a handful of international journals. At the same time, the term globalization indicates new dangers which are not confined to a distinct territory. Such dangers extend from climate-change to financial crises to globally operating criminal and terrorist groups.

Last but not least, the term globalization stands for the proliferation of international organizations and the expansion of international law, which, depending on the conception, promote globalization, simply institutionalize it or rather try to shape a globalized world for the benefit of public welfare.<sup>13</sup> The increasing autonomy of international law and international organizations from the political preferences of individual states is viewed by some as a prerequisite of a system of international law that meets the challenges of globalization.<sup>14</sup> National law, once considered the expression of the will of a people, accordingly implements ever more international rules resulting from an international process that is necessarily different from processes under domestic constitutions.<sup>15</sup> National law is hereby de-nationalized. Summing up, national politics are now found to be bound by a multiplicity of legal and factual constraints originating from outside the nation-state. To the extent that national politics reflect democratic processes, globalization and democracy clash.

## B What is Democracy?

On first glance it would seem that the fall of the Berlin Wall and the dissolution of the Soviet bloc resolved all fundamental issues over the core contents of the principle of democracy with respect to the organization of public power.<sup>16</sup> There is an almost universal and increasingly legally based consensus regarding the *necessary* requirements for a state to qualify as being democratic. International law,<sup>17</sup> comparative law<sup>18</sup> as well as political and constitutional theory<sup>19</sup> all agree upon the elements deemed necessary: officers of government must ultimately derive their power from citizen-based elections that are general, equal, free and periodic. Moreover, all public power has to be exercised in accordance with the rule of law and has to be restricted through

<sup>13</sup> On possible understandings see Ferrarese, *supra* note 8, 57 *et seq.* In more detail see Sands in this issue.

<sup>14</sup> Cf. Tietje, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes', 118 *Deutsches Verwaltungsblatt* (2003), 1081, at 1087.

<sup>15</sup> Thürer, 'Völkerrecht und Landesrecht – Thesen zu einer theoretischen Problemschreibung', 9 *Schweizerische Zeitschrift für Int. und Europäische Recht* (1999), 217 *et seq.*; Tietje, *supra* note 14, 1093, sees 'domestic and international law as a functional unity'.

<sup>16</sup> The most visible expression of this belief is F. Fukuyama, *The End of History and the Last Man* (1992), 133 *et seq.* I do not address the much debated topic of social prerequisites of democracy; on this see Howse in this issue.

<sup>17</sup> A groundbreaking article is Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992), 46; Dahm, Delbrück and Wolfrum, *supra* note 4, 14 *et seq.*; Frowein, 'Konstitutionalisierung des Völkerrechts', 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2000), 427, 431 *et seq.*; see also M. Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (1993), 435 *et seq.*; for a critique see Koskeniemi, 'Whose Intolerance, Which Democracy?', and Roth, 'Evaluating Democratic Progress', both in G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (2000), at 436, 493.

<sup>18</sup> N. Dorsen *et al.*, *Comparative Constitutionalism* (2003), at 1267 *et seq.*; C. Grewe and H. Ruiz Fabri, *Droits constitutionnels européens* (1995), 223 *et seq.*

<sup>19</sup> Schmidt, *supra* note 7, 17; G. Sartori, *Demokratiethorie* (1992), 33, 40 *et seq.*

a guaranteed possibility of change in power.<sup>20</sup> Even those for whom globalization alters everything do not question this understanding of democracy.

This consensus with respect to the requirements of democracy has not, however, led to a consensus on theory and premises. One still has to distinguish an understanding of democracy which takes as its starting point the people as a macro-subject (the holistic concept of democracy) from one which designates affected individuals as its point of reference (the individual, civil or fundamental rights concept of democracy, including the deliberative theory of democracy). It is likewise not decided as to whether democracy is concerned with the self-determination of a people or of affected individuals (the emphatic or emancipatory conception of democracy) or whether it simply requires effective controls over those who govern (the sceptical understanding of democracy).<sup>21</sup> Democracy remains an essentially contested concept.

The different conceptions of democracy still lead to different results on some issues in the municipal realm, such as granting electoral rights to resident foreigners, allowing citizen participation in administrative procedures or employee involvement in decision-making in public or private organizations. These divergences do not, however, affect or endanger the solid consensus over the institutions and procedures required for the realization of democracy within a state.

Such a consensus does not extend to the issue as to how globalization affects the achievement of democracy and how it can be maintained in the process of globalization. In both regards, the differing conceptions of democracy result in conflicting diagnoses or proposals, neither of which command any larger support. Thus the theoretical discussion of democracy acquires its greatest relevance on the transnational level.<sup>22</sup>

### 3 Effects of Globalization on Democratic States

This discussion might eventually lead to a broadly accepted strategy for achieving genuine democratic transnational arrangements. At the moment, however, the varying conceptions collide. Often, dichotomies, such as the following, are used in an attempt

<sup>20</sup> 'Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has at its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.

Democracy, with its representative pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.'; Charter of Paris for a New Europe, 30 ILM (1991), 190, 194.

<sup>21</sup> For a convincing reconstruction from the perspective of the German constitutional scholarship see Volkmann, *supra* note 7, 582 *et seq.*; see other reconstructions by Mastronardi, 'Demokratiethoretische Modelle – praktisch genutzt', 7 *Aktuelle Juristische Praxis* (1998) 383; Schmidt, *supra* note 7, at 115 *et seq.*

<sup>22</sup> The debate in the European Union shows that such a discussion can lead to convincing results. Following an intensive and sharp, and sometimes apparently uncompromising, debate the model of dual legitimation has become a widely agreed-upon solution. The main focus point is a dual form of representation, on the one hand through representatives of the peoples as macro-subjects (Council, European Council), on the other hand through representatives of the individual Union citizens (European Parliament).

to order the multifaceted conceptions: formal versus substantial, holistic versus individualistic, weak versus strong, liberal versus communitarian, elitist versus participatory and output-orientated versus input-orientated.<sup>23</sup> Yet, the main theoretical positions do not really fit within any dualist models. The situation is more complex. For this reason a more inductive approach has been chosen for the following analysis.

## ***A Globalization as a Threat to National Self-determination***

Most academic treatments of the relationship between globalization and democracy have a diagnostic character. More often than not they come to the conclusion that globalization endangers democracy in its current form. That endangerment is usually considered to arise 'behind the scenes'; unlike the danger to democracy by an authoritarian government, globalization does not intervene directly in the democratic decision-making process. More specifically, three theoretical positions appear to be of particular importance.<sup>24</sup>

### *1 Globalization as Americanization*

The first position considers the developments subsumed under the term globalization as an expansion of US-American interests and lifestyles. Accordingly, globalization is little more than American hegemony.<sup>25</sup> In this version, globalization means the economic triumph of *American* neo-liberalism, which primarily benefits *American* enterprises, the cultural dominance of the *American* entertainment industry, which transforms social patterns in other nations, or the leading academic role of *American* universities. All of this is seen to occur in a framework of historically unprecedented *American* political and military supremacy. Central international institutions, especially the International Monetary Fund, the World Bank and the World Trade Organization – to a lesser extent, the United Nations – are considered agents of this development.<sup>26</sup>

