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INTERNATIONAL LEGAL THEORY

Opposition in International Law – Alternativity and Revisibility as Elements of a Legitimacy Concept for Public International Law

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Abstract
As international law is widening in regulatory scope and intensity, it arguably suffers from a legitimacy deficit. This article conceives of this deficit as a deficit in possibilities to politicize, criticize, and contest international law-making proposals in the way a loyal opposition does in a domestic constitutional context: through the representation of relevant societal interests, the voicing of critique, and the safeguarding of alternative proposals for the future. The author of this article tries to bring together the current debate in political theory on the value of legitimate disagreement and dissent in political institutions and the ongoing discussion on the legitimacy of international law. Therefore, a concept of an institutionalized opposition for international law-making processes is developed, referencing authors such as Hannah Arendt and Claude Lefort. Next, the author analyses whether one can already find instances of an institutionalized opposition in international law – in parliamentary assemblies and in international agreements which are designed to present a legal–political counterweight to specific legal concepts and institutions.

Key words
international institutions; law-making; legitimacy; opposition; politicization

1. THE POLITICAL DEFICIT OF INTERNATIONAL LAW

Law-making in the international order is a process which knows no institutionalized opposition. The dynamic between government and opposition does not present an integral part of the legislative process in public international law. In an intergovernmental, usually consensual setting, there are hardly any possibilities to represent conflicts along ideological, functional, or party-political cleavage lines, in other words: in different ways than in inter-state conflicts. There are also hardly any possibilities to formally express dissent in a non-destructive way. While the referral of these types of conflicts to the domestic political process has not been

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problematic for a long time, recent changes in the structure and content of international and transnational law now point to the lack of an institutionalized opposition in international law.

Over the last decades, public international law has seen a rise in the importance of non-governmental actors, such as non-governmental organizations (NGOs) and individuals.[1] At the same time, the authority of international institutions and courts is increasingly directed against individuals.[2] Despite these developments, formal international law-making still largely takes place in an environment of consensual intergovernmentality.[3] Whether in conferences for negotiating treaties, international summits, or informal networks – states negotiate public international law in fora in which only they have the right to sign agreements, claiming to represent a unified *raison d'état* – states are seen as monolithic units, to the effect that social, economic, socio political, party-political conflict – everything the government–opposition-dialectics express – can be disregarded. Whereas internal societal conflict is represented and articulated in parliament, it is the government that represents the *raison d'état* externally – thought to be uniform, stable, and most importantly, exempt from and somehow beyond party politics. This structure of representation and argumentation is no longer adequate to the scope and intensity of regulations in public international law.

Although the fields and intensity of international legal regulatory tools refer increasingly to questions between individuals, they can perceive conflict only as taking place between states. However, many law-making proposals produce winners and losers among groups and individuals. In other words: they have a redistributive character and are socially contentious. In national legislation, these contentions are represented by complex processes and within diverse fora: in corporatist deliberative processes, including diverse social actors such as unions, associations, NGOS, and lobbyists of all sorts; within government, through the division of responsibilities among different branches, representing distinct functional aspects; or finally, in the public contest of political parties within parliament. The latter marks a legislative proposal as rather social or liberal, left- or right-wing, security- or freedom-orientated, religious or secular. The frontiers of political conflict, institutionally condensed as they are in parties' and fractions, structure this contest thematically and are in constant flux.[4] Any modern democratic order is marked by a highly ambiguous dialectic of consensus and dissent, plurality and unity, change and

1 See S. Charnovitz, 'Nongovernmental Organizations and International Law', (2006) 100 AJIL 348, at 348–72; A. Peters, *Jenseits der Menschenrechte – die Rechtsstellung des Individuums im Völkerrecht* (2014).

2 See the first two volumes of the project International Public Authority: A. v. Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions* (2010); A. v. Bogdandy and I. Venzke (eds.), *International Judicial Lawmaking* (2012).

3 See J. Alvarez, *International Organizations as Law-Makers* (2005), at 121; J. Klabbers, *An Introduction to International Institutional Law* (2009), 227.

4 A highly-instructive account of the sectoralization of public international law as a loss of universal political means of expression can be found in J. Bast, 'Das Demokratiedefizit fragmentierter Internationalisierung', in H. Brunkhorst (ed.), (2009) 18 *Demokratie in der Weltgesellschaft, Soziale Welt*, special issue, at 185–93.

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stability. Democracies are built around the fact that political questions are routinely and legitimately contested.[5]

Two examples should clarify this point. The infamous targeted sanctions of the UN Security Council are determined by its Sanctions Committees;[6] only members of the Security Council can participate, usually excluding even the home countries of the persons in question. From the perspective of basic rights as well as democratic legitimacy, these measures are difficult to justify.[7] In most states, such measures would provoke heated conflicts along the dividing line of security interests versus human rights. The intergovernmental configuration of the Security Council and the Security Committees, on the other hand, does not allow for such debate. Even when one member state, such as France, disagrees with another, such as the US, and tries to prevent the imposition of a measure, this conflict is ultimately staged as a conflict between two states, not one between two ideologies opposing each other along the political cleavage separating freedom and security.

This also becomes apparent when one considers the diverse conflicts between international economic and financial organizations on the one hand, and social, environmental, cultural, or labour organizations on the other. Their legal acts and conventions are often diametrically opposed. In terms of representation and legitimation, the vocabulary of externalities and legal conflict does not accurately reflect the ideological quarrels that underlie these disputes – namely those between economic and financial interests on the one hand, and socio political ones on the other. In fact, these conflicts are genuinely political and should therefore be deliberated in genuinely political (preferably parliamentary) processes, before being relayed to the judicial process. Limiting the solution of legal conflicts to judicial settlement does not do justice to the fact that, for instance, IMF measures (as in the recent case of Greece) produce not only externalities, but also winners and losers in a very tangible sense.[8]

It is argued here that the split representation of the public good within the domestic sphere and the unified representation of the public good of the state in the international sphere spring from an exaggerated dichotomy between internal and external affairs, which, owing to the transformation of public international law,[9] is no longer sustainable. As international law is increasingly concerned with

5 See J. Waldron, *Law and Disagreement* (1999); J. Waldron, *The Dignity of Legislation* (1999).

6 Established by UN SC Res. 1267 (1999) and modified several times; for details see http://www.un.org/sc/committees/1267/ (accessed 7 August 2015).

7 See J. Almquist, 'A Human Rights Critique of European Judicial Review: Counter-Terrorism Sanctions', (2008) 57 ICLQ 303; B. Fassbender, 'Targeted Sanctions and Due Process', A Study commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations, 20 March 2006 (final), (2006) 3 *International Organizations Law Review* 437, at 437–85.

8 However, there is an abundance of scholarly debate on the binding force of human rights in international organizations: see C. Janik, *Die Bindung internationaler Organisationen an internationale Menschenrechtsstandards* (2012); B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', (1992) 12 *Australian Year Book of International Law* 82, at 82–108.

9 C. Tomuschat, 'Obligations Arising for States without or against their Will', (1993) IV RdC 241, at 195, 269ff.; J. Weiler, 'The Geology of International Law', (2004) 64 ZaöRV 547, at 547, 557; L. Helfer, 'Nonconsensual International Lawmaking', (2008) *University of Illinois Law Review* 71; B. Simma, 'Consent: Strains in the Treaty System', in R. St. J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law* (1983), at 485; B. Simma, 'From Bateralism to Community Interest in International Law', (1994) RdC 250, at 217.

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previously domestic fields of law, such as economic, environmental, or immigration law, it needs to reflect the political, societal conflicts underlying these issues and thereby politicize international law-making in these areas. If most economic questions in most states are politicized along the cleavages of liberal versus social or strong versus weak government-lines, and environmental law-making along the lines of green versus economy-friendly proponents, then these cleavages should also be clearly represented in international fora dealing with such questions. Thus, public international law touches increasingly and with increasing intensity on areas that are socially and politically contested, but does not allow for institutional possibilities of (i) articulating this contestation and (ii) making the law available to the political process in a way that would be adequate to its political character.

As a consequence, we can diagnose a political deficit in the international law-making process.[10] This deficit has two dimensions: on the one hand, there is a deficit of representation. On the other hand, there is a lack of institutional possibilities for legal change. Both are explicable in the light of a strict dichotomy between national and international topics, reflected in jurisgenerative mechanisms, logics of representation, and possibilities of articulation.

Tying these considerations with the ongoing debate on the legitimacy of international law, I will argue in this article that disagreement, instead of being marginalizing in the international law-making process, needs to be conceptualized in an assertive and productive way. As Hannah Arendt, Claude Lefort, Jeremy Waldron, and Samantha Besson and others have shown, disagreement is at the centre of democratic legitimacy and needs to be perceived primarily for what it is: the notion of a society of free subjects which can legitimately hold diverging views on political, policy making, and law-making issues. Therefore, this article focuses on what constitutional and political theory can offer to international law with regard to the value of disagreement, conceptually embodied most poignantly in the concept of an institutionalized opposition. After a more elaborate development of how to perceive the current crisis of international law – a crisis in the adaptability of international law as well as a deficit in institutionalized forms of contestation – (sections 1.1. and 1.2.), I will try to sketch a concept of opposition as a mechanism of international institutional law (section 2) and will discuss Parliamentary Assemblies as well as the phenomenon of conventions intentionally designed to counteract or counterbalance an international legal regime as instances of international opposition (section 3).

