

## CENTRAL ASPECTS OF THE DEBATE ON THE COMPLEXITY OF INTERNATIONAL LAW

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### ABSTRACT

*The way that actors create, implement, and control international law is far more complex today than it was thirty years ago. International law has become increasingly detailed and specific, as international relationships and transnational legal processes have become more complex. The distinction between national and international law is much less clear. States remain the primary actors, but there has been a multiplication and intensification of the role of sub-state and non-state actors. There is a continuous transformation of international law, by both public and private mechanisms, from the national to the international sphere and vice versa. The evolution of norms has also become increasingly dense. Any discussion in this arena must contend with new sources and new subjects of international law. This Recent Development presents three scholarly contributions to this discussion. First, this Recent Development analyzes new trends in the proliferation of norms, and how it impacts our understanding and application of international law. It reveals that: (1) there are multiple norms arising from new and old international institutions and systems of integration; (2) it is now possible to more readily integrate more states into the international legal system; and (3) international law now progressively supersedes domestic law in many areas. Second, this Recent Development proposes the possibility of new sources of international law including networks of judges, state agents, and private companies and other private actors. Subjects and participants must contend not only with international law, but also with private or hybrid legal systems, which are often autonomous of their host nation-states. International legal scholarship frequently neglects these sources, even if they are vital to certain legal subsystems, such as finance or monetary law. Third, this Recent Development examines and summarizes some of the more controversial ideas on international law today including: (1) global constitutionalism; (2) global democracy; (3) complexity; and (4) fragmentation in international law. The*

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*discussion illustrates the limitations of these concepts in the real world, and explores practical applications. This Recent Development surveys a spectrum of global perspectives on these issues, and references articles from doctrinal sources in a variety of countries including the United States, Germany, France, United Kingdom, Japan, and Brazil.*

## INTRODUCTION

International legal theory is undergoing a major transformation in response to globalization processes. The way that actors create, implement, and control international law is far more complex today than it was thirty years ago. There has been a corresponding intensification of the transnational legal process. The distinction between national and international law has become less clear. States continue to be the main actors in international law, but there has been a multiplication and intensification of the role of sub-state and non-state actors.<sup>1</sup> International law continuously traverses between the national and international spheres, through both public and private instruments. Meanwhile, the process through which norms evolve becomes increasingly dense. Therefore, international relations have simultaneously become much more rule-oriented.<sup>2</sup>

However, international legal subsystems<sup>3</sup> such as international economic law (trade, finance, monetary), human rights law, humanitarian law, and environmental law have not been transformed in the same direction (rationale, rules of recognition, hierarchy) or at the same speed. International trade law has internationalized much faster than others, such as human rights or environmental law. Some states accept and participate in global integration more intentionally and actively than others.<sup>4</sup> Some authors suggest the idea of “polychrony” in international law: differences in the “time” of each legal

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<sup>1</sup> FRANÇOIS OST & MICHEL VAN DE KERCHOVE, *DE LA PYRAMIDE AU RESEAU. POUR UNE THEORIE DIALECTIQUE DU DROIT* 43–45 (2002).

<sup>2</sup> Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 *NEB. L. REV.* 181, 184 (1996).

<sup>3</sup> The concept of “system” changes according to the theory. Some Italian, Spanish, and Portuguese authors use the definition of Norberto Bobbio, “ordenamento.” NORBERTO BOBBIO, *POSITIVISMO JURÍDICO, LIÇÕES DE FILOSOFIA DO DIREITO* 198–99 (1995). French authors prefer the expression “ordre juridique” (legal order). *See id.* Commentators in the Anglo-Saxon tradition use the term “legal system.” *See, e.g.*, FRANÇOIS OST & MICHEL VAN DE KERCHOVE, *LEGAL SYSTEM BETWEEN ORDER AND DISORDER* ix–x (Iain Stewart trans., Oxford University Press 1994). Most authors, including Kelsen, Hart, and Romano, use these terms as synonyms. *See id.* at 10. I will follow them.

<sup>4</sup> OST & VAN DE KERCHOVE, *supra* note 3, at ix–x.

subsystem create conflicts among them.<sup>5</sup> A model once complicated (multiple and heterogeneous) becomes overwhelming and complex (interactive and unstable).<sup>6</sup>

Many different issues related to the transformation of international law have consequences for the way that we understand it: the proliferation of norms, the creation of new sources and subjects of international law, the limits of some new meta ideas, global constitutionalism, global democracy, and complexity versus fragmentation of international legal systems. Each of these discussions is subject to intense debate and scholarly study nowadays, including courses at the Hague Academy of International Law and other important forums.<sup>7</sup>

In this Recent Development, I discuss fundamental points on three important subjects. The first subject is the proliferation of norms, interpreted as the multiplication of treaties, customs, and the unilateral acts of international organizations and states. It is possible to integrate many more states into the international legal system, with many norms arising from new and old international organizations as well as the attribution of new capacities and competencies from the national to the international level. However, even if this integration is a clear process, it is impactful enough to change the way we understand international law. The legal framework of the World Trade Organization (“WTO”) is one example.<sup>8</sup>

The second subject of this paper, which receives more debate and achieves less consensus, concerns the possibility of new sources of international law arising from judicial networks, state agents, and private networks.<sup>9</sup> Actors must contend not only with international administrative law but also with private or hybrid legal regimes that are autonomous in relation to states. International law scholarship normally neglects this as a serious topic of study.<sup>10</sup> However, in

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<sup>5</sup> MIREILLE DELMAS-MARTY, ORDERING PLURALISM 133–48 (Naomi Norberg trans., Hart Publishing 2009).

<sup>6</sup> *See id.*

<sup>7</sup> *See, e.g., Hague Academy of International Law 2013: Programme of the 2013 Session*, HAGUE ACAD., [http://www.hagueacademy.nl/download/Poster\\_2013\\_EN.pdf](http://www.hagueacademy.nl/download/Poster_2013_EN.pdf) (last visited Feb. 3, 2013).

<sup>8</sup> *See infra* notes 71–78 and accompanying text.

<sup>9</sup> The discussion of whether or not new sources of international law have been created has been presented by various authors. *See, e.g.,* ONUMA YASUAKI, A TRANSCIVILIZATIONAL PERSPECTIVE ON INTERNATIONAL LAW: QUESTIONING PREVALENT COGNITIVE FRAMEWORKS IN THE EMERGING MULTI-POLAR AND MULTI-CIVILIZATION WORLD OF THE TWENTY-FIRST CENTURY (2010).