This threatening scenario is based mainly on understandings of democracy that view self-determination as the be-all and end-all of democracy, whether they rest on a holistic tradition concerned with the self-determination of a people, or on a fundamental rights tradition concerned with the self-determination and self-realization of individuals. Accordingly, globalization endangers democracy because it builds up pressure to assimilate and leads to heteronomy, as a result of which the national democratic process is no longer free to shape the nation's life. This criticism of globalization is found in various – otherwise contrasting – theoretical and ideological camps. It is present within both the conservative criticism of mass culture (*Kulturkritik*) and the emancipatory conceptions of democracy. It is important to stress that, on this understanding, globalization does not necessarily lead to a weakening of state

<sup>23</sup> Volkmann, *supra* note 7, 598, n. 90; in detail see S. Dellavalle, *Una costituzione senza popolo?* (2002), 67 *et seq.*

<sup>24</sup> For an overview see E. Altvater and B. Mahkopf, *Grenzen der Globalisierung. Ökonomie, Ökologie und Politik in der Weltgesellschaft* (4th ed., 1999), 542 *et seq.*

<sup>25</sup> Mattei, 'A Theory of Imperial Law', 10 *Indiana Journal of Global Legal Studies* (2003) 383; Sur, 'The State between Fragmentation and Globalisation', 8 *EJIL* (1997) 421, 433.

<sup>26</sup> Krisch, 'Weak as a Constraint, Strong as a Tool? The Place of International Law in U.S. Foreign Policy', in D. Malone and Y. Khong (eds.), *Unilateralism and U.S. Foreign Policy* (2003), 41.

institutions. Few proponents of this position doubt that globalization is driven by the political power of the US.

## 2 *Globalization as a Capitalist Strategy*

A second critical position views globalization as capitalism's attempt to increase profits, to conquer markets, and – in particular in the Western welfare states – to reduce profit-restricting social achievements.<sup>27</sup> The danger for democracy lies, with regard to the Western democracies, above all in the undermining of the democratic balance attained between the opposing class interests. This position is mainly based on an emancipatory understanding of democracy, which is most prominent in European social democratic parties,<sup>28</sup> but it can also be of a Marxist-Leninist provenance. Representatives from developing nations often consider globalization as an extension of colonial economic dependency for the benefit of Western businesses and states.<sup>29</sup> This version by no means proclaims the decline of the state, which it considers instead as the most important agency for the implementation of particular interests.

## 3 *Globalization as the Weakening of State Institutions*

The third position lacks the immediate critical impetus of the former two. It focuses rather on the fundamental weakening of power of national institutions to shape a nation's life, resulting from the increased strength of transnationally operating groups of individuals and organizations, in particular economic actors, but also criminal organizations. These groups are seen to have moved from the national into the international realm and as having emancipated themselves – at least partially – from the political supremacy of state institutions.<sup>30</sup> This position views globalization much more as a spontaneous evolutionary development than do the first two.<sup>31</sup>

Political attempts by state institutions to counter the negative aspects of globalization are judged ambivalently under this understanding. Accordingly, as opposed to the first two versions, international law and in particular international economic law are not construed as being the driving forces of globalization; rather they are seen as being capable of promoting global welfare. Nevertheless, the international mechanisms which aim to legally order the spontaneous process of globalization, including

<sup>27</sup> Altvater and Mahnkopf, *supra* note 24, at 562 *et seq.*; Beck, *supra* note 8, 14; H.-P. Martin and H. Schumann, *Die Globalisierungsfalle. Der Angriff auf Demokratie und Wohlstand* (1996), 193 *et seq.*

<sup>28</sup> See in more detail Schmidt, *supra* note 7, at 159 *et seq.*

<sup>29</sup> Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World', 32 *NYU Journal of International Law and Politics* (1999–2000) at 243, particularly 246 *et seq.*, 275 *et seq.*; a helpful overview of the multi-layered discussion is provided by Chimni, 'Towards a Radical Third World Approach to Contemporary International Law', 5 *International Center for Comparative Law & Politics Review* (2002) 16, 21 *et seq.*

<sup>30</sup> Mathews, 'Power Shift', 76 *Foreign Affairs* (1997) 1, at 50 *et seq.*; Luhmann, 'Der Staat des politischen Systems', in U. Beck (ed.), *Perspektiven der Weltgesellschaft* (1998), 375; Zumbansen, *supra* note 1, at 61 *et seq.*

<sup>31</sup> Enquête Commission, *supra* note 8, at 56.



those of global governance,<sup>32</sup> are critically assessed under this position due to their detrimental effect on democracy. It criticizes the frailty of their democratic control, their lack of transparency and responsiveness, their technocratic character, and the difficulty of changing their once-established rules.<sup>33</sup>

This understanding is further developed by various theoretical schools.<sup>34</sup> The system theory, as elaborated by Niklas Luhmann, is particularly influential in Germany; it acuminates the understanding dramatically. According to this theory the most important sectors of national societies have already been fully globalized, and a global society with a global political system (the '*international community*') has been formed. However, neither the global nor the national political systems, which subsist as partial systems, are considered to enjoy supremacy over other societal spheres.<sup>35</sup> The demise of the supremacy of politics is a key assertion of this theoretical camp with profound consequences for democracy.

Such a dramatic diagnosis of the fundamental weakening of traditional democratic institutions is by no means limited to this theory. Also some theoreticians of international relations assert the existence of an integrated (or 'de-bordered') world in which the nation-state becomes increasingly irrelevant.<sup>36</sup> On the basis of a number of sociological studies, the majority opinion of the German Parliament's Enquête Commission on globalization similarly concludes that globalization causes a substantial erosion of democratic decision-making in national institutions.<sup>37</sup>

## B *Globalization as an Instrument of Democratization*

These bleak visions contrast with optimistic accounts. There is by no means a consensus that globalization weakens the realization of the democratic principle. Rather, some see a close interaction between globalization and democratization. In this respect, it is helpful to distinguish between a school of thought focused on economic development and one based on the further development of international law.

<sup>32</sup> On Global Governance see Commission on Global Governance, *Our Global Neighbourhood. The Report of the Commission on Global Governance* (1995), 253 *et seq.*; Messner and Nuscheler, 'Global Governance. Organisationselemente und Säulen einer Weltordnungspolitik', in D. Messner and F. Nuscheler (eds.), *Weltkonferenzen und Weltberichte. Ein Wegweiser durch die internationale Diskussion* (1996), at 12, 21.

<sup>33</sup> Considerations of this kind focus on the WTO: Charnovitz, 'WTO Cosmopolitics', 34 *NYU Journal of International Law & Politics* (2002) 299 *et seq.*; M. Krajewski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation* (2001), at 217 *et seq.*; Hilf and Eggers, 'Der WTO-Panelbericht im EG/USA-Hormonstreit', 8 *Europäische Zeitschrift für Wirtschaftsrecht* (1997) 559; see generally Crawford, 'Democracy and International Law', 64 *BYIL* (1994) 113 *et seq.*

<sup>34</sup> E.g. C. Schmitt, *Der Begriff des Politischen* (2nd ed., 1963), at 10 of the foreword: 'Die Epoche der Staatlichkeit geht nun zu Ende' ('The era of statehood is coming to an end').

