COMMENT

COMMENTARY TO ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER THE LEGITIMACY OF INTERNATIONAL LAW AND THE ROLE OF THE STATE

INTRODUCTION: FRAGMENTATION AND THE ROLE OF THE STATE

It will come as a surprise to many readers that Professor Teubner presented their fascinating contribution on regime collision[1] to the *Michigan Journal of International Law*'s Symposium on a panel devoted to "the Role of the State in International Law." Indeed, one could not imagine better devil's advocates than Professor Teubner and Dr. Andreas Fischer-Lescano. They propose a radical break with a concept of international law and order based on the autonomous will of Nation-States. Accordingly, legal regulation does not only, if at all, emanate from Nation-States, but from a panoply of other public and, mostly, private actors. Thus, the authors dismiss all claims of an "organizational or dogmatic unity of international law."[2]

Professor Teubner and Dr. Fischer-Lescano do, however, not only challenge the "Westphalian system,"[3] but also the recent advocacy of the Bush administration in favor of a world of sovereign Nation-States loosely cooperating in "coalitions of the willing."[4] The experience with recent international rulings may confirm their viewpoint. For example, the Bush administration was forced to apply the WTO Appellate Body decision declaring U.S. steel tariffs illegal.[5]

However, such an explanation fails to recognize the element of choice. It was the United States that imposed the tariffs in the first place, in full knowledge of their doubtful compatibility with trade rules. It also considerably underestimates the possibility of irrational behavior in spite of the perfect knowledge of the threat of negative consequences. In any case, it was the State which decided not only to accept the obligations in question, but also

1. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

2. Fischer-Lescano & Teubner, *supra* note 1, at 1017.

3. *See, e.g.*, Leo Gross, *The Peace of Westphalia: 1648–1948*, 42 AM. J. INT'L L. 20 (1948).

4. Secretary of Defense Donald Rumsfeld, Remarks as delivered at the Marshall Center 10th Anniversary in Garmisch, Germany (June 11, 2003) *at* http://www.defenselink.mil/speeches/2003/sp20030611-secdef0285.html (last visited Nov. 6, 2003).

5. *See* United States—Definitive Safeguard Measures on Imports of Certain Steel Products, Report of the Appellate Body, Nov. 10, 2003, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, all *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2003.

whether to implement the international decision or rather suffer the consequences.[6]

Nevertheless, the characterization of the present predicament as one of fragmentation of the public space into different issue areas conforms to the experience of most international lawyers. The unity of the Nation-State appears increasingly illusory. Legal specialization does not stop at national borders. Although States are represented in the vast majority of decision-making bodies, whether at the WTO or in the Basle Committee on Banking Supervision,[7] it may be more important whether a State representative regards herself as trade lawyer, environmental lawyer, or human rights lawyer, than whether she represents the United Kingdom or Morocco. Thus, for many lawyers, globalization appears indeed characterized by a shift from territorial borders to functional boundaries.[8] Most issue areas[9] such as trade, environment, or human rights have left territorial boundaries behind and cannot be dealt with effectively at a national level.

But States continue to be the main unit of legitimacy and of, ideally democratic, debate and decision-making. For this role of the State, no substitute appears on the horizon. The "democratic deficit" of regional and international institutions remains unresolved; alternative models of legitimacy—such as pure functionalism and market rationality—are based on a standard of efficiency which is itself in need of justification. Systems of rules and norms constructed 'bottom-up,' that is, by a process of self-ordering of a particular issue area,[10] cannot legitimize outcomes, because

6. This does not imply that such action would be compatible with WTO rules. *See* Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416, 416–17 (1996). For a convincing argument against Hippler Bello, *see* John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1997); John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?*, 98 AM. J. INT'L L. 109 (2004). Bello has modified her view since. *See* Judith Hippler Bello, Book Review, 95 AM J. INT'L L. 984, 986–87 (2001) (reviewing JOHN H. JACKSON, THE JURISPRUDENCE OF GATT & THE WTO (2000)); *but see* Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUDS. S179, S190 (2002) (endorsing Bello's earlier viewpoint).

7. On government networks generally, *see* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); for criticism regarding the lack of democratic accountability of these networks, *see* Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997).

8. NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 571 (1995); NIKLAS LUHMANN, DIE GESELLSCHAFT DER GESELLSCHAFT 158–60 (1997).

9. For the term, *see, e.g.*, David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 6–10 (2002). To compare the term "regimes" as used by political scientists, *see* Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983). However, as Leebron shows, *supra* at 9, the latter definitions lie square to legal terminology.

10. *See* Gunther Teubner, *Global Bukowina: Legal Pluralism in World Society*, *in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

they are self-imposed by the relevant power holders and power brokers—and thus open to challenges from all those not participating in the process, but subject to their decisions.

As Daniel Philpott's contribution to this symposium[11] has demonstrated anew, the stakes of this debate can hardly be overstated. The religious wars caused the Western nations to recognize the monopoly of legitimate violence in the State. After the horrific World Wars and Nazi crimes, international society extended, to a certain degree, this solution to the international level by requiring Security Council approval for the use of force by States except in self-defense.[12] Thus, no less is in question than the idea of the Nation-State as authoritative, but democratic arbiter of disputes between citizens, and as a locus of democratic struggle, debate and decision-making about the "public interest."

Of course, Teubner and Fischer-Lescano do not ignore the problem. They argue that each sub-system can itself develop the relevant decision-making processes in a transparent and democratic fashion. But this proposition pre-supposes an analysis of who is affected by the decisions within an issue area. Due to the uncertainty and fallibility of all consequential analysis, however, the effects of decisions in one subsystem on others will also be indeterminate and uncertain. Therefore, the presumption underlying the general competence of States—namely, that most decisions in the public sphere affect all citizens and must therefore be legitimized, directly or indirectly, by all of them—is also valid internationally, whether one deals with human rights, the environment, or trade and development.

Thus, the present contribution suggests that the appeal of Teubner's and Fischer-Lecano's model is diminished by a certain lack of attention to questions of democratic legitimacy. This argument reproduces, to a certain extent, the famous *Methodenstreit* between Niklas Luhmann and Jürgen Habermas at the international level.[13] Nevertheless, the phenomena described by Teubner and Fischer-Lescano are real, and reaffirmations of orthodoxy will be of little help. The following comments suggest that, in spite of an ever-growing functional differentiation, issue areas are held together by a

11. Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 MICH. J. INT'L L. 981 (2004).

12. Of course, recent developments may have unraveled this compact. *See* Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16 (May/June 2003). For arguments against Glennon's views, *see* Mary Ellen O'Connell, *Review Essay: Re-leashing the Dogs of War*, 97 AM. J. INT'L L. 446, 447–48 (2003); Andreas L. Paulus, *The War against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691, 716–17 (2004) (containing further references).

13. *See* JÜRGEN HABERMAS & NIKLAS LUHMANN, THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE: WAS LEISTET DIE SYSTEMFORSCHUNG? (1971).

minimum of common values and decision-making procedures[14]—in other words, by general international law which bases its legitimacy on decisions of, ideally democratic, national processes of decision-making.