<sup>10</sup> *See, e.g.,* PIERRE-MARIE DUPUY, L'UNITE DE L'ORDRE JURIDIQUE INTERNATIONAL: COURS GENERAL DE DROIT INTERNATIONAL PUBLIC (2003).

some legal subsystems, such as finance or monetary law, those new aspects are important to understanding how they work.

The third subject of this paper is an analysis of the concepts of global constitutionalism, global democracy, and complexity versus fragmentation in international law. These are questions of faith more than questions of argumentation. The main issues are hierarchy, recognition, plurality, or complexity of norms and systems. Divergent discourses emerge from legal scholars in Europe, the United States, and Asia, with strong and contradictory arguments.<sup>11</sup> We are far from consensus or from convincing arguments that stand up to critique.

## I. THE PROLIFERATION OF NORMS

Areas previously regulated by national laws or left unregulated are now the objects of international law, regional systems of integration, international organizations, or the law of other national legal systems with extraterritorial effects. International and foreign themes have come to predominate over national subjects.

There are four processes for the multiplication of norms—differing from traditional treaty-making processes—by which international law engages state actors: the inspiring influence of non-national law, the integrative influence of regional and global legal systems, the imperative influence of international law, and the extraterritorial influence of norms originating in powerful countries. These are discussed in the Subparts below.

### A. *The Influence of Non-National Law*

States adopt similar legal solutions regardless of whether international actors prompt them to do so. They are influenced by a process of persuasion, not imposition. Some authors consider the phenomenon as a “normative intercrossing” or “cross-fertilization,” that is not only a set of similar national frameworks,<sup>12</sup> but a way to build international law. There are three different modes of influence by which legal systems are transplanted from one

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<sup>11</sup> See, e.g., GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012); YASUAKI, *supra* note 9; Armin Von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, 23 EUR. J. INT’L L. 315 (2012).

<sup>12</sup> See, e.g., MIREILLE DELMAS-MARTY, LA REFONDATION DES POUVOIRS 153 (2007) (discussing the internationalization of corporate responsibility).

jurisdiction to another: international norms and organizations inspire national law, international institutions stimulate the adoption of norms in their members or even in non-members, and the national legal solutions of some states inspire those of other states.<sup>13</sup>

Regarding international norms and organizations inspiring international law, since the proliferation of international organizations, different states have created institutions or norms to better manage new international legal structures, even if they do not have the legal obligation to do so. There is an intense process of normative cross-fertilization, motivated by the prestige or reputation of some sources, the necessity to find solutions for similar problems, expectations of effectiveness, and political or economic incentives.<sup>14</sup> One example is the effects of the WTO legal system on municipal law. In fact, the expectations of WTO Dispute Settlement Body (“DSB”) interpretations, based on previous legal reasoning, shape national public policies. In China, for example, to avoid divergences among national courts, the national government attempted to annul the autonomous power of provinces to rule against WTO law, prohibited internal discretionary measures on economic and trade law, and created jurisdictions to manage the interests of foreigners, internally named “WTO courts.”<sup>15</sup>

In many other cases, international organizations induce or convince countries to adopt national norms. In such cases, states do not see these norms as a foreign model (*ultra vires*), and they do not fear retaliation, but they identify those norms as the correct solution, or as a better solution, for a common problem.<sup>16</sup> In this situation, affected states do not even need to be members of the international organization that influence their national norms. One example is Brazil’s submission of its competition law and policy to the Organisation for Economic Cooperation and Development (“OECD”) for peer review.<sup>17</sup> Under the OECD’s peer review process, states submit their national

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<sup>13</sup> Michele Graziadei, *Legal transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRES L. 723 (2009).

<sup>14</sup> Irma Johanna Mosquera Valderrama, *Legal Transplants and Comparative Law*, 2 REVISTA COLOMBIANA DE DERECHO INTERNACIONAL 261, 265 (2003).

<sup>15</sup> MIREILLE DELMAS-MARTY, *LE RELATIF ET L’UNIVERSEL* 117 (2004); Julia Ya Chin, *Trade, Investment and Beyond: The Impact of WTO Accession on China’s Legal System*, 2007 CHINA QUARTERLY 720, 735–37.

<sup>16</sup> See, e.g., José E. Alvarez, *Do States Socialize?*, 54 DUKE L.J. 961, 964–65 (2005) (detailing how the British came to ratify the Genocide Convention).

<sup>17</sup> JAY SHAFFER, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], COUNTRY STUDIES: BRAZIL – PEER REVIEW OF COMPETITION LAW AND POLICY (2005).

norms for peer review to receive qualified criticism.<sup>18</sup> They look to create better conditions to improve their own domestic legal system.<sup>19</sup> Partly in response to criticisms received at the OECD, Brazil, which is not an OECD member created a new competition law framework in 2011.<sup>20</sup>

A similar movement occurs when a state reproduces a solution implemented nationally in another state. For example, the United States legal framework on money laundering has become a worldwide model and a source of inspiration for the OECD.<sup>21</sup> This influence is frequently asymmetrical, since Europe and the United States influence many more states than vice-versa.<sup>22</sup>

In addition, global administrative law is expanding fast. International legal standards created by international organizations, networks of public stakeholders, and networks of private actors provide minimum procedures to be followed by states.<sup>23</sup> States follow these standards by achieving a minimum level of quality.<sup>24</sup> They can then participate in these networks, reducing transaction costs.<sup>25</sup> There are many different examples of this approach, such as Genetically Modified Organism guidelines (used to facilitate the trade of commodities),<sup>26</sup> patent analysis mechanisms,<sup>27</sup> the International Organization for Standardization,<sup>28</sup> civil aviation regulations,<sup>29</sup> and banking regulations.<sup>30</sup>

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<sup>18</sup> See *id.* at 3.

<sup>19</sup> See *id.*

<sup>20</sup> See Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 1.12.2011 (Braz.) (repealing Lei No. 9.781, de 19 de Janeiro de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 20.01.1999 (Braz.); articles 5 and 6 of Lei No. 8.137, de 27 de Dezembro de 1990, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.12.1990 (Braz.); and articles 1 through 85, and 88 through 93 of Lei No. 8.884, de 11 de Junho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.06.1994 (Braz.)).

