

Ubi Ius, Ibi Civitas: A Republican Account of the International Community

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Despite the still modest breakthrough of ‘supranationalism’, the progress made in terms of the institutionalisation, not to say integration and ‘globalisation’ of international society is undeniable. Witness the proliferation of international organizations, the gradual substitution of an international law of cooperation for the traditional law of coexistence, the emergence of the concept of ‘international community’ and its sometimes successful attempts at objectivization. A token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rule of *jus cogens*, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and response to the social necessities of States organised as a community.¹

Yet, for all the abundance of these references [to the international community], it is rare for the “international community” to have been subjected to the conscious endeavours of definition: it is almost as if there exists a subliminal and pervasive appreciation of the meaning of this term—of what forms and frames this community—that eliminated the need for further detail or consideration.²

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¹ Judge Bedjaoui, in ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 268, 270–1.

² Kritsiotis, D., ‘Imagining the International Community’, *European Journal of International Law*, 12 (2002), 964.

I. Introduction: de iure gentium sine civitate

Since the 1920s,³ but even more post-1945 with the adoption of the United Nations Charter and post-1989 with globalization and the emergence of other subjects of international law besides States, international lawyers and theorists of international law have made a repeated use of general concepts such as 'international community' and 'international society' to refer to some or all subjects of international law and/or their objective interests.⁴ The concept is often regarded as the paradigm of the transition from an international law of co-existence to an international law of co-operation⁵ or, more recently, from bilateralism to multilateralism in international law-making.⁶

International law itself sometimes refers to the notion of international community. It is the case, for instance, in the *jus cogens* definition of Article 53 Vienna Convention on the Law of Treaties (VCLT),⁷ in the reference to international

³ Verdross, A., *Die Verfassung der Völkerrechtsgemeinschaft* (Berlin: Springer, 1926). See on the 1930s German authors: Tomuschat, C., 'Die internationale Gemeinschaft', *Archiv des Völkerrechts*, 33 (1995), 1; Tomuschat, C., 'International Law as The Constitution of Mankind', in *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (United Nations Publication, 1997), 37; Paulus, A. L., *Die internationale Gemeinschaft im Völkerrecht – Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (Munich: Beck, 2001); von Bogdandy, A., 'Constitutionalism in International Law: Comment on a Proposal from Germany', *Harvard International Law Journal*, 47 (2006), 223.

⁴ e.g. Mosler, H., 'The International Society as a Legal Community', *Recueil des Cours*, 140 (1974), 1; Mosler, H., 'International Legal Community', *Encyclopedia of Public International Law*, 74 (1984), 309; Dupuy, R.-J., *La communauté internationale entre le mythe et l'histoire* (Paris: Economica, 1986); Frowein, J. A., 'Das Staatengemeinschaftsinteresse – Probleme bei Formulierung und Durchsetzung', in *Festschrift für Karl Doehring zum 70. Geburtstag* (Berlin: Springer, 1989), 219; Lachs, M., 'Quelques réflexions sur la communauté internationale', in Dupuy, R. J. and Boulouis, J. (eds.), *Le droit international au service de la paix et de la justice et du développement*, *Mélanges Michel Virally* (Paris: Pédone, 1991), 349; Onuf, N., 'The Constitution of International Society', *European Journal of International Law* (1994), 1; Simma, B., 'From Bilateralism to Community Interest in International Law', *Recueil des cours*, 250 (1994), 217; Tomuschat, 'Die internationale Gemeinschaft' (above, n. 3); Franck, T., *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995); Abi-Saab, G., 'La "communauté internationale" saisie par le droit: essai de radioscopie juridique', in *Boutros Boutros-Ghali amicorum discipulorumque liber: paix, développement, démocratie* (Bruxelles: Bruylant, 1998), 81; Abi-Saab, G., 'Whither the International Community?', *European Journal of International Law*, 9 (1998), 248; Simma, B. and Paulus, A. L., 'The "International Community": Facing the Challenge of Globalization', *European Journal of International Law*, 9 (1998), 266; Paulus, 'Die internationale Gemeinschaft im Völkerrecht' (above, n. 3); Part II; Kriticos, 'Imagining the International Community' (above, n. 2), 961; Jouannet, E., 'L'idée de communauté humaine à la croisée des la communauté des États et de la communauté mondiale', *Archives de philosophie du droit*, 47 (2003), 191; and Jouannet, E., 'La communauté internationale vue par les juristes', *Annuaire français des relations internationales*, VI (2005), 3.

⁵ Friedman, W., *The Changing Structure of International Law* (London: Stevens & Sons, 1964).

⁶ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4); Abi-Saab, 'La "communauté internationale" saisie par le droit' (above, n. 4), 85–6; Abi-Saab, 'Whither the International Community?' (above, n. 4).

⁷ The concept of *jus cogens* has since been used and defined for the first time by the ICJ in the *Case concerning armed activities on the territory of the Congo (Democratic Republic of Congo v*

crimes in Article 5(1) of the Rome Statute of the International Criminal Court or in the reference to obligations *erga omnes* or *omnium* in the Articles on State responsibility or in the International Court of Justice's case-law.⁸ Most recently, the whole debate pertaining to the constitutionalization of international law has essentially revolved around the idea that there is—or at least should be in order to compensate for the deconstitutionalization of national politics—an international community with shared objective and universal interests and institutions to promote those interests.⁹

Curiously, there are no shared understandings, however, among international lawyers of what this community is or should be.¹⁰ This indeterminacy is sometimes denounced as intentional by international realists and pluralists who see the idea of international community as a statist and centralizing metaphor without institutional reality in international relations. In the wake of the post-2001 anti-hegemonic trend, others have criticized its vagueness as paving the way

Ruanda), ICJ Reports 2006, <<http://www.icj-cij.org>>, par. 64 and Separate opinion of Judge Dugard, par. 10.

⁸ e.g. ICJ, *Barcelona Traction, Light and Power Company Limited*, Second Phase, ICJ Reports 1970, <<http://www.icj-cij.org>>, par. 32; ICJ, *Threat or Use of Nuclear Weapons*, ICJ Reports 1996, <<http://www.icj-cij.org>>, par. 79. See also ICJ, *Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, <<http://www.icj-cij.org>>, par. 157.

⁹ e.g. Charney, J., 'Universal International Law', *American Journal of International Law*, 87 (1993), 529; Charney, J., 'International Law-making in a Community Context', *International Legal Theory*, 2 (1996), 38; Tomuschat, 'Die internationale Gemeinschaft' (above, n. 3); Tomuschat, 'International Law as The Constitution of Mankind' (above, n. 3), 37; Fassbender, B., 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law*, 36 (1998), 561–6; Habermas, J., 'Har die Konstitutionalisierung des Völkerrechts noch eine Chance?', in Habermas, J. (ed.), *Der gespaltene Westen. Kleine politische Schriften X* (Frankfurt: Suhrkamp, 2004), 113 (translated as 'Does the Constitutionalization of International Law Still Have a Chance?', *The Divided West*, Cambridge: Polity Press 2006), 115); Habermas, J., 'Eine politische Verfassung für die pluralistische Weltgesellschaft?', in Habermas, J. (ed.), *Zwischen Naturalismus und Religion* (Frankfurt: Suhrkamp, 2005); Habermas, J., Herborth, B. (eds.), *Anarchie des kommunikativen Freiheit* (Frankfurt: Suhrkamp, 2007) 406; de Wet, E., 'The International Constitutional Order', *International and Comparative Law Quarterly*, 55 (2006), 51; von Bogdandy, 'Constitutionalism in International Law' (above, n. 3).

¹⁰ See, however, Onuf, 'The Constitution of International Society' (above, n. 4); Allott, P., 'The True Function of Law in the International Community', 5 *Indiana Journal of Global Legal Studies*, 5 (1997), 391; Abi-Saab, 'La "communauté internationale" saisie par le droit' (above, n. 4), 81; Abi-Saab, 'Whither the International Community?' (above, n. 4); Simma and Paulus, 'The "International Community" (above, n. 4), 266; Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 2); Kriticos, 'Imagining the International Community' (above, n. 2); See e.g. passing references to the international community without a definition in international constitutionalists' writings: Tomuschat, 'Die internationale Gemeinschaft' (above, n. 3); Tomuschat, 'International Law as The Constitution of Mankind' (above, n. 3), 37; Fassbender, 'The United Nations Charter as Constitution of the International Community' (above, n. 9), 529; von Bogdandy, 'Constitutionalism in International Law' (above, n. 3). See Ruiz Fabri, H. and Grewe, C., 'La constitutionnalisation à l'épreuve du droit international et du droit européen', in Gard, L. et al. (eds.), *Les dynamiques du droit européen en début de siècle. Etudes en l'honneur de Jean-Claude Gauthron* (Paris: Pédone, 2004), 189 on this gap in the literature.

towards the moralization and unilateralization of international law-making.¹¹ With the growing concern about the legality¹² and the legitimacy of international law,¹³ however, it has become crucial to understand the notion of international community with more precision.¹⁴

Without a clear conception of the nature, boundaries, and constituency of the community or communities concerned by international law-making and of the ways to link their interests and decisions back to national political communities, efforts made to institutionalize global democracy,¹⁵ or at least to develop mechanisms of international accountability,¹⁶ are seriously hindered.¹⁷ There can be no theory of global democracy without first determining who is to be included among those deciding democratically about international law.¹⁸ While it is true that the wealth of literature pertaining to global governance has largely abandoned the question of 'whether' such governance is possible in favour of that of 'how' it could be,¹⁹ this move might have been a bit swift and its authors assumed more than they could. This presumably has to do with the reality of

¹¹ e.g. Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4); Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 9); Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (above, n. 9), 324; Kwaka, E., 'The International Community, International Law and the United States: Three in One, Two against One and the Same?', in Byers, M. and Nolte, G. (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003), 25; Paulus, A. L., 'The Emergence of the International Community and the Divide Between International and Domestic Law', in Nollkämper, A. and de Wet, E. (eds.), *New Perspectives on the Divide between International Law and National Law* (Oxford: Oxford University Press, 2007).

¹² e.g. Besson, S., 'Theorizing the Sources of International Law', in Besson, S. and Tsadiras, J. (eds.), *Philosophy of International Law* (Oxford: Oxford University Press, forthcoming).

¹³ e.g. Buchanan, A., *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004); Buchanan, A., 'Legitimacy of International Law', in Besson, S. and Tsadiras, J. (eds.), *Philosophy of International Law* (Oxford: Oxford University Press, forthcoming).

¹⁴ Others mention the 'fate of international law': Koskeniemi, M., 'The Fate of Public International Law: Between Technique and Politics', *Modern Law Review*, 1 (2007), 30 who refers to the 'regulative ideal of the universal community'.