LEGITIMACY PROBLEMS IN A WORLD OF MULTIPLE REGIMES

A. *Pluralism as a Value—The Example of Religion*

In a certain way, the approach suggested by Professor Teubner and Dr. Fischer-Lescano itself requires the recognition of some first principles common to all legal systems, from the application of legal method to the recognition of a pluralism both of values and issue areas. However, not all systems lend themselves easily to such recognition of their inherent limits. The most telling example is religion, and, as Professor Philpott has shown in his presentation, it was religion which brought about the necessity for a pluralist international system based on territory and the principle of *cuius regio, eius religio*.[15] The terrorism promulgated by a certain branch of Islamic fundamentalism has recently shown that the universal recognition of religious pluralism remains precarious even in the contemporary inter-State order.

That may also be a reason why human rights and religion occasionally have an uneasy relationship.[16] For some, human rights consist of almost neutral, substantively empty principles protecting individuals against interference from the public. In that vein, human rights delineate the public and private spaces and do not express overarching values. Increasingly, however, human rights seem to fulfill, in the international system, a quasi-religious, ideological function, providing values for the international system and defining limits for legal regulation—a function, of course, which is embraced and not contradicted by Teubner and Fischer-Lescano.[17] But if each and every subsystem must observe the values of human rights, equal participation, and even democratic governance, there is not only fragmentation, but also a considerable amount of "value-glue"—and therefore unity. That is exactly what international *ius cogens* is about—and the skepticism expressed by Teubner and Fischer-Lescano[18] contrasts with their optimism regarding the emergence of similar processes within specific issue areas.[19] But to the

14. For a practical example, *see* Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903 (2004).

15. Philpott, *supra* note 11.

16. *Cf.* Philpott, *supra* note 11.

17. Fischer-Lescano & Teubner, *supra* note 1, 1033 *passim*.

18. *Id*.

19. Of course, this does not imply that *ius cogens* in its current form can fulfill this function properly.

extent human rights are providing those values, they will occasionally conflict with other overarching systems, for example religion.

Of course, this comment does not suggest that religious freedom and pluralism are necessarily incompatible with each other. The challenge rather consists in devising a legal order that allows for the expression of different religions, albeit each of them claims to present a comprehensive system—in other words, in devising a legal order representing a Rawlsian "overlapping consensus."[20] But religious fundamentalism demonstrates that functional pluralism is itself grounded on values. It thus cannot avoid questions of legitimacy by pointing to a miraculous "auto-poiesis" of subsystems that would automatically justify their separate existence. Teubner's and Fischer-Lescano's pluralism must itself rely on the recognition of overarching values by the participants of the system. In other words, for the avoidance of an all-out war between fragments claiming comprehensiveness and sovereignty, some unitarian principles for the relationship between different subsystems and issue areas are required. Thus, the discussion cannot be avoided about what establishes such a consensus—and whose consensus it is anyway.

B. *International Law as Overarching System*

This question thus leads us to the role of (international) law in the management of the systems and of their intercourse. One possibility to conceptualize the role of law—which seems to be espoused by Teubner and Fischer-Lescano—is to regard law as a meta-phenomenon, as following the development of the issue areas it applies to. Changes in the structure of other systems (such as politics or religion) will be reflected in the law applying to them.[21] On the other hand, however, law itself is a system of its own, containing its own set of assumptions how to generate knowledge and to arrive at normative conclusions. The inherent characteristics and specificities of law provide for a minimum of unity and coherence, such as rules on law-making, law interpretation, and law enforcement.

As to international law, many observers have doubted its legal character, from John Austin[22] to contemporaries like now Under-Secretary of State

20. JOHN RAWLS, POLITICAL LIBERALISM 133 *passim* (1993). For an extension of the overlapping consensus to the international realm, *see* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 14 (1995); ANDREAS L. PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT: EINE UNTERSUCHUNG ZUR ENTWICKLUNG DES VÖLKERRECHTS IM ZEITALTER DER GLOBALISIERUNG 157–59 (2001) [hereinafter INTERNATIONALE GEMEINSCHAFT]; THOMAS POGGE, REALIZING RAWLS 227 (1989); BRAD ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 6 (1999).

21. Fischer-Lescano & Teubner, *supra* note 1.

22. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 117–26 (Wilfried E. Rumble ed., 1995).

John Bolton.[23] As H.L.A. Hart has put it, international law allegedly misses "secondary" rules of recognition, change and adjudication.[24] Some, such as Thomas Franck, have recently concluded that international law has now acquired these qualities,[25] only to have second thoughts on matters such as Kosovo and Iraq.[26] Niklas Luhmann was decidedly more optimistic. Noting the gap between societal development and its translation into legal form, the lawyer-turned-sociologist remarked with his characteristic irony: "But naturally, even lawyers have the courage to travel and to thereby step beyond the area of validity of their legal order."[27] Teubner and Fischer-Lescano now seem to recognize a lot of law in separate functional issue areas, but not in the overarching system. In fact, their claim that law has to follow functional issue areas seems to care little about the specific characteristics and assumptions of a legal as opposed to a political or social order.

However, if (international) law is supposed to be a system of its own, it needs to have basic systemic rules in place. Teubner and Fischer-Lescano appear to believe that these rules are different from system to system, but they tell us little of how they come about. In fact, in almost all cases cited by them, whether the *Yahoo!* case, copyright or patent law, the legal regulations in question stem from the very State or inter-State bodies which have been dismissed before as increasingly irrelevant. Thus, a trend from territorial to functional tasks will be followed by functional rather than territorial conflicts of norms—but this also depends on the norms in question, not only on the problem to solve. It makes a difference whether one balances international labor law against trade law or national copyright laws against different national standards for the limitation of freedom of speech.

The parsimonious character of international law makes it quite malleable for the self-ordering of régimes—within certain limits. International law grounds its obligations either in consent or in custom—and recognizes certain general principles, either internationally or derived from domestic legal systems.[28] One may dispute whether such an order fulfills Hart's requirements for a legal system,[29] but it certainly provides enough leeway for *leges*

23. John Bolton, *Is There Really "Law" in International Affairs*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1 (2000). For a spirited defense of the legal character of international law, *see* Anthony d'Amato, *Is International Law Really "Law"?*, 79 N.W. U. L. REV. 25 (1985).

24. HERBERT L. A. HART, THE CONCEPT OF LAW 213–37 (2d ed. 1994).

25. See FRANCK, *supra* note 20, at 1–6.

26. For recent discussion, *see* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003).

27. LUHMANN, DAS RECHT DER GESELLSCHAFT, *supra* note 8, at 573 n. 40 (my translation). The German original reads: "Aber natürlich haben auch Juristen den Mut zu reisen und dabei den Geltungsbereich ihrer Rechtsordnung zu überschreiten."

28. *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1), 56 Stat. 1055, T.S. No. 993.