1.1. The inside/outside divide – Public international law and representation

How did this divide between the inside and the outside of the state come about? How did it happen that, externally, governments are taken to represent the state in its entirety while internally, the whole of society can only be represented through

10 To paraphrase Renaud Dehousse, who has described this phenomenon in the context of the EU: R. Dehousse, 'Constitutional Reform in the European Community. Are there Alternatives to the Majority Avenue?', in J. E. S. Hayward (ed.), *The Crisis of Representation in Europe* (1995), at 118, 123; see also J. Weiler, 'Europe in Crisis – On "Political Messianism", "Legitimacy" and the "Rule of Law"', (2012) *Singapore Journal of Legal Studies* 248, 248, 251 et seq.

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a fragmented optic of government *and* opposition? Why do we allow states to singularly represent the public good externally while such a claim would be considered authoritarian domestically? The reason lies in the diverging intellectual and conceptual histories the state has undergone domestically and internationally: the inside/outside divide.

Most evidently, the notion of legitimate statehood, closely linked to the concept of representation, has undergone a democratic revolution internally, to which there has been no equivalent at the international level. The dominant paradigm suggested that since international law is a horizontal and consensual order in which public authority is not exercised, there is no need for its democratization. In public international law, the state is represented 'in its totality'[11] by the head of state. In this way, it is easier to attribute responsibility, lead negotiations, and guarantee independence from domestic discontinuities. In particular, the 'one state, one vote' principle protects the universality of public international law, in the sense that it allows for dealing with non-democratic states: at least in theory, all states have an effective government – its legitimacy can be treated as an internal matter.[12] This model rests on the assumption that public international law, as a quasi-private, horizontal order,[13] is only concerned with the relationship between states. For the most part, its content could be separated from the inter-individual relationship of domestic law. As a consequence, it was believed that even in terms of substantive law, public international law would not refer to the position in law of individual persons or matters. In exceptional cases, the state would act for the individual.[14]

Arguably, however, the inside/outside divide, separating a monolithic conceptualization of representation to the outside from a pluralistic conception on the inside, goes further and relates to the constitutional conceptualization of the external branch.[15] In European political thought, democracy was long regarded as a phenomenon linked to parliament – as a part of society; the state, meanwhile, was identified with a hierarchically functioning, unitary government and administration.[16] The claim to politicization and questioning, representation of a split public will in many democratic societies stopped short of the external branch. Thus, foreign affairs are organizationally separate from domestic affairs: even after law-making had been democratized and parliamentarized domestically, the attribution of foreign

11 G. Leibholz, *Repräsentation*, in *Evangelisches Staatslexikon II* (1987), at 2988; See G. Leibholz, *Das Wesen der Repräsentation und der Gestaltwandel der Demokratie im 20. Jahrhundert* (1966), at 196 et seq.; N. Luhmann, 'Die Weltgesellschaft', (1971) 57 ARSP 1, 19, 27.

12 For a critical perspective: A.-M. Slaughter, 'International Law in a World of Liberal States', (1995) 6 EJIL 503, at 503–38; N. Petersen, 'The Principle of Democratic Teleology in International Law', (2008/2009) 34 *Brooklyn Journal of International Law* 33, at 33–84.

13 S. H. Lauterpacht, *Private Law Sources and Analogies in International Law* (1927), at 81.

14 See the case of the *The Mavrommatis Jerusalem Concessions*, [Publications of the Permanent Court of International Justice, 26.3.] PCIJ Rep., (1925) Series A No. 5, at 50; for a general perspective, see J. Klabbers, *International Law* (2013), at 288ff.

15 For an important moment of development of this idea during the French Revolution M. Troper, Les rélations exterieur dans la constitution de l´an III, in his *La Théorie, Le Droit, L´État* (2001), at 129.

16 For Germany: C. Schönberger, *Parlament im Anstaltsstaat – Zur Theorie parlamentarischer Repräsentation in der Staatsrechtslehre des Kaiserreichs (1871–1918)* (1997), at 301 et seq.; for France: D. Bates, 'Political Unity and the Spirit of the Law: Juridical Concepts of the State in the Late Third Republic', (2005) 28 *French Historical Studies* 1, at 69.

affairs to the government justified the serious limitation of parliamentary legislative rights in the field of international politics.[17] To this day, the need for quick action allegedly justifies the prerogative of the executive branch in foreign affairs – individual decision-making is favoured over plural, collegiate deliberation.[18] Thinking the state as *one* person, represented through *one* individual, is central for the concept of external sovereignty.[19]

Ideologically, the unitary external representation of the state was made plausible through the concept of reason of state: there can only be one *raison d'état*, one national interest, given a priori by the natural interest of self-assertion.[20] Thus, 'for each state at each particular moment there exists one ideal course of action, one ideal *raison d'état*'.[21] This supposedly exceptional character of international affairs – their accelerated pace, the need for secrecy, and the relevance for national security – distinguishes them from domestic matters and justifies excluding them from the sphere of domestic legislation, marked as the latter is by publicity and conflict.[22]

This dichotomy between external and internal representation and legitimation is no longer convincing: nowadays public international law includes regulations regarding almost all formerly domestic matters,[23] including states' own legitimacy.[24] From the standpoint of democratic theory, no single voice can represent the formation and articulation of public opinion – especially in areas as contested as social, labour, trade, financial, or immigration law. Socially and politically contested questions are therefore treated in parliaments, not least because the sheer number of members and political parties expresses the plurality of opinions:

> it is no accident that in almost every society in the world, statutes are enacted by an assembly comprising many persons (usually hundreds) who claim in their diversity to represent all the major disagreements about justice in their society, and whose laws claim authority in the name of them all, not just in the name of the faction or majority who voted in their favour.[25]

In a democracy, political dissent is not only legitimate; legitimate controversy concerning the actual meaning of the common good is its very foundation.[26] If law-making is only legitimate to the extent that the law-making process expresses this social and political contestedness through plural and dynamic mechanisms of

17 H. Arendt, *The Origins of Totalitarianism* (2006 [1955]), at 530 et seq.: 'in the Continental systems this representation of the nation as a whole had been the "monopoly" of the state'.
18 With respect to the EU, see M. Koskenniemi, 'International Law Aspects of the CFSP', in M. Koskienniemi (ed.), *International Law Aspects of the European Union* (1998), 27–30.
19 See R. Jennings and A. Watts (eds.), *Oppenheim's International Law* (1992), § 36.
20 On the history of the concept, see K. D. Wolf, *Die Neue Staatsräson* (2000), at 35 et seq.
21 F. Meinecke, *Machiavellism – The Doctrine of Raison D'Etat and its Place in Modern History* (1984 [1924]), 'Introduction', at 1.
22 J. Bartelson, *A Genealogy of Sovereignty* (1995), at 210.
23 See the exhaustive research of J. K. Cogan, 'The Regulatory Turn in International Law', (2011) 52 *Harvard International Law Journal* 321.
24 R. O. Keohane, S. Macedo, and A. Moravcsik, 'Democracy-Enhancing Multilateralism', (2009) 63 *International Organization* 1, at 1–31.
25 J. Waldron, *Law and Disagreement* (1999), at 10; see a similar argument in Kelsen, *The Essence and Value of Democracy* (2013 [1929]), at 82.
26 C. Lefort, 'The Question for Democracy', in C. Lefort, *Democracy and Political Theory* (1988), 1, at 15, et seq, 18 et seq.

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representation, the unitary portrayal of states in public international law is highly problematic.

1.2. Temporality and international law

From a temporal point of view, the institution of opposition allows for the effective inclusion of dissent in the legislative process, both as a buffer for legislative initiatives and as a repository for renewal over time. In public international law, however, marked as it is by a wish for consensus, conflict means standstill.[27] International legal institutions are paralyzed when faced with conflict. There is no possibility of voicing concerns regarding a certain solution, without threatening the functioning of the system as a whole.[28] Dissenters are forced to either abstain, silently consent, or question the system as a whole, since opposition quickly comes across as systemic opposition. Yet, often the potential of blockade does not do justice to the constellation of interests – not even to those of the dissenters. The consequences are the slow pace of public international law, its being sidelined by more informal ways of regulation, and a blindness to its political nature which does not find adequate expression.

Usually, amendments to existing treaties require consent by the parties once more. The underlying assumption of sovereignty as independence is that this veto-player-structure of international law is unproblematic since, for states, there always exists a viable alternative: to regulate the issue in question 'alone', at the national level. This assumption, however, is flawed in several ways: First, there is an increasing need for regulation at the international level. Oftentimes, to have a common solution is within the collective interest of the international community. In a context of interdependence rather than independence, states often do not dispose of the possibility to regulate highly transnationalized fields of application alone. The unfair result is: The requirement of universal consent favours solutions that are reduced to the smallest common denominator.[29] States threatening with a veto are empowered out of proportion. This means that in substance, the consensus principle is in no way neutral. Rather, it favours those positions which are closest to the status quo and discriminates against juridico-political change: The state that wants no or little change can gain a negotiation advantage much more easily than the one that strives for more extensive transformation.[30] Veto powers disproportionately favour those opposed to altering the status quo. In other words: The inflexibility of agreements becomes problematic when public international law has redistributive implications. They are usually particularly contested and require revisibility in order to be legitimate.