<sup>21</sup> Maira Machado, *Similar in their Differences: Transnational Legal Processes Addressing Money Laundering in Brazil and Argentina*, 37 LAW & SOC. INQUIRY 330, 333, 338 (2012).

<sup>22</sup> See *id.*

<sup>23</sup> See generally NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010).

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> *Id.* at 189–222.

<sup>27</sup> See, e.g., Jonathan Franklin, *Electronic Resource Guide: International Intellectual Property Law*, AM. SOC'Y INT'L L., <http://www.asil.org/erg/?page=iip1#h.gkkqy1f8w9do> (last visited Feb. 12, 2012).

<sup>28</sup> *About ISO*, ISO, <http://www.iso.org/iso/home/about.htm> (last visited Feb. 12, 2013).

<sup>29</sup> See, e.g., *ICAO in Brief*, INT'L CIVIL AVIATION ORG., <http://www.icao.int/Pages/icao-in-brief.aspx> (last visited Feb. 12, 2013).

<sup>30</sup> See, e.g., U.N. Secretary-General, *International Standby Practices (ISP98): Rep. of the Secretary-General*, U.N. Doc. A/CN.9/477 (June 4, 1999), *reprinted in* [2000] 31 Y.B. UNCITRAL 579, U.N. Doc. A/CN.9/SER.A/2000.

## B. *Regional and Global Systems of Integration*

Systems of integration can be either regional or global. Global systems concern a limited range of specific issues, which are arranged thematically. Thematic integration involves many states on a specific topic, such as human rights, trade, and the environment. By contrast, regional integration involves a smaller set of states. Countless variations on these two models are possible.

Processes of integration proceed at multiple scales and speeds. At the regional level, legal systems may integrate multiple issues in a coordinated manner simultaneously, but each regional system has its own rationale. Integration may also occur in an uncoordinated manner, involving multiple subjects and a myriad of actors and fragmented processes, which also generate a new complexity.

At the WTO alone, there are notifications of more than five hundred integration processes.<sup>31</sup> Integration processes are a tool to catalyze global integration, providing a mechanism for meta objectives such as global free trade, security, peace, and human rights. New legal spaces gradually emerge, with uniform rules and rules of recognition.

The most advanced regional integration is carried out by the European Union, which accepts the free circulation of people, goods, and factors of production, along with monetary integration and intense cultural exchange.<sup>32</sup> Other regional processes, such as MERSOCUR, ASEAN, or NAFTA, advance more slowly.<sup>33</sup> They seek to stimulate local production and reduce dependence on other powers or regions.<sup>34</sup> In the case of MERCOSUR, national public and private actors have been attempting to improve regional trade and diversify exports for more than ten years.<sup>35</sup> Since then, regional trade has increased more than tenfold, while political integration has not progressed.<sup>36</sup> To sum up,

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<sup>31</sup> *Regional Trade Agreements*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm), (last visited May 4, 2013)(stating that “some 546 notifications of [Regional Trade Agreements] . . . had been received by the GATT/ WTO”).

<sup>32</sup> See Fraser Cameron, *The European Union as a Model for Regional Integration 1* (Council on Foreign Relations, Working Paper, 2010); see also DIRECTORATE-GENERAL FOR COMMUNICATIONS, EUROPEAN COMMISSION, *HOW THE EUROPEAN UNION WORKS passim* (2012).

<sup>33</sup> See Sergio Fabbrini, *European Regionalism in Comparative Perspective: Features and Limits of the New Medievalis* [sic] *Approach to Word* [sic], 14 *AGORA WITHOUT FRONTIERS* 438, 456–66 (2009).

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* at 459.

<sup>36</sup> Balança Comercial – Mercosul, COMÉRCIO EXTERIOR, <http://www.desenvolvimento.gov.br/sitio/interna/interna.php?area=5&menu=2081> (follow “Série histórica – Mercosul: 1989 a 2013” hyperlink) (last visited May 4, 2013).

regional systems of integration are more than intermediary steps to political integration, and must be understood as valuable legal tools to implement national political economic strategies.<sup>37</sup>

Europe is a laboratory, a locus for experimentation of new ways of integration that holds positive and negative lessons for other regional systems and for globalization debates.<sup>38</sup> Over forty years, the European Union has created over one-hundred thousand norms.<sup>39</sup> Its economic interdependencies are extremely powerful. It has become unrealistic for a state to consider abandoning the Europe Union, considering the importance of economic interdependence among member countries. The recent economic crisis and the possibility of Greece exiting from the Euro common currency reflect the effects that this could have on the global economy.<sup>40</sup>

European integration can teach lessons about “flexibility” in international economic law. The European Union has promoted tolerance going back to the time of adaptation required by states as they internalized supranational rules. Different layers of norms permit integration in a variable geometry. Instead of a federation of states, there is supranational governance.<sup>41</sup> Instead of a constitution, there are constitutionalization processes.<sup>42</sup> European institutions and politicians avoid discussing the replacement of solid institutions such as sovereignty, federalism, and nationality in the name of the maintenance of multicultural and local powers. The simultaneous improvement of local and global power is known as a “glocalization” process.<sup>43</sup>

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<sup>37</sup> See generally ALICE ROCHA DA SILVA, L'ARTICULATION ENTRE L'OMC ET LES ACCORDS COMMERCIAUX REGIONAUX (2012).

<sup>38</sup> See Jürgen Habermas, TIME OF TRANSITIONS 96 (2006).

<sup>39</sup> Number of laws, EUABC, <http://en.euabc.com/word/2152> (last visited May 5, 2013).

<sup>40</sup> See, e.g., Agustino Fontevecchia, *Don't Forget Europe: Greek Euro Exit Possible as Athens Protests Austerity*, FORBES (Nov. 6, 2012, 1:15 PM), <http://www.forbes.com/sites/afontevecchia/2012/11/06/dont-forget-europe-greek-eu-exit-possible-as-athens-protests-austerity/>.

<sup>41</sup> Wilhelm Lehmann, *Supranational Decision-Making Procedures*, EUR. PARLIAMENT (Dec. 2011), [http://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.4.1.pdf](http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.4.1.pdf).

<sup>42</sup> See generally Frank Schimmelfennig et al., *Conditions for EU Constitutionalization: A Qualitative Comparative Analysis*, 13 J. EUR. PUB. POL'Y 1168 (2006) (presenting a quantitative analysis of EU constitutionalization processes).