¹⁵ e.g. Caney, S., 'Cosmopolitan Justice and Institutional Design: An Egalitarian Liberal Conception of Global Governance', *Social Theory and Practice*, 32 (2006), 725; Besson, S., 'Institutionalizing Global Democracy', in Meyer, L. et al. (eds.), *International Law, Justice and Legitimacy* (Cambridge: Cambridge University Press, forthcoming); Besson, 'Theorizing the Sources of International Law' (above, n. 12).

¹⁶ e.g. Buchanan, A. and Keohane, R. O., 'The Legitimacy of Global Governance Institutions', *Ethics & International Affairs*, 20 (2006), 405; Grant, R. and Keohane, R. O., 'Accountability and Abuses of Power in World Politics', *American Political Science Review*, 99 (2005), 29.

¹⁷ This can be exemplified by debates about the political nature of the European Union and the European polity that followed the crisis of legitimacy of EU law, itself triggered by the extension of EU competences after 1992. See e.g. Besson, S., 'Sovereignty in Conflict', in Watbrick, C. and Tierney, S. (eds.), *Towards an International Legal Community, The Sovereignty of States and the Sovereignty of International Law* (London: BICL, 2006), 131; Weller, J., 'The Geology of International Law—Governance, Democracy and Legitimacy', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 64 (2004), 547.

¹⁸ Goodin, R., 'Enfranchising All Affected Interests, and its Alternatives', *Philosophy & Public Affairs*, 35 (2007), 40.

¹⁹ Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 427.

international politics: their current institutionalization that paradoxically provides almost too many kinds of and too many places for uncontrolled deliberation and communication, but very little individuation both of the political subjects actually deliberating and of their individual rights.²⁰ This is what Lafont captures as the danger of minimalism inherent in the new genre of 'realist utopias' developing in cosmopolitan studies.²¹

Republican theory with its concepts of freedom as non-domination, self-government, and political equality, and more precisely cosmopolitan republican theory—whether in its early accounts²² or in contemporary proposals²³—provide interesting insights for international law theory.²⁴ Freedom from domination is a complex concept, whose meaning has been discussed and refined by many republican accounts in the past.²⁵ In a nutshell, it corresponds to the ability not to be subject to the arbitrary will of others in a given normative background (status), but also to the capability to create and to become a full member of the political co-operation scheme in which the common will and this normative background is generated (power).²⁶ This republican account of the international rule of law can help develop an inclusive and parity, albeit multilateral, account of the legitimacy of international law in an era of global legal pluralism. Through the republican magnifying glass, this chapter explores ways of individuating those affected by global laws and decisions *qua* international political community, and

²⁰ Schmalz-Bruns, R., 'Demokratie im Prozess der Globalisierung', in Hützel-Caddegnes, T. and Schmidt, T. (eds.), *Demokratie in Europa und europäische Demokratie* (Wiesbaden, 2005), 215; Fraser, N., 'Die Transnationalisierung der Öffentlichkeit. Legitimität und Effektivität der öffentlichen Meinung in einer postwestfälischen Welt', in Niesen, P. and Herberth, B. (eds.), *Anarchie des kommunikativen Freiheit* (Frankfurt: Suhrkamp, 2007), 245–50; Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 436–8.

²¹ Lafont, chapter 11 in this volume. See also Besson, S., 'The EU and Human Rights: Towards a New Kind of Post-National Human Rights Institution', *Human Rights Law Review*, 6 (2006), 323.

²² e.g. Kant, I., 'Idea for a Universal History with a Cosmopolitan Purpose', trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), 41; Wolff, C., *Ius gentium methodo scientifica pertractatum* (Oxford: Clarendon, 1934).

²³ e.g. Bohman, J., 'Republican Cosmopolitanism', *Journal of Political Philosophy*, 12 (2004), 336; Bohman, J., *Democracy Across Borders: From Demos to Demoi* (Boston: MIT Press, 2007); Buchanan, J., *Justice, Legitimacy and Self-Determination* (above, n. 13); Cheneval, F., *La Cité des peuples* (Paris: Editions du Cerf, 2005).

²⁴ e.g. Onuf, N., *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998); Quill, J., *Liberty after Liberalism: Civic Republicanism in a Global Age* (London: Palgrave MacMillan, 2005); Slaughter, S., *Liberty beyond Neo-Liberalism: A Republican Critique of Self-Government in a Globalising Age* (London: MacMillan Palgrave, 2005); Sellers, T., *Republican Principles in International Law* (Basingstoke: Palgrave Macmillan, 2006); Deudney, D. H., *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton: Princeton University Press, 2007).

²⁵ See for a detailed discussion, Besson and Martí, introduction to this volume.

²⁶ Bohman, J., 'Nondomination and Transnational Democracy', in Laborde, C. and Maynor, J. (eds.), *Republicanism and Political Theory* (London: Basil Blackwell, 2007), 197.

fleshes out the criterion of significant 'affectedness' alluded to in recent work on the subject.²⁷

II. *Ubi ius gentium*...

Ubi societas, ibi ius is a well-known and somehow manichean descriptive statement that captures the social origins and development of a legal system.²⁸ The inter-State development of international law, by contrast, *prima facie* precluded any social origins or social development and was regarded as sufficient to account for the development of a legal system. If there was an international society, it was at the most a society of sovereign States deciding equally about their respective rights and obligations under international law.

With the development of the subjects, scope, and normativity of international law,²⁹ however, it is argued that this society of States can no longer account for the legitimacy of international law from the individual's perspective. Paradoxically, therefore, we seem to have reached the stage where there are international legal norms, but no individualized and institutionalized society to match it yet. In short, the circumstances of international law³⁰ turn the causality between society and law-making on its head and raise the question of the identification and consolidation of an international community to legitimize international law-making.

1. Whose international law?

International law is usually defined as a set of norms pertaining to the international community and the co-operation between international legal subjects, whether States, international organizations (IOs), or individuals.

While international law was for a long time inter-State law created *for and by States*, the development of its object and gradually of its subjects has changed this. International law already affects the life of individuals directly and applies in all areas of national law. It can no longer be said to regulate exclusively the relations between States. This is the case, of course, of international human rights, but it

²⁷ e.g. Besson, S., 'Deliberative Democracy in the European Union: Towards the Deteritorialization of Democracy', in Besson, S. and Marri, J. L. (eds.), *Deliberative Democracy and its Discontents* (Aldershot: Ashgate, 2006) 181; Besson, 'Institutionalizing Global Democracy' (above, n. 15); Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18); 40; Fraser, 'Die Transnationalisierung der Öffentlichkeit' (above, n. 20), 224; Caney, 'Cosmopolitan Justice and Institutional Design' (above, n. 15), 725; Pogge, T., *Human Rights and World Poverty* (Cambridge: Polity Press, 2002).

²⁸ Simma and Paulus, 'The "International Community"' (above, n. 4), 267.

²⁹ for a detailed account of those changes, Besson, 'Theorizing the Sources of International Law' (above, n. 12).

³⁰ See on this idea, Rohman, 'Republican Cosmopolitanism' (above, n. 23), 336.

also applies to international administrative law, international criminal law, international environmental law, etc. Individuals have accordingly gradually become direct subjects of international law, but also of obligations in the context of international criminal law or international investment law.³¹ Furthermore, their passive personality has gradually given rise to an active personality that gives them the possibility of invoking those rights and of being held accountable for their obligations under international law. The same applies *mutatis mutandis* to other international subjects such as international organizations.

Interestingly, however, while international law is no longer created only for States, it remains largely—at least in formal law-making channels—created by States.³² On the one hand, while international organizations have gained self-legislating power, their founding treaties remain international agreements between States. Further, individuals remain largely excluded, or at least only indirectly involved through States or IOs in international law-making. On the other hand, despite important developments in multilateral treaty-making that involve IOs and individuals (through NGOs mostly), certain sources of international law such as customary law or general principles remain largely State-originated despite applying more broadly to other international law subjects as well.

2. What international law?

Besides changes in the subjects of international law, and hence challenges to its authorship in international law-making processes, there have also been noticeable changes in the nature, scope, and degree of normativity of international law. From subjective, relative and conventional, the normativity of international law has become, depending on the subject matters, objective, universal, and absolute.³³

As a result, the voluntarist and bilateral paradigm of Westphalian law-making is gradually eroding: certain international legal norms, such as human rights but also environmental norms, can gain an *erga omnes* scope and imperative weight without any noticeable differences in their law-making process. Moreover, certain norms bind States and other international subjects without their consent towards subjects with which they have not entered into a bilateral relationship and this in a non-negotiable way. Certain treaties, for instance, become customary and hence generate obligations *erga omnes* and *omnium* without all States' consent.

³¹ I am assuming that the authority of international law and the obligations to obey that it claims to create can be equated to those of national law. This is clearly the case of international norms of direct effect, as exemplified by most European legal norms in the EU or European human rights law. See Besson, 'Theorizing the Sources of International Law' (above, n. 12); Buchanan, 'Legitimacy of International Law' (above, n. 13); Cohen, J. and Sabel, C., 'Extra-Republicanism Nulla Justitia', *Philosophy & Public Affairs*, 34 (2006), 147.

³² Tomuschat, C., 'Obligations Arising for States without or against their Will', *Recueil des Cours*, IV (1993), 300; Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3), 248–9.

³³ Besson, 'Theorizing the Sources of International Law' (above, n. 12).

This is a testament of the interests and values shared by subjects of international law beyond those of States.

Interestingly, however, while the authority of international law has largely overtaken what its current law-makers are willing to abide by, its law-making processes have remained largely the same despite their quasi-legislative multi-lateralization and majority-based operation in certain cases.

3. Whose international authority?

International law is still largely made as *ius inter gentes* and, when it is not, its subjects remain indeterminate and non-individuated.³⁴ This creates a legitimization gap between the nature, scope and degree of the legitimate authority claimed by the norms created and the contractual qualities vested in most of the processes through which they are produced.³⁵

As a result, the State Consent model alone can no longer account for the authority of all international law norms. The development of other sources of international law such as customary law makes it increasingly difficult to link normativity back to consent in a States' society. State consent remains at the most a residual source of legal authority in the cases where States are both authors and subjects of international legal norms.³⁶ Moreover, even when this link seems plausible, most legal philosophers actually doubt that consent can be a constitutive source of legal authority of its own.³⁷ This becomes even more problematic when those protected by the respect for autonomy, and equal autonomy more precisely, are States and IOs, whereas those usually protected by consensual approaches to authority are individuals.³⁸

Of course, many argue that this legitimization gap can be filled by objective and often imperative international legal norms that bind States even against their will to protect the interests of other subjects of international law; international human rights are often invoked as the solution in this context.³⁹ The problem with this approach, however, is well-known in national constitutional theory and raises the controversial issue of the right of rights and democracy; human rights cannot replace democratic status and deliberation over one's rights in a democracy.⁴⁰ The fundamental connexion between human rights and political rights, and between human rights and political status or membership is

³⁴ Bohman, 'Republican Cosmopolitanism' (above, n. 23), 339.