29. *See supra* note 23 and accompanying text.

speciales. The main problem does not lie in the international legal requirements for binding norms, but in the limitation of its law-making subjects to States. However, this problem is not impossible to overcome if one contemplates applying the same criteria—namely, the legally binding nature of formal commitments and of custom accompanied by a joint conviction regarding their legally binding nature—to the pronouncements of non-State actors.[30] However, non-State actors can only bind themselves. As soon as public interests are at stake, only public decision-making appears legitimate. Thus, the question of "who decides?" appears everything but "unimportant."[31]

Teubner and Fischer-Lescano suggest substituting *ius cogens* by a regime-specific transnational ordre public. They are skeptical, although not quite hostile, towards recent claims of the "constitutionalization" of an "international community law."[32] The present author shares their skepticism if such constitutionalization attempts to artificially construct hierarchical legal orders independent of the actual international consensus.[33] But as far as *ius cogens* is concerned, Teubner and Fischer-Lescano are working with the same concepts as international lawyers do, in particular human rights and participation.[34] Different issue-related legal subsystems are far more likely to refer to general human rights-requirements than to create new ones—the transnational *ordre public* will thus appear as little more than an implementation of existing *ius cogens*. But even if such specific *ordre public* rules can be shown to exist, they do not take away the need for some common minimum standards for any legal subsystem. Some of these rules will be more of a formal nature—how rules are made and interpreted—others will be substantive, setting material limits to the self-ordering of subsystems.

Ultimately, of course, it is a matter of perspective whether one interprets the use of norms from other systems as an autonomous incorporation or as evidence for the existence of one common system.[35] Thus, one may understand Teubner's and Fischer-Lescano's presentation not so much as advocacy of fragmented systems without a minimum of common legal rules, but as an argument for a greater equilibrium between hierarchical and diverse views of international law—an argument which finds the enthusiastic support of the

30. For a discussion of the human rights obligations of corporations, *see* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

31. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-centred Constitutional Theory? in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 16 (Christian Joerges et al. eds., 2004).

32. Fischer-Lescano & Teubner, *supra* note 1, 1014, 1033.

33. *Cf.* PAULUS, INTERNATIONALE GEMEINSCHAFT, *supra* note 20, at 285–318.

34. *See, e.g.*, Teubner & Fischer-Lescano, *supra* note 1.

35. *Cf.* Andreas L. Paulus, *Beyond the Monism—Dualism Debate*, Paper presented at the Seminars on Theoretical Approaches to the Relationship Between International and National Law (Amsterdam, Jan. 17, 2003). I also thank Dirk Pulkowski for directing my attention to this point.

present author. On the other hand, however, the increasing recognition of the same body of non-derogable norms beyond the fall-back rules of international law demonstrates the 'staying power' of an international *ius cogens* over and above the ordinary norms of specific legal orders.

C. *Collision-Norms and Democratic Legitimacy*

The main problem with the theory of the autopoietic character of the law of new legal regimes most likely relates to its lack of attention for questions of legitimacy. Teubner and Fischer-Lescano create the impression that the stakeholders in each system can perfectly take care of questions of legitimacy themselves. Accordingly, legitimacy itself is a relative concept and must therefore be dealt with separately in each system. At times, Teubner and Fischer-Lescano seem to rely on a sort of materialist theory, according to which the solution follows quasi-automatically from the inherent characteristics of the functionalities involved. But such a claim hides rather than uncovers the basically political character of the decision: Balancing trade and animal protection may not always be possible, for example, by upholding both. Imagine you could catch tuna only by killing dolphins. In this case, compromise is impossible; either tuna or dolphin. Preferring the one to the other, however, requires a political choice. Such legitimacy can only come from a process which is considered legitimate by the international community at large. Criteria for legitimate decisions are of a general, not of a functional nature. Besides, by emphasizing the separate character of functional systems, Teubner and Fischer-Lescano seem to ignore that, in a globalized world, everything is somehow connected to everything else. As anyone who has watched TV reports on natural or political crisis can attest, global communication leads to some global responsibility. Thus, the separate character of each legal subsystem appears limited. To give an example: In the *Yahoo!* case, a French court decided that Yahoo! had to block a racist webpage as far as it can be seen in France because its display there violates sect. R.645-2 of the French Criminal Code.[36]

Should we allow such questions to be decided by the "Web community," for instance ICANN, because a regulation by a territorial State alone is not fully possible and the Internet should be regulated internationally rather than nationally? Or should we allow the French courts to order *Yahoo!* to at least take those steps to block territorial access that appear technically feasible (which would block access in France to about 90 percent)? The result of the first solution would be a unified regulation probably in the interest of most Internet providers and most customers (but certainly not all, in particular those who favor continental European rather than Anglo-Saxon free speech

36. On the case see Mathias Reimann, *Introduction: The Yahoo! Case and Conflict of Laws in the Cyberage*, 24 MICH. J. INT'L L. 663–65 (2003) (containing further references).

standards). In the second case, 100 percent efficiency cannot be reached (if one does not allow for a complete shutdown of the Internet in France which no reasonable person would contemplate), but the majority of the French society which legitimizes the outlawing of neo-Nazi propaganda would win over the interests of the global Internet community.

However, the solution on the basis of Internet self-ordering appears illegitimate. The eighty-year-old Holocaust victim is affected (and offended) by neo-Nazi propaganda on right-wing-websites even if she does not use the Internet, but learns of the contents of the sites in her local newspaper. She is not represented, however, when the Internet community is allowed to regulate itself. Likewise, everybody, not only the potential Internet users, will be affected by the success of strategies to improve access to the Internet. This would require, in turn, that legitimate decisions need to include representatives of society of a whole.

Teubner and Fischer-Lescano tread on thin ice to only take care of the concerns of the insiders of the system, not of the outsiders. Because decisions made within many systems profoundly influence the fate of those not within the system, some general system of accountability and legitimacy seems preferable to functionally fragmented ones. At the very least, functional systems should be built by processes of a general nature—such as public international law treaties—and not by custom-designed, but not necessarily legitimate special procedures. In other words, the move from territoriality to functionality should not be accompanied by a move from democracy to technocracy. This ultimately requires a minimum of public control over the private exercise of power.

D. *Fragmentation and the Role of the Lawyer*

Finally, the system advocated by Teubner and Fischer-Lescano also raises questions with regard to the role of the lawyer. They counsel the lawyer to go beyond colliding state-set norms and thus to use their authority to devise new, functionally attuned rules.[37] However, this transforms the lawyer from a representative of society to an active rule-maker. It is of course unavoidable that lawyers devise rules in the absence of authoritative pronouncements by legislatures, in particular in cases of collision of different sets of rules and principles. However, this does not take away the duty of the lawyer to refer her authority back to the society which has empowered her under the condition of respect for the law as set by the competent political authorities. In the United States, we see currently a backlash against judges who openly assume "political" roles at the detriment of the legislature. As much as one may deplore the slow process of international

37. Fischer-Lescano & Teubner, *supra* note 1, at 1017, 1024.

rule-making by State consensus, there is no doubt that the lawyer is simply not entitled to ignore the existing norms emanating from democratically elected national legislatures.

In the end, the lawyer represents not functional systems, but human beings, human beings who are not—or at least should not be—the objects, but the subjects of the system. Although the human being belongs to several functional associations, she is a whole, not a functionally disaggregated entity. As such, she needs not only functional systems that serve her specific needs, but also a comprehensive representation which is able to weigh different interests against each other. Thus, States as representatives of the public appear not at all redundant. The disaggregated character of power in the European legal orders may sometimes appear to dissimulate the representative character of the democratic Nation-State, but the discussion of the democratic deficit of European institutions brings the point home. In the United States, there may be more space for self-regulation, but only public authorities are deemed to be entitled to authoritative law-making. The lawyer is bound to implement the presumed will of her constituents.