<sup>43</sup> See generally Agata Kozłowska, *European Unity Through “Glocalization,”* 5 PRAGUE J. CENT. EUR. AFF. 10 (2003) (arguing that Europe is glocalizing, and not globalizing).



The concept of a national margin of appreciation is another cornerstone of European integration.<sup>44</sup> Courts permit the flexible interpretation of communitarian concepts according to national specificities.<sup>45</sup> As political actors consider whether it is possible to advance a specific subject, they close the national margin, reducing the states' possibilities for different local interpretations of the same supranational rule. A national margin of appreciation is an escape valve for the strongest national tensions, because it (1) allows for different interpretations of the same legal text, according to the legal environment, (2) pacifies cultural conflicts, (3) allows for the co-existence of common rules, and (4) respects differences in the time necessary to absorb and internalize regional rules.<sup>46</sup> This legal scenario creates a *Europe à la carte*, in which states can choose the most appropriate legal framework for their particular realities.

The idea of national margin of appreciation resembles the idea of accepted level of risk found in the Agreement on the Appreciation of Sanitary and Phytosanitary Measures.<sup>47</sup> In applying the concepts of a national margin of appreciation or a national level of acceptance of risk, respectively, states may choose how to implement an international rule according to their particularities, but only if the international legal framework admits diverse interpretations.<sup>48</sup> This process is more prevalent in European integration than in international economic law.

### C. *The Expansion of Imperative Norms*

Imperative norms can be understood as the peremptory norms of international law, combined with other norms to which states must attend to survive in an international scenario. The recognition of international peremptory norms is a recent movement; acceptance of the concept is increasing. The international courts and tribunals only recognized these norms in 1990.<sup>49</sup> Even if the International Court of Justice ("ICJ") had the opportunity to consolidate peremptory norms after the fall of the Berlin wall, international

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<sup>44</sup> Mireille Delmas-Marty & Marie-Laure Izorche, *Marge nationale d'appréciation et internationalisation du droit. Réflexions sur la validité formelle d'un droit commun pluraliste*, 52 REVUE INTERNATIONALE DE DROIT COMPARÉ 753, 755–56 (2000).

<sup>45</sup> *Id.* at 754.

<sup>46</sup> *Id.* at 760.

<sup>47</sup> See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 493 [hereinafter SPS Agreement].

<sup>48</sup> Compare text accompanying notes 45–46, with SPS Agreement, *supra* note 47, art. 10.

<sup>49</sup> See *infra* notes 52–55 and accompanying text.

courts and tribunals have assumed a strong position only in the last twenty years.<sup>50</sup> This addition to the milieu of international law is thus very recent. The concept of the “imperative norm of international law” was born in 1970, in the Barcelona Traction case, but without a detailed conceptualization.<sup>51</sup> Similarly, in 1979, in the case of diplomatic and consular personnel of the United States in Tehran, the ICJ identified some “imperative obligations” of international law, without providing much detail to the concept.<sup>52</sup>

Different courts recognized institutions such as the European Court of Human Rights in 1998 (*Al-Adsani* case)<sup>53</sup> and the Inter-American Court of Human Rights in different cases. It was only in 1996, when deciding the legality of using nuclear weapons, that the ICJ recognized the existence of an inviolable ensemble of international norms, imposable on all states, independent of ratification.<sup>54</sup> In 2006, in the *Congo v. Rwanda* case, the concept was finally recognized as a part of international law.<sup>55</sup>

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<sup>50</sup> *See id.*

<sup>51</sup> *See* Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 1, 304 (Feb. 5) (separate opinion of Judge Ammoun).

<sup>52</sup> *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 7, 20 (Dec. 15).

<sup>53</sup> *See, e.g.,* Al-Adsani v. United Kingdom, App. No. 35763/97, 2001-XI Eur. Ct. H.R. paras. 4–5.

<sup>54</sup> *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 83 (discussing the concept of *jus cogens*).

<sup>55</sup> Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 267, 272 (2009). For other instances of the recognition of the *jus cogens* category of international norms, see *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, para. 153 (Dec. 10, 1998); *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, *passim* (Sept. 17, 2003). Within the *Congo v. Rwanda* case, Judge Koroma expounded on *jus cogens* and *erga omnes* norms, as follows:

Hence, in my judgment, a State which denies the Court's jurisdiction to enquire into allegations alleging violation of the Convention would not be lending the co-operation required to “liberate mankind from the odious scourge” of genocide or to fulfill the object and purpose of the Convention. Denying recourse to the Court essentially precludes judicial scrutiny into the responsibility of a State in a dispute relating to the violation of the Convention. 22. This point is of particular cogency in this case concerning Rwanda, a State where genocide took place and which justifiably called on the United Nations Security Council to set up an international criminal tribunal to try those who committed the crime against a section of its population. It will thus not be in keeping with the spirit and objective of the Convention to refuse to allow judicial consideration of the allegation of genocide perpetrated in another country because Rwanda itself or its agents are alleged to be responsible. While this is not to claim that the seriousness of an obligation, the *jus cogens* status of a norm or the *erga omnes* nature of an obligation *per se* confers jurisdiction on the Court, as was recognized in the Judgment, it is nevertheless my opinion that it is incumbent on Rwanda in this case, as a State party to the Genocide Convention—and which itself was a victim of genocide and rightly referred the matter to the competent organ of the United Nations—to allow scrutiny of the allegation that it had breached its obligations under the Genocide Convention.

The norms of international economic law are not considered to be peremptory. However, most states deem it necessary to be part of the WTO, in order to protect themselves from unilateral sanctions by more powerful states, as has often happened in the past.<sup>56</sup>

#### *D. The Extraterritorial Influence of the Norms of Powerful Countries*

Powerful states can impose norms on other states. This usually happens when there is a dependency relationship or political pressure, or when the costs of non-implementation are too severe, as a function of bilateral agreements between private actors. The United States, France, and the United Kingdom, for example, have different rules with extraterritorial effects to combat corruption and regulate certain processes of industrial production, labor standards, and national security.<sup>57</sup> These rules are intended to punish domestic enterprises or even foreign enterprises or individuals that commit crimes in other countries.