³⁵ Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (above, n. 9), 358.

³⁶ Buchanan, *Justice, Legitimacy and Self-Determination* (above, n. 13), 317–19; Besson, 'Institutionalizing Global Democracy' (above, n. 15); Besson, 'Theorizing the Sources of International Law' (above, n. 12).

³⁷ Buchanan, *Justice, Legitimacy and Self-Determination* (above, n. 13), ch. 7.

³⁸ *Ibid.*, 317–20, 325.

³⁹ e.g. *ibid.*; Buchanan, 'Legitimacy of International Law' (above, n. 13).

⁴⁰ Besson, S., *The Morality of Conflict: Reasonable Disagreement and the Law* (Oxford: Hart Publishing, 2005); Bellamy, R., 'The "Right to Have Rights": Citizenship Practice and the Political

insufficiently acknowledged in most accounts of international law legitimacy and even in cosmopolitan republican ones.⁴¹ Moreover, even if democratic or membership rights are granted *qua* human rights in this context, organizing judicial remedies will not exempt other authorities from the duty to enforce those rights in practice and hence to organize themselves democratically. Democracy is not (only) about unilateral *ex post* compensation⁴² for failure to respect its requirements, but about collective self-determination about whether and how to do it, however difficult it is to realize in practice.⁴³

III. ... ibi civitas gentium

The development of the personal and material scope of international law and its hiatus with those traditionally identified as the subjects and authors of current international law-making processes calls for an exploration of the nature, boundaries, and constituency of what some authors and international law itself increasingly refer to as the community of international law. If democratic national law requires a law-making process in which all those affected by a decision be given a chance of having an input in the decision-making process of the national political community,⁴⁴ legitimate international law-making should also be the product of some kind of common inclusive and paritary political process within the international political community. In short, international law subjects should be 'both subjects in law's empire and citizens in law's republic'.⁴⁵

1. Alternative authorships

Two main alternatives are usually distinguished in the idea of a political international community: one propounded by the so-called liberal or realist approach

Constitution of the EU', in Bellamy, R. and Warleigh, A. (eds.), *Citizenship and Governance in the European Union* (London: Continuum, 2001), 41.

⁴¹ e.g. Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18); Buchanan, 'Legitimacy of International Law' (above, n. 13).

⁴² Generally speaking, the idea of compensation from one level of governance to another raises more questions than it solves: who compensates whom and why should there be such a compensation, etc.? See e.g. Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18); Bohman, 'Republican Cosmopolitanism' (above, n. 23), 336.

⁴³ e.g. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 9); Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (above, n. 9), 324; Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9); Bohman, 'Republican Cosmopolitanism' (above, n. 23), 341 and 345; Cohen, J. L., 'Whose sovereignty? Empire Versus International Law', *Ethics and International Affairs*, 18 (2004), 1; Cohen, J. L., 'Sovereign Equality vs. Imperial Right: The Battle over the "New World Order"', *Constellations*, 13 (2006), 485.

⁴⁴ For a democratic concept of legal authority, see Besson, *The Morality of Conflict* (above, n. 40), ch. 13.

⁴⁵ Cohen and Sabel, 'Extra-Republicam Nulla Justitia?' (above, n. 31), 148.

that favours a society of democratic States and the other put forward by the so-called communitarian or humanist approach that promotes a world state's community.⁴⁶ While both reflect an important part of the interests that need to be represented in international law-making whether State-related or individual-related, they do so in part only.

a. *A society of democratic States*

A first reaction to these changes in international law might be to reinforce the *status quo* and to consolidate the existing Vattelian *societas gentium* or society/association of States by vesting it with indirect popular legitimacy.⁴⁷ This is actually the kind of community that one may derive from Article 53 VCLT, which refers to the imperative norms recognized by the 'international community of States'.

After all, if States internally abide by republican democratic requirements, their international decisions are likely to respect the interests of all those affected in each State. This corresponds to the shift from the so-called State Consent model of international law legitimacy to the Democratic State Consent model.⁴⁸ The Democratic State Consent model matches a merely indirect form of global democracy, one that derives the legitimacy of international law from the electoral legitimacy of State representatives negotiating and consenting to those norms on behalf of their national constituency.⁴⁹ Interestingly, it is also the model that contemporary (cosmopolitan) republican theorists often favour,⁵⁰ as it is *prima facie* the most respectful of national political autonomy and sovereignty.

As a matter of fact, the focus on national democracy in recent international norms pertaining to the right to democracy confirms the traditionally indirect approach to international legitimacy based on national democracy and hence ultimately on State consent.⁵¹ From the 1980s onwards, indeed, international

⁴⁶ For details of this opposition, see Dupuy, *La communauté internationale entre le mythe et l'histoire* (above, n. 4); Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3).

⁴⁷ Grotius, H., *De jure belli ac pacis libri tres*, trans. F. W. Kelsey (Oxford: Oxford University Press, 1925); de Vattel, E., *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (Washington, DC: Carnegie Institution, 1916).

⁴⁸ See the discussion in Besson, 'Institutionalizing Global Democracy' (above, n. 15); Buchanan, *Justice, Legitimacy and Self-Determination* (above, n. 13); Buchanan, 'Legitimacy of International Law' (above, n. 13); Christiano, T., 'International Institutions and Democracy', in Besson, S. and Tsoulas, J. (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, forthcoming).

⁴⁹ Paulus, A. L., 'Comment: The Legitimacy of International Law and the Role of the State', *Michigan Journal of International Law*, 25 (2004), 1057. See also Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions' (above, n. 16); Buchanan, 'Legitimacy of International Law' (above, n. 13).

⁵⁰ e.g. Sellers, *Republican Principles in International Law* (above, n. 24), 44; Cheneval, *La Cité des peuples* (above, n. 23), 256. Contra: Bohman, 'Republican Cosmopolitanism' (above, n. 23), 336; Bohman, 'Nondomination and Transnational Democracy' (above, n. 26).

⁵¹ Crawford, J. and Marks, S., 'The Global Democracy Deficit: An Essay in International Law and its Limits', in Archibugi, D., Held, D., and Kohler, M. (eds.), *Re-Imagining Political Community, Studies in Cosmopolitan Democracy* (Cambridge: Polity Press, 1998), 82–5.

law itself started regulating issues of legitimacy, and democratic legitimacy more precisely, albeit at the national level. This has been the case quite early on, for instance, in the areas of the right to self-determination and democracy-conditioned State recognition, of free elections monitoring, and of democratic and more generally human rights conditionality clauses in trade agreements.⁵² Paradoxically, however, the gradual emergence and reinforcement of the so-called international right to democracy⁵³ did not immediately lead to challenging international law-making processes themselves. This may seem quite surprising given the latter's *prima facie* dubious democratic quality; not only did those processes vest very little legitimacy into the international democratic standards developed for national political processes, but the concentration of international competences in the executive and hence the 'deparliamentarization'⁵⁴ of international matters at the national level had perverse effects on national democracies themselves.⁵⁵

True, democratic State consent is a primary factor of global democracy, provided of course that the States consenting are democratically organized, that State representatives are publicly accountable and that the ways in which decision-making among States is organized are adequately inclusive and egalitarian.⁵⁶ Even though intra- and inter-State democracy is necessary, it is not, however, sufficient in itself to protect individuals from domination on the part of other individuals, their own or other States, and international organizations. International norms now cover areas traditionally left to national law, go well beyond the regulation of inter-State relations, and impact on individuals' basic interests without respecting national legitimization channels. As a result, protection against normative domination by their own State or by other States

⁵² Fox, G. and Roth, B., 'Introduction: The Spread of Liberal Democracy and Its Implications for International Law', in Fox, G. and Roth, B. (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000); Pippin, C., 'Right to Democracy in International Law', *European Journal of International Law*, 15 (2004), 213; Crawford and Marks, 'The Global Democracy Deficit' (above, n. 51).

⁵³ Franck, T., *The Power Of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990); Crawford, J., 'Democracy and International Law', *British Yearbook of International Law*, 44 (1993), 113; Crawford, J., 'Democracy in International Law—A Reprise', in Fox, G. and Roth, B. (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), 114.

⁵⁴ Stein, E., 'International Integration and Democracy: No Love at First Sight', *American Journal of International Law*, 95 (2001), 489.

⁵⁵ Crawford, J., 'Democracy and the Body of International Law', in Fox, G. and Roth, B. (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), 91; Crawford, 'Democracy in International Law' (above, n. 53); Deparliamentarization and the undermining of formal and accountable representation mechanisms of national interests in international negotiations is actually increasing, as confirmed by the recent ICJ decision in the *Case concerning armed activities on the territory of the Congo* (above, n. 7), §47.

⁵⁶ Christiano, 'International Institutions and Democracy' (above, n. 48); Pettit, P., 'A Republican Law of Peoples', in Besson, S. and Tsoulas, J. (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, forthcoming).

and IOs also requires directly including individuals among international law-makers.

As a result, it is time, on the one hand, *individuals* become international law-makers as well. Indeed, their interests might diverge from those of their national polity, because they are members of a minority at national level.⁵⁷ In fact, even in a democratic State, the international or external interests of that State might actually differ from those of the sum or the majority of that State's citizens, given the primary and increasing role of the executive in foreign policy and international negotiations. Furthermore, even when individual interests match their government's, the rule of international democracy, and in particular majoritarian rule in multilateral law-making, but also veto rights in case of unanimous voting cannot always guarantee international results that are in line with individual national will, or at least respect the principle of political equality in terms of the proportionality of votes to the size of the populations represented. Thus, indirect international democracy models of this kind face the famous dilemma between States defending their citizens' interests at the expense of other States and their citizens, on the one hand, and following the rules of international democracy at the expense of their own citizens' interests, on the other.⁵⁸ Moreover, not all individuals affected by international law are citizens of democratic States and hence have a say in national democratic processes pertaining to international issues or are represented by democratically elected representatives in international fora, thus creating an inequality in legitimacy.⁵⁹

On the other hand, the society of democratic States model also excludes from the legitimization chain all *international organizations*, such as the EU, where both individuals and States participate or are represented, and whose laws constitute an important part of international law.⁶⁰ Most countries nowadays are members of more than a hundred international or supranational organizations.⁶¹ They have developed and consolidated as essential subjects in international law and their collective interests, when democratically established, deserve representation elsewhere in international law-making.⁶²

⁵⁷ Besson, 'Theorizing the Sources of International Law' (above, n. 12); McCorquodale, R., 'International Community and State Sovereignty: An Uneasy Symbiotic Relationship', in Warbrick, C. and Tierney, S. (eds.), *Towards an International Legal Community* (London: BICL, 2006), 241.