CONCLUSION: INTERNATIONAL LAW AND THE LASTING ROLE OF STATES

There is little doubt in the present author's mind that Teubner and Fischer-Lescano have identified the challenges for international law in the twenty-first century. Indeed, "uncritically transferring nation-state circumstances to world society" will not help at a time when new international actors make the old border between States and international society disappear in order to create a profoundly pluralist international community. Neither, as Professor Teubner has pointed out elsewhere,[38] will unlearning the constitutional experience do. No doubt, networking will play a central part in any solution to be found. Nevertheless, questions of democratic legitimacy and of a common value-base remain part of the agenda. The reliance on hierarchies, such as *ius cogens* or a constitutional reading of the Charter of the United Nations will not be sufficient and does not provide solutions in each and every value conflict. If no legal norm is in place, and no legal principle available, the lawyer cannot simply run away from her job but must find a solution by balancing both the norms and interests involved.

Where I depart company with Teubner and Fischer-Lescano is their reliance on and trust in apolitical, functionalist solutions to value-conflicts between different legal orders, and their apparent disregard for questions of political legitimacy. In a world in which international and regional organiza-

38. Teubner, *Societal Constitutionalism*, *supra* note 31.

tions suffer from the (in)famous "democratic deficit," democratic accountability and responsibility is still concentrated in States. Thus, States remain the main source of legitimacy for political decisions. That is why international law still relies on State consent and inter-State consensus. States also play a central role in the protection of human rights, in spite of increasing international supervision.

Law in general, and international law in particular, does not only follow slavishly the needs of other systems such as religion or cyberspace, but is based on normative assumptions and values of its own. It is a system of its own and thus maintains a basic unity. The rules on law-making by State consensus provide, for the time being, for a certain formal unity of international law. Some of the products of this process, in particular the Charter of the United Nations and the *ius cogens* norms of human rights, peace, international criminal justice, and free trade, provide a substantive cohesion of an otherwise loose system permitting for a lot of derogation from its framework.[39] As long as there is no world State in place, the analysis of the breakdown of the State appears overstated—there is no international mechanism, neither globally, nor sectorally, which could substitute the legitimizing role of the State (system).

Let us make no mistake: Globalization is bringing about important changes in world governance, with an increasing importance of non-State actors and more independent international organizations, but also with an increasing insistence of world civil society on accountability and democracy of both international and domestic actors. But it appears to be no winning strategy, I would submit, to advocate changes which would bring about less accountability and democracy by taking away the instances of representation of the overall public. As such an institution, the State remains indispensable not only for regulating parochial local affairs, but also for striving to realize something akin to the common good, both domestically and, jointly with others, internationally.

When reading Teubner's and Fischer-Lescano's article more closely, the critical reader discovers many common threads in the different issue areas, such as the importance of human rights and of democratic and transparent decision-making procedures, as well as the recognition of the relativity of functional borders and hence of the necessity of accommodation. Thus, a case can be made for an international order based on the rule of law which does recognize, even celebrate, functional fragmentation, but does not lose sight of the necessity of a substantive coherence of laws and institutions

39. *See* Pierre-Marie Dupuy, *L'unité de l'ordre juridique international. Cours général de droit international public*, 297 RECUEIL DES COURS 9, 93, 207, *passim* (2002). For a development of common values in contemporary international law, *see* PAULUS, INTERNATIONALE GEMEINSCHAFT, *supra* note 20, at 250–70.

translating requirements of legitimacy into comprehensive legal norms and principles binding on all.

ANDREAS L. PAULUS
Visiting Assistant Professor of Law
University of Michigan Law School (2003/04)
Lecturer,
Ludwig-Maximilians-University Munich

REPLY TO ANDREAS L. PAULUS CONSENSUS AS FICTION OF GLOBAL LAW

Andreas Paulus reminds us correctly that narratives "of a world of sovereign states loosely cooperating in 'coalitions of the willing' no longer tell the whole story."[1] One of the achievements of the 20th century has been the insertion of a vertical dimension within horizontal international law; a dimension created by the ICJ's *Traction* decision and the Vienna Convention of the Law of Treaties, and within which we can observe "obligations arising for states without or against their will."[2] Any narrative that characterizes these legal norms as a simple product of interstate consensus is particularly thin if analysis focuses upon the genesis of international legal norms. Real world processes are far more complex: states are only one of many actors who seek to invoke the existence of international legal norms, and even the ICJ accentuates generalizability rather than real-world uniformity:[3]

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the existence of a new rule.[4]

One of the consequences of this development is, that Paulus' premise—interstate consensus as the source of the legitimacy of law—is extremely questionable in relation to international legal obligations. More importantly, however, denying the legal dimensions of communication between non-state actors likewise precludes a large number of social phenomena. In other words, analysis is incomplete if one ignores the fact that:

> [w]e are currently witnessing serious challenges to nation-state sovereignty from three directions. First, supra-national norms and structures (international human rights law, the WTO) impinge upon sovereignty in unprecedented ways. The claim here is not that states have been hermetically sealed up to this point; it is

1. Andreas Paulus, *Commentary to Andreas Fischer-Lescano & Gunther Teubner The Legitimacy of International Law and the Role of the State*, 25 MICH. J. INT'L L. 1047 (2004).

2. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 197 (1993).

3. For a deconstructive analysis, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL ARGUMENT 6 *passim* (1989).

4. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 62, para. 186 (June 27) [hereinafter Nicar. v. U.S.].

> rather that interference in state sovereignty is now being justified in legal terms that carry increasing weight around the world. Second, subnational groups are demanding (and receiving) increasing degrees of autonomy [. . .] I will label the third dimension along which sovereignty is under challenge as 'transnationalism'—the presence within state borders of communities of non-nationals with significant ties across borders.[5]

This cannot be said to result in the death of statehood; it can however be said to reflect upon a fundamental change of social differentiation.[6] Consequently, we would like to answer Paulus' critique of the "functional appropriateness perspective" with brief reference to the *Yahoo!* case named in his response, which deals with cyberspace crimes.

CASE EXAMPLE: CYBERCRIME

Following the judgment of the Paris Grande Instance, Yahoo! is required to deny French users access to auctions of Nazi memorabilia.[7] The case touches upon the fundamental issue of a universal right of access to digital communication.

A. *Functionality versus Territoriality*

One of the most decisive responses of the international political system to these challenges was the conclusion of a European Cybercrime Conven-

5. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197, 201–02 (2000).

6. Thus, international law literature is increasingly concerned with differentiation of law and politics. *See, e.g.*, Uwe Kischel, *The State as a Non-Unitary Actor: The Role of the Judicial Branch in International Negotiations*, 39 ARCHIV DES VÖLKERRECHTS 269 (2001). Anne-Marie Slaughter underestimates the drama and polycontextuality of differentiation processes, applying a form of network theory that restricts itself to an area of formal social organization and disregards a spontaneous social sphere. This results in various democratic problems. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 12 *passim* (2003).