As is the case for many other hard issues in internationalization of law, the imposition of national rules is associated with significant crises. Terrorism crises lead some countries to impose security models on the rest of the world. The economic crisis and the financial crisis in the last ten years have had similar consequences. In 2002, as a function of the financial crisis and fraud scandals involving such entities as Enron, WorldCom, Adelphia, Peregrine Systems, and Tyco International, the United States enacted the Sarbanes-Oxley Act.<sup>58</sup> The use of the same U.S. accountability standards from private companies makes it possible to have access to credit with better interest rates. In some cases, the extraterritorial norm is in conflict with other national norms. An example is the motivation of an employee to denounce his enterprise when

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Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 1, 61 (Feb. 3) (Koroma, J., dissenting).

<sup>56</sup> See JOHN JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY AND ECONOMICS RELATIONS* 39 n.33 (2000).

<sup>57</sup> See, e.g., Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.); Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to -3 (2006) (containing provisions commonly known as the Anti-Bribery provisions); Council Regulation 2271/96, Protecting Against the Effects of the Extra-territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309) 1 (EC). Cf. D. Alison von Rosenvinge, *Global Anti-Corruption Regimes: Why Law Schools may Want to Take a Multi-Jurisdictional Approach*, 10 GERMAN L.J. 785, 787, 789 (2009).

<sup>58</sup> See generally Kathleen F. Brickey, *Andersen's Fall from Grace*, 81 WASH. U. L.Q. 917 (2003) (tracing the impetus for enacting the Sarbanes-Oxley Act through analysis of the legal strategy pursued by Arthur Andersen).

he knows corporate misconduct has taken place. Whereas the United States generally promotes such disclosures, France typically protects secret corporate acts.<sup>59</sup>

Finally, the extraterritoriality of rules also significantly affects the processes of production. The classical example is the prohibition by some states of the importation of certain products produced in an undesirable manner. The most significant forum to discuss the legality of these national restrictive measures is the WTO, where such measures are decided in accordance with article XX of the General Agreement on Tariffs and Trade.<sup>60</sup> There are cases, such as those concerning the importation of shrimp and tuna, in which the importer succeeded in imposing its national legal framework on the exporter, with the consent of the WTO.<sup>61</sup>

In sum, the unilateral acts of some international organizations have become more powerful than ever. Resolutions of the Security Council, decisions and interpretative declarations of the WTO, and decisions of regional and global courts infuse the international legal system with many other norms that either are new or were previously not important enough to be considered legally binding. The multiplication of norms means a multiplication of soft and hard laws, with different degrees of compliance and methods of enforcement. This new international legal scenario today is only possible with the legal mechanisms outlined above.

## II. NEW SOURCES OF INTERNATIONAL LAW?

The legal framework constituting international law comes not only from treaties, customs, principles, and unilateral acts of states and international

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<sup>59</sup> Ian L. Schaffer, *An International Train Wreck Caused in Part by a Defective Whistle: When the Extraterritorial Application of SOX Conflicts with Foreign Laws*, 75 *FORDHAM L. REV.* 1829, 1834, 1852–54 (2006).

<sup>60</sup> General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

<sup>61</sup> See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, para. 186, WT/DS58/AB/R (Oct.12, 1998) (holding that “[a]lthough the measure of the United States in dispute . . . serves an environmental objective that is recognized as legitimate under paragraph (g) of article XX of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination”); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, para. 407, WT/DS381/AB/R (May 16, 2012) (finding that the United States’ objective of “contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins” is legitimate, but that the United States’ “dolphin-safe” labelling provisions were inconsistent with Article 2.1 of the TBT Agreement).

organizations. New processes of normative construction have also arisen from the process of the internationalization of law. The internationalization of law is different from the construction of international law. It is a process that emerges from the national sphere to the international sphere, crosses national spheres without passing through international law, or passes through transnational private law, crossing or ignoring all national and international laws.<sup>62</sup> Different forms of dialogue take place, from which emerge a common legal grammar, constitutional confluence, cross-fertilization between judges, and private legal networks with pretensions of autonomy in relation to the state legal system.

#### A. *Common Legal Grammar*

The first step to a dialogue is to know the meaning of the expressions used by other interlocutors. In legal studies, such understandings are usually produced in comparative law. On one hand, the rise of common legal concepts results from different processes: the intensification of the use of the same expressions in different legal instruments; the creation of lists of meanings in treaties, national norms, and private contracts; the reduction of the possibility of imposing interpretative clauses during ratification; and the strengthening of the single undertaking mechanism. On the other hand, the intensification of new concepts comes from communication processes in transnational private networks.

The increasing use of uniform, singular expressions has been particularly valuable in the case of emergent legal concepts. The precautionary principle, the accepted level of risk, and the national margin of appreciation are common examples. The precautionary principle was born in Britain and in Germany in the 1970s.<sup>63</sup> During the 1980s and especially the 1990s, it diffused quickly in many national and international courts and treaties, mainly in trade, environmental and sanitary, and phytosanitary norms, as a principle of law.<sup>64</sup>

Using a common meaning reduces the possibilities of interpretation of legal expressions at the national level. In second-level analysis, such a term might be used to define a more complex concept, such as the possibility of using the

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<sup>62</sup> See, e.g., DELMAS-MARTY, *supra* note 12, at 153.

<sup>63</sup> Akawat Laowonsiri, *Application of the Precautionary Principle in the SPS Agreement*, 14 MAX PLANCK Y.B. UNL. 565, 568 (2010).

<sup>64</sup> *Id.* at 568–70.

“zeroing” technique to identify dumping.<sup>65</sup> In this case, two contrasting views of the “zeroing” concept spread worldwide. First, American authorities, in imposing legal concepts in regulatory law, employed the term “zeroing.”<sup>66</sup> Many countries started to use the same definition and corresponding method, mainly because the U.S. adopted the most anti-dumping measures.<sup>67</sup> Attitudes toward the concept were only changed after discussion in another relevant forum, the WTO.<sup>68</sup> Thus, there was a limitation of the legal concept.<sup>69</sup> This process became more intense with the proliferation and globalization of transnational communities in different areas.