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27 In its mitigated form, this also applies to agreement types and organizations that operate on the basis of consensus decision-making, e.g. according to footnote 1 of Art. IX(1) WTO agreement; a more detailed exposition of these issues is to be found in chapter three of I. Ley, *Opposition im Völkerrecht* (2014), at 31 et seq.

28 A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 158; during the Review Conference of the Rome Statute in Kampala in June 2010, the UK and France did not prevent the consensus of the compromise, but they did make declarations regarding their dissenting positions.

29 In social science, the phenomenon is called 'negative integration'; see P. Caro de Soursa, 'Negative and Positive Integration in EU Economic Law: Between Strategic Denial and Cognitive Dissonance?', (2012) 13 *German Law Journal* 979, at 979–1012.

30 A. Peters, 'Dual Democracy', in J. Klabbers et al., *The Constitutionalization of International Law* (2011), at 263, 289.

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Public international law adapts to the increasing need to arrive at regulations, even when they are not equally in the interest of all, by means of a number of strategies of adjustment: soft law, tacit consent, consensus, possibilities to opt out of agreements or reservations, the careful introduction of majority votes, and, in particular, the strong jurisgenerative function of courts, or the reversed consent principle of the Dispute Settlement Body (DSB) of the WTO.[31] Yet these coping strategies overstretch the legitimatory mechanisms in international law, which are built around the assumption of static agreements.[32] A parliament can only take responsibility for an agreement in a meaningful way if the latter's contents are largely known at the time of parliamentary consent. Dynamic contracts, on the other hand, require continual legitimation, in particular through voicing and registering dissent. Output-orientated justification strategies do not work when the output is itself contested.

How can this be dealt with? I suggest that it is necessary to take a closer look at the institution of opposition, which reacts precisely to this dilemma: including the opposition in the procedure makes legislation possible, even when solutions that rely on general consensus cannot be found. At the same time, the theory of opposition accepts that this is only possible when justice is done to the contingency of a solution – that is, precisely not through an appeal to a fundamental consensus, or to the claim that there exist functional, practical necessities without alternatives. Contested solutions become justifiable only to the extent that the law-making process meets two procedural conditions: alternativity and revisibility, i.e. the integration of alternative proposals into the process as well as the realistic possibility of changing the law in the future.

At this theoretical level of reflection, the conception of opposition encompasses the national and the international planes. The political transcends the state, therefore my argument should not be misunderstood as being dependent on a domestic analogy or methodological nationalism. Obviously, the application of the concept to the respective levels needs a sense for institutional contexts, but instead of treating the domestic and the international as dwelling in two completely separated conceptual realms we should look for frames that can help to integrate their analysis.

2. Theory of opposition

From a liberal perspective, public authority is always under suspicion of abusing its power and excessively limiting the liberty of the individual. The transmission of power to international bodies jeopardizes the individual freedom in form of the right to be protected from interference in a sphere of personal rights. According to this school of thought, the control of public authority is guaranteed in part by the

31 S. C. Tomuschat, 'Obligations Arising for States Without or Against their Will', (1993) 241:IV RdC 195, at 195–374.

32 J. Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Comments', in J. Wolfrum and V. Röben (eds.), *Legitimacy in International Law* (2008), at 1, 17.

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institution of opposition.[33] The latter has the continuous task of controlling the executive power through mechanisms like parliamentary investigation committees, hearings, and enquiries; furthermore, oppositions force governments to justify their actions and thus guarantee (contrary to judicial control) that procedural requirements are met. In other words, the primary function of opposition in liberal thought is to prevent mistakes.[34]

An epistemic reading of opposition is similarly opposed to the antagonism that comes with the duality of government and opposition; it interprets the latter's function as being about fact-finding through the process of negotiation between diverging perspectives.[35] On this account, opposition is conducive to the development of the general will in the deliberative process: it introduces arguments and aspects into the process of the formulation of laws so that rational decisions can be made, while taking account of all interests and aspects.[36]

2.1. The pluralist reading: Opposition does justice to the contingency of the law-making process

The pluralist reading, on the other hand, focuses on a process that is called non-domination,[37] *contre-démocratie*,[38] or contestatory democracy;[39] it deals with the integration of constructive political opposition into the law-making process and its significance from the perspective of legitimacy theory. This process is about the right of a minority to express its views and opposition. Granting certain rights to participate and criticize strengthens the legitimacy of the procedure as a whole as well as the law that results from it. Opposition institutionalizes 'the continuous reflection and the ceaseless presence of a perspective from which one can see that all could be different, or rather, could have been different'.[40] In this way, the institutionalization of opposition shows that the law is not a monolithic entity, but the result of a political process. A main characteristic of this process is that it never comes to an end. As a consequence, the resulting law has a dynamic quality and can be seen as the expression of this permanent intra-societal process of communication.[41]

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33 N. Luhmann, *Die Unterscheidung von Staat und Gesellschaft*, in his *Soziologische Aufklärung 4* (2005 [1987]), at 69, 91 et seq.; on this element in the theory of Lefort: B. Flynn, *The Philosophy of Claude Lefort* (2005), 54.

34 J. S. Mill, *Considerations on Representative Governmment* (1995 [1861]), at 457.

35 Vgl. R. Dahl, 'Reflections on Opposition in Western Democracies', (1966) 1 *Government and Opposition* 2 , at 7, 11ff.: 'If freedom of dissent is thought (by most libertarians and democrats) to be a desirable freedom in itself, advocates of libertarian democracy have usually contended, as John Stuart Mill did, that an opportunity for the expression of dissenting opinions is also a necessary (though definitely not sufficient) condition for "rational" political action. The citizens of any country, in this view, need dissenters and oppositions in order to act wisely, to explore alternatives, to understand the advantages and disadvantages of different alternatives, to know what they want and how to go about getting it.' On the historical achievement of the development of oppositions, see the editor's preface in R. Dahl (ed.), *Political Oppositions in Western Democracies* (1966), at xi–xix.

36 O. Lepsius, 'Die erkenntnistheoretische Notwendigkeit des Parlamentarismus', in Bertschi et al. (eds.), *Demokratie und Freiheit* (1999), at 123.

37 P. Pettit, *Republicanism* (1997), at vii et seq., 21 et seq.

38 P. Rosanvallon, *La contre-démocratie* (2006), especially at 22 et seq., 126 et seq.

39 For an introductory overview see Peters, *supra* note 30, at 270 et seq.

40 Luhmann , 'Theorie der politischen Opposition', (1989) 36 *Zeitschrift für Politik* 1, at 13, 20 (transl. by Ç. Yildiz).

41 C. Lefort, 'The Question for Democracy', in C. Lefort, *Democracy and Political Theory* (1988), 1, at 15, et seq, 18 et seq.

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According to Albert Hirschman's model of 'exit, voice and loyalty', a functional opposition,[42] which is immanent to the system, can be described as the 'voice': this capacity to articulate grievances in the form of criticism or protest stabilizes institutions and alleviates the need for 'exiting' the institution altogether.[43] At the same time, the installation of institutionalized forms of dissent can be seen as a broadening of forms of consent: the moment an agent has the opportunity to dissent or exit the system, but does not make use of it, it is assumed that his abstention from protest implies consent. Conversely, functional opposition that focuses on particular acts of legislation of the legal system are interpreted as outlets for discontent with particular regulations; if this dissatisfaction plays itself out within the system, it is assumed to implicitly support the system, as it presupposes the legitimacy of the system as a whole. This empirical argument indicates the fragility of institutions in which there is no possibility to articulate legitimate criticism.

The concept of politicization, until now not very precise, has two dimensions within this context: on the one hand, there is the empirical element of publicity, that is the public perception and critical revision of a political intention; on the other – and this will be at the centre of our attention – a normative one. Politicizing jurisgenerative procedures highlight the scope of action, i.e. the contingency of law-making. Through the representation and discussion of alternatives and possibilities of change, jurisgenerative processes indicate the openness of the procedure and thus ultimately the political freedom of those involved. Two procedural principles are therefore central to the institutionalization of opposition: alternativity and revisibility. Alternative formulations of the general will that are not, or not accurately, reflected in the majority position must have the chance to be articulated during and after the law-making procedure, and have the possibility of reopening the political process.[44]

The main legitimating function of opposition is its capacity to create political alternatives to an existing regulation; it thus guarantees the possibility of reopening a given procedure – in other words, revisibility. The public knowledge of alternative political staff and programmes, which after almost any legislative proposal leads to debate over issues in need of change, indicates the contingency of the legislative act. Hence from the pluralist standpoint, opposition represents first and foremost a reflexive solution to the central problem of power, namely the dilemma of wanting to bind public authority more closely to the will of those affected, without being able to do so perfectly under conditions of diverging political visions. Opposition is at the same time the expression of political freedom *and* of political authority. Thus, opposition has precisely the function that modern legitimation debates in particular

42 On the distinction between systematic and functional opposition, i.e. one that refers to concrete issues, see P. Mair, 'The Europeanization Dimension', (2004) 11 *Journal of European Public Policy* 2, at 337, 343.