<sup>35</sup> Luhmann, 'Die Weltgesellschaft', 57 *ARSP* (1971) 1, 27 *et seq.* *Die Gesellschaft der Gesellschaft* (1997), 145 *et seq.* and 'Der Staat des politischen Systems', in Beck (ed.), *supra* note 30, at 376 *et seq.*; Teubner, 'Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus', 15 *Rechtshistorisches Journal* (1996) 255 *et seq.*

<sup>36</sup> Forschungsgruppe Weltgesellschaft, 'Weltgesellschaft: Identifizierung eines "Phantoms"', 37 *Politische Vierteljahresschrift* (1996) 5, at 12 *et seq.*

<sup>37</sup> Enquête Commission, *supra* note 8, at 56.

### 1 *Globalization as the Promoter of Liberal Democracy*

The first school of thought, to which the periodical *The Economist* and the minority of the German Parliament's Enquête Commission belong, emphasizes the positive democratic effects of free-trade and communicative freedoms.<sup>38</sup> It focuses on the link between global free-trade and prosperity on the one hand and the ensuing link between prosperity and democracy on the other.<sup>39</sup> Clearly, this conception is less concerned with political self-determination; in the liberal tradition of the democratic theory, democracy is predominantly seen as a set of institutions for ensuring the control and responsiveness of politicians and bureaucrats.

Against this background, a limitation on the leeway for national political activity due to the pressures of globalization is not considered as fundamentally negative or hostile to democracy. Rather, these pressures are seen as tending to limit the scope for unreasonable decisions of the political classes which damage the interests of the majority of consumers.<sup>40</sup> Moreover, democracy and fundamental rights are found to be stabilized through global publicity and global media, which loosen the grasp of authoritarian regimes on individuals.

### 2 *The Constitutionalization of International Law*

Similar conclusions are attained by a school of thought that asserts the advent of a 'constitutionalization of international law'. It focuses on increasingly stringent international rules which bind national governments.<sup>41</sup> Three observations form the core of this school: the deepening of the ethical dimension of international law, its expansion and more effective enforcement, and its partial emancipation from the will of the individual state.<sup>42</sup> All these developments are considered, in principle, as adequate responses to the challenges of a globalized world. The core institutions of international law are seen as increasingly effective instruments *vis-à-vis* dictatorial regimes

<sup>38</sup> *Ibid.*, 461 *et seq.* (minority vote).

<sup>39</sup> Regarding the correlation between trade and wealth see Chow, 'Causality between Export Growth and Industrial Development', 26 *Journal of Development Economics* (1987), 55 *et seq.*; Harrison, 'Openness and Growth: A Time-Series, Cross Country Analysis for Developing Countries', 48 *Journal of Development Economics* (1996), 419 *et seq.*; Frankel and Romer, 'Does Trade Cause Growth?', 89 *American Economic Review* (1999) 379 *et seq.* Regarding the correlation between wealth and democracy see Helliwell, 'Empirical Linkages between Democracy and Economic Growth', 24 *British Journal of Political Science* (1994) 225 *et seq.*; Barro, 'Determinants of Democracy', 107 *The Journal of Political Economy* (1999) 158; Acemoglu and Robinson, 'Why did the West extend the Franchise? Democracy, Inequality and Growth in Historical Perspective', 115 *Quarterly Journal of Economics* (2000) 1167.

<sup>40</sup> Meng, 'Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG', in U. Beyerlin *et al.* (eds.), *Festschrift für Rudolf Bernhardt* (1995), at 1063, 1080 *et seq.*

<sup>41</sup> This school of thought is particularly strong in the German speaking scholarship: see Frowein, *supra* note 17, 440 *et seq.*; Tomuschat, 'International Law as the Constitution of Mankind', in United Nations (ed.), *International Law on the Eve of the Twenty-first Century* (1997), 37; Uerpmann, 'Internationales Verfassungsrecht', 56 *Juristenzeitung* (2001) 565, at 566 *et seq.*; Cottier and Hertig, 'The Prospects of 21st Century Constitutionalism', 7 *Max Planck UNYB* (2003) 261; see also Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited', 1 *Max Planck UNYB* 1.

<sup>42</sup> Mosler, 'The International Society as a Legal Community', 140 *Rd.C.* (1974) 1, at 31 *et seq.*; Tomuschat, *supra* note 4, at 72 *et seq.*; Fassbender, 'Der Schutz der Menschenrechte als zentraler Inhalt des völkerrechtlichen Gemeinwohls', 30 *Europäische Grundrechte-Zeitschrift* (2003) 1, at 2 *et seq.*

and even promoters for democratic forms of government.<sup>43</sup> Globalization is, in principle, considered as a chance for a stronger international law to further democratic domestic institutions.<sup>44</sup>

### C Globalization as a Bugaboo

The last position to be mentioned in relation to the consequences of globalization on democracy is that of the doubters. They deny that the process of 'de-bordering' has achieved such a magnitude that national institutions have seriously been affected; in consequence, globalization has so far not limited the effectiveness of democracy in Western states. This position is particularly favoured in trade-union circles.<sup>45</sup> It points to the fact that the European states continue to redistribute about 50 per cent of their gross domestic product. This is seen as proving that the political grasp of the state on most sectors of society continues to be tight. Decisions on redistribution of resources and security – as the core of the national political process – are considered to be taken within a national framework hardly constrained by globalization.

## 4 Strategies to Respond to the Challenge

While most studies on democracy and globalization aim at a diagnosis of their relationship, numerous researchers propose a response to the challenge that globalization presents to democracy.<sup>46</sup> Such proposals form one facet of the discussion about the legitimacy of international law, i.e. the rational grounds as to why international law may merit acceptance and obedience.<sup>47,48</sup>

<sup>43</sup> Franck, *supra* note 17, at 47 *et seq.*; Stein, *supra* note 2, at 533 *et seq.*; Beutz, 'Functional Democracy: Responding to Failures of Accountability', 44 *Harv JIL* (2003) 387, at 391 *et seq.*

<sup>44</sup> Culminating in the right to intervention: see, early on, Schachter, 'The Legality of Pro-Democratic Invasion', 78 *AJIL* (1984) 645, at 649 *et seq.*; Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy', 34 *Harv JIL* (1993) 163, at 175; F. Tesón, *A Philosophy of International Law* (1998), 55, at 57; a critical view is that of Koskeniemi, 'Die Polizei im Tempel', in H. Brunkhorst (ed.), *Einnischung erwünscht? Menschenrechte und bewaffnete Intervention* (1998), at 63, 64 *et seq.* For the position that international law is strengthened through the process of globalization see List and Zangl, 'Verrechtlichung internationaler Politik', in G. Hellmann, K. Wolf and M. Zürn (eds.), *Die neuen internationalen Beziehungen* (2003), at 387 *et seq.*

<sup>45</sup> Altwater and Mahnkopf, *supra* note 24, at 383; Genschel, 'Globalisierung als Problem, als Lösung und als Staffage', in G. Hellmann, K. Wolf and M. Zürn (eds.), *Die neuen internationalen Beziehungen* (2003), at 429, 435.