The principle of the single undertaking also has a significant role because it prompts the creation of a common definition by dispute settlement mechanisms, when different states have different interpretations of the same concept. This was prevalent at the WTO, not only because of the direct effect of its decisions on parties, but also because of the effect of WTO decisions on cases outside of the WTO forum.<sup>70</sup> The process is salient because of the importance of precedents for future cases inside the organization, its legitimacy to other forums, and, moreover, because of the migration of WTO judges and panelists to other private mechanisms to settle conflicts.<sup>71</sup>

There are various reasons for the legitimacy of DSB/WTO. The first is the highly legal technicality of their decisions.<sup>72</sup> Second, the decisions of the WTO are coherent, since DSBs maintain consistency in their interpretations of WTO law.<sup>73</sup> All reports are founded in precedent.<sup>74</sup> Since the first reports, there has been an effort to build uniform interpretations, looking at how different legal

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<sup>65</sup> For a definition of the “zeroing” technique, see Sungjoon Cho, *No More Zeroing?: The United States Changes its Antidumping Policy to Comply with the WTO*, ASIL INSIGHTS (Mar. 9, 2012), <http://www.asil.org/pdfs/insights/insight120309.pdf>.

<sup>66</sup> *See id.*

<sup>67</sup> *See, e.g., id.* (discussing the European Community’s use of zeroing against bed linens imported from India).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.,* JEANNE J. GRIMMETT, CRS REPORT FOR CONGRESS, WTO DECISIONS AND THEIR EFFECT IN U.S. LAW 5–6 (2007) (delineating provisions in the United States’ Uruguay Round Agreements Act that “set[ ] out requirements for administrative implementation of adverse WTO decisions.”).

<sup>71</sup> *See, e.g.,* José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields*, 1 OÑATI SOCIO-LEGAL SERIES, no. 4, 2011 at 1, 13–14.

<sup>72</sup> Adrian T.L. Chua, *Precedent and Principles of WTO Panel Jurisprudence*, 16 BERKELEY J. INT’L L. 171, 174–75 (1998).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

systems use international law and its rule of interpretation.<sup>75</sup> Yet, where there was no obligation to follow precedent, DSBs maintain their previous interpretations, building a hybrid system that uses continental and common law rationale at the same time.<sup>76</sup>

In any case, the WTO adjudication system is largely sealed off, and uses international law only in a subsidiary way, as with the Vienna Convention on the Law of Treaties. There is also an apparent impartiality. It is not possible to affirm that there are political preferences in favor of powerful states, or politically-sensitive themes. The rate of confirmation of irregularities is practically the same between all groups of states. In a certain way, some sensitive themes, such as environmental protection, had more elastic interpretations of some legal concepts, but these were not new since they followed previous models consolidated in American and in European courts. When the WTO specifies a legal concept, it travels towards national policy makers, who start to use the same concept nationally.<sup>77</sup>

### *B. Constitutional Confluence*

Internationalization of law can occur with the emergence of global legal values. It does not depend on any treaty but is the result of an expansion of values, in a normative intercrossing logic. Through different processes for the constitutionalization of new values, states incorporate into their constitutions similar provisions that are motivated by a single concern. It is a weighty phenomenon, since almost one-third of the states of the world reformed their constitutions after the 1980s.<sup>78</sup> With the expansion of the democratic western model in Southeast Asia and Eastern Europe, and the reduction of dictatorships in Latin America, there was a new space for the introduction of new subjects into constitutions.<sup>79</sup>

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<sup>75</sup> *Id.* at 178–82.

<sup>76</sup> *Id.*

<sup>77</sup> See *WTO Analytical Index—Guide to WTO Law and Practice*, WORLD TRADE ORG., [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/analytic\\_index\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm) (last visited May 4, 2013) (providing a portal to the WTO's "comprehensive guide to the interpretation and application of the WTO agreements by the Appellate Body, dispute settlement panels and other WTO bodies").

<sup>78</sup> PAOLO BISCARETTI DI RUFFIA, INTRODUCCIÓN AL DERECHO CONSTITUCIONAL COMPARADO 520–23 (1996).

<sup>79</sup> See Stephen Chee, *Southeast Asia in 1988: Portents for the Future*, 1989 SOUTHEAST ASIAN AFF. 3, 12–13; Dirk Kruijt, *Low Intensity Democracies: Latin America in the Post-Dictatorial Era*, 20 BULL. LATIN AM. RES. 409, 412–13 (2001).

Constitutional norms are the object of a reinterpretation process. New global values, which are becoming common to many countries, inspire similar constitutional reforms and reinterpretations of constitutional texts.<sup>80</sup> Yet, constitutional texts have an objective materiality.<sup>81</sup> Their meaning is the express object of interpretation, giving a certain margin of flexibility to the interpreter. Intangible norms permeate many constitutional and supranational legal frameworks.<sup>82</sup>

### C. *Dialogue of Judges*

A dialogue of judges can occur through several mechanisms: from the process of recognition and the self-imposition of limits; with the cognition of foreign law and its decisions; in the definition of foreign or international jurisdiction in case of conflicts; in recognition of decisions taken in other states; and, in a more sophisticated way, with the concern about how law is applied in different states. This process makes it possible to build similar interpretations, contributing to a common or at least similar law.

Some authors believe that there is an informal community of judges who exchange ways of thinking about the law, how to apply international law in national courts, and how to take decisions with extraterritorial effects.<sup>83</sup> Others believe in an openness of judges to a global communication process and point to it as one of the most valuable pillars for a global legal community that is strong enough to link fragmented spaces of global law.<sup>84</sup> Finally, other authors maintain that dialogue is one action of liberal countries involving judges who share common concerns with the building of world law, with valid precedent to the entire judiciary transnational community.<sup>85</sup>

### D. *The Emergence of a Global Public Sphere*

There is an integration process of networks of domestic and international actors responsible for the creation, implementation, and control of public and private policies. They adopt common solutions as methods for public management, poverty reduction, violence control, and so on. This communicative environment reveals a public sphere. The way to produce this

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<sup>80</sup> See OST & VAN DER KERCHOVE, *supra* note 1, at 16.

<sup>81</sup> *Id.* at 59.

<sup>82</sup> See, e.g., *id.* at 437.

<sup>83</sup> See, e.g., DELMAS-MARTY, *supra* note 5, at 41–43.

<sup>84</sup> See generally MARCELO NEVES, *TRANSCONSTITUCIONALISMO* (2009).