43 A. Hirschman, *Exit, Voice and Loyalty* (1970), at 21 et seq.

44 For the importance of contestation in public international law, see B. Kingsbury and M. Donaldson, 'From Bilateralism to Publicness in International Law', in U. Fastenrath et al. (eds), *Essays in Honour of Bruno Simma* (2011), at 79; on the centrality of revisability: N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2010), at 273.

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claim it should have, especially with respect to European and international issues: raising awareness about political conflicts that make clear what is at stake in political processes. This goes against 'managerialist' or expertocratic tendencies, according to which public international law is, on the whole, a non-partisan consensus in the interest of all.[45]

2.2. A pluralist subject of legitimation

Theorists largely agree that societal plurality needs to be represented and communicated.[46] From this follows a contingent quality of law-making that is at the same time a condition of political freedom: the achievement, dignity, and (often difficult) duty of modern political orders is precisely to deal responsibly with this freedom.[47] Public institutions thus have a function for the pluralist subject of legitimation that recognizes and processes ('agreement to disagree') diversity. This approach assumes that procedural law-making rules serve the purpose of keeping the violent potential for conflict in check: different positions are taken seriously and, in a first instance, represented. Yet the purpose of the process is not necessarily to overcome disagreement, but rather to translate it into pragmatic forms, for instance through compromise or the referral to other institutions.

We therefore postulate a plural concept of the international subject of legitimacy, which, as a complex subject in and of itself, represents its social reality. From this perspective, the integration of society into one unified entity, the state, is not sufficient. Within the context of international legal procedures, different societies or communities are still the decisive subjects of legitimation; international-legal normativity has to be deduced from them. They need to be thought of as pluralistic or corporative associations that gradually thicken into subjects of will formation and political action.[48] To be sure, every form of representation includes a unifying element that integrates differences between voters or other represented stakeholders into a common mode. The crucial difference for my model of legitimacy lies in the question of whether the locus of representation is in itself unified or open to dissent. If the world order ceases to be an order of sovereign states, and there are weighty indicators for that, the demand for a pluralist mode of international representation gains legitimacy.

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45 D. Kennedy, 'Challenging Expert Rule: The Politics of Global Governance', (2005) 27 *Sydney Law Review* 5, at 5; S. Marks, 'Big Brother is Bleeping Us – With the Message that Ideology Doesn't Matter', (2001) 12 EJIL 1, at 109; M. Shapiro, '"Deliberative","Independent" Technocracy v. Democratic Politics: Will the Globe Echo the EU?', (2004) 68 *Law and Contemporary Problems* 341; M. Koskenniemi, 'The Fate of Public International Law', (2007) 70 MLR 1, at 1; M. Koskenniemi, 'Constitutionalism as Mindset', (2007) 8 *Theoretical Inquiries in Law* 1, at 9; see also the critical account of the alleged neutrality of the European Commission by J. Weiler, 'The Transformation of Europe', (1991) 100(8) *The Yale Law Journal* 2403, at 2476 et seq.

46 Kelsen, *supra* note 25, at 100; see the related account in J. Dewey, *The Public and Its Problems* (1954), at 69 et seq.; and fundamentally dissenting C. Schmitt, *The Crisis of Parliamentary Democracy* (1988), on the contradiction between parliamentarism and democracy, for instance at 9 et seq.

47 H. Arendt, *On Revolution* (2006 [1963]), at 228; see M. Canovan, *Hannah Arendt* (1992), at 145, 224.

48 In the European or global spheres, however, democracy theories that do not depart from intersubjectivity or collectivity, but from the individual, are dominant, A. v. Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations', (2012) 23(2) EJIL 315, at 315, 323ff.

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Inasmuch as international law is relevant for societal issues, the question arises of whether and when the heterogenous basic configuration of modern societies plays a role for international-legal mechanisms of representation. The dualistic view assumes that a clear distinction between society and state as original entities is possible, and that a right to involvement becomes necessary only when there are immediate legal obligations on individuals by international law. The necessity of societal involvement in the jurisgenerative process is supposed to be triggered by the direct effect of international law.[49]

This conception cannot deal appropriately with the fact that international-legal stipulations are more and more closely-knit and that consequently, the room for parliamentary manoeuvre is dwindling. A deficit in representation and participation does not only arise when international regulations claim immediate effect in and of themselves or when they dispense with the need for participation by national governments to take effect; it emerges even when the freedom of the transforming norm-setting entities is seriously limited and thus the identity of authors and addressees of legal regulations is no longer preserved. Thus, from the perspective of legitimation theory, the 'one state, one vote' principle is no longer appropriate in many areas of international law. A regime of 'one state, many (different) votes' may be more so.

3. Institutional implications for international law

Under which conditions can we speak of opposition in public international law? To become practically relevant this model of legitimacy has to feed into concrete institutional features. Obviously, 'opposition' cannnot mean the institution of a like-minded faction in a world-parliament. It denotes an institutional mode through which a pluralist form of representation is organized and guaranteed at the level of international law. This idea of an opposition needs intermediate principles that govern their institutional realization in order to create more political legitimacy for the process of law-making. Two principles are crucial in this context.

The first principle is *alternativity*. In the ideal case, the law-making process should take account of those transnational political conflicts of interest that are relevant to the field of regulation in question. Other regualatory paths should be made explicit, they should become formalized, and they should be included into the deliberation of a given proposal. From the outside, much of the international regulatory consensus looks like the ratification of something allegedly necessary that is only contested in so far as national interests are at stake. The formulation of political alternatives remains at the outside of the process, conducted by NGOs or other private parties. But for a legitimate procedural frame of law-making articulated alternatives have to be integrated into the institutional framework of the law-making procedure. Traces of this requirement can be found in international forms of parliamentarism and, more

49 C. Calliess, 'Das Demokratieprinzip im Europäischen Staaten- und Verfassungsverbund', in J. Bröhmer et al. (eds.), *Internationale Gemeinschaft und Menschenrechte* (2005), at 399; A. v. Bogdandy, 'Grundprinzipien', in A. von Bogdandy and J. Bast (eds.), *Europäisches Verfassungsrecht* (2009), at 13, 64 et seq.

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often, at the national levels: for instance, in the case of compulsory referenda for international treaties in states like Switzerland.[50] But neither the national political process nor the participation of NGOs as actors only in the institutional environment can make up for the lack of institutionalized alternativity in international law-making.

While alternativity operates *ex ante*, before international rules are passed, the second institutional feature, *revisability* concerns the rules for establishing and amending international law. A central element of politically legitimate law is that it can be changed. The challenge is to make international law more flexible by way of procedures that are themselves representative and flexible. While it does not seem to be possible for the time being to change the principle of consensus as the standard basis of international obligations, more effort has to be invested into second-order procedures that allow for a formalized development of international institutions. This is especially the case where institutional set-ups are used by a minority of states against a majority that cannot achieve a decision over veto-positions. Solutions could include the distinction between basic framework regulations (that we can already find in some international institutional law) and time limits for consensual rules.

In constellations that are purely intergovernmental, a higher degree of alternativity could be achieved through the representation of different functional interests of a state. The much complained about fragmentation of international law can be used as a point of departure for the route to a law-making process that is open to regulatory alternatives. International regime conflicts are the embryo of an autonomous political process beyond the negotiation of state interests.

The representation of different, even conflicting, interests within a sovereign state in international law is complicated by the fact that such representation increases legitimacy only when it does not end in mutual blockade. Instead, a political process is needed whose outcome is open. This means that alternativity and revisability have to coincide. By giving prominence to one while disregarding the other, juris-generative processes are not politicized in ways that increase legitimacy; rather, the result is either blockade or a degree of flexibility that has no legitimate basis.

In which institutions and in what kind of procedures of international law can the feature of alternativity and revisibility be institutionalized? Instead of constructing ideal procedures it is desirable to reconstruct existing procedures in international law in order to find traces of a practice of opposition in international law.

First, I will consider parliamentary assemblies.[51] In particular, I shall take a closer look at the Parliamentary Assembly of the Council of Europe (PACE) – in many respects, it has developed in a far-reaching and partly even innovative way (section 4.1.). However, for now, there is no indication that the significance of parliamentary assemblies will further increase.[52] It seems unlikely that they will become

50 Art. 140(1)(b), Art. 141(1)(d) Swiss Federal Constitution.
51 Comprehensively: B. Habegger, *Parlamentarismus in der internationalen Politik* (2005); S. Marschall, *Transnationale Repräsentation in Parlamentarischen Versammlungen* (2005).
52 On the parliamentarization of public international law, see Ch. 12 in Ley, *supra* note 27.

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international legal subjects like governments and that (like the European Parliament) they will be involved in the legislative process in an obligatory manner.