<sup>46</sup> An overview with varying classifications is Beck, *supra* note 8, at 218 *et seq.*; Volkmann, *supra* note 7, at 598 *et seq.*, each case with additional evidence. The palette of offers varies significantly.

<sup>47</sup> Regarding this general discussion see Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law', 93 *AJIL* (1999) 596 *et seq.*; Stoll, 'Globalisierung und Legitimation' (Göttinger introductory lecture), available at <http://www.cege.wiso.uni-goettingen.de/Veranstaltungen/antrittsvorstellung.pdf>; cf. also S. Kadelbach, *Zwingendes Völkerrecht* (1992), at 130 *et seq.*

<sup>48</sup> The issue of the legitimacy of international law extends beyond its democratic credentials. Further grounds might also support its legitimacy, in particular the effective protection of human rights as well as the effective treatment of social problems. The maintenance of peace or the protection of the environment (the so-called *output* legitimacy) is of particular importance in this respect: see Cassese, 'Lo spazio giuridico globale', 52 *Rivista trimestrale di diritto pubblico* (2002) 323, at 331 *et seq.*, and in detail Kumm in his comment on this article in this issue.

Most academic contributions regarding the protection and development of democracy in the process of globalization have not yet been developed into detailed models. Rather, they exist in a preliminary stage involving the testing of ideas on a new and by no means fully understood phenomenon. In particular, international legal scholarship in continental Europe does not yet focus on the democratic legitimacy of international law and international organizations.<sup>49</sup> The principle of democracy is, generally speaking, only dealt with in two respects: first, as an international legal requirement regarding a national system of government and, second, in connection with parliamentary control of foreign policy.<sup>50</sup> Further debate, on which this article focuses, is not yet concerned with the design of appropriate practical institutional arrangements, but rather with their conceptual foundations. Here, a classification of the various approaches is proposed with respect to their views on international law and the developments they recommend.

### A State Sovereignty as a Paradigm

One approach for safeguarding democracy within the process of globalization is based on the conviction that its successful realization is only possible within a nation-state.<sup>51</sup> This approach is usually based on an understanding of democracy focusing on self-determination, be it of a holistic or of a fundamental rights (individualistic) provenance. The primary concern is the protection of and the return to the political supremacy of national democratic institutions, i.e. the protection of state sovereignty in its traditional meaning. As a result, this approach resists the transnationalization of societal spheres

<sup>49</sup> The close connection between US international legal scholarship and the discipline of international relations leads to a more intensive perception. For a useful compilation see G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (2000). The latest overview is provided by the contributions in 10 *Indiana Journal of Global Legal Issues* (2003) 1; nevertheless, the subject is also considered by American scholars to be in an embryonic phase: Ku and Jacobson, 'Broaching the Issues', in C. Ku and H. Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law* (2003), at 3, 8. In continental European journals there have been relatively few contributions in the past six years that have focused on this subject. The United Kingdom is situated, like most, halfway between the European and American positions. The *European Journal of International Law* does not differ in this respect, with contributions from Wheatley, 'Democracy in International Law: A European Perspective', 51 *ICLQ* (2002) 225, at 227 *et seq.* and 'Deliberative Democracy and Minorities', 14 *EJIL* (2003) 507; Sur, *supra* note 25, at 421; Marks, 'The End of History? Reflections on some International Legal Theses', 8 *EJIL* (1997) 449.

<sup>50</sup> Randelzhofer, 'Zum behaupteten Demokratiedefizit der Europäischen Gemeinschaft', in P. Hommelhoff and P. Kirchhof (eds.), *Der Staatenverbund der Europäischen Union* (1994), at 39, 40 *et seq.*; it is difficult to find more detailed discussions in general textbooks: cf. K. Doehring, *Völkerrecht* (1999), at paras. 117, 239 and 990; K. Ipsen, *Völkerrecht* (4th ed., 1999), at 374 *et seq.*; Kunig, 'Völkerrecht und staatliches Recht', in W. Graf Vitzthum (ed.), *Völkerrecht* (2nd ed., 2001), at 87, 93 *et seq.*; M. Shaw, *International Law* (4th ed., 1997), at 177 *et seq.*; P. Daillier and A. Pellet, *Droit International Public* (6th ed., 1999), at 427 *et seq.*; B. Conforti, *Diritto Internazionale* (5th ed., 1997), at 191 *et seq.*; J. González Campos *et al.*, *Curso de Derecho Internacional Público* (2002), at 432 *et seq.*

<sup>51</sup> Isensee, 'Abschied der Demokratie vom Demos', in D. Schwab *et al.* (eds.), *Festschrift für Paul Mikat* (1989) at 705.

and the autonomization of international political decision-making and international law-making.<sup>52</sup>

### 1 *Limited International Coordination as a Paradigm*

To protect the democratic state as an institution of political self-determination, this conception can lead to the demand to slow down or even reject developments which contribute to a globalization that endangers democracy. As Ernst-Wolfgang Böckenförde, perhaps the most eminent living German *Staatsrechtslehrer*, puts it: 'If statehood [and therefore democracy] is to be preserved, then a counter-thrust against the globalization process appears necessary in the form of a struggle for the re-establishment of the supremacy of politics in a governable space'.<sup>53</sup> In order to counter transnational interdependence detrimental to democracy, the development of international law must, in this view, also be slowed down or even rejected. This is especially so in so far as it supports such interdependence or affects spheres where law-making and political decision-making require maximum legitimation, particularly with regard to the redistribution of resources, security or national identity. In light of growing transnational interdependence, parliamentary control of foreign policy is not considered sufficient to uphold democracy. Due to the lack of a global *demos*, this understanding rejects an increase in the autonomy of international decision-making. Rather, it questions globalization as a path for increasing societal wealth and individual freedom, and accords the principle of democracy fundamental primacy.

Translated into the categories of international law, this understanding corresponds to a position that considers mere coordination<sup>54</sup> – rather than cooperation or even integration – as the appropriate task and *gestalt* for international law.<sup>55</sup> Accordingly, the concept of sovereignty, in the sense of a state's autonomy, forms the guiding paradigm for the development of international law. The international system should therefore aim at sovereign equality and not at its democratization. In other words, the principle of democracy translates in the international realm into the principle of sovereign equality.

<sup>52</sup> Böckenförde, 'Die Zukunft politischer Autonomie', in E.-W. Böckenförde, *Staat, Nation, Europa* (1999), at 103, 124 *et seq.*; similar to Hillgruber, *supra* note 4, at 1076 *et seq.*, 1079; Isensee, 'Die alte Frage nach der Rechtfertigung des Staates', 54 *Juristenzeitung* (1999) 265; Kahn, 'American Hegemony and International Law', 1 *Chicago JIL* (2000) 1, at 3 *et seq.*; Rubenfeld, 'The Two World Orders', in G. Nolte (ed.), *American and European Constitutionalism* (forthcoming).

<sup>53</sup> Böckenförde, *supra* note 52, at 123; see also Schindler, 'Völkerrecht und Demokratie', in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Seidl-Hohenveldern* (1998), at 611, 618, asserts a tension impossible to overcome. Translation by the author.