7. T.G.I. Paris, Nov. 20, 2000, Ordonnance de Référé, UEJF, LICRA v. Yahoo!, Inc., No. 00/05308, *available at* http://www.juriscom.net, *translated at* http://www.cdt.org/speech/international/001120yahoofrance.pdf. This judgment confirms the earlier judgment of May 22, 2000, in which Yahoo was required to prevent access to Nazi memorabilia auction pages. T.G.I. Paris, May 22, 2000, Ordonnance de Référé, UEJF, LICRA v. Yahoo!, No. 00/05308, 00/05309, *available at* http://www.juriscom.net. For the resulting enforcement proceedings before US courts, see Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 145 F. Supp. 2d 1168, 1171 (N.D. Cal. 2001); Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1192 (N.D. Ca. 2001) (both courts holding the French judgment unenforceable). For instructive discussion on this issue, see Marc H. Greenberg, *A Return to Lilliput: The LICRA v. Yahoo! Case and the Regulation of Online Content in the World Market*, 18 BERKELEY TECH. L.J. 1191 (2003).

tion (Cybercrime Convention or Convention).[8] The Cybercrime Convention is the first international treaty that concerns itself with the particular characteristics of offences that are committed deploying the internet and other computer networks. In particular, it regulates copyright infringement, the pursuit of child pornography, computer-related fraud and assaults on network security. As enunciated in the preamble, its most important goal is the promotion of a "common criminal policy aimed at the protection of society against cybercrime, inter alia by adopting appropriate legislation and fostering international co-operation."[9] A first appendix to the Convention concerns itself with cases of racist or xenophobic propaganda.[10] The most important Convention rule that deals with the issue of the criminal use of the Internet concerns the issue of jurisdiction. Article 22 of the Cybercrime Convention foresees that:

> Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2–11 of this Convention, when the offence is committed: (a) in its territory; or (b) on board a ship flying the flag of that Party; or (c) on board an aircraft registered under the laws of that Party; or (d) by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.[11]

This provision is augmented through the creation of a limited obligation to act in cases of overlapping jurisdictions: "When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution."[12] Overlapping jurisdiction will be the rule rather than the exception, however,

8. Convention on Cybercrime, *opened for signature* Nov. 23, 2001, S. TREATY DOC. NO. 108-11, Europ. T.S. No. 185, *available at* http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm [hereinafter Cybercrime Convention]. The Convention was adopted at the 109th session of the ministerial committee of the European Council on the 8th of November 2001 and presented for signature at the international conference on cybercrime on the 23rd November 2001. The convention is also open to non EU member states and has already been signed by more than thirty states including the US, where President Bush sent it to the Senate on November 17, 2003.

9. *Id.* at pmbl.

10. Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, *opened for signature* Jan. 28, 2003, Europ. T.S. No. 189, *available at* http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm; The following entities helped with and can be referred to for the preparation process: European Committee on Crime Problems (CDPC), Committee of Experts on the Criminalisation Acts of Racist or Xenophobic Nature Committed through Computer Networks (PC-RX).

11. Cybercrime Convention, *supra* note 8, at art. 22.

12 *Id.* at art. 22, para. 5

since the territoriality principle stated within Article 22, Paragraph 1(a) of the Convention possesses a double character which can relate both to the criminal act and to the occurrence of illegal consequences. This is also made clear in the explanatory protocol on Article 22:

> Paragraph 1 *litera* a) is based upon the principle of territoriality. Each Party is required to punish the commission of crimes established in this Convention that are committed in its territory. For example, a Party would assert territorial jurisdiction if both the person attacking a computer system and the victim system are located within its territory, and where the computer system attacked is within its territory, even if the attacker is not.[13]

As regards the limited obligation to act detailed in Article 22, Paragraph 5, the explanatory protocol declares that:

> In the case of crimes committed by use of computer systems, there will be occasions in which more than one Party has jurisdiction over some or all of the participants in the crime. For example, many virus attacks, frauds and copyright violations committed through use of the Internet target victims located in many States. In order to avoid duplication of effort, unnecessary inconvenience for witnesses, or competition among law enforcement officials of the States concerned, or to otherwise facilitate the efficiency or fairness of the proceedings, the affected Parties are to consult in order to determine the proper venue for prosecution. In some cases, it will be most effective for the States concerned to choose a single venue for prosecution; in others, it may be best for one State to prosecute some participants, while one or more other States pursue others. Either result is permitted under this paragraph. Finally, the obligation to consult is not absolute, but is to take place 'where appropriate.' Thus, for example, if one of the Parties knows that consultation is not necessary (e.g., it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.[14]

Even the most cursory of reviews confirms that this attempt to coordinate national legal orders by means of the application of the territoriality principle will not solve the conflicts problem. Accordingly, alternative solutions are sought within political consultation mechanisms, or a *pactum de*

13. Explanatory Report, Convention on Cybercrime, Nov. 8, 2001, art. 22, para. 233, Europ. T.S. No. 185.

14. *Id.* at para. 239.

negotiando. Nonetheless, and with simple regard to the existence of more than thirty signatory states to the Convention, the functionality of such a solution might be doubted. In addition, however, qualms might be expressed about the effectiveness of this political process in view of the fact that over 150 States within the international community are not party to the Convention. The difficulties of creating appropriate global legal norms for cybercrime are further increased since the claim that the Convention is codifying common legal norms of international law is difficult to justify. The effort to avoid much deplored visions of the neutralization of tension between freedom and security through the proverbial "race to the bottom" will require, above all, the development of transnational norms that anticipate the potential global effects that local and functional legal decisions may have. As we have described, judicial instances must conceive of themselves as a part of a transnational legal order and shift their horizons above nationally structured normative orders to include a transnational law-making process within which NGOs, international organizations and spontaneously coordinated societal actors are attempting to establish the legitimacy of global law with reference to a variety of sources.

B. *Polycentric Ius Non Dispositivum versus Uniform Ius Cogens*

All such actors seek to expound specific principles and to universalise values. The declaration of the Independence of Cyberspace reproduces the constitutional-political pathos of national constitutional acts and declaims to the:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. [. . .] the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.[15]

Similarly, the European Council's Cybercrime Convention identifies as its leading principles:

> the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights, as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, as well as other applicable international human rights treaties, which reaffirm

15. John P. Barlow, *A Declaration of the Independence of Cyberspace*, Feb. 9, 1996, *at* http://www.dtext.com/hache/indep.html.

> the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy.[16]

The principles evoked here do not form a part of the *ius cogens* in the sense established by Article 53 of the Vienna Convention. If the argument is really one of whether all rights identified within the "International Bill of Rights"[17] could or should be dignified with this status, then the tense relationship between the hierarchical and horizontal nature of the transnational law-making process—a tension which Paulus also recognizes[18]—would simply be resolved in favor of the hierarchical principle. Political consensus upon such an extension of *ius cogens* could never be achieved; as is well known the principle's existing constellation has met with much national opposition from influential states such as France. Amongst other things, the dominant skepticism concerns any expansion in the jurisdiction and applicability of a provision, Article 53 Vienna Convention, which nonetheless—and this is emphatically confirmed—is seen as serving a useful role within international law and within the arena of international human rights, and which furthermore forms one of the most important constitutionalizing elements within this regime.[19]

A very different issue is the reference to global values in legal argument. The ICJ has referred to global values on countless occasions.[20] The limits to law are not jurisdictional, but are rather to be found within references to values that lie " 'above all fluctuating validity claims' and which provide law with 'a level of meaning [. . .] upon which necessary foundations—in modern terms, peaceful cohabitation—are formed.' "[21] Recognition within the doctrine of the international community[22] for common value references is thus, at least in part, correct, particularly since the existence of an "International Bill of Rights," comprising both international human rights covenants

16. Cybercrime Convention, *supra* note 8, at pmbl.

17. The three principal instruments which are deemed the "International Bill of Rights" are: Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); The International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); and the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

18. Paulus, *supra* note 1.

19. Andreas Fischer-Lescano, *Die Emergenz der Globalverfassung*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 717, 737 (2003).