⁵⁸ Archibugi, D., 'The Reform of the UN and Cosmopolitan Democracy: A Critical Review', *Journal of Peace Research*, 30 (1993), 1.

⁵⁹ Christiano, 'International Institutions and Democracy' (above, n. 48).

⁶⁰ Crawford, J., 'Responsibility to the International Community as a Whole', *Indiana Journal of Global Legal Studies*, 8 (2001), 313.

⁶¹ Cohen and Sabel, 'Extra-Republicanism Nulla Iustitia?' (above, n. 31), 166.

⁶² Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4); Franck, *Fairness in International Law and Institutions* (above, n. 4), 13 [contra: Franck, *The Power of Legitimacy Among Nations* (above, n. 53)]; Fassbender, 'The United Nations Charter as Constitution of the International Community' (above, n. 9), 529; Crawford, 'Responsibility to the International Community as a Whole' (above, n. 60). Contra: Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9).

In those new circumstances, the call for the legitimacy of international law comes closer to the one in national law; international legal norms should also be able to be justified directly to those to whom they apply (i.e. the entire international community including individuals and IOs, and not only national States) on grounds of global justice and cosmopolitan ethics. This is also what is confirmed by the phrase 'international community as a whole' used by the ICJ and by the Statute of Rome when referring to the personal scope of some international duties.⁶³

b. *A world State's community of individuals*

A more radical alternative to closing the legitimacy gap in international law might be to aim at reproducing the national political community at the international level by creating a *civitas maxima*, a world State or world republic.⁶⁴ After all, if there are universal and objective interests protected by international law and if international legal norms bind further subjects than States, it might mean that national polities no longer suffice in protecting nor in representing those interests and that they should be replaced by a world State.

While this was for a long time regarded as the upshot of cosmopolitan republicanism and especially of Kantian republicanism, it need not be the case, quite the contrary.⁶⁵ Not only is it not realistic in view of the resilience of national politics and the role of national law in international law, and the inherent pluralism and heterarchy prevailing in international legal sources, on the one hand. But, on the other, it is also normatively counterindicated as a regulative ideal; it would indeed disregard popular sovereignty and political autonomy by diluting the many political communities now existing into a new one.⁶⁶ National polities ought to retain their primary role in the protection of individual interests against domination.

Replacing the current ensemble of communities by a world State would also be counterproductive from a national democratic point of view. Even though they have been deeply affected and somehow weakened by globalization, national law-making processes remain much more central to international law-making

⁶³ e.g. ICJ, *Barcelona Traction* (above, n. 8), 32.

⁶⁴ e.g. previous Habermas, J., 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory*, 29 (2001), 766; Wolff, *Ius gentium methodo scientifica pertractatum* (above, n. 22).

⁶⁵ e.g. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 9); Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (above, n. 9), 324; Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 439–40; Cheneval, *La Cité des peuples* (above, n. 23), 255. Contra: Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18); Nagel, T., 'The Problem of Global Justice', *Philosophy & Public Affairs*, 33 (2005), 113. In this sense, the terms 'cosmopolitanism' or 'cosmopolitan republicanism' are not used to support a post-national super-State encompassing all national States.

⁶⁶ Cohen, 'Whose sovereignty?' (above, n. 43), 1; Besson, 'Sovereignty in Conflict' (above, n. 17), 131.

processes than some claim they do. They are crucial to the ratification and implementation of international norms.⁶⁷ They have also become major channels of transnational and comparative law-making.⁶⁸ Global democracy ought rather to be seen as encompassing different levels of legitimization and placing national democracy at the core of global democratic processes.⁶⁹

Interestingly, renouncing to the regulative ideal of a world State, however unrealistic it currently is, is not as easy as it first seems. Most accounts of the multilateral political community cannot relinquish their implicit unitarian underpinnings.⁷⁰ Habermas, for instance, moved away in 2004 from defending a federal European State as a solution to the European legitimacy crisis and a world State in general on Kantian republican premises, to promoting 'global domestic politics' without a world State at the international level.⁷¹

Despite a very detailed and advanced model of multilateral international politics,⁷² Habermas' account remains curiously minimalist. Its separation of issues of right such as global justice, addressed by world citizens in a supranational world institution like the United Nations, from ethical issues such as human rights or other distributive issues that ought to be addressed by transnational politics among States fails to convince.⁷³ It primarily fails to convince, from a Habermasian perspective, given the segregation of deliberation over more concrete aspects of human rights policy from deliberation over issues of justice and the implausibility of the explanation based on the consensus requirement.⁷⁴ Moreover, the model also fails to convince in general democratic and especially republican terms. Indeed, the multiplication of political subjects (individuals and States) in a multilateral political community also necessarily implies, for Habermas, a division of labour according to subject matters between subjects of international law; individuals should be the only ones deliberating and deciding over issues of human rights and justice at the exclusion of States. This also implies,

⁶⁷ Sasson, S., 'The Participation of States and Citizens in Global Governance', *Indiana Journal of Global Studies*, 10 (2003), 10 and 15; Paulus, 'Comment' (above, n. 49), 1047.

⁶⁸ Slaughter, A. M., 'Government Networks: The Heart of the Liberal Democratic Order', in Fox, G. and Roth, B. (eds.), *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000), 199; and Slaughter, A. M., 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks', *Government and Opposition*, 39 (2004), 159; Delbrück, J., 'Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?', *Indiana Journal of Global Studies*, 10 (2003), 29.

⁶⁹ Sasson, 'The Participation of States and Citizens in Global Governance' (above, n. 67), 5; Besson, 'Institutionalizing Global Democracy' (above, n. 15).

⁷⁰ See, *a contrario*, Lafont, chapter 11 in this volume.

⁷¹ Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 9); Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (above, n. 9), 324; Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9).

⁷² Literally 'world internal politics' or 'Weltinnenpolitik' after Delbrück, J., *The Future of International Law Enforcement: New Scenarios—New Law?* (Berlin: Duncker & Humblot, 1993) and Delbrück, 'Exercising Public Authority Beyond the State' (above, n. 68), 29.

⁷³ Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 143–4, 448.

⁷⁴ Lafont, chapter 11 in this volume.

however, the implausible and counterproductive separation of fora of deliberation about the right from fora of ordinary politics across different levels of governance. Moreover, it means introducing a hierarchy between the legal sources of international law that would be induced by the hierarchy between the law-making levels, a hierarchy that is necessary to sustain the idea of an international constitution and formally entrenched constitutional norms such as human rights.⁷⁵

The difficulty, however, is that remedying those shortcomings would necessarily give rise, in the Habermasian model of deliberative consensus and co-originality of human rights and democracy, to a unitarian and supranational political community of world citizens—an entity not so distant from a world republican State. As a result, the multilateral political community *qua* middle way between a world State society and a society of States is not as easy to conceive of and to construct as it first seems.

2. The multilateral community

The international community is best conceived therefore as both a community of States (and groups of States) *and* a community of individuals (and groups of individuals); when seen as a political community, the international community has both States and individuals as its 'citizens' in neo-Kantian terms.⁷⁶ While it is clear by elimination that the international community lies between the mere society of States and the political community of a world State, it is also important, however, to provide a positive argument for the identification of this international community, its main characteristics and its exact constituency.

a. Why an international community?

i. Process or entity

As alluded to before, the international community remains paradoxically largely indeterminate despite its increasing function in international law and the legitimacy hiatus thus created.

One reason for this indeterminacy is ontological. According to some authors, the international community is only an ideal, a postulate, a fiction, or even a myth.⁷⁷ If this holds, then it would be vain to seek to identify it with more

⁷⁵ Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft' (above, n. 9), 346.

⁷⁶ Jouanet, 'L'idée de communauté humaine à la croisée des la communauté des États et de la communauté mondiale' (above, n. 4), 220–32; Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 406.

⁷⁷ e.g. Dupuy, *La communauté internationale entre le mythe et l'histoire* (above, n. 4), 181; Delmas, M., *Les forces imaginantes du droit, le relatif et l'universel* (Paris: Seuil, 2004); Koskeniemi, 'The Fate of Public International Law' (above, n. 14), 30. See also Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3).

precision. The problem with those accounts is that they often concede more than they should; in order to avoid the legitimacy hiatus alluded to before, they usually complement law-making by a society of States with a rhetorical reference to an inclusive community of stakeholders.⁷⁸ In any case, there is a parcel of truth in this methodological quibble. Since the international community is a normative concept whose development corresponds to a normative requirement: its boundaries and constituency depend on contestation by the community itself⁷⁹ and fluctuate with its process of self-determination.⁸⁰

This brings us to a second reason put forward for the indeterminacy of the concept of international community. It lies in its processual nature;⁸¹ if the community consists in a process only, it cannot be identified as an outcome. This is a false dilemma, however. While the community of values and interests in international law is clearly to be consolidated through a self-constituting process, the current legitimacy gap in international law stems from the lack of individuation and institutionalization of those sharing these common interests and values before the process can take place. As a result, the international community should be understood as both a process of sharing interests and values and an entity sharing those interests and values.⁸² This processual dimension in the constitution and development of the international community explains how it is a matter of degree.⁸³ The international community can share interests and values to different degrees and still be regarded as a community with fluctuations in its communal quality across time and place.

A further difficulty that might explain the indeterminacy of the concept 'international community' pertains to its scope and more particularly how it relates to the human community as a whole. Some authors argue indeed for the equivalence of both communities.⁸⁴ While it is clear that members of the international community share more than their natural features *qua* human beings, there is a certain ambiguity in distinguishing the former from the latter.⁸⁵ It

⁷⁸ e.g. Franck, *Fairness in International Law and Institutions* (above, n. 4); critique by Kriticos, 'Imagining the International Community' (above, n. 2).

⁷⁹ Besson, 'Sovereignty in Conflict' (above, n. 17), 131.

⁸⁰ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4), 248; Simma and Paulus, 'The "International Community"' (above, n. 4), 277.

⁸¹ e.g. Allott, 'The True Function of Law in the International Community' (above, n. 10).

⁸² Onuf, 'The Constitution of International Society' (above, n. 4).

⁸³ e.g. Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4); Abi-Saab, 'La "communauté internationale" saisie par le droit' (above, n. 4), 81–108; Dupuy, *La communauté internationale entre le mythe et l'histoire* (above, n. 4), 181.

⁸⁴ e.g. Dupuy, *La communauté internationale entre le mythe et l'histoire* (above, n. 4); Allott, 'The True Function of Law in the International Community' (above, n. 10); Moreau Defarges, P., *La communauté internationale* (Paris: PUF, 2000), 6; Bohman, 'Republican Cosmopolitanism' (above, n. 23), 336; Bohman, 'Nondomination and Transnational Democracy' (above, n. 26).