<sup>54</sup> Similarly see W. Friedmann, *The Changing Structure of International Law* (1964), at 60 *et seq.*

<sup>55</sup> Weil, 'Vers une normativité relative en droit international?', 86 *Revue générale de droit international public* (1980) 5, at 44 *et seq.* This sceptical position can be confined to individual areas, as I propose with the model of 'co-ordinated interdependence' for the interpretation and development of WTO law: von Bogdandy, 'Law and Politics in the WTO. Strategies to Cope with a Deficient Relationship', 5 *Max Planck UNYB* (2002) at 609, 612 and 653 *et seq.*

## 2 *The International Law of Coordination Plus Informal Cooperation*

An approach that allows for state cooperation beyond mere coordination on the basis of the above-mentioned premises advocates informality. This position is not opposed to cooperation as such, but considers processes of international legalization and autonomous international legislation as problematic under the democratic principle.<sup>56</sup> It prefers that cooperation, which more substantially affects democratic self-determination than coordination, operate outside the legal framework.

By staying outside the legal framework, cooperating national politicians retain a firm grasp on all issues even after a decision has been taken. No international norm will thus obstruct national democratic processes. This understanding puts technocratic elites operating outside the legal framework at the centre of the international political processes.<sup>57</sup> The G-8 process, with its profound effects on the domestic political agenda, therefore appears as a trend-setting example of international cooperation responsive to the democratic principle.<sup>58</sup>

## 3 *Unilateralism*

A third option upholding the primacy of national sovereignty, which also allows for enjoyment of the benefits of globalization, is unilateralism.<sup>59</sup> It is mostly held by US authors, but also appears in European thinking.<sup>60</sup> A democratic justification of unilateral policy can easily be given. According to the common – though not uncontested – understanding, the principle of democracy under a given constitution applies *only* to the relationship between those to whom the constitution grants power and the citizenry of that state. The effects of domestic law and policy on foreigners or other peoples consequently lies outside the ambit of this principle.<sup>61</sup>

Under this understanding, if globalization is considered desirable or inevitable, it should be shaped, where possible, according to preferences and decisions found in the national democratic process. The implementation of national interests *vis-à-vis* the interests of other states and foreigners can accordingly be construed as the realization of the democratic principle of the legally relevant constitution, i.e. the constitution

<sup>56</sup> Goldstein *et al.*, 'Introduction: Legalization and World Politics', 54 *International Organisation* (2000) 385 *et seq.*

<sup>57</sup> Junne, 'Theorien über Konflikte und Kooperation zwischen kapitalistischen Industrieländern', in V. Rittberger (ed.), *Theorien der internationalen Beziehungen* (Supp. 21, 1990), at 353, 364 *et seq.*; Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 183, at 184 *et seq.*; also published as 'Government Networks: the Heart of the Liberal Democratic Order', in Fox and Roth, *supra* note 17, at 199; Stewart, 'Administrative Law in the Twenty-First Century', 78 *NYU L Rev* (2003) 437, at 455 *et seq.*

<sup>58</sup> See the contributions in the collected volumes J. Kirton and G. von Furstenberg (eds.), *New Directions in Global Economic Governance* (2001) and J. Kirton *et al.* (eds.), *Guiding Global Order* (2001); P. Hajnal, *The G7/G8 System – Evolution, Role and Documentation* (1999).

<sup>59</sup> For the basis of a singular American status in international law see Reisman, 'Assessing Claims to Revise the Laws of War', 97 *AJIL* 82 at 82 *et seq.*, 90 (2003); as an expression of democratic constitutionality see Kahn, *supra* note 52, at 10 *et seq.*, 18; Rubinfeld, *supra* note 52; an extensive account of the conceptual background is by Afsah, 'Creed, Cabal or Conspiracy – The Origins of the Current Neo-Conservative Revolution in US Strategic Thinking', 4 *German Law Journal* (2003), at 901 *et seq.*

<sup>60</sup> R. Cooper, *The Breaking of Nations. Order and Chaos in the Twenty-first Century* (2003), at 83 *et seq.*

<sup>61</sup> Kahn, *supra* note 52, at 8.

that grants power to the national government in question. Seen in this light and constitutionally speaking, George W. Bush's responsibility *only* towards the American people is legally relevant, and enforcing national security against Afghanistan or Iraq contains a democratic dimension.<sup>62</sup>

To be sure, not all scholars who construe democracy on this theoretical basis advocate unilateralism. There is room for different approaches if further considerations and principles are given more weight, such as peace,<sup>63</sup> the 'open state'<sup>64</sup> or respect for international law.<sup>65</sup> It is, however, important to see that international obligations almost by necessity lead to a constriction of democracy under this understanding.

## B *Cosmopolitan Law as a Paradigm*

The starkest contrast to the above-mentioned approach is formulated by those who advocate cosmopolitan law, which they consider the ultimate normative objective of modernity. Such law, they argue, should be the foundation and expression of a democratic global federation or cosmopolitan democracy. Accordingly, the nation-state is viewed as a mere intermediary stage in the institutional evolution of public power. This understanding rests on a long tradition which has left its marks on international law scholarship,<sup>66</sup> as well as political thinking in general.<sup>67</sup> Its main premise is that only a democratic world federation can lay down law which shapes globalization according to the needs of humanity. The international political level must itself operate democratically in order to satisfy the democratic principle.<sup>68</sup> This perception usually results from a fundamental rights understanding of democracy,<sup>69</sup> which focuses mostly on self-determination. Only such an emphatic understanding of democracy is capable of demanding a world federation, something that many consider to be utopian.<sup>70</sup>

<sup>62</sup> See the National Security Strategy of the USA: 'In the war against global terrorism, we will never forget that we are ultimately fighting for our democratic values and way of life'. The National Security Strategy of the United States of America, White House, September 2002, III., available at <http://usinfo.state.gov/topical/pol/terror/secstrat.htm#nss1>. In this sense one can also point to Art. I-3(4)(1) of the Draft Treaty for a Constitution for Europe, which states: 'In its relations with the wider world the Union shall uphold and promote its values and interests'.

<sup>63</sup> L. Chieffi, *Il valore costituzionale della pace* (1990).

<sup>64</sup> This principle has developed in German scholarship: see *infra* Section 4C1.

<sup>65</sup> For example, the German Federal Constitutional Court (BVerfG), 89 BVerfGE 155, at 185 *et seq.*

<sup>66</sup> G. Scelle, *Le Pacte des Nations et sa liaison avec Le Traité de Paix* (1919), at 101 *et seq.*, 105 *et seq.* and *Précis de droit des gens* (1932), vol. 1, at 188 *et seq.*; Schücking, 'Die Organisation der Welt', in W. van Calker (ed.), *Festschrift für Paul Laband* (1908), at 533 *et seq.*; whereas Kelsen, the most significant representative of monism in international law, remains sceptical: see H. Kelsen, *Peace Through Law* (1944), at 9 *et seq.*

<sup>67</sup> See, e. g., E. Jünger, *Der Weltstaat. Organismus und Organisation* (1960).

<sup>68</sup> Archibugi, 'Principi di democrazia cosmopolita', in D. Archibugi and D. Bettham (eds.), *Diritti umani e democrazia cosmopolita* (1998), at 66, 90 *et seq.* Some scholars consider national elections as hardly capable of legitimizing important governmental decisions on the international plane: cf. H. Brunkhorst, *Solidarität. Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (2002), at 20.