20. For references to ICJ jurisprudence, see Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law*, 281 RECUEIL DES COURS 46 (1999).

21. NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 527 (1993) (our translation).

22. For a comprehensive discussion, see ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT (2001).

and the Declaration of Human Rights, demonstrates that discussion on the universality versus the relativity of values is misconceived; after all, the merest glance at the rights catalogue reveals that an overwhelming number of international legal subjects give international legal recognition to such positive values.[23] Nonetheless, the work of the law only really begins at this point and the question of universal values and the human rights catalogue must be posed in a different manner; to what (rather than simply to themselves) do such values refer?[24] The only certainty is that positive values (freedom, peace and equality) take preference over their negations (lack of freedom, war and inequality).[25] Consensus upon an accepted hierarchy of values is just as elusive as is a mutual rejection of values, with the consequence that reference to a universal value community offers us little assistance.[26] The essential paradox of the social contract construction is reproduced within rights catalogues—the diffuse formula that "the rights of one party form obligations for another party" is now given positive form in clauses such as:

> Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."[27]

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.[28]

23. On the consensus on values, see Alfred Verdross, *Die Wertgrundlagen des Völkerrechts*, 4 ARCHIV DES VÖLKERRECHTS 129, 139 (1953–1954).

24. NIKLAS LUHMANN, GIBT ES IN UNSERER GESELLSCHAFT NOCH UNVERZICHTBARE NORMEN? 18 (1993).

25. On the problem created by the fact that different observers ascribe different meaning to the same value, see Charles Chaumont, *Cours Général de Droit International Public,* 129 RECUEIL DES COURS 335, 344 (1970).

26. On the troublesome consequences for the "International Bill of Rights," see Surya Prakash Sinha, *The Axiology of the International Bill of Rights*, 1 PACE Y.B. INT'L L. 21 (1989).

27. Universal Declaration of Human Rights, *supra* note 17, at art. 29.

28. International Covenant on Civil and Political Rights, *supra* note 17, at art. 19, para. 3.

Rights catalogues will thus have little to say in cases of value conflict; that is, in exactly those cases in which values must prove their practical relevance:[29] they loose their directive value at exactly the moment when it is required most. And the same is true in reverse: judgments are always, and only, necessary where values give rise to conflicting demands, such that there are not rules for judgments.[30] Lawyers fondly refer to "value balancing"[31] and "practical concordat" in such cases.[32] These are formulas, however, that can only retain their unity to the exact degree that they do not divulge their own consequences and do not reveal what they do not say.[33] Their obfuscating potential is only strengthened through concepts such as the "margin of appreciation,"[34] which is designed to reflect cultural peculiarities and widen discretion.[35] In order to balance values, to promote practical concordats and to reach decisions in cases of conflict, we thus require a legal system in which reference to values may very well symbolize seeming subservience to a fictitious unity of the heterogeneous, but in reality only stabilizes behavioral expectations, not through the chimera of unity, but through a distinction of the legal from the non-legal:

> [T]he *distinction* between system and environment replaces the traditional emphasis on the *identity* of guiding principles or values. Differences, not identities, provide the possibility of perceiving and processing information. The sharpness of the difference between system and environment may be more important than the degree of system integration (whatever this means), because morphogenetic

29. Surya Prakash Sinha, *Legal Polycentricity*, *in* LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW 31 (Hanne Petersen & Henrik Zahle eds., 1995).

30. LUHMANN, *supra* note 24, at 20.

31. ROBERT ALEXY, THEORIE DER GRUNDRECHTE 138 (Suhrkamp 1994) (1985).

32. KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND para. 72 (20th ed. 1995). For a reformulation of this thought from an international law perspective, see Dieter Blumenwitz, *Souveränität—Gewaltverbot—Menschenrecht. Eine völkerrechtliche Bestandsaufnahme nach Abschluß des nicht-mandatierten NATO-Einsatzes in Ex-Jugoslawien*, *in* POLITISCHE STUDIEN 30 (1999).

33. Niklas Luhmann, *Grundwerte als Zivilreligion*, 3 SOZIOLOGISCHE AUFKLÄRUNG 293 (Niklas Luhmann ed., 1981); LUHMANN, *supra* note 24, at 21.

34. Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Right*s, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240 (1996); ANNETTE RUPP-SWIENTY, DIE DOKTRIN VON DER MARGIN OF APPRECIATION IN DER RECHTSPRECHUNG DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE (1999).

35. Even the UN Human Rights Commission, in accordance with the ICCPR takes partial note of this formula developed by the European Commission of Human Rights. *See* International Covenant on Civil and Political Rights, *supra* note 17, at art. 28, para. 1, especially with regard to the interpretation of the human rights obligation of individual states, see Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. POL. 844 (1999).

processes use differences, not goals, values, or identities, to build up emergent structures.[36]

The "legal validity" of values within the global community is only observable to the degree that these values are distilled into legal operations. In other words, fundamental principles and human rights of the global community are therefore neither a consensual *a priori*, nor an accepted derivation from natural law, nor do they have the character of Kelsen's *Grundnorm*. Instead, they are legal artifacts to which law reflexively refers. Thus, it is the law which decides the undecidable: the validity of values; along with collisions; concordances and heterogeneities between them: as well as the compatibilization of dissent.[37] By virtue of the internal differentiation of global law, however, conflicts judgments are always taken and "practical concordats" always concluded from the perspective of a specific legal regime. The notion of "liberty" within the context of the Internet or the ICCPR implies—even though we might regret this from a moral perspective—something very different from the "liberty of trade" evoked in the context of the WTO regime. Seen within a "regimes" perspective, the issue is not one of deciding upon conflicts between different values, but is rather a matter of maintaining compatibility between the different concepts of liberty found within different regimes. Thus, the reference to a "cohesive glue,"[38] or indeed to "overlapping consensus"[39] underestimates the fact that the issue is not a matter of factual consensus within the international community or the internet community. Instead, fragmented processes of norm creation each work with their own visions of consensus, possess their own textual references that are applied differently in different contexts and feign commensurability of the incommensurate through the re-entry of external rationalities.

C. *Constitutional Pluralism v Unity of Global Law*

Such a polycentric view of global society does not, however, place the establishment of a system of global law in doubt. The application of a common legal code stabilizes borders of the legal and non-legal and the most important task of global constitutionalism is that of maintaining the

36. Niklas Luhmann, *The World Society as a Social System*, *in* ESSAYS ON SELF-REFERENCE 175, 179 (Niklas Luhmann ed., 1990).

37. *See* Karl-Heinz Ladeur, *Prozedurale Rationalität—Steigerung der Legitimationsfähigkeit oder der Leistungsfähigkeit des Rechtssystems?*, 7 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 265 (1986); *see also* the description in MARCELO NEVES, VERFASSUNG UND POSITIVITÄT DES RECHTS IN DER PERIPHEREN MODERNE: EINE THEORETISCHE BETRACHTUNG UND EINE INTERPRETATION DES FALLS BRASILIEN 42 (1992).