⁸⁵ Abi-Saab, G., 'Humanité et Communauté internationale dans la dialectique du droit international', in *Humanité et droit international, Mélanges René-Jean Dupuy* (Paris: Pédone, 1991), 3; Abi-Saab, 'La "communauté internationale" saisie par le droit' (above, n. 4), 83; Tomuschat, 'Die internationale Gemeinschaft' (above, n. 3), 6.

is indeed both a smaller group in the sense that the values and interests shared are not necessarily exhaustive of all human values and interests (except in the case of human rights or other rights and obligations *erga omnes* and *omnium*), and a larger group as the international community *prima facie* encompasses not only individuals, but also groups of individuals such as States, and IOs whether transnational, international, or supranational. Moreover, many of the interests shared by the international community emerged and matured with the development of international law⁸⁶ and do not simply predate the internationalization. As a result, they are institutional or political interests, rather than natural or pre-political interests in general.⁸⁷

In this last respect, it is important to emphasize that the international community differs from 'civil society'. Of course, pre-1945 civil society consisted of the sum of all national societies and hence (during that period) it could be equated with the international community. With the development of the personal and material scope and normativity of international law, however, civil society has been identified with the sum of all individual stakeholders without respect for national boundaries and thus without respect for national political communities.⁸⁸ What this implies therefore is that international civil society's role is becoming very similar to that of national civil society in the national public sphere; it is a necessary complement to the international political community,⁸⁹ but should not be conflated with it.

ii. Society or community

Another concern when trying to identify the nature of the international community is its communal nature.

The traditional distinction between society and community⁹⁰ cannot apply as such to the international community, given that the latter cannot be pre-social. In principle, the community or *Gemeinschaft* is considered as natural and pre-political, whereas the society or *Gesellschaft* is voluntary and political or legal. As a result, the distinction should be reversed in the case of the international community.⁹¹ Contrary to what was held in the seventeenth century, the international community did not pre-exist international law and international

⁸⁶ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4), 234.

⁸⁷ Contra: Bohman, 'Nondomination and Transnational Democracy' (above, n. 26), 203–4.

⁸⁸ Moisi, D., 'Les thèmes favoris de la Communauté internationale', in Broghe, G. (ed.), *La "Communauté internationale": concept, bilan* (Paris: Fondation Singer-Polignac, 2002), 75.

⁸⁹ Fraser, 'Die Transnationalisierung der Öffentlichkeit' (above, n. 20), 224.

⁹⁰ e.g. Tonnies, F., *Community and Civil Society*, trans. J. Harris and M. Hollis (Cambridge: Cambridge University Press, 2001); Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3), 9–223 on various theories.

⁹¹ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4), 245; Dupuy, *La communauté internationale entre le mythe et l'histoire* (above, n. 4), 15.

institutions as a state of nature between States.⁹² It only appeared as it is today through the operation and development of international law.⁹³

Then why choose to refer to an 'international community' rather than to an 'international society'? Following a more Weberian approach to the concepts of societies and communities, 'society' is often used to refer to mere factual interdependence, while 'community' refers to a 'society-plus' in which members are not only factually interdependent, but also share common values and interests.⁹⁴ True, there has been an international society ever since the creation of international law that allowed the co-existence between equal sovereigns and legal regimes.⁹⁵ However, post-1945, and more specifically post-1989 developments reveal that the notion of international community was quickly used as a catalyst for shared interests and values in international law. This community of values and interests can be exemplified in the increasing number of objective and/or imperative norms of international law (e.g. international crimes, international human rights, etc.).

iii. Legal or political community

In principle, a community can share interests and values without being necessarily regarded as a legal community or as a political community.

The international community, however, is clearly an international *legal* community⁹⁶ as opposed to a purely social community.⁹⁷ It has developed with the evolution of international law; both its constituency and its interests have been influenced by the development of international legal norms.⁹⁸ True, if international law is constrained by the international community's interests and values, the latter cannot depend on international law only.⁹⁹ What this means, however, is that international law has through its impact on new subjects contributed to the awareness and development of an international community of interests and values, which in turn—and this corresponds to the dynamic nature of law—consolidates and sets limits on how the law can impact them. This explains why it is easier to define those reciprocal interests and values that are constitutive of the international community, than the exact identity and constituency of the community sharing those interests and values.¹⁰⁰

⁹² Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 9); Cheneval, *La Cité des peuples* (above, n. 23).

⁹³ Abi-Saab, 'La "communauté internationale" saisie par le droit' (above, n. 4), 83.

⁹⁴ Simma and Paulus, 'The "International Community"' (above, n. 4), 266; Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3), 10–16, 220.

⁹⁵ Onuf, 'The Constitution of International Society' (above, n. 4).

⁹⁶ Simma and Paulus, 'The "International Community"' (above, n. 4), 266 on the 'Völkerrechtsgemeinschaft' [Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (above, n. 3), V].

⁹⁷ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4), 234.

⁹⁸ Onuf, 'The Constitution of International Society' (above, n. 4), 7.

⁹⁹ Simma and Paulus, 'The "International Community"' (above, n. 4), 267–8.

¹⁰⁰ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4), 235.

Of course, even though the international community is a legal community in the sense that its interests are both gradually being developed by law and constraining the law, it is not yet regarded as a legal entity under international law and is not vested with the quality of subject under international law.¹⁰¹ This is paradoxical since it is, strictly speaking, both the right-bearer of duties *erga omnes* and the duty-bearer of duties *omnium*. In terms of procedures, however, *erga omnes* obligations are owed to each State individually, as exemplified by the implementation of Article 40 of the Articles on State Responsibility for Unlawful Acts in case of violations of *jus cogens*.¹⁰² Moreover, when human rights violations are at stake, procedures remain eminently bilateral or intersubjective: between two States or between one State and an individual. There are very few international procedures to date that allow for collective individual interests (e.g. *actio popularis*) to be invoked before judicial or executive international institutions or that allow for the whole international community to be held responsible for human rights violations. Further, there is as of yet no directly invocable notion of 'public interest' (that is not reducible to State interest) in international law that may be used to counterbalance human rights claims.

The republican idea of the rule of law as constitutive of a political status rather than as a mere means for protection and security¹⁰³ requires more than simply being ruled by law; this is what distinguishes a community of law from a true legal community. The next question therefore is whether this *prima facie* legal community is or can be matched by a *political* community. There is no agreed set of criteria as to how to judge what makes a multitude of people a *demos* or a political community. In short, members of a political community share common, interdependent, or reciprocal interests and goals (i) and organize themselves autonomously to reach them (ii).¹⁰⁴

Self-rule or self-legislation, which lies at the core of democracy, also implies self-constitution: the community that binds itself by the laws it generates, defines itself at the same time as a democratic subject by drawing its own boundaries.¹⁰⁵ True, these boundaries usually match historical, cultural, or ethnic boundaries.¹⁰⁶ Comparative politics and history have shown, however, that this is not always the case. Often all it takes is some kind of 'we-feeling', a form of solidarity among

¹⁰¹ Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3); Crawford, 'Responsibility to the International Community as a Whole' (above, n. 60), 307.

¹⁰² Crawford, 'Responsibility to the International Community as a Whole' (above, n. 60), 319; Franck, *Fairness in International Law and Institutions* (above, n. 4).

¹⁰³ Bohman, chapter 2 in this volume; Waldron, J., 'The Rule of International Law', *Harvard Journal of Law and Public Policy*, 30 (2006), 15.

¹⁰⁴ Bohman, 'Republican Cosmopolitanism' (above, n. 23), 340–1.

¹⁰⁵ Benhabib, S., *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), ch. 4.

¹⁰⁶ e.g. Canovan, M., *Nationhood and Political Theory* (Cheltenham: Edward Elgar, 1996); Miller, D., *Citizenship and National Identity* (Cambridge: Polity Press, 2000). See a discussion by Fraser, 'Die Transnationalisierung der Öffentlichkeit' (above, n. 20), 224; and Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18).

different 'stakeholders'.¹⁰⁷ In fact, solidarity need not necessarily be political at all; it can be generated by the political exercise itself.¹⁰⁸ Therefore, this minimal requirement of solidarity can also apply at the international level,¹⁰⁹ and there is no reason to necessarily confine solidarity to State boundaries,¹¹⁰ as recently exemplified in the European Union.¹¹¹

At the moment, the international community clearly is not (yet) a political community. True, its members have objective interests in common. However, the international community is not yet organized autonomously. Nor are all international subjects entirely conscious of their common interests and goals, and of the need to collectively defend them.¹¹² There are no or very few examples in international law of a proceduralization of the international community's interests, nor of an institutionalization of the community itself.¹¹³ International law-making itself remains largely State-centred despite increasing informal influences by groups of individuals and IOs. While the United Nations is currently the closest to an inclusive institution,¹¹⁴ it remains—despite reforms—run for and by States and does not officially involve other subjects such as IOs and individuals in UN law-making processes. This is particularly striking when compared with law-making processes in the EU where European common interests are clearly given an institutional voice. As a result, there is an international legal order, but the subjects of that legal order do not yet form the political community that can legitimize those legal norms; they are ruled by law without being able to rule the law, and hence to constitute themselves.

Of course, this does not mean that the international community should not become political. On the contrary, the constitution of such an international political community is a normative requirement based on mutual interests and interdependence; it does not merely derive causally from factual interdependence or

¹⁰⁷ Archibugi, D., 'Cosmopolitan Democracy and Its Critics: A Review', *European Journal of International Relations*, 10 (2004), 437.

¹⁰⁸ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4); Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 9); Cohen and Sabel, 'Extra-Republicanism Nulla Justitia?' (above, n. 31), 159.

¹⁰⁹ MacDonald, R. St. J., 'The Principle of Solidarity in Public International Law', in Dominicié, C., Parry, R., and Raymond, C. (eds.), *Études de droit international en l'honneur de Pierre Lalumière* (Basel: Helbing Lichtenhahn, 1993), 275.

¹¹⁰ Calhoun, C., 'The Class Consciousness of Frequent Travellers: Towards a Critique of Actually Existing Cosmopolitanism', in Archibugi, D. (ed.), *Debating Cosmopolitics* (London: Verso, 2003), 86; Cohen and Sabel, 'Extra-Republicanism Nulla Justitia?' (above, n. 31), 159.

¹¹¹ Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Bohman, *Democracy Across Borders* (above, n. 23).

¹¹² Abi-Saab, 'Whither the International Community?' (above, n. 4); Simma and Paulus, 'The "Power in World Politics"' (above, n. 4), 276; Grant and Keohane, 'Accountability and Abuses of Public International Law' (above, n. 16), 33 on 'imagined communities'; Koskeniemi, 'The Fate of Public International Law' (above, n. 14), 30.