<sup>69</sup> F. Müller, *Demokratie zwischen Staatsrecht und Weltrecht* (2003), at 11 *et seq.*; J. Habermas, *Faktizität und Geltung* (1992), at 532 *et seq.* and *passim*: Offe and Preuß, 'Democratic Institutions and Moral Resources', in D. Held (ed.), *Political Theory Today* (1991), 143 *et seq.*

<sup>70</sup> Presented as an outright ethical obligation by O. Höffe, *Demokratie im Zeitalter der Globalisierung* (2nd ed., 2002), 267.

Yet, the demand for a democratic world federation can legally be construed from the principle of democracy set out in national constitutions. If the principle is understood as requiring individual self-determination, a structural democratic deficit in the age of globalization arises. Many state measures impact upon individuals in other states. However, these persons, as non-citizens, have almost no possibility to assert their interests and preferences within the democratic process of the regulating state. Against this background, participation in and the opening up to global democratic institutions may overcome democratic deficits in national decision-making processes. Thus, the principle of democracy in the constitutions of many states can be construed as aiming towards an almost Hegelian superceding (*Aufhebung*) of traditional statehood.

Most recent publications on international law which envisage a world federation devote little space to the democratic principle.<sup>71</sup> Research in other disciplines has been much more prolific in this regard.<sup>72</sup> The key for democratization of the international realm is often considered to be a global institution of a parliamentary nature. Such an institution would catalyze global democratic processes and the formation of a global public.<sup>73</sup> It is not uncommon for the European Union to be viewed as an example.<sup>74</sup> The constitutions of the established democratic nation-states are sometimes also conceived as guiding lights of a global order, albeit not as blueprints. Some authors, however, advocate new but little-defined sets of institutions in order to anchor democracy on the world plane.<sup>75</sup> Within the latter models, representative organs are only accorded a subordinate role.

Be that as it may, law-making under contemporary international law is considered unsatisfactory and in need of a far more solid democratic basis. Many scholars place much emphasis on transnationally operating non-governmental organizations, which they construe as the nucleus of a future democratic global public capable of animating global democratic institutions.<sup>76</sup>

### ***C International Law of Cooperation as a Paradigm***

A third school of thought advocates intense cooperation among democratic nation-states and focuses accordingly on the international law of cooperation. The key belief

<sup>71</sup> Cf. B. Fassbender, 'The U.N. Charter as a Constitution', 36 *Colum JTL* (1998) 574 and *UN Security Council Reform and the Right of Veto. A Constitutional Perspective* (1998), at 301 *et seq.* (1998); Hobe, *supra* note 8, 281; J. Delbrück, 'Wirksameres Völkerrecht oder neues "Weltinnenrecht"', in J. Delbrück, *Die Konstitution des Friedens als Rechtsordnung* (1996), at 318 *et seq.*; but see also his more recent piece 'Exercising Public Authority Beyond the State', 10 *Indiana Journal of Global Legal Studies* (2003) 1, at 29, 37 *et seq.*

<sup>72</sup> The theoretical scope of approaches is evident when comparing O. Höffe's Kantian focused book *Demokratie im Zeitalter der Globalisierung*, *supra* note 70, with the Hegelian approach taken by H. Brunkhorst, *Solidarität*, *supra* note 68, at 110 and 184.

<sup>73</sup> For concrete proposals see Archibugi, *supra* note 68, at 98 *et seq.*, 109; also D. Held, *Democracy and the Global Order* (1995), at 278 *et seq.* and 'Kosmopolitische Demokratie und Weltordnung. Eine neue Tagesordnung', in M. Lutz-Bachmann and J. Bohman (eds.), *Frieden durch Recht* (1996), at 220 *et seq.*, 232.

<sup>74</sup> Early on see J. Monnet, *Memoires* (1976), 617; also Petersmann, 'The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization', 6 *EJIL* (1995) 161, at 221.

<sup>75</sup> Müller, *supra* note 69, at 143.

<sup>76</sup> Brunkhorst, *supra* note 68, at 209 *et seq.*; Müller, *supra* note 69, at 139.



is that the democratic nation-state is and remains the essential framework for the realization of the democratic principle as well as the pivotal point of the international system. The nation-state is considered capable of thoroughly mastering the challenge of globalization in close cooperation (including partial integration) with other states and with the aid of international organizations.<sup>77</sup> In the course of globalization, the nation-state has been weakened and fragmented. Nevertheless, the two core premises of a well-functioning democracy within a nation-state are considered to remain intact:<sup>78</sup> national elections and parliamentary institutions continue to convey a sufficient amount of democratic legitimacy and the state retains the capacity to enforce its will throughout the national society.

Under German constitutional law, the openness of Germany towards international legal regimes of a cooperative nature is constitutionally required.<sup>79</sup> The same is true for the European Union.<sup>80</sup> Such openness can also be deduced from the constitutional principle of democracy. The argument is similar to the one already presented with respect to cosmopolitan democracy. The deduction is based on a fundamental rights understanding of democracy, which not only includes citizens, but requires – in order to minimize heteronomy – that the preferences and interests of affected foreigners be taken into account.<sup>81</sup> Thus, international law acquires its own and specific democratic significance, unavailable to domestic law, since international law is the standard instrument for giving foreigners a voice in national law-making.<sup>82</sup>

This school of thought distinguishes itself from that focused on state sovereignty because it does not understand openness towards international law and international policy as a disadvantage for democracy. On the contrary, according to this vision, such openness achieves a democratic potential that the closed or hegemonic state cannot attain. Loss of national self-determination is compensated through greater transnational participation.

The fundamental difference between this and the cosmopolitan school of thought lies in the fact that global democratic institutions are considered in practice futile and – as

<sup>77</sup> As a form of 'global governance', cf. Enquête Commission, 'Summary', *supra* note 8, at 76 *et seq.*; König, 'Governance als Steuerungskonzept', in K. König *et al.*, *Governance als entwicklungs- und transformations-politisches Konzept* (2002), at 9 *et seq.*

<sup>78</sup> Walter, 'Constitutionalizing (Inter)national Governance', 44 *GYIL* (2001) 170 *et seq.*

<sup>79</sup> According to the preamble, the Basic Law is: '... moved by the purpose to serve world peace as an equal part of a unified Europe'; in detail see Mosler, 'Die Übertragung von Hoheitsgewalt', in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (1992), vol. 7, § 175, para. 14; Tietje, *supra* note 14, 1087.

<sup>80</sup> Art. 11 EU Treaty. This idea is even more forcefully expressed through the European Draft Treaty establishing a Constitution for Europe, Art. 3 (4), III-193.

<sup>81</sup> See S. Langer, *Grundlagen einer internationalen Wirtschaftsverfassung* (1995), at 23 *et seq.*, 51; for an appropriate understanding of the concept of sovereignty see Dahm, Delbrück and Wolfrum, *supra* note 4, at 218 *et seq.*; R. Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (2003), 17. This notion is also expressed in BVerfGE 83, 37, 52.