<sup>85</sup> See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 74–75 (2004).



law, common to different states, is different from the production method of traditional sources of international law. They have their own compliance and enforcement mechanisms. To understand international law nowadays, it is necessary to study diversity.<sup>86</sup>

A similar concept in liberal logic was proposed by some authors<sup>87</sup> and this Recent Development responds to criticisms that the original concepts are limited to liberal countries. There exists a continuous creative process directed toward empowerment through multiple spheres: institutional and political spheres; progressive mechanisms to ensure the peaceful resolution of disputes; civil and political rights and equal access to courts; rule of law; private property protected from state activity; dense networks of transnational relations between individuals and groups; and informal linkages among elites from different countries (bureaucratic, economics, scientific, and so on).<sup>88</sup> Global administrative law and mutual recognition regimes seem to advance different aspects of a possible global public sphere.

#### *E. Private Normative Regimes*

Private regimes also produce law, with major or minor autonomy in relation to state law and international law. The autonomy comes from the capacity to implement decisions taken in a private sphere. We find this in transnational networks, as well as inside domestic arenas. The relationship between these autonomous regimes and (inter) state law can be indifference, opposition, or collaboration<sup>89</sup>

For this Recent Development, the most central aspect of private international networks is the passage through national environments.<sup>90</sup> States remain the elements of coordination among national legal orders; however, other transnational networks become relevant. The legal conception becomes thematic instead of territorial.<sup>91</sup> In the periphery, most of the time, law that is created by enterprises, non-state organs, and contracts, non-state organs, and

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<sup>86</sup> *See generally id.*

<sup>87</sup> *See* José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 186–87 (2001) (summarizing the liberal logic proposed by Anne-Marie Slaughter).

<sup>88</sup> *Cf. id.*

<sup>89</sup> *See generally* MARCELO D. VARELLA, *INTERNACIONALIZAÇÃO DO DIREITO* (2013).

<sup>90</sup> Hans Kelsen, *Les Rapports de Système entre le Droit Interne et le Droit International Public*, 14 RECUEIL DE COURS DE L'ACADEMIE DE DROIT INTERNATIONAL, no. 4, 1926 at 227.

<sup>91</sup> JURGEN HABERMAS ET AL., *A CONSTELAÇÃO PÓS-NACIONAL: ENSAIOS POLÍTICOS* 41 (2001).

contracts has intrinsic validity, and its validity is not dependent on the state.<sup>92</sup> The main engine for it is civil society and not political society. The dissemination of a global law comes from the periphery of the system and not from its center. The validity is not from the state, but from expectations of actors that are strong enough to assure the legitimacy and effectiveness of its norms.<sup>93</sup>

Some legal networks—such as *lex mercatoria*, *lex electronica*, *lex financiaria*, and *lex deportiva*—have density and relevance. Each of these networks has its own rationale. Not only are these networks independent of states, but in many cases they gain power from interactions with states.<sup>94</sup>

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There is a factual problem: International law needs these networks to exist, and depends on these legal manifestations to be effective. Sometimes this rule is considered legitimate by large communities (territorialized or not), and it is effective. To sum up, we cannot conceive international law today without these new forms of normative manifestations.

There are three main obstacles to understanding these sub-national, private, and public norms as sources of international law. First, the category “source of international law” has an established meaning among internationalists, with a precise definition.<sup>95</sup> Second, it is impossible to link states with such norms. Third, there will be many consequences to international legal theory that are hard to assume. We will focus only on this last point.

If we assume that there are new sources of international law, we must admit that the actors who produce those sources are subjects of international law. As a result, national judges, civil servants, enterprises, and NGOs would be new subjects of international law. Beyond that, it would be impossible to identify a limit to what is a source of international law, since any contract or norm created by a small network would be able to be considered a new source. If everyone and everything could be a subject and a source, nobody and nothing would be. The concept, along with any theory attached to it, loses its meaning.

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<sup>92</sup> See, e.g., SLAUGHTER, *supra* note 85, at 160.

<sup>93</sup> See, e.g., Gunther Teubner, ‘Global Bukowina’: Legal Pluralism in the World Society, in GLOBAL LAW WITHOUT A STATE 3, 8 (Gunther Teubner ed., 1997) (discussing *lex mercatoria*).

<sup>94</sup> See *id.* at 9–11.

<sup>95</sup> U.N. Charter art. 38.

In any case, even if we assume the idea that there are not new sources of international law, the legal framework today poses new challenges. The idea of a pyramid does not correspond to the image of international law today. Hierarchy is not only normative but varies according to each subsystem. The international system is no longer linear, since the rules of recognition could vary and be different at the same time. The possibility of an international legal system presupposes juxtapositions of international orders, in different layers, crossed by different normative discourses. The reception of different rules depends on the subject and source but not the nature of norm itself. The ideas of monism and dualism are not enough to understand the international legal system. The idea of networks seems to be more adequate.<sup>96</sup>

### III. QUESTIONS OF FAITH: FRAGMENTATION OR COMPLEXITY, CONSTITUTIONALISM AND DEMOCRACY

Various discussions attempt to use consolidated categories at a national level to apply them to the international arena. Most of the time they have failed because any transposition is impossible at the stage of disorder in a post-national time. One solution proposed by many authors is to change a consolidated concept and so represent civil society as constitutionalized or democratic or the legal order as global.

A first idea is the notion of human community, replacing the modern concept of the state community. This is a seductive notion, but it has its problems. It requires a presupposition that a legal order is intended for human beings directly and not for the states. The process is still more complex, with the densification of legality that oscillates between two different visions for the source of international law—one intended for human beings and the other for states.<sup>97</sup> In that case, there would be two parallel legal systems, one inter-human, and another inter-state.<sup>98</sup> The first one presupposes the idea of a vast human community.<sup>99</sup> The second one presupposes a community of states without a center.<sup>100</sup> These two different visions oscillate between authors and

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<sup>96</sup> See OST & VAN DER KERCHOVE, *supra* note 1, at 43.

<sup>97</sup> See Emmanuelle Jouanet, *L'Idée de Communauté Humaine à la Croisée de la Communauté des Etats et de la Communauté Mondiale*, in *La Mondialisation entre Illusion et l'Utopie*, 47 ARCHIVES DE PHILOSOPHIE DU DROIT 191 (2003).

<sup>98</sup> *Id.* at 191.

<sup>99</sup> *Id.* at 194.