For this reason, I will discuss further below whether the fragmentation of international law into different sectoral regimes can contribute to the politization of law-making procedures, in the sense that regimes could refer critically to one another with respect to their different perspectives and concerns (section 4.2.). Regarding the participation of non-state actors in international law-making, NGOs come to the fore (section 4.3.). As we have seen, the inclusion of NGOs cannot substitute a formal law-making procedure that takes alternativity seriously. Still, their right to participate in law-making conferences and in the proceedings of international organizations has increased dramatically over the last two decades.[53] They also had a contestatory role to play during the worldwide protest against the war in Iraq in 2003 and the demonstrations against the WTO Ministerial Conference in 2009. Nevertheless, they do not have the status of legal subjects. NGOs cannot claim to represent anyone other than their membership; for the ideal of democratic equality, this creates as many problems regarding legitimacy as their participation solves. Thus, apart from some examples referred to further below,[54] they will not play a prominent role in the further discussion.

Regarding the WTO, Isabel Feichtner has shown that the waiver procedure can be interpreted as a legislative mechanism which contrasts the political goals of the WTO with those of other regimes, for instance with those that take a developmentalist approach.[55]

A further possibility of expressing contestation in the inter-regime relationship is what I would like to call 'counter-conventions' – classical international treaties that are intentionally developed to politically oppose other organizations and their political claims. Thus, the Biosafety Protocol of the Convention on Biological Diversity was developed to balance the WTO's position on the question of genetically modified organisms. Finally, even non-state and informal forms of regulation have to be considered. In part, their structural independence from the procedures of international law can represent concerned interests and adapt more easily than would be possible through international procedures.

4. Case studies: Opposition in public international law

4.1. The Parliamentary Assembly of the Council of Europe

In various ways, the Parliamentary Assembly of the Council of Europe (PACE) contributes to the politization of the Council of Europe as well as of other international organizations. Already the structure of membership – the representation of different peoples through parliamentary delegations – corresponds to the heterogeneity

53 See the comprehensive, so-called Cardoso-Report, UN GA of 11.6.2004, A/58/817.
54 See below (3.3).
55 See I. Feichtner, *The Law and Politics of WTO Waivers – Stability and Flexibility in Public International Law* (2011); I. Feichtner, 'The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests', (2009) 20(3) EJIL 615, at 615–45.

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of represented societies. Thus the plurality of interpretations regarding the societal common good is mirrored as much as the division of public authority into government and opposition.[56]

4.1.1. Political groups and the right of initiative

In accordance with Article 18 of PACE's Rules of Procedure, the members of parliament divide into political groups. These were not provided for when the Council of Europe was founded in 1949, but they developed informally relatively quickly. Since 1956, an independent funding of the political groups has been foreseen,[57] and the Council's Rules of Procedure have recognized them since 1964.[58] Currently, there are five political groups: the Group of the European People's Party (EPP), the Socialist Group (SOC), the European Democrat Group (EDG), the Alliance of Liberals and Democrats for Europe (ALDE), and the Group of the Unified European Left (UEL).[59] The division into groups is essential for the distribution of speaking rights, filling certain leadership positions, and – informally – exercising some electoral rights of the Assembly.[60] The electoral behavior of the delegates, meanwhile, does not exclusively follow a party-political logic – country of origin *and* political allegiance play a role. Sometimes, the matter at hand is decisive; moreover, left-wing members appear to have a greater tendency towards political cohesion than right-wing ones, whose voting behaviour tends more towards national unification.[61]

Parliamentary assemblies can boost the activity of international organizations through their initiatives, as instigators of ideas, or as a 'motor of reform';[62] in this sense, they have a dynamic effect. PACE has fought for (and won) an extensive capacity for policy shaping. Its right of initiative – remarkable when compared to the EP – concerns all acts of the Council of Europe, including the conventions. It is set down in Article 15(a) CoE Statute[63] and is made use of in the form of recommendations. About 40 per cent of the passed conventions of the Council of Europe can be traced back to PACE initiatives.[64] Among others, it has initiated the European Convention on Human Rights and its Additional Protocols, the UN Convention against Torture, the Framework Convention for the Protection of National Minorities, as well as the Convention on Human Rights and Biomedicine.[65]

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56 Art. 6.2 PACE Rules of Procedure: 'Insofar as the number of their members allows, nations delegations should be composed so as to ensure a fair representation of the political parties or groups in their parliaments …'

57 P. Schieder, 'Die Rolle der Fraktionen im Europarat', in U. Holtz (ed.), *50 Jahre Europarat* (2000), at 101 et seq.

58 J. Stegen, 'Die Rolle der Parlamentarischen Versammlung als Motor des Europarats', in U. Holtz (ed.), *50 Jahre Europarat* (2000) at 79, 82.

59 See http://website-pace.net/en_GB/web/apce/political-groups (20 August 2014) (accessed 7 August 2015).

60 Schieder, *supra* note 57, at 101, 104 et seq.

61 See the investigation cited by Habegger, according to which both frontiers of conflict had approximately the same impact on voting between 1983 and 1994; Habegger, *supra* note 51, at 89. The seating arrangements in the Chamber [during sessions] reflect neither a national, nor a party-political order; instead, members appear as individual representatives. See M. Wittinger, *Der Europarat* (2005), at 140, para. 129.

62 See, for instance, A. Nothelle, 'The OSCE Parliamentary Assembly – Driving Reform', *OSCE Yearbook 2006*, at 374, 377.

63 Statute of the Council of Europe.

64 F. Arndt, 'Parliamentary Assemblies, International', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008), online edition, at para. 14; Habegger, *supra* note 51, at 118, 153 et seq.

65 Habegger, *supra* note 51, at 153 et seq; M. Wittinger, *Der Europarat* (2005), at 156.

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4.1.2. Rights of electing staff and filling positions

A mediated form of shaping politics is the right to elect and appoint staff. Here, too, PACE enjoys a substantive legal position: not only does it have the right to appoint the Secretary General of the Council of Europe upon recommendation by the Council of Ministers,[66] as well as the president of the Assembly (Article 28(a) CoE Statute); according to Article 22 of the ECHR,[67] it also appoints the judges of the European Court of Human Rights (ECtHR) from a list submitted by member states. The legitimacy of ECtHR judges is significant when compared with that of the judges of other international courts of justice, even those of the Court of Justice of the EU (CJEU).[68]

Moreover, a number of positions that the Assembly needs to fill are staffed by political groups: The Secretary General of the Council of Europe, the president of the Assembly, the chairpersons of the committees, and their deputies. According to an agreement between the political groups, the appointments of the President and the Secretary General[69] follow a rotation principle in periods of three years according to the following order: SOC, ALDE or EDG, EPP, EDG or ALDE; the Unified European Left cannot claim any position.[70] Furthermore, there is a tacit agreement that the Secretary General of the Council of Europe and the President of the Assembly must not be members of the same political group.[71]

This procedure is particularly remarkable with respect to the Secretary General of the Council of Europe: Traditionally, such a position is seen as apolitical, administrative, and neutral when it comes to the member states. Thus, employees of the Secretariat are not answerable to their respective governments.[72] Through the appointment and election by political groups, the position of Secretary General is upgraded and politicized. It was possible to witness partisan election behaviour during the elections of the socialist candidate Lalumière in 1994 and the Christian Democrat Schwimmer in 1999.[73]

66 Art. 36(b) CoE Statute.

67 In the version of Protocol No. 11.

68 On the procedure for the election of ECHR judges, see A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), at 163 et seq.

69 According to Art. 36(b) CoE, he is appointed by the PACE, but in practice, the Secretary-General is mostly nominated from among the ranks of the Assembly. In the elections of 2009, however, the Committee of Ministers reserved the right to nomination, in order to appoint someone with governmental experience and thus improve the image of the Council of Europe; *Agence France Presse*, 24 June 2009: 'Wahl des neuen Generalsekretärs im Europarat geplatzt'.

70 H. Klebes, *Die Rechtsstruktur des Europarats und insbesondere der Parlamentarischen Versammlung* (1996), at 14.

71 Habegger, *supra* note 51, at 121, n. 471.

72 H. Schermers and N. Blokker, *International Institutional Law* (2003), § 435.

73 Habegger, *supra* note 51, at 121, n. 469; P. Schieder, 'Die Rolle der Fraktionen im Europarat', in U. Holtz (Hrsg.), *50 Jahre Europarat* (2000), at 101; against established practice, however, the Committee of Ministers reserved the right to nomination in 2009, in order to nominate someone of high visibility for the position. Subsequently, the PACE refused to confirm the candidate during the first round of voting; press release of the PACE, 29 September 2009, 'Thorbjørn Jagland elected Secretary General of the Council of Europe', available at: http://assembly.coe.int/ASP/NEwsManager/EMB_NewsManagerView.asp?ID=4939 (accessed 7 August 2015).

4.1.3. Institutionalized external action by PACE

Largely unnoticed by the international legal public, PACE has gained a measure of parliamentary control over other intergovernmental organizations by means of a highly innovative mechanism. Through a logic of networks, it arrives at mitigating the problematic aspects of fragmentation. On the one hand, it achieves the institutional connection, communication, and even control and scrutiny of the activities of international organizations; on the other, it can economize on the limited legitimation of resources of public attention as well as parliamentary legitimation.