<sup>82</sup> Some reports of the WTO's Appellate Body seem to be inspired by this understanding: see WTO Appellate Body Report, *Standards for Reformulated and Conventional Gasoline*, AB-1996-1, WT/DS2/AB/R (29 Apr. 1996); *United States – Import Prohibition of certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* AB-2001-4, WT/DS58/AB/R (21 Nov. 2001).

legal and political projects – normatively problematic. Following Kant, a world federation is understood as potentially despotic.<sup>83</sup> As opposed to the fourth school of thought (Section 4.D), state supremacy is assumed to continue over all other spheres of society. This school of thought attracts the support of most international legal scholars. Within it, two positions for determining the appropriate forum for cooperation can be distinguished: the unitarian model of legitimation and the pluralist model of legitimation.

### 1 *The Unitarian Model of Legitimation*

Under the first position, the democratic principle is institutionally realized *only* through the choices of the electorate. All public acts achieve a democratic quality only when they are either enacted (exceptionally) by the citizenry as such (through referenda) or can be traced back to the decisions of elected bodies ('chain of democratic legitimation').<sup>84</sup> According to this understanding, the democratic legitimacy of international law can be improved by better parliamentary control of the executive,<sup>85</sup> the establishment of international institutions of a parliamentary nature<sup>86</sup> or referenda.

The involvement of those affected or other civil actors in decision-making processes is not attributed any positive relevance for democracy by the unitarian model. Rather, it sees the democratic principle as shedding negative light on such participatory procedures, because they represent a potential threat to the democratic 'chain of legitimation'. It is this point which distinguishes this position from the one described below (Section 4.C.2): civil participation, in particular that of non-governmental organizations, cannot strengthen the democratic credentials of international law or international politics. No procedures are seen as having been developed so far whereby civil participation complies with core requirements of the democratic principle, above all the requirement of democratic equality.<sup>87</sup>

Consequently, the democratic openness to the interests of citizens of other states is carried out procedurally via governmental cooperation as well as via international

<sup>83</sup> Kant, 'Zum ewigen Frieden', in I. Kant, *Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik* (K. Vorländer (ed.), 1964), at 115, 147.

<sup>84</sup> The 'chain of legitimation' is a core concept of German constitutional law; see Böckenförde, 'Mittelbare/repräsentative Demokratie als eigentliche Form der Demokratie', in G. Müller (ed.), *Festschrift für Kurt Eichenberger* (1982), at 301 *et seq.*, 315; this has been important in numerous decisions of the Federal Constitutional Court, see most recently BVerfG, Az.: 2 BvL 5/98 5. Dec. 2002, available at <http://www.bundesverfassungsgericht.de/cgi-bin/link.pl?entscheidungen>, at n. 156 with further references concerning earlier decisions.

<sup>85</sup> Cf. Wolfrum, 'Kontrolle der auswärtigen Gewalt', 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1997) 38, at 45 *et seq.*, 61 *et seq.*; furthermore see Hailbronner, 'Kontrolle der auswärtigen Gewalt', 56 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (1997) 7.

<sup>86</sup> See Kadelbach, 'Die parlamentarische Kontrolle des Regierungshandelns bei der Beschlußfassung in internationalen Organisationen', in R. Geiger (ed.), *Neue Probleme der parlamentarischen Legitimation im Bereich der auswärtigen Gewalt* (2003), at 41, 53, 56 *et seq.*; for an overview of the relevant international practice see H. Schermers and N. Blokker, *International Institutional Law* (3rd ed., 1995), § 558 *et seq.* Lindemann, 'Parliamentary Assemblies, International', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1997), vol. 3, 892–898; Walter, 'Parliamentary Assemblies, International', *Addendum*, in *ibid.*, 898–904.

<sup>87</sup> Stoll, *supra* note 47, V A 4 b, VII.

bodies that are essentially controlled by national governments. Thus, the executive and technocratic character of international political processes are not viewed within this framework as problematic under the democratic principle. Moreover, further international legalization and a cautious development of international organizations towards more autonomy ('constitutionalization of international law'<sup>88</sup>) do not raise concern.

The basic premise of this position is that additional international legalization and more autonomous international law-making are required in order to cope with the challenge of globalization. Accordingly, limitations on national democracy do not constitute the main legitimacy problem of international law. The focus of concern is rather the protection of the rule of law and of fundamental rights.<sup>89</sup> This understanding can be summarized as follows: there cannot be a democratic world federation, but there can be a world of closely and successfully cooperating democracies; it is the task of contemporary scholarship to contribute the realization of this objective.<sup>90</sup>

## 2 *The Pluralist Model of Legitimation: Civil Society Takes Centre Stage*

The second position believes that the international law of cooperation can substantially increase the democratic legitimacy of international law if new forms of civic participation are adopted. Such forms, going beyond elections and referenda, are possible avenues for the realization of the democratic principle and adequate responses to the detachment of international processes from national parliamentary control.<sup>91</sup> The underlying premise is that enabling the participation of non-governmental organizations (NGOs), as exponents of the international civil society, represents a prime strategy for furthering the democratic principle on the international plane.<sup>92</sup> At its heart there usually lies a fundamental rights understanding of democracy focused on the opportunity for participation of the individual, but this position sometimes also draws on neo-corporative theories of democracy.<sup>93</sup>

<sup>88</sup> Uerpmann, *supra* note 41, at 565 *et seq.*

<sup>89</sup> Cf. Bourgeois, 'On the Internal Morality of WTO Law', in A. von Bogdandy *et al.* (eds.), *Liber Amicorum Claus-Dieter Ehlermann* (2002), at 39 *et seq.* Frowein, 'Issues of Legitimacy around the United Nations Security Council', in J. Frowein *et al.* (eds.), *Festschrift für Tono Eitel* (2003), at 121, 122 *et seq.*

<sup>90</sup> This also appears as the vision of Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', in: J. Habermas, *Der gespaltene Westen* (2004), at 113, 134 *et seq.*, 137 *et seq.*

<sup>91</sup> Of particular interest in recent years has been civil actors' access to the WTO Dispute Settlement mechanism: Mavroidis, 'Amicus Curiae Briefs before the WTO: Much Ado about Nothing', in *Liber Amicorum Claus-Dieter Ehlermann*, *supra* note 89, at 317 *et seq.*, and Steger, 'Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience', in *ibid.*, at 419 *et seq.*; Ascensio, 'L'amicus curiae devant les juridictions internationales', 105 *Revue générale de droit international public* (2001) 897.

<sup>92</sup> Enquête Commission, *supra* note 8, at 439 *et seq.*; Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', 42 *Der Staat* (2003) 1, at 8 *et seq.*; Khan, 'The Anti-Globalization Protests: Side-show of Global Governance, or Law-making on the Streets?', 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law)* (2003) 323; Charnovitz, *supra* note 33, at 299; I. B. Boutros-Ghali, *An Agenda for Democratization* (1997), Sales No. E.97.1.3, at 29, and 34 *et seq.*

<sup>93</sup> This latter understanding informs the EU Commission's White Paper on European Governance: see COM(2001)428 final, available at [http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001\\_0428en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf).