<sup>100</sup> *Id.* at 197.

their visions of the legal system, creating antagonisms, as the human community could be sometimes against the community of the states.<sup>101</sup>

Another group of authors identifies different legal orders, confronting subsystems of international law or those subsystems with non-state systems, such as private legal regimes. They question the usefulness of the legal system concept, in the face of the idea of a multiplicity of autonomous legal orders. The idea of an eventual conflict between autonomous legal subsystems supports the notion of fragmentation.<sup>102</sup> One aspect of fragmentation is the possibility of conflict among different international courts. There would be “nomadic floating legal entities, totally autonomous, in a legal ether.”<sup>103</sup> Another aspect of fragmentation would be, maybe more relevantly, three conflicts of rationale: among different subsystems; between a subsystem and individual actors in a global society; and within a subsystem and its own rational standards understood as necessary to expansion.<sup>104</sup>

In another way, many other authors, looking at the same reality, seem connected between subsystems, with different elements to bridge them, such as the importance of judges, the efforts to avoid direct conflict, and dialogue among international organizations, private actors, states, and domestic law.<sup>105</sup>

The second idea is constitutionalization. Authors who identify a global constitution, or many different global constitutions, need to choose between different definitions of what constitutes a constitution. From a normative perspective, the definition would be the fundamental rule that defines the way public authority must be exercised<sup>106</sup> or the “sum of basic . . . legal norms which comprehensively regulate the social and political life of a polity.”<sup>107</sup>

There is no global constitutionalism for many reasons, including asymmetry of power between the powerful states; absence of clear division of powers (legislative, executive, and judiciary) at a global level; and difficulties

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<sup>101</sup> *Id.* at 213.

<sup>102</sup> See Pierre-Marie Dupuy, *Fragmentation du Droit International ou des Perceptions qu'on en a?*, 2 (EUI Working Papers, LAW No. 2006/14).

<sup>103</sup> *Id.* (translated from the original French, which reads, “sortes de monades juridiques flottant, totalement autonomes, dans un éther juridique”).

<sup>104</sup> TEUBNER, *supra* note 11, at 81.

<sup>105</sup> See discussion *infra* Part III.

<sup>106</sup> JEAN-BAPTISTE-RENE ROBINET, DICTIONNAIRE UNIVERSEL DES SCIENCES MORALE, ÉCONOMIQUE, POLITIQUE ET DIPLOMATIQUE OU BIBLIOTHEQUE QUE DE L'HOMME-D'ÉTAT ET DU CITOYEN 56 (1780).

<sup>107</sup> Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579, 581 (2006).

in determining the organic competence, the material dominium, and the capacity of a general protection of human rights according to pre-established procedures. The United Nations Security Council lacks legitimacy, and there is no constitutional people, or any functional equivalent, that would permit generalized support where there is no cultural homogeneity, common political founders' myths, a public sphere, or similar forms of representation.<sup>108</sup>

However, according to the concept of the constitution, it is possible to identify many different constitutions that assume the same reality. Gunther Teubner, for example, identifies multiple constitutional fragments, considering the idea of Niklas Luhmann on the constitution as an element to connect law and politics.<sup>109</sup> According to Teubner, Luhmann's theory is not enough to explain the reality of international law. In this vision, every international legal subsystem (WTO, human rights, environment, *lex mercatoria*, *lex electronica*, and so on), would create its own mechanisms for identifying its rules, creating hierarchies, and enforcing its decisions.<sup>110</sup>

The challenge would be to create a common global law that could admit different sources of legal norms, sometimes conflicting, in a way that respects cultural diversity. Nevertheless, the advance of multiple constitutional fragments does not reveal a better, fairer, or more democratic world.

In this thinking, there would be two possible destinations for the archipelago of constitutional fragments: autonomization or coordination. For autonomization, we understand the enhancing of the sectoral rationale and the exacerbation of antagonisms. For coordination, we understand the building of "meta-meta rules" capable of creating bridges of dialogue among sectoral constitutional fragments. The presence of environmental concerns to WTO judges would be an example of these bridges. However, it is impossible to know which path to follow. Any conclusion is a question of futurology.

Finally, it is only possible to identify democracy in a global world if there is a change in the concept of democracy that we have used for at least two hundred years. We found different authors using other definitions for democracy, including the idea of accountability, transparency, and human rights achievements. These concepts could be related to legitimacy or effectiveness, but not to democracy. There is no democracy in international

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<sup>108</sup> See TEUBNER, *supra* note 11, at 3.

<sup>109</sup> *Id.* at 3 n.5.

<sup>110</sup> *Id.* at 3 & n.5.

law or its institutions for three main reasons: there is a great distance between decision-makers and the subjects of the decisions in the international arena; the majority of countries and the population of the world are excluded from the decision-making process; and the creation of law and power is much greater and more complex than the decisions taken by the United Nations and a few international organizations.<sup>111</sup>

## CONCLUSION

The legal scenario today is in transformation. As Mireille Delmas-Marty suggests, it is like a windy sky with clouds, in constant mutation.<sup>112</sup> When we identify a shape, the reality has already changed. It is impossible to describe the reality, because at the same time we identify flashes of fragmentation in international law with many antagonisms.

It is possible also to propose a new rationale for the global legal system. In the last case, this new rationale would be much more complex, with a new coordination of relationships, new sources, and new subjects of law.

The difficulty is to reveal the linkages between sources, subjects, regional systems of integration, and mechanisms of dispute settlement in a new complexity of international law.<sup>113</sup> In that “carnival of principles,”<sup>114</sup> with different criteria of identity, the unity of the legal system is not logical, but political.<sup>115</sup> The complexity of international law is related to the necessity of explaining how the traditional concepts and ideas that sustain international legal theory can survive the actual post-national legal relations scenario.

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<sup>111</sup> Onuma Yasuaki, reacting to this text when I presented this piece at Georgetown University, highlighted the idea that all these non-state norms could not be considered legitimate and democratic. I agree with him. However, his argument cannot be used as a reason to not consider them as norms, recognized by different communities of actors.

<sup>112</sup> Mireille Delmas-Marty, *Au pays des nuages ordonnées*, 1 *REVUE ASPECTS* 13, 14 (2008).

<sup>113</sup> William W. Burke-White, *International Legal Pluralism*, 25 *MICH. J. INT'L L.* 963, 964 (2004).

<sup>114</sup> Luiz Fernando Barzotto, *Razão de Lei. Contribuição a uma Teoria do Princípio da Legalidade*, 3 *REVISTA DE DIREITO DA GV* 219, 240 (2007) (translated from the original Portuguese, which reads, “carnaval principiológico”).

<sup>115</sup> *Id.* at 240–41.