¹¹³ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4), 249; Simma and Paulus, 'The "International Community"' (above, n. 4), 276; Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3), 285.

¹¹⁴ Simma and Paulus, 'The "International Community"' (above, n. 4), 274.

mutual influence on each other's interests.¹¹⁵ Some authors have argued, however, that the international community cannot become a political community because of the lack of plausibility of the political and democratic processes required for it to develop and consolidate. True, aiming only at full and direct democratic participation on the model of what applies in national democracies is implausible for reasons of size and plurality.¹¹⁶ Democratic representation is a far more realistic and promising model to pursue in the circumstances prevailing at the international level.¹¹⁷ Moreover, representation actually allows for the reflexive inclusion of all affected albeit non-territorial interests and for editorial and constitutory democracy-enhancing mechanisms.¹¹⁸ In any case, as in the national State, every single type of law-making process, depending on its agents and the level at which it takes place, should be matched by different democratic procedures. Thus, the transactional, the legislative, and the regulatory types of international law-making processes should be institutionalized differently to gain in democratic legitimacy, just as different sources of national law whether customary, legislative, or regulatory are organized differently.¹¹⁹

b. What international community?

i. Multilateral and multilevel community

If the international political community lies between a mere society of States and a world State's political community, it should be able to encompass both States (and groups of States) and individuals (and groups of individuals) in a complex political entity.¹²⁰ This is not an entirely new phenomenon: in many areas of international governance, such as in the EU, one already finds different national *demos* represented as such in the same international political processes, both *per se* (as in the context of interparliamentary collaborations) and as States, besides

¹¹⁵ Bohman, 'Republican Cosmopolitanism' (above, n. 23), 338–40; Bohman, 'Nondomination and Transnational Democracy' (above, n. 26), 201.

¹¹⁶ e.g. Grant and Keohane, 'Accountability and Abuses of Power in World Politics' (above, n. 16), 34.

¹¹⁷ Besson, *The Morality of Conflict* (above, n. 40); Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Besson, 'Institutionalizing Global Democracy' (above, n. 15).

¹¹⁸ Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Besson, 'Institutionalizing Global Democracy' (above, n. 15); Keohane, R., Macedo, S., and Moravcsik, A., 'Democracy-Enhancing Multilateralism', IIJL Working Paper 2007/4, <http://ducis.jhfc.duke.edu/wp-content/uploads/archive/documents/Keohane_paper.pdf>; Pettit, P., 'Democracy, National and International', *Monist*, 89 (2006), 302; Bohman, 'Republican Cosmopolitanism' (above, n. 23), 350–1.

¹¹⁹ Stein, 'International Integration and Democracy' (above, n. 54); Weiler, 'The Geology of International Law' (above, n. 17); Besson, 'Theorizing the Sources of International Law' (above, n. 12).

¹²⁰ Simma, 'From Bilateralism to Community Interest in International Law' (above, n. 4), 234; Simma and Paulus, 'The "International Community"' (above, n. 4), 266; Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3) on this 'duality'; Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 447 on the basis of the Kantian policy of peoples.

the individuals in those different *demoi*.¹²¹ Thus, rather than seek to identify a unitary global *demoi*, be it national or supranational, the alternative to an indirectly democratic global polity *qua* union of democratic States should be a directly *demoi*-cratic global polity *qua* union of peoples as States and individuals.¹²²

As a result, the international community should be understood as both multilevel and multilateral.¹²³ It is composed of as many overlapping and interlocking communities as international law subjects and this is what is meant by the multilateral community of communities. And it is comprised of many different levels of institutional grouping of all or some of those subjects whether national, transnational, international, or supranational without global institutions or fora where all subjects and all institutions are represented or can converge.¹²⁴ For instance, the EU is multilateral in the sense that it involves both States and individuals as subjects and multilevel in the sense that they are grouped in supranational (Commission), international (Council), and transnational (Parliament) institutions.

Of course, official fora of deliberation and decision need to be complemented by non-official ones that account for the civil dimension of the international public sphere. This is the case at the national level, but these channels are even more important to put into place at the global level; indeed, accountability mechanisms are spatially and chronologically deferred in a functional democracy and need to be complemented by strong and interconnected public spheres.¹²⁵ It is important, however, to distinguish the democratization of international law-making from its privatization.¹²⁶ While non-official or non-public channels of communication and deliberation need to be developed to complement those

¹²¹ Weiler, J., 'To Be a European Citizen: Eros and Civilization', in Weiler, J. (ed.), *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), 324; Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Bohman, *Democracy Across Borders* (above, n. 23).

¹²² Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Besson, 'Institutionalizing Global Democracy' (above, n. 15); Nicolaidis, K., 'We, The Peoples of Europe...', *Foreign Affairs*, 83 (2004), 97.

¹²³ e.g. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 9); Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (above, n. 9), 324; and Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9); Bohman, 'Republican Cosmopolitanism' (above, n. 23), 336; Cheneval, *La Cité des peuples* (above, n. 23); Besson, 'Institutionalizing Global Democracy' (above, n. 15).

¹²⁴ e.g. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (above, n. 3), 434; Thompson, J., *Justice and World Order: A Philosophical Inquiry* (London: Routledge, 1992).

¹²⁵ Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Besson, 'Institutionalizing Global Democracy' (above, n. 15); Dryzek, J. S., *Deliberative Democracy and Beyond* (Oxford: Oxford University Press, 2000).

¹²⁶ Besson, 'Theorizing the Sources of International Law' (above, n. 12). Contrà: Reisman, M., 'The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application', in Wolfrum, R. and Röhren, V. (eds.), *Developments of International Law in Treaty Making, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Berlin: Springer Verlag, 2005); Fischer-Lessano, A. and Teubner, G., *Regime-Kollisionen: Zur Fragmentierung des Völkerrechts* (Frankfurt: Suhrkamp, 2006).

multilevel political communities on the model of what takes place in the EU,¹²⁷ and are in fact already largely developed,¹²⁸ they cannot be regarded as political sub-communities *per se*. Although it is true that more and more transnational administrative regulation stems from private groups and bodies, their role in the international civil society alluded to previously should not be confused with a political function.¹²⁹ The same applies to non-governmental organizations in general, which play a non-negligible part in the multilateral processes of law-making in IOs and increasingly so, but should not be regarded as law-makers in themselves for lack of democratic credentials.

In fact, the multilateral and multilevel nature of the international political community, with its imperfectly overlapping and partly imbricated sub-communities, explains the internal pluralism of international law—particularly the lack of hierarchy among its sources such as treaty-law, customary law, general principles, case-law, etc.¹³⁰ It also accounts for the fragmentation of international law that is comprised of many different regimes of equal formal rank.¹³¹ Finally, the multilateral and multilevel international political community also fits the external legal pluralism between international law and national law that do not necessarily lie in hierarchical priority to each other, but on the contrary complement each other.¹³²

ii. Pluralistic community

An important feature of global democracy in the multilevel and multilateral international political community is that it takes place at the same time at many different levels of territorial governance: national, international, supranational, and transnational.¹³³ As a result, managing a multilateral and multilevel

¹²⁷ Besson, S., 'The Many European Constitutions and the Future of European Constitutional Theory', *Archiv für Rechts- und Sozialphilosophie Beiheft: Staats- und Verfassungstheorie im Spannungsfeld der Disziplinen*, 105 (2006), 160.

¹²⁸ Bohman, 'Republican Cosmopolitanism' (above, n. 23), 336; Fraser, 'Die Transnationalisierung der Öffentlichkeit' (above, n. 20), 224; Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 438.

¹²⁹ e.g. Dryzek, *Deliberative Democracy and Beyond* (above, n. 125); Besson, 'Sovereignty in Conflict' (above, n. 17), 131.

¹³⁰ Besson, 'Theorizing the Sources of International Law' (above, n. 12); Besson, S., 'Whose Constitution(s)? International Law, Constitutionalism and Democracy', in Dunoff, J. and Trachtman, J. (eds.), *Ruling the World: International Constitutionalism* (Cambridge: Cambridge University Press, forthcoming).

¹³¹ Koskeniemi, 'The Fate of Public International Law' (above, n. 14), 4–9.

¹³² Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 443 on this complementarity; see also Paulus, 'The Emergence of the International Community and the Divide Between International and Domestic Law' (above, n. 11); Besson, 'Theorizing the Sources of International Law' (above, n. 12).

¹³³ Sassen, 'The Participation of States and Citizens in Global Governance' (above, n. 67); Held, D., 'The Transformation of Political Community: Rethinking Democracy in the Context of Globalization', in Shapiro, I. and Hacker-Cordon, C. (eds.), *Democracy's Edges* (Cambridge: Cambridge University Press, 1999), 84.

international community requires coherence-promoting mechanisms at each level of deliberation and decision-making.¹³⁴

This is eased by the inclusion of the interests of the international community in general at all levels of international law-making. Indeed, not only should the international political community be understood as connecting a plurality of democratic subjects at many levels whether national, transnational, international, or supranational, but it can only be effectively understood as such if it is conceived of as qualitatively pluralistic as well. Plurality is not only a quantitative characteristic of global democracy, but also a qualitative one *qua* functioning mode in each of these many subjects of global democracy wherever they are localized. Multilevel law-making alone remains a territorialized mode of international law-making that does not fully match the largely deterritorialized application of international law and its impact on subjects whose interests are not necessarily included among those taking part or represented at each level and hence in the entity deliberating and deciding.¹³⁵

On this model, different political communities—either located separately at national level or together in different fora at the transnational, international, or supranational global levels—constitute together a global functional *demos*. For instance, national citizens elect and vote in national elections as global citizens by including further interests of members of the international community in their deliberations, thus turning national policies into more or less global ones depending on the topics addressed. As such, citizens are simultaneously national and international citizens, and have to deliberate as coherently as possible with those different sets of interests in mind.¹³⁶ Similarly, in international institutions, national representatives deliberate neither only as representatives of their national *demos* nor as those of a single global *demos*, but as representatives of a functional *demos of demoi*. These many fragmented and functional international communities constitute themselves alongside deliberations and decisions at the different levels of the international community depending on the interests affected by the laws in the making. Of course, the inherent pluralism of each political community in a globalized world also implies a certain degree of fluctuation.¹³⁷

¹³⁴ Besson, S., 'From European Integration to Integrity—Should European Law Speak with Just One Voice?', *European Law Journal*, 10 (2004), 257; Kumm, M., 'Constitutional Democracy Encounters International Law: Terms of Engagement', in Choudhry, S. (ed.), *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007), 256.