38. Christian Tomuschat, *International Law as the Constitution of Mankind*, *in* INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION 37, 45 (1997).

39. JOHN RAWLS, POLITICAL LIBERALISM 133 (1996).

independence of law as against politics, the economic, and religion. Inter-legality poses a challenge because "[t]he world community swarms with myriad legal orders (in today's parlance we would call them 'sub-systems'); they do not live by themselves, each in its own area, but intersect and overlap with each other."[40] In other words, global law can only be recognized as fragmented because the legal regimes use the same code. At the same time, internal differentiation within the global law increasingly occurs upon functional rather than territorial lines. With regard to inter-legality, constitutionalization means that each regime is reflexively oriented to its own social environment and in this way incorporates an *altera pars.* Responsiveness can only be secured by means of the re-entry of external rationalities. Problems that arise are clearly similar to those found in the relationship of national law to international law within the Westphalian system of States. This relationship between State and international law is similarly paradoxical and the monistic, dualistic and the qualified dualistic doctrines developed within international law theory cannot end the circularity created by the fact that, on the one hand, States constitute international law, whilst, on the other, international law constitutes States.[41]

When Paulus makes the point that it is "a matter of perspective whether one interprets the use of norms from other systems as an autonomous incorporation or as evidence for the existence of one common system,"[42] he is referring to the core problem of regime pluralism. Each conflict can only be settled within the context of its own entanglement. Even were it possible to clearly state that the international legal regime, with the ICJ at its center, possesses secondary rules of recognition in H.L.A. Hart's terms and is constitutionalized to the degree that one can identify the emergence of a global political constitution,[43] we must nonetheless recognize that the international law perspective is but one of many. As per Marti Koskenniemi:

> Likewise, statements by the Presidents of the ICJ are to be seen as defensive moves in a changing political environment. '[S]pecialized courts [. . .] are inclined to favour their own disciplines.' Judge Guillaume stated in 2000. This is true—but it applies equally to his own Court. If the Presidents argue that other tribunals should request advisory opinions from their Court, then surely this should be read as an effort to ensure position at the top of the institutional hierarchy. But if the conflict has to do with preferences for future development, then it is unsurprising that not one body has expressed interest

40. Antonio Cassese, *Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law*, 1 EUR. J. INT'L L. 210, 211 (1990).

41. Fischer-Lescano, *supra* note 19.

42. Paulus, *supra* note 1.

43. Fischer-Lescano, *supra* note 19.

> in submitting its jurisdiction to scrutiny by the ICJ [. . .] Today's institutional struggles do not favour the interests of sovereign equality represented by 'generalist' lawyer diplomats.[44]

Within constitutional pluralism—and this point cannot be overstressed—there is no unitary center, no hierarchical higher instance. ICANN and other fora of global law make divergent decisions on cybercrime and the constitutionalization of each regime must establish a mutual interplay between autonomous social and autonomous legal processes.[45] These conditions alone allow for the phenomenon of constitutional duplication, which is characteristic of structural coupling and which precludes the widely held concept that takes as its point of departure the notion that a unitary concept of constitution acts as a melting pot for legal and social orders. The constitution is simply only ever a node or hook between two real-world processes: from the legal viewpoint, reality entails a process of legal norm production that is necessarily enmeshed with the fundamental structures of the social system; from the perspective of the constituted social system, reality entails a process of the creation of the fundamental structures of social order that simultaneously informs law and is, for its part, given normative direction by law.[46] Structural coupling restricts both systems'—legal process and social process—ability to mutually influence one another. The overpowering of one by the other is prevented, mutual irritations are concentrated within narrowly restricted and often institutionalized paths of influence.

D. *Democracy Without A Demos versus Cosmopolitical Homogeneity*

Obviously, there are limits to the democratic theory argument that only those norms created by means of interstate consensus should have global validity. Legal validity cannot even be secured for the most fundamental of human rights, such as rights guarding against apartheid, slavery and genocide: not all states are members of the Genocide Convention, not all states—France springs to mind —agreed to art. 53 of the Vienna Convention that lends validity to the notion of *jus cogens*, whilst the most important

---

44. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 562 (2002); *see also* Martti Koskenniemi, International Law in Europe: Between Tradition and Renewal, Speech at the Inauguration Conference of the European Society of International Law at Florence, at 4 (May 14, 2004)(on file with authors).

45. On the structural coupling of law with other social systems, see Gunther Teubner, *Idiosyncratic Production Regimes: Co-evolution of Economic and Legal Institutions in the Varieties of Capitalism*, *in* THE EVOLUTION OF CULTURAL ENTITIES: PROCEEDINGS OF THE BRITISH ACADEMY 161 (Michael Wheeler et al. eds., 2002); LUHMANN, *supra* note 21, at 440.

46. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory? in* CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE (Christian Joerges et al. eds., forthcoming 2004).

addressee of the ban upon apartheid—the South African Republic of the 1970s and 1980s—remained fierce in its opposition to it. Even when international law is viewed in isolation, democracy and a transnational legal order are still trapped within a circular relationship which international law doctrine attempts to address either:

- by arguing for the return of the post-westphalian system to a co-ordinatory form of international law;[47]
- by demanding an intensification in the cooperative character of the international law of states;[48]
- by means of a reduction of international legal process to a notion of democratic states as law-makers;[49] or
- through the postulation of a cosmopolitan democracy,[50] or even a global republic.[51]

Our starting point is that the most powerful political actors are no longer in a position to control global development of a law. Global regimes reject an external political determination with the consequence that any analytical perspective that restricts itself to a global social contract between States is not in a position to take note of the full range of problems posed by the globalization of law:[52] in other words, if global law is reduced to include only those legal developments that take place in consensual statal proceedings, then a multitude of social phenomena are excluded. An appropriate analysis of the problem thus falls victim to the leading goal of normative unity, and whilst this might possibly facilitate the retention of an ideal unitary international law legitimated by statal consensus, it nonetheless represents a cognitive reductive dissonance. Obviously, we agree with the warning supplied by Paulus that "[t]he move from territoriality to functionality should not be accompanied by a move from democracy to technocracy."[53] His faith,

47. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983); Ernst-Wolfgang Böckenförde, *Die Zukunft politischer Autonomie*, *in* STAAT, NATION, EUROPA: STUDIEN ZUR STAATSLEHRE, VERFASSUNGSTHEORIE UND RECHTSPHILOSOPHIE 103, 116 (Ernst Wolfgang Böckenförde ed., 1999).

48. *See* Paulus, *supra* note 1.

49. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

50. DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER 278 (1995); OTFRIED HÖFFE, DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG 267 (2d ed. 2002); WELTREPUBLIK: GLOBALISIERUNG UND DEMOKRATIE (Stefan Gosepath & Jean-Christophe Merle eds., 2002).

51. For a useful summary, see Armin von Bogdandy, *Demokratie, Globalisierung, Zukunft des Völkerrechts—eine Bestandsaufnahme*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 853 (2003).

52. *See* the critiques in GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 185 (Studienausgabe, Ralf Dreier ed., C.F. Müller 1999) (1932).