PACE functions as an accompanying parliamentary entity for different international organizations: the International Committee of the Red Cross (ICRC),[74] the European Conference of Ministers of Transport, the European Civil Aviation Conference, the UN Economic Commission for Europe,[75] the Organization for Economic Co-operation and Development (OECD), and, since 1992, also for the European Bank for Reconstruction and Development (EBRD).[76] Once a year, a member of these organizations presents an account of their activities to PACE and answers questions of the delegates. Subsequently, PACE makes a statement, in which the activities of the organizations are evaluated and practical propositions regarding future projects are made.

As the OECD has members that are not at the same time members of the Council of Europe,[77] PACE forms an extended assembly with the delegations of the parliaments of those countries that are not members of the Council of Europe for the yearly summit of the OECD. According to Articles II(1)(iii) and (iv) of its Rules of Procedure,[78] a delegation of the European Parliament[79] and the Secretary General of the OECD may also participate in these reunions, in which the yearly report is presentend and the delegates' questions are answered. In accordance with Article II(2)(2) of the Rules of Procedure, the delegations are supposed to mirror the currents of opinion within their respective parliaments.[80]

The Co-operation Agreement between PACE and the EBRD[81] also stipulates that PACE's President may participate in the reunions and conferences of the Bank; conversely, the President of the Bank may participate in the annual debate of the Assembly regarding the Bank and answers the questions of the delegates. Moreover, once a year, the Committee of Economic Affairs and Development holds its reunion at the Bank.

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74 See the Co-operation Agreement Concluded between the Parliamentary Assembly and the President of the ICRC – Exchange of Letters, reprinted in the Rules of Procedure of the PACE, at 244 et seq.

75 Schermers and Blokker, *supra* 72, at § 1725.

76 U. Holtz, 'Der Europarat und die Europäische Bank für Wiederaufbau und Entwicklung', in U. Holtz (ed), *50 Jahre Europarat* (2000), at 271.

77 Australia, Canada, Japan, South Korea, Mexico, New Zealand, and USA.

78 Reprinted in the Rules of Procedure of PACE, at 226–40.

79 But according to Art. VIII (1) of the Rules of Procedure without the right to vote.

80 See the Co-operation Agreement between the organizations: 'Arrangement entre le Conseil de l'Europe et l'Organisation de Coopération et de Développement Économique', November 1962, in particular Art. 11–13.

81 Co-operation Agreement Concluded between the Council of Europe and the European Bank for Reconstruction and Development – Exchange of Letters between the President of the Parliamentary Assembly and the President of the EBRD on co-operation between the Assembly and EBRD (1992), reprinted in the Rules of Procedure of the PACE, at 242.

After these debates, the Assembly writes a report[82] in which it evaluates the activities of these organizations and makes practical recommendations. It usually confronts the economic focus of both organizations with aspects of social welfare, human rights, the rule of law, and the promotion of democracy. Generally, PACE adopts the role of mediator: it addresses proposals not only to the organization itself, but also to the member states (which are simultaneously member states of both organizations) and the delegates, calling for support for certain policies of the OECD or the EBRD.[83]

The reports of the Assembly on the EBRD are particular proof of the close communication between both organizations.[84] They contain many, often very precise calls for specific actions, the implementation of which is tracked and accompanied throughout a continuous process of exchange and communication.[85] For instance, PACE offered very serious criticism of the budgetary decisions of the first president, Jacques Attali, shortly after the EBRD was established. The criticism was to the effect that too high a percentage of the means of the Bank were channeled into furnishing its headquarters, rather than going into operative projects.[86] The subsequent resignation of the first EBRD President is mainly attributed to this exertion of influence.[87]

4.1.4. Non-institutionalized foreign [external] action

Finally, PACE sometimes tries to scrutinize other international organizations, even where no agreement exists. Its intervention in the context of the World Health Organization's (WHO) management of the H1N1 virus ('swine flu') is only one example. In that case, it closely examined the intransparency surrounding appointments to the Advisory Group of Experts, as well as wide-ranging emergency plans and vaccination campaigns, which later turned out to be unnecessary. In early 2010, the WHO's Assistant Director-General in charge of influenza had to give an account to the Assembly Committee in charge, and was critically examined. This early reaction of PACE garnered a lot of public attention; it is often credited for the WHO's decision to make the appointment of experts and their affiliations with the pharmaceutical

82 Under the auspices of the Committee on Social Affairs, Health and Sustainable Development.

83 See Ley, *supra* 27, at ch. 14.

84 This impression was confirmed during a telephone interview with with an employee of the Secretariat of the responsible Committee on Social Affairs, Aiste Ramanauskaite. According to her, there is a constant exchange between PACE and the EBRD; the expertise that the Parliamentary Assembly has gained in matters regarding Eastern Europe through its own missions is consulted and used particularly frequently. Thus, the co-operation goes far beyond the annual plenary debate.

85 See the proposals in Res. 1064 (1995), at para. 3.

86 See PACE Res. 1002 (1993), at para. 12: 'The Assembly questions the need for the Bank to have such an expensive and prestigious headquarters. In order to ensure proper use of taxpayers' money and to avoid the creation of a negative public image prejudicial to the Bank's work ..., the Assembly urges the Bank to observe strict standards of cost-effectiveness in its internal administration, and to abstain from all conspicuous forms of representation, and to establish tighter budget controls and auditing of all its operations. The Assembly asks that the auditors' report following their investigation into allegedly extravagant expenditure by the Bank be made available to its Committee on Economic Affairs and Development'.

87 See the affirmative statement in Res. 1040 (1994), at para. 2 und Res. 1064 (1995), at paras. 1, 2, Res. 1094 (1996), at para. 1, which nevertheless adds the proposal in para. 2 'that administrative expenses may be further reduced by making the bank's so far resident board of directors non-resident as well as smaller in size, thereby liberating resources for operational activities'.

industry public; subsequently, the WHO also revised the procedure for responding to epidemics, set down in the International Health Regulations.[88]

These examples show that even without close institutional ties between the WHO and the Council of Europe, the criticisms made by PACE drew public attention to the matter;[89] but even more importantly, they led to a review of the criticized events and of the regulations from which they stemmed. The review is certainly not solely due to the criticisms made by PACE; but its reaction triggered a wave of criticism in the media and subsequently in other institutions. Thus, the goal of health security, at the centre of the WHO's operations,[90] could be better communicated through the principles of sound budget management and procedures in accordance with the rule of law.

The question of which preventive measures should be taken when faced with unknown future risks involves considerations that cannot be reduced to good or bad decisions: especially with respect to permutations and the spread of viruses, decisions regarding health often have to be taken under conditions of uncertainty: the consequences of the pandemic may be catastrophic, while the probability of the event's occurrence is small or difficult to forecast. In such cases, the question which quantities of which vaccine should be stored involves a variety of judgments, assessments, and, owing to the scarcity of financial resources, also preferences. When the Plenary Session of the WHO corrected the response protocol regarding epidemics in 2011, the principle of revisibility was implemented, as is appropriate for political decisions of this kind. The sparse literature on the subject considers this exterior dimension of PACE to be successful and visionary. It is imaginable that this model can be applied to other constellations, as well.[91] Such improvement of integration and co-ordination, but also mutual criticism and control of international organizations is an expandable element for increasing the legitimacy of international organizations.

4.2. Counter-conventions: The UNESCO Convention on the Diversity of Cultural Expressions

The different functions, goals, perspectives, and biases of international organizations whose goals are possibly contradictory can be viewed as an expression of social plurality at the international level – despite the fact that they represent entirely governmental settings. I would like to consider in how far even classical intergovernmental institutions can represent transnational, functional conflicts when engaging in critical interaction with each other and reacting to each others' different functional perspectives. Currently, inter-institutional links are very weakly institutionalized. Nevertheless, some legislative mechanisms exist which can represent inter-functional conflicts of interest and solve them through a

88 See I. Ley, 'Zur Politisierung des Völkerrechts – Parlamentarische Versammlungen im Außenverhältnis', (2012) 50 *Archiv des Völkerrecht* 191, at 191–217.
89 Habegger, *supra* note 51, at 189 et seq.
90 Art. 1 WHO: 'The objective of the World Health Organization … shall be the attainment by all peoples of the highest possible level of health'.
91 Habegger, *supra* note 51, at 219, 233ff.

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political process, thereby bringing together contestability and revisibility.[92] Especially the powerful WTO has been made the object of opposing conventions several times when dissenting coalitions were not able to prevail within the framework of the WTO.

The tense relationship between multilateral environmental protection agreements and WTO rules has somewhat relaxed since a working compromise was reached including legislative, judicial, and institutional balancing mechanisms.[93] Political differences, meanwhile, and the resulting uncertain legal situation in other fields are more difficult to resolve. The USA and Europe continue to quibble over how to deal with genetically modified food (the so-called GMOs[94]), or cultural products and services – as a consequence, no consensus on these questions has been reached within the WTO. In both cases, a group of states that was against a trade liberalization of GMOs and cultural products tried to secure its position outside the WTO, via international agreements within other institutional venues: the Cartagena Protocol on Biosafety as an additional protocol to the Convention on Biological Diversity in 2000[95] and the UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005.[96] This begs the question of whether signing agreements that actually aim at other regimes with the purpose of creating a counterbalance can be valued as a form of legitimizing politization. This question will be analysed with respect to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter Convention on the Diversity of Cultural Expressions).