¹³⁵ Besson, 'Deliberative Demoi-cracy in the European Union' (above, n. 27); Besson, 'Institutionalizing Global Demoi-cracy' (above, n. 15).

¹³⁶ On 'European Citizens', see Besson, S. and Urzinger, A., 'Toward European Citizenship', *Journal of Social Philosophy*, 39 (2008), 185. Contra: Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 446.

¹³⁷ Abi-Saab, 'La "communauté internationale" saisie par le droit' (above, n. 4), 81.

c. *Whose international community?*

i. **The criterion of inclusion**

When one extends democratic deliberation across territorial politics functionally to all those significantly affected by a decision, one may therefore count a new kind of political constituent or subject (i.e. moral-political constituent) besides electoral or formal political constituents in each territorial entity.¹³⁸ If the global functional *demos of demoi* may be constituted on grounds of deterritorialized solidarity, one needs to determine what makes it the case that someone is a citizen of a functional *demos* when the individual is not member of the corresponding territorial *demos*. This is the famous problem of the boundaries of democracy or of the constitution of the *demos*.¹³⁹

When general international law is at stake, it is the international community as a whole that is affected and hence should be included. Some international legal norms, however, do not impact all international law subjects' interests.¹⁴⁰ Determining who is to be part of the sub-communities at the different levels discussed above, but also of the functional communities represented at each of those levels—when all those whose interests are affected are not effectively represented by participants in those sub-communities—requires a criterion.

In view of the argument in the previous sections, the criterion relates to the reciprocal interests in one another's actions within a given group of people and, more precisely, to *the way in which certain interests are affected by a given decision*. Most authors mention the fact of being 'affected' by a polity's decision as sufficient to trigger the inclusion in a given political community.¹⁴¹ This should clearly be understood to mean all possibly affected interests so as to avoid any time incoherence in the statement.¹⁴² To prevent the principle from enfranchising every single person, however, it is important to narrow the scope of those possibly affected by a decision. In this respect, some may claim that being affected is a purely factual criterion that anyone can fill, and does not then suffice to trigger

¹³⁸ Besson, 'Deliberative Demoi-cracy in the European Union' (above, n. 27); Gutmann, A. and Thompson, D., 'What Deliberative Democracy Means', in Gutmann, A. and Thompson, D. (eds.), *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), 37–8; Thompson, D., 'Democratic Theory and Global Society', *The Journal of Political Philosophy*, 7 (1999), 111 and 120.

¹³⁹ e.g. Whelan, F. G., 'Prologue: Democratic Theory and the Boundary Problem', in Penneck, R. and Chapman, J. (eds.), *Liberal Democracy, Nomos XXV* (New York: New York University Press, 1983), 13; Pogge, *Human Rights and World Poverty* (above, n. 27); Benhabib, *The Rights of Others* (above, n. 105); Gould, C., *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004); Besson, 'Deliberative Demoi-cracy in the European Union' (above, n. 27); Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18); Fraser, 'Die Transnationalisierung der Öffentlichkeit' (above, n. 20), 248–9.

¹⁴⁰ Contra: Fassbender, 'The United Nations Charter as Constitution of the International Community' (above, n. 9), 561–6.

¹⁴¹ Gould, *Globalizing Democracy and Human Rights* (above, n. 139); Gutmann and Thompson, 'What Deliberative Democracy Means' (above, n. 138); Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18).

¹⁴² Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18), 52–4.

normative consequences and democratic rights in particular. Arguably, therefore, the line must be drawn somewhere.

The proposed criterion is that those whose basic interests (i) are affected (ii) significantly (iii) by policy decisions, are able to participate directly or indirectly in the process of making such decisions.¹⁴³ This criterion allows for the constitution of fluctuating functional communities depending on the issues and interests affected.¹⁴⁴

The first element pertains to the *kind* of interests affected: they should be basic or fundamental interests, i.e. interests in the conditions for one's self-development or self-determination. Only when a decision affects basic needs or entitlements is one then entitled to have a say. Further, these basic interests are objective interests. As such, the criterion does not depend on how important one's interests are actually felt to be. As a result, external preferences may not count as interests for our purpose.

The second element relates to the *degree* of affectation of the interests: it must be comparable to a *de facto* obligation.¹⁴⁵ To avoid an open-ended factual criterion of affectedness, some authors opt for bindingness as a test for the degree of affectation of one's fundamental interests. The difficulty is that stakeholders in overlapping communities of fate are not most of the time strictly speaking legally bound by the democratic decisions taken by other polities. In practice, the difference is often moot, since very often stakeholders simply have to abide by the new legal situation thus created. As such, their being 'affected' is already, albeit indirectly, quasi-normative and not only factual.¹⁴⁶ This kind of quasi-normative affectedness can be measured in terms of domination.¹⁴⁷

The third element pertains to the *quality* of affectedness of the interests; the normative or quasi-normative impact on the interest must be direct and unmediated.¹⁴⁸ This need not be identified with actual coercion,¹⁴⁹ as laws can have normative effects without involving coercion and *a fortiori* quasi-normative effects can be coercion-free. However, the causality link between the measure of significant impact and those affected should be strong. Affectedness should be quantitatively significant in the sense of being likely to lead to one's domination and to the exercise of arbitrary power on one.¹⁵⁰

¹⁴³ Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Besson, 'Institutionalizing Global Democracy' (above, n. 15); Pogge, *Human Rights and World Poverty* (above, n. 27), 184; Caney, 'Cosmopolitan Justice and Institutional Design' (above, n. 15), 727 ff.

¹⁴⁴ Abi-Saab, 'La "communauté internationale" saisie par le droit' (above, n. 4), 81.

¹⁴⁵ Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18), 49–50, *a contrario*.

¹⁴⁶ *ibid.*

¹⁴⁷ On the notion of domination, see Besson and Marti, introduction to this volume.

¹⁴⁸ Caney, 'Cosmopolitan Justice and Institutional Design' (above, n. 15), 728; Besson, 'Institutionalizing Global Democracy' (above, n. 15).

¹⁴⁹ *Contra*: Caney, 'Cosmopolitan Justice and Institutional Design' (above, n. 15), 728.

¹⁵⁰ Bohman, 'Republican Cosmopolitanism' (above, n. 23), 340–2.

ii. The organization of inclusion

Based on democratic principles, inclusion in the international political community should be organized in a paritary way in terms of chances of participation or representation of the interests of those affected in the international law-making process.¹⁵¹

This is, of course, provided there is a rough equality of stakes among those who have shared interests in the community.¹⁵² This additional condition pertains to the *scope* of the quality of affectedness used. One may ask indeed whether all those included should all be significantly affected in the same way or in a way sufficiently similar to be deemed as having equal stakes. Some have argued participants should have an input in public deliberations that match the level of their potential affectedness in comparison to that of others.¹⁵³ Political equality and the principle of equal stakes probably require, however, drawing a line somewhere to prevent comparatively minimally (albeit objectively significantly) affected people from having a say, even a proportionate one, in a given political community. The dispersal of voices might indeed lead to a decrease in political equality overall, when many of those included are so loosely affected that their input is minor but minimizes the impact of the majority whose interests are roughly equally affected by the decision.

As a matter of fact, some authors argue that members in the international community can have interdependent interests, but cannot be deemed as equally affected and hence do not have equal stakes in certain packages of issues.¹⁵⁴ This approach to global democracy is too statist and focused on a world State's political community, however. Once it has become clear that the international community is both a community of States (and groups of States) and individuals (and groups of individuals), packages of issues can no longer be restricted to what international or supranational organizations can do about those issues. The law issued by IOs is only a very small part of public international law, since the point of international law is to give national authorities obligations to implement and concretize international norms, thus creating equal stakes for all via the intervention of national legislators and other institutions.¹⁵⁵ As a result, nowadays almost all areas of national law have been internationalized one way or the other and vice-versa, thus making the distinction between national and international law moot, at least from the perspective of stakeholders.¹⁵⁶ Moreover, with the densification—the so-called legalization (*Verrachlichung*) of international law—packages of issues get constituted at the global level with some of us having more

¹⁵¹ Fraser, 'Die Transnationalisierung der Öffentlichkeit' (above, n. 20), 247; Christiano, 'International Institutions and Democracy' (above, n. 48).

¹⁵² Christiano, 'International Institutions and Democracy' (above, n. 48).

¹⁵³ Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18).

¹⁵⁴ Christiano, 'International Institutions and Democracy' (above, n. 48).

¹⁵⁵ Besson, 'Institutionalizing Global Democracy' (above, n. 15).

¹⁵⁶ Besson, 'Theorizing the Sources of International Law' (above, n. 12).

stakes in issues X, while others have more stakes in issues Y, but with all issues being connected one way or another. As a result, members of the international community can be regarded as sharing interests and as having roughly equal stakes in the interdependence of those interests.

The democratic principle of parity has a few important consequences in a multilevel and multilateral political community where many subjects deliberate and decide at the same time in different settings and at many levels on separate, but also sometimes on overlapping issues.

To start with, the paritary nature of the international community implies that there should not be a strict division of labour, neither between the different institutional levels as there would be in a federal entity nor between the different multilateral subjects in the political processes. Competences should fluctuate and be of many kinds to accommodate the subject matter. Some authors, who have recently shifted from a world State's political community model to a multilevel community model, have made this mistake, however, and foresee a division of labour between the different political subjects and hence the different political levels.¹⁵⁷ Such a division between subjects and competences within institutional levels of global governance contradicts the European experience, where all issues of daily European internal politics are decided through political processes that associate States *and* individuals at different levels and pertain to the same subject matters.

In terms of paritary rights within each level of international law-making, things are made even more complex by the composite nature of many institutions of the international community that comprises both States (and groups of States) *and* individuals (and groups of individuals). For instance, a major concern is whether the principle of political equality can transcend categories of international law-makers applying to States, IOs, and individuals at the same time (question of the commensurability of international political equality), on the one hand, and whether equality can be said to apply to other international subjects than individuals (question of the transitivity of international political equality), on the other.

As to the first concern, once political equality is measured according to a commensurable standard such as numbers of political representatives, input rights in procedures, etc., things might not be as bad as they first seem. State sovereignty is decoupled, somehow, from popular sovereignty in international law and this double sovereignty raises interesting issues when those two components usually imbricated do not entirely match each other. The hybrid mechanisms developed in the European Union may be used as an example of ways of including and combining national and individual interests in international

¹⁵⁷ e.g. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?' (above, n. 9); Habermas, 'Eine politische Verfassung für die pluralistische Weltgesellschaft?' (above, n. 9), 346; Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 444. For a critique, see Lafont, chapter 11 in this volume.

law-making: proportional voting, double majorities, and qualified majorities, but also bi-cameral assemblies are often used in federal politics to protect political equality across the board.¹⁵⁸ The inclusion of IOs among the subjects and law-makers of other international bodies, such as the EU in the WTO or the EU in the Council of Europe in the near future, trigger even more complex issues of parity in representation and participation. Of course, respecting the political equality of non-democratic States might neutralize the respect owed to their population's interests.¹⁵⁹ It is crucial therefore to consolidate in priority democratic standards at national level through processual, but especially substantive international law along the lines discussed previously.