53. Paulus, *supra* note 1.

however, in the democratic nature of the international law-making process still strikes a false note.[54] The majority of states that are party to the international law-making process are not founded within notions of democratic transmission. Accordingly, normative demands, such as those made by Anne Marie-Slaughter, that democracies should be given a privileged space within the system of the international community also set a false accent because it rests upon strategies of exclusion and marginalization.[55] The suggestion that aristocratic networks or coordinated executives within international organisations such as the UN, WTO, IMF, etc.,[56] might take on the role of supplying global law with legitimacy is similarly misplaced.

Returning to the Cybercrime Convention: the Convention was worked out within the arena of European Council proceedings following the Ministerial Committee's early recommendation that the harmonisation of national provisions was necessary.[57] The US was granted observer status early on in proceedings and a common EU position was already established in 1999.[58] The Legal Committee of the Parliament Assembly gave its opinion on the final draft convention on April 10, 2001. Two weeks later, on April 24, the 15th draft was laid directly before the European Council's Parliamentary Assembly.[59] Despite occasionally very powerful critiques from technical and data protection experts only one amendment was adopted.[60] The draft was

54. *See* the critiques in the following: B. S. CHIMNI, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004); Sonja Buckel, *Empire oder Rechtspluralismus? Recht im Globalisierungsdiskurs*, 36 KRITISCHE JUSTIZ 177 (2003).

55. Gerry Simpson, *Two Liberalisms*, 12 EUR. J. INT'L. L. 537 (2001).

56. Philip Allott, *The Emerging International Aristocracy*, 35 N.Y.U. J. INT'L L. & POL. 309 (2003).

57. Concerning Problems of Criminal Procedure Law Connected with Information Technology, Council of Europe Recommendation No. R(95)13 (Adopted by the Committee of Ministers on September 11, 1995 at meeting 543 of the Ministers' Deputies), *available at* http://www.privacy.org/pi/intl_orgs/coe/info_tech_1995.html.

58. 1999/364/JHA: Common Position of 27 May 1999 adopted by the Council on the basis of Article 34 of the Treaty on European Union, on negotiations relating to the Draft Convention on Cyber Crime held in the Council of Europe, 1999 O.J. (L 142) 1–2.

59. Council of Europe Debate on the Freedom of Expression and Information in the Media of Europe, EUR. PARL. ASS. DEB. 2001 Ordinary Sess., 10th Sitting (April 24, 2001), at 380, para. 6.

60. Sections of this are documented by the Center for Democracy and Technology. *See* Comments of the Center for Democracy and Technology on the Council of Europe Draft "Convention on Cybercrime" (Dec. 11, 2000), *at* http://www.cdt.org/international/cybercrime/001211cdt.shtml; Global Internet Liberty Campaign Member Letter on Council of Europe Convention on Cyber-Crime Version 24.2 (Dec. 12, 2000), *at* http://www.gilc.org/privacy/coe-letter-1200.html; Comments of the American Civil Liberties Union, the Electronic Privacy Information Center and Privacy International on Draft 27 of the Proposed CoE Convention on Cybercrime (June 7, 2001), *at* www.privacyinternational.org/issues/cybercrime/coe/ngo_letter_601.htm. Here is at least one critique of this issue:

> In the last few years, after considerable international debate over surveillance, privacy and electronic commerce, the use of encryption has been liberalized, except in a few authoritarian governments such as China and Russia. Article 19.4 is a step backwards by

reviewed for a final time by the European Committee on Crime Problems and approved at the next plenary session. The Convention was finally adopted by the Committee of Ministers on November 8, 2001. Since non-EU members can at best only be given observer status within these closed European circles, it is difficult to claim that these proceedings contributed to the creation of global democratic legitimacy. And the opinion of the Centre for Data Protection of the German State of Schleswig-Holstein was correct in its critique that:

> The European Councils draft convention on cybercrime mentioned in the Commission notification was drafted without the transparency and participation of democratically legitimated decision-makers that is necessary in this highly sensitive policy area.[61]

The democratic deficit within the international community and the law-making mechanism of international law is thus currently as great, if not far greater, than the deficit found within global regimes which, for their part, do not represent particular territorial groupings. As a consequence, the challenge is one of ensuring that exclusionary tendencies of regimes will be combated. On the one hand, the universalizing potential of the regime needs to be liberated. On the other, steps must be taken to ensure that such regimes are reflexively connected with their social environments. Such a constitutionalization might facilitate the liberation of the yet to be exhausted democratic potential of these regimes. The constitutional challenge within each regime would be the normative securing of the duality of social autonomy within sub-systems, or the securing of a dynamic between spontaneous and organised realms. The matter would be one of stabilizing and institutionally securing the spontaneous/organized distinction. In the Internet, a distinction between spontaneous public realms (in a manner similar to the fundamental rights sections of political and market constitutions) and highly formalized organizational realms (comparable with state administrative law

---

seemingly requiring that countries adopt laws that can force users to provide their encryption keys and the plain text of the encrypted files.

Id. at para. C.

61. Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein: Sichere Informationsgesellschaft, Bekämpfung der Computerkriminalität und Datenschutz, *Stellungnahme zur Mitteilung der Kommission KOM(2000) 890, zugleich Kritik des Entwurfs einer "Convention on Cyber-Crime" des Europarats*, (PC-CY (2000) Draft No. 25 Rev.), *at* http://www.datenschutzzentrum.de/material/themen/cybercri/cyberkon.htm, para. 5 (our translation). *See also Report concerning the public hearing of interested parties on the issues addressed in the Communication on 7 March 2001*, organized by the European Commission, *available at* http://www.europa.eu.int.

or company law), would stabilize each realm within its own rationality, and would conceive of its major task the elaboration of mutual controls.[62]

E. *Summary*

The unity of public and private regimes would be fostered within global law. The common normative vision is the re-specification of political constitutional law. In each internal realm the duality of the spontaneous public sphere and a highly formalized organizational sphere needs to be secured. This reflects the fact that the major threat to global society is posed by the particularistic and expansive tendencies of highly refined rationality spheres and that the simple substitution of the concept of the *pars pro toto* of politics by a *totum pro parte* is an inadequate response. Rather, a more appropriate strategy would be one of paying adequate attention to *strange loops*: If world politics does not manage to represent world society as a whole, and if it seems to be less and less the political system that puts the decisive consequences on societal reality, but other, non-state actors,[63] then the response to these challenges becomes a matter of constitutionalizing self-contained public and private regimes.

ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER
(Frankfurt am Main)

62. Teubner, *supra* note 46; *see also* Andrea Ottolia & Dan Wielsch, *Mapping the Information Environment: Legal Aspects of Digitalization and Modularization*, 6 YALE J.L. TECH. 174, 199 (2004), *at* http://research.yale.edu/lawmeme/yjolt/files/20032004Issue/Ottolia&Wielsch.pdf.

63. *See* Armin Nassehi, *Politik des Staates oder Politik der Gesellschaft? Kollektivität als Problemformel des Politischen*, *in* THEORIE DER POLITIK: NIKLAS LUHMANNS POLITISCHE SOZIOLOGIE 38 (Kai-Uwe Hellman et al. eds., Suhrkamp 2002); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?* 4 EUR. J. INT'L L. 447 (1993).