4.2.1. The UNESCO Convention on the Diversity of Cultural Expressions – A counterweight to the WTO?

The example stems from the interface of world trade law and the protection of cultural goods: it shows that the UNESCO Convention on the Diversity of Cultural Expressions has been used as a form of protest against the categorization of cultural goods as regular trade goods, plausible as this may seem from the standpoint of trade law. This question of the right categorization of cultural goods is at the centre of the conflict between UNESCO and WTO: Are cultural goods ordinary objects of trade, or do they possess some other, overriding quality of cultural importance, which forecloses their being treated as any other trade goods?[97] With the increase in world

92 Termed 'Contested Multilateralism' by J. Morse and R. Keohane, see J. Morse and R. Keohane, *Contested Multilateralism*, *The Review of International Organizations*, March 2014, Open Access Publication, available at: http://link.springer.com/article/10.1007%2Fs11558-014-9188-2#page-1 (9 September 2014) (accessed 7 August 2015).

93 For representatives of the abundant literature on the conflict of regimes, see J. Pauwelyn, *Conflict of Norms in Public International Law* (2003).

94 For a definition of 'living modified organism', see CPB Art. 3(g): '"Living modified organism" means any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology".

95 See N. Krisch, *Beyond Constitutionalism* (2010), at 189 et seq.

96 Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, available at: http://portal.unesco.org/culture/en/ev.php-URL_ID=33232&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 7 August 2015).

97 Art. III (2) GATT is of particular relevance, as it stipulates that no internal taxes or charges on imported products shall be levied, if no such taxes or charges are levied on 'like' domestic products.

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trade during the 1990s, this question became ever more important, as it provoked vehemently defensive attitudes against what was seen as American global cultural imperialism.[98]

Many states support their cultural industries with subsidies, content regulations, access barriers, tax advantages, co-production agreements, and the limitation of foreign investment.[99] During the Uruguay Round (1986–1993), and especially during negotiations concerning the General Agreement on Trade and Services (GATS), the EC and Canada in particular demanded the introduction of an exemption clause for cultural goods (*exception culturelle*),[100] comparable to Article 2106(f) in conjunction with Annex 2106 NAFTA. In the absence of a consensus with the US, only an 'agreement to disagree'[101] could be obtained.[102] The effect was that no general rule could be set down in the GATS and that many states introduced exemptions[103] to exclude audiovisual services from the ambit of the most favoured nation principle (Article II GATS).[104]

When the concept of cultural exemptions could not be made effective, another one was adopted: that of cultural diversity. A number of states, following Canada and the European Community, decided to enter into a binding agreement, not under the auspices of the WTO, but under that of UNESCO.[105] On the one hand, legislative activity within the WTO requires the consensus of all member states, which was not forthcoming due to the resistance of the US; according to Article IV B.4 of the UNESCO Constitution,[106] however, the adoption of a UNESCO convention only requires a majority of two thirds.[107] On the other hand, the choice of the UNESCO as a form of settlement had the advantage that the burden of argumentation now lay with the supporters of a special regime: While in the WTO, they were forced to make a case *against* the liberalization of further trade areas (though this was stipulated in the GATS), it was possible to make a positive case *for* a concept of cultural diversity within the UNESCO. Now the opponents of such a convention were forced to advance reasons against it.[108] From the perspective of the fragmented representation

98 M. Footer and C. Graber, 'Trade Liberalization and Cultural Policy', (200) 3 JIEL 115, 119.
99 For an overview of the measures, see ibid., at 122–26.
100 See Art. 4(1) (cultural diversity), Art. 4(3) (cultural expressions), Art. 4(4) (cultural activities, goods and services); T. Voon, 'Cultural Products and the World Trade Organization', Melbourne Law School Legal Studies Research Paper No. 342, at 19, lists under 'cultural goods' films, videos, radio, TV, audio records, books, magazines, newspapers, and related services.
101 As formulated by Bill Clinton (cited in S. Azzi, 'Negotiating Cultural Space in the Global Economy', (2005) 60 *International Journal* 765, at 765, 767); see WTO, Council for Trade in Services, Audiovisual Services: Background Note by the Secretariat, 15 June 1998 (S/C/W40), at 30.
102 On the course of negotiations during the Uruguay Round with respect to this question, see J. Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (1999), at 212–15, 243–4, 310–12, 320, 324–27.
103 In terms of international treaty law, these are qualifications in compliance with Art. 19 VCLT.
104 Voon, *supra* note 100, at 25. See WTO, 'Services Database: Predefined Report – All Countries' MFN Exemptions, available at: http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (accessed 7 August 2015).
105 See H. Ruiz-Fabri, 'Jeux dans la Fragmentation', (2007) 111 *Revue générale de droit international public* 1, at 43, 47–56.
106 UNESCO Constitution, 16 November 1945, available at: http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 7 August 2015).
107 J. Pauwelyn, 'The UNESCO Convention on Cultural Diversity, and the WTO', *ASIL Insight*, 15 November 2005.
108 See Ruiz-Fabri, *supra 105*, at 43, 52 et seq.

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of societal claims, it is no less significant that in the WTO, negotiations are conducted by trade and economic ministers, whereas in the UNESCO General Conference, they are conducted by the ministers of education.[109]

Two other facts catalysed the decision to create a convention for the protection of cultural diversity.[110] On the one hand, the WTO-DSB decided in the *Canada-Periodicals* ruling of 1997 that no tax was to be imposed on so-called split-run magazines. These (in this case of US-American) news magazines were published in an adapted form in a foreign market – in particular, advertisements were drawn from the targeted market.[111] Moreover, negotiations for the Multilateral Agreement on Investment of the OECD were brought to a standstill when France refused to agree, because no exemptions were granted for its cultural sector by the business-friendly OECD.[112]

Upon recommendation by the UNESCO Executive Board,[113] the UNESCO General Conference charged the Director-General with the task of writing a report and a draft for the Convention.[114] The choice of the legal instrument was made with the purpose of creating a regulation that could resist trade law. With the assumption that the Doha Round would be concluded by 2005, the process of negotiation took remarkably little time.[115] After a prolonged period of absence, the US re-entered the UNESCO for the very purpose of participating in it.[116] After an interdisciplinary board of experts had written a draft,[117] other organizations – namely the WTO, UN Conference on Trade and Development (UNCTAD), and the World Intellectual Property Organization (WIPO)[118] – 88 states, and 15 NGOs were asked to submit their opinions. After two further negotiation rounds, during which disagreement centred on the inclusion of a clause taking account of possible conflicts with the regulations of the WTO, the General Conference approved the Convention with 148 votes against two dissenting votes (the US and Israel) and four abstentions in

109 Argued in particular by the Canadian Minister of Education, Sheila Copps; see Azzi, *supra* note 101, at 765, 768.

110 Azzi, *supra* note 101, at 765, 767.

111 Canada — Certain Measures Concerning Periodicals, WT/DS31/A/R of 30 July 1997.

112 Azzi, *supra* note 101, at 765, 767.

113 After the conclusion of a preliminary enquiry; see Preliminary Study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity, 12 March 2003 (166 EX/28), available at:http://unesdoc.unesco.org/images/0012/001297/129718e.pdf (accessed 7 August 2015).

114 Resolution 32C/34 of July 2004 (CLT/CPD/2004/CONF.201/5), available at: http://unesdoc.unesco.org/images/0013/001356/135650e.pdf (accessed 7 August 2015).

115 M. Burri-Nenova, 'Trade and Culture', (2008) 5 *Manchester Journal of International Economic Law* 3: 'entered into force on 18 March 2007 after an incredibly swift ratification process'.

116 The USA had left the UNESCO on 31 December 1984; owing to the increasing number of former colonial and socialist states, it perceived the organization as too ideological; in particular, the withdrawal came amid controversies over the New World Information order, which the US saw as an attack on press freedom. The re-entry of the US in 2003 is attributed to the fact that it wanted to influence the formation and contents of the UNESCO Convention.

117 Preliminary Draft of A Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions, UNESCO Doc. CLT/CPD/2004/CONF-201/2 of July 2004, available at: http://www.incd.net/docs/UNESCOdrafto4.pdf (accessed 7 August 2015).