The second concern can also be brushed aside by reference to the principles applicable in federal politics. Those politics protect the political equality of sub-polities and political groups. True, applying basic principles of political equality to sovereign States and IOs will require revising traditional rather formalistic accounts of sovereign equality between States based on Article 2 par. 1 UN Charter. To take just a few examples, some of these consensualist accounts regard majority rule in international law-making, unobjectionable customary law, and *jus cogens* norms as examples of State inequality.¹⁶⁰ Based on egalitarian accounts of majority rule in a polity,¹⁶¹ however, these may be deemed as *prima facie* inequalities only. In a republican multilateral community, such formal inequalities should rather be understood as protecting the political equality of all subjects including individuals and other States and hence as consolidating sovereignty *qua* non-domination.

iii. The responsibility of inclusion

An objection that is often raised at this stage pertains to the agent in charge of determining that the criterion for inclusion is fulfilled and that bears responsibility for ensuring that inclusion.¹⁶² In the national State, territory was traditionally used as convenient shorthand of affectedness and therefore as a mode of delimitation of the polity before law was globalized and started applying across functional rather than territorial lines. After all, those whose interests were affected by a decision usually lived together on the same territory. In this sense, territorialization raises the well-known paradox of the democratic polity, according

¹⁵⁸ Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik' (above, n. 9), 450–1.

¹⁵⁹ Caney, 'Cosmopolitan Justice and Institutional Design' (above, n. 15), 725; Buchanan, 'Legitimacy of International Law' (above, n. 13).

¹⁶⁰ e.g. Kingsbury, B., 'Sovereignty and Inequality', *European Journal of International Law*, 9 (1998), 599.

¹⁶¹ e.g. Beitz, C. R., 'Procedural Equality in Democratic Theory: A Preliminary Examination', in Chapman, J. W. and Pennock, J. R. (eds.), *Liberal Democracy, Nomos XXV* (New York: New York University Press, 1983), 71; Besson, *The Morality of Conflict* (above, n. 40), 245 et seq.

¹⁶² e.g. Grant and Keohane, 'Accountability and Abuses of Power in World Politics' (above, n. 16), 34; Cohen and Sabel, 'Extra-Republicam Nulla Justitia?' (above, n. 31), 174.

to which the modern democratic polity is both constituted and constrained by pre-political territorial boundaries and hence cannot be constituted and function as democratically as it should.¹⁶³ Territoriality is no fatality, however, and democratic iterations may gradually help fill the gap between those affected and those participating.¹⁶⁴

The same conclusion applies to the determination of the boundaries of the international political community. It would be wrong to hope for a democratic self-determination of the boundaries of the international community;¹⁶⁵ self-determination necessarily starts by being undemocratic or democratic by accident, where democracy means deciding according to the procedural rules and standards established by the groups of all those affected, and then gradually improves through democratic iteration.¹⁶⁶ This does not mean, however, that the determination of those affected and self-constitution are entirely unprincipled and pragmatic.¹⁶⁷ Nor should it be held to imply that democracy is incremental however it first started.¹⁶⁸

This is even less the case with international self-determination. Contrary to what one may expect, indeed, the international political community is already characterized by a rich egalitarian background of republican duties due to its inherent quantitative and qualitative pluralism. This allows for the responsibility for inclusion to be allocated more precisely.

To start with, the *multilateral* and *multileneal* nature of the proposed model of cosmopolitan republicanism implies that the pre-existing democratic autonomy of States, and accordingly of IOs, should be respected. This in turn constrains the personal scope of proto-deliberations in the international community. This actually also constitutes a duty of States to their own citizens, who can claim for as inclusive political communities beyond the State as possible in order to protect their interests and freedom from domination on the part of other individuals, States, and IOs; these duties could even be sanctioned through national electoral processes.¹⁶⁹ In this respect, groups of States, which have already internalized their mutual interests in their national deliberations and constituted inclusive common fora of deliberation and decision, will have no difficulty to expand those

¹⁶³ Benhabib, *The Rights of Others* (above, n. 105), ch. 4; Pogge, T., 'Creating Supra-National Institutions Democratically: Reflections on the European Union's "Democratic Deficit"', *The Journal of Political Philosophy*, 5 (1997), 163; Whelan, 'Prologue' (above, n. 139), 13.

¹⁶⁴ e.g. Habermas, 'Constitutional Democracy' (above, n. 64), 766; Benhabib, *The Rights of Others* (above, n. 105); Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Delbrück, 'Exercising Public Authority Beyond the State' (above, n. 68), 40; Bohman, 'Nondomination and Transnational Democracy' (above, n. 26), 208.

¹⁶⁵ e.g. Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18).

¹⁶⁶ Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Besson, 'Institutionalizing Global Democracy' (above, n. 15).

¹⁶⁷ Contra: Grant and Keohane, 'Accountability and Abuses of Power in World Politics' (above, n. 16), 34.

¹⁶⁸ Goodin, 'Enfranchising All Affected Interests, and its Alternatives' (above, n. 18), 44–5.

¹⁶⁹ Besson, 'Institutionalizing Global Democracy' (above, n. 15).

requirements beyond the regional level to the international one; one may think of EU Member States in this context.¹⁷⁰

Moreover, if, as alluded to before, political membership is the fundamental condition of non-domination and hence of basic human rights, the criterion of significant affectedness generates an individual *right* to democratic inclusion on the part of those excluded. This right to democratic inclusion is allegedly part of the normative background of justice beyond the State.¹⁷¹ What this implies is that there are as many duty-bearers as there are sub-communities in the international community *lato sensu*. Each political community, whether a State or a transnational, international, or supranational organization, owes a duty of inclusion to non-members of that community who are significantly affected by its decisions, even though they are also members at other levels and in other sub-communities of the larger international community.

A common and difficult objection lies in national sovereignty and more precisely in the concept of popular sovereignty.¹⁷² It seems *prima facie* counterintuitive indeed to argue that a polity's democratic process should be concerned with the interests of another and vice-versa. This objection relies on an outdated conception of sovereignty, however.¹⁷³ Contemporary State sovereignty can no longer be equated only with a sovereignty of competence or immunity, but has also become a sovereignty of responsibility towards one's State's population, and towards others' whose interests it might affect. In circumstances of increasing global interdependence, sovereignty can only be exercised in co-operation, whether this takes place at the national, international, supranational, or transnational level. As a result, the exercise of sovereignty becomes reflexive and dynamic as it implies a search for the best allocation of power in each case, thus questioning and potentially improving others' exercise of sovereignty as well as one's own.¹⁷⁴

Since democratic rule is one of the values protected by popular sovereignty, the correct exercise of sovereignty implies, on the one hand, looking for the best level of decision to endow those affected by that decision with the strongest

¹⁷⁰ Besson, 'From European Integration to Integrity' (above, n. 134); Besson, 'The EU and Human Rights' (above, n. 21), 323; Nicolaidis, K. and Lacroix, J., 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms', in Foot, R., Gaddis, J. L., and Hurrell, A. (eds.), *Order and Justice in International Relations* (Oxford: Oxford University Press, 2003), 125.

¹⁷¹ Cohen and Sabel, 'Extra-Republicanism Nulla Juristicia?' (above, n. 31), 173–4; Bohman, 'Republican Cosmopolitanism' (above, n. 23), 344.

¹⁷² Goldsmith, J. and Posner, E., *The Limits of International Law* (Oxford: Oxford University Press, 2005), ch. 8; Buchanan, A., 'Democracy and the Commitment to International Law', *University of Georgia Journal of International and Transnational Law*, 34 (2006), 305.

¹⁷³ Buchanan, 'Legitimacy of International Law' (above, n. 13); Falk, R. and Strauss, A. L., 'On the Creation of Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty', *Stanford Journal of International Law*, 36 (2000), 191.

¹⁷⁴ Besson, 'Sovereignty in Conflict' (above, n. 17), 131; Cohen, 'Whose sovereignty?' (above, n. 43), 1; Cohen, 'Sovereign Equality vs. Imperial Right' (above, n. 43), 485.

voice and hearing.¹⁷⁵ Often, this will imply giving priority to the level of governance closer to those affected, but not necessarily as EU decision-making has demonstrated.¹⁷⁶ Functional sovereignty also leads, on the other hand, to a change in the nature of the democratic process itself and in the scope of those included, whether at national, transnational, international, or supranational level; this is particularly important at national level where all affected interests cannot always participate or even be represented. This functional inclusion is not only democratically beneficial to non-national interests included, but also to pre-existing national interests. Thus, minorities who were previously under-represented or social groups whose inclusion was not sufficiently guaranteed in certain EU Member States have been empowered by the broader inclusion of all European interests affected in national decision-making processes.¹⁷⁷ Transnational deliberation fora also have an editorial impact on national deliberation processes through the intervention of other politics and international subjects, thus rejuvenating the national separation of powers.¹⁷⁸ As a result, national democracy and hence popular sovereignty are enhanced, rather than undermined by the development of an international political community.

IV. Conclusion: *de iure ex civitate gentium*

The international community has long been invoked in the writings of political theorists, and is increasingly mentioned in positive international law. Nevertheless, the boundaries and nature of such an international political community have largely remained indeterminate despite many recent proposals as to how to improve the legitimacy of international law and its democratic credentials. Important developments in the subjects, objects, and scope of international law have made its identification and consolidation more pressing, however. From a republican perspective, indeed, subjects of international law's empire should also be able to become citizens of international law's republic.

¹⁷⁵ Maduro, M., 'Where to Look for Legitimacy?', in Eriksen, F. O., Fossum, J. E., and Menendez, A. (eds.), *Constitution Making and Democratic Legitimacy* (ARENA Report 5/02, Arena, Oslo 2002); Besson, 'Institutionalizing Global Democracy' (above, n. 15).

¹⁷⁶ Schmidt, V., 'The European Union: Democratic Legitimacy in a Regional State?', *Journal of Common Market Studies*, 42 (2004), 975.

¹⁷⁷ Besson, 'From European Integration to Integrity' (above, n. 134); Besson, 'Deliberative Democracy in the European Union' (above, n. 27); Besson, 'Institutionalizing Global Democracy' (above, n. 15); Dryzek, J. S., 'Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia', *Political Theory*, 33 (2005), 218; Schmidt, 'The European Union' (above, n. 176), 980–1; Duina, F. and Oliver, P., 'National Parliaments in The European