The central institutional issue for the pluralist approach concerns the development of decision-making systems in such a way that civil actors can participate in international procedures and ultimately in international law-making, conveying social interests, preferences and values. This position emphasizes the need for transparency of international politics, seeing it as indispensable for effective democratic involvement of the nascent transnational civil society.

### **D *Democracy after the Demise of the Supremacy of Politics***

All of the preceding understandings rest on the premise of the supremacy of politics over other societal spheres. However, numerous scholars diagnose a loss of this supremacy, finding instead new disorder resulting from overwhelming differentiation and fragmentation. Some even go so far as to claim that the world is relapsing into a situation akin to the Middle Ages.<sup>94</sup> The supremacy of the nation-state over other societal spheres is said to have become substantially eroded, leading to the inability of the state to organize society effectively. Any conception which envisages the realization of democracy through the supremacy of politics is, consequently, futile and hopeless in the era of globalization.

With reference to the future of democracy, most representatives of this vision agree that democracy organized through statal procedures has lost much of its meaning. Accordingly, the political apathy of many citizens appears intuitively astute. Some even diagnose – by no means joyously – the end of democracy.<sup>95</sup> Public law scholarship cannot shrug off such a diagnosis. Should it prove convincing, a fundamental reorientation of constitutional scholarship and practice would be advisable, requiring for example the horizontal application of fundamental rights as an instrument for protecting individuals from infringements by other private actors.<sup>96</sup> Furthermore, in order for constitutional law to realize its basic principles throughout the entire society,<sup>97</sup> new legal institutions would have to be conceived and established.

Notwithstanding the diagnosed demise of the supremacy of politics, there are also proposals for maintaining democracy in this new setting. They can best be described as aiming at the control of any powerful actor. Gunther Teubner asserts the formation of a new system of the separation of powers provided by separate and competing social systems. These systems in turn are seen as responding to the democratic principle through the formation of ‘dualistic social constitutions’. Any such system is divided into a spontaneous sphere which allows for participation of individuals and an organizational

<sup>94</sup> Cf. above, Section 3A3.

<sup>95</sup> J.-M. Guéhenno, *Das Ende der Demokratie* (1994), at 13 *et seq.*, 162 and *passim*; see similarly Böckenförde, *supra* note 52, at 116; Dahl, ‘Can International Organizations be Democratic?’, in I. Shapiro and C. Hacker-Cordon (eds.), *Democracy’s Edges* (1999), at 19 *et seq.*

<sup>96</sup> Thürer, ‘Modernes Völkerrecht: Ein System im Wandel und Wachstum – Gerechtigkeitsgedanke als Kraft der Veränderung?’, 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2000) 557, at 587 *et seq.*; Teubner, ‘Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie’, 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) 1, at 4 *et seq.*; Guéhenno, *supra* note 95, at 14.

<sup>97</sup> This is a core concern of European public law scholarship.

sphere which checks the other systems.<sup>98</sup> It is also argued that democracy might be maintained through another radically innovative avenue, i.e. by basing new law less on decisions of public bodies, but rather having it emerge spontaneously within the international society. The prime example is the alleged emergence of legal norms as a result of the outrage of international society in response to specific situations.<sup>99</sup>

Positions in the 'governance' debate reach similar conclusions to the extent that consensual forms for the development and implementation of policy are considered to be appropriate responses to the challenges of globalization. Given the largely fragmented international system, the consensus of large businesses, NGOs and further important actors is deemed necessary and adequate.<sup>100</sup> Such approaches are mostly based on models of associative democracy,<sup>101</sup> whereby democracy is realized through consultation among the representatives of collective interests.

## 5 Perspectives for Future Research

Scholarship provides for very divergent analyses of how globalization impacts on the existing forms of democracy and proposes different strategies for responding to the diagnosed challenges. The multiplicity and divergence of opinions should, given the diffused nature of the phenomenon and the dynamics of its development, be welcome: it protects against viewing the problem too narrowly and rashly opting for a strategy that might do more harm than good.

Clearly, the challenge of globalization to democracy is becoming the most important challenge to democratic theory – whether on a legal, political or philosophical plane.<sup>102</sup> Further contributions in this field should – and herein lies the central proposition of this article – strive towards transparently formulating their premises. This would make it easier to evaluate possible interpretations of current law and strategies for its development.

Yet, it cannot be expected that a consensus on an appropriate democratic theory for the transnational realm will ultimately arise. Theories sometimes die out, but are hardly ever abandoned. However, once the different positions are well understood,

<sup>98</sup> Teubner, 'Privatregimes: Neo-spontanes Recht und duale Sozialverfassung in der Weltgesellschaft', in D. Simon (ed.), *Festschrift für Spiros Simitis* (2000), at 437, 447 *et seq.* and 'Globale Zivilverfassungen', *supra* note 96, at 25 *et seq.*

<sup>99</sup> Teubner, 'Globale Bukowina', *supra* note 35, at 255; Fischer-Lescano, 'Globalverfassung: Verfassung der Weltgesellschaft', 88 *ARSP* (2002) 349, at 356 *et seq.*; see also Reisman, 'A Critique of International Treaty Making', in R. Wolfrum (ed.), *The Development of International Law in Treaty Making* (forthcoming).

<sup>100</sup> Commission on Global Governance (ed.), *Issues in Global Governance/Our Global Neighborhood* (1995), at 253 *et seq.*

<sup>101</sup> Schmitter, 'Interest, Association, and Intermediation in a Reformed Post-Liberal Democracy', in W. Streeck (ed.), *Staat und Verbände* (1994), at 161; Martinelli, 'Governance globale e responsabilità democratica', in F. Brun and N. Ronzitti (eds.), *L'Italia e la politica internazionale* (2001), at 47, 51 *et seq.*

<sup>102</sup> The need to look much more deeply into the issue of democracy is also triggered by an understanding of international law as *public* international law. The essence of *public* law is its authoritative nature, i.e. its binding nature irrespective of the consent of the addressee. Therefore, the issue of legitimacy, which provides normative reasons for this authoritative nature, takes on increasing importance. Yet, the foremost ground of legitimacy is – in the European perspective – the respect for the principle of democracy.

the pragmatic genius of legal scholarship might find institutional arrangements that would fit most theories. This is not mere wishful thinking. Two core concepts of German public law, for example, the state (*Staat*) and the statute (*Gesetz*), bridge radically different understandings of legitimacy. Public law scholarship in the form of 'dogmatic construction' has thereby contributed to laying the foundations for a widely accepted system of public law, perhaps proving the superiority of 'dogmatic' or 'formal' scholarship over legal and political theory as a means for resolving concrete issues.<sup>103</sup> If international law scholarship succeeded in developing similar bridging concepts, that would be no little achievement. However, in order to be heard in a globalized international law community anchored in Anglo-Saxon international law scholarship, good ideas will probably not suffice. The largely isolated international lawyers of continental Europe also need a common organizational platform, which might be provided by the recently established European Society of International Law.<sup>104</sup>

<sup>103</sup> For a non-formal view of the achievements of formalism, see M. Koskenniemi, *The Gentle Civilizer of Nations* (2002), at 502 *et seq.*

<sup>104</sup> See the website of the European Society of International Law at <http://www.esil-sedi.org>.