118 UNESCO, 'What were the stages that led to the adoption of the Convention?', http://www.unesco.org/new/en/culture/themes/cultural-diversity/cultural-expressions/the-convention/historical-background/what-were-the-stages-that-led-to-the-adoption-of-the-convention/ (26 April 2013) (accessed 7 August 2015)

October 2005.[119] Again, after a very short period of time, it entered into effect with 30 ratifications[120] in March 2007. It now includes more than 130 states.[121]

The political quarrel between the US and most of the other states became apparent during the negotiations regarding the relationship of the Convention with world trade law. Both sides accused each other of shrouding their real intention by paying lipservice to other political objectives – cultural diversity and free trade, respectively. The US suspected the project to be nothing more than a protectionist manoeuvre aiming to shield indigenous cultural industries; the other states saw the attempts of the US to push free trade as a bid for cultural dominance.[122]

Was the endeavour of creating a convention that could prevail over trade law successful? Even the goal of the convention collides with WTO-regulations (e.g. paragraph 18 of the Preamble and Articles 2 and 6 of the UNESCO Convention). The conflict clause in Article 20 falls short of the original objective, namely to prioritize the Convention over trade law: While Article 20(1) stipulates that the Convention is not subordinated to other treaties, Art. 20(2) states that it must not modify the content of other treaties. Thus particularly Articles XX(d)[123] or (f)[124] GATT are gateways to interpretations that are more in line with the terms of Articles 31(3)(c) of the Vienna Convention on the Laws of Treaties (VCLT) in conjunction with Article 3(2)(2) of the Dispute Settlement Understanding (DSU).[125]

4.2.2. Assessment

Given the relatively weak legal position of the Convention when compared to the regulations of the WTO, the political support it rallies is all the more important: Its significance lies probably not so much in its conflict clauses. Rather, it has succeeded in granting cultural products a special status in a globalized world by moulding an instrument of public international law with a high number of participants to which states and agents can refer in the future.

The Convention has changed the debate over the status of cultural goods in international law: Previously, the debate centred on whether cultural diversity could justify trade barriers, and on whether cultural goods have an extra-economic, intrinsic dimension; both perspectives are now widely accepted. Nowadays, the question is not so much *whether* the protection of means of cultural expression should limit free trade, but rather *how* the Convention of UNESCO and the regulations of the WTO can be made compatible with each other.[126]

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119 Details on the negotiations can be found in Conrad, Öffentliche Kulturförderung und Welthandelsrecht (2008), at 417–22.

120 According to Art. 29 of the Convention.

121 See http://portal.unesco.org/la/convention.asp?KO=31038&language=E (accessed 7 August 2015).

122 On this Footer and Graber, *supra* note 98, at 115, 119.

123 Exemption for measures that are necessary for the application of laws and other regulations, provided that they are not inconsistent with the GATT.

124 Exemptions for the protection of national cultural goods of artistic, historic, or archeological value.

125 On the possibilities opened up by the Agreement, see J. Wouters and B. de Meester, 'The UNESCO Convention on Cultural Diversity and WTO Law', (2008) 42 JWT 205; A. Khachaturian, 'The New Cultural Diversity Convention and its Implications on the WTO International Trade Regime', (2006) 42 Texas ILJ 191.

126 See Burri-Nenova, *supra* note 115, at 2.

The UNESCO Convention is an instrument that emerged from political resistance to the effects of the WTO regulations on the cultural sector, and was drawn up in opposition to the WTO regulations. From the perspective of any single state that is both a member of the WTO and the UNESCO Convention (as was the case with most of them), we have here an example of the pluralist representation of different interests: potentially contradicting interests are represented in agreements which are related to one another substantially, although they are not related institutionally. This fragmentation, for instance, allows corporations and other representatives of economic interest to lobby with the WTO representation of a given state, while cultural interests may be reflected and voiced at the UNESCO representation. This point is underscored if one looks at the diverse and wide-ranging membership in international institutions of a state in a more formal way: In so far as Canada is a member of the WTO and party to the WTO agreements, Canada is not only bound by the trade agreements treating cultural goods as any other trade good, but it is also a political supporter and representative of that system – while equally campaigning for a different policy in the UNESCO venue.

The Convention has politicized the WTO regulations inasmuch as it highlighted that the balance they created was in favour of free trade and disfavoured other interests. It thus underscored the political interests that are inherent in the order established by the WTO. Since the USA and Israel are not parties to the Convention, it continues to be unclear what the exact relationship between the Convention and the regulations of the WTO is, and how an agreement would be reached in a case of actual dispute. Dispute settlement mechanisms are therefore desirable. This role could be adopted by a committee representing both the UNESCO and the WTO in equal measure.[127] Nevertheless, the fact that the UNESCO Convention came into existence in the first place creates a new balance of power between culture and trade. In cases of conflict, the political counterbalance that the Convention stands for cannot be neglected.[128]

4.3. Informal and private forms of regulation

Finally, it is also necessary to consider informal and private forms of regulation, which increasingly take on functions of global governance. An example of successful regulation is the *Forest Stewardship Council* (FSC). The objective of this NGO, representing not only public interest groups but also industry representatives, is to protect forests and work towards environmentally and socially sustainable forms of deforestation. The *Forest Stewardship Council* thus tries to balance the interests of the forest-based industry, environmental organizations, and affected indigenous peoples. All three groups are represented in committees of the FSC, and collectively,

127 C. Graber, too, demands a 'procedural interface between the law of the WTO and the CCD', in his 'The New UNESCO Convention on Cultural Diversity – A Counterbalance to the WTO?', (2006) 9(3) JIEL 553, 571; on the role that the Intergovernmental Committee of the UNESCO Convention could play, see at 574.

128 Ibid., at 553.

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they set down a catalogue of rules, the application of which is a condition of being granted the label of the FSC.[129]

Another example is the *Kimberley Process Certification Scheme* (KPCS),[130] an informal agreement of states that have committed themselves to only trading diamonds with states that have been certified according to agreed-upon criteria. In this way, diamond extraction that is suspected of financing international terrorism or the armed violence of rebel groups against governments shall be prevented. According to its own statements, this agreement already covers 99.8 per cent of the worldwide trade of rough diamonds.[131] The KPCS now includes 54 members (81 states; the EU counts as one member). According to Section VI(10) KPCS, NGOs may participate in the plenary sessions, which take place on a regular basis; they are invited either by other international organizations, or even by the diamond industry, with the effect that the institution explicitly takes account of the potential conflict between the diamond industry and social or humanitarian agents.

One may doubt that these corporatist forms of bringing together industry and society are equivalent to the institutionalization of opposition as it emerges within a state. By comparison, the mediation of societal interests by political parties is much more transparent and enjoys more representativity. Nonetheless, these phenomena should not be disregarded, for they are possible motors of a politicization of international law-making processes.

5. Final assessment

The examples have shown that the fragmentation of international regimes can be seen as an opportunity for its legitimate politicization if they function as instances of institutionalized critique and legislative change. Thereby, these procedures overcome the unitary representation of the state to some extent. When the WHO and Council of Europe or the UNESCO and WTO have a relationship of criticism and exchange that admits different perspectives on a given legislative project, a member state will no longer be represented by only one position. Rather, their interaction can be understood as a complex of representation, in which the political diversity existing within a state is represented through the different institutional venues.

Yet so far, possibilities for politicizing international law-making processes along non-international lines have been limited. It is frequently not possible to use the alliances of states within international organizations (e.g. the G-77 or other groups within the UN General Assembly, even those that are not regionally diversified) for politicization according to common interests; the existing majority constellations

129 See E. E. Meidinger, 'The New Environmental Law: Forest Certification', (2002–2003) 10 (1&2) *Buffalo Environmental Law Journal* 211, at 211–316; S. Guéneau, 'Certification as A New System of Non-State Global Forest Governance System', in A. Peters et al. (eds.), *Non-State Actors as Standard Setters* (2009), at 379 et seq.

130 Kimberley Process Certification Scheme, reprinted in the appendix to Kimberley Process Certification Scheme for Rough Diamonds – Request for a Waiver, G/C/W/431, at 6–21; available at: http://www.kimberleyprocess.com/documents/basic_core_documents_en.html (accessed 7 August 2015).

131 See the definition in Section I, Kimberley Process Certification Scheme: 'ROUGH DIAMONDS mean diamonds that are unworked or simply sawn, cleaved or bruted and fall under the Relevant Harmonised Commodity Description and Coding System 7102.10, 7102.21 and 7102.31'.

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make consensus decision-making necessary. For the same reason, the innovative three-tier structure of representation of the ILO has not spilled over to other organizations. Nonetheless, the stronger institutionalization of opposition, i.e. the introduction of pluralist forms of representation *along with* a careful relaxation of the consensus-principle, is the only way of responding to the current deadlock in international law-making.

Many different versions of party-political, sectoral, and institutional contestation are conceivable in the spectrum of international-legal forms of organization and action. From the point of view of the present model, legitimation theory renders them desirable, at least if they reflect transnational interest conflicts or the redistributive potential of international-legal solutions, thus forming the starting point for the inclusion of non-state actors. This article, on the other hand, aimed to construct a theoretical framework for identifying the added value of these forms of oppositions and indicated some examples. Ideally, this article would prompt further research, attempting to discover and describe politicizing mechanisms in public international law-making.

The institutionalization of criticism cannot restore the 'unity' or 'generality' of public international law that is most probably lost.[132] What can be achieved by means of institutional law is the representation of different particularities, in order to gain a more complete view of the problems and needs of the international community. Only when these are not perceived as without alternatives, but as political, malleable, and negotiable can one meet them in the mode of collective freedom and responsibility.

132 For a nostalgic obituary, See M. Koskenniemi, 'The Fate of Public International Law: Between Techniques and Politics', (2007) 70 *Modern Law Review* 1, at 1–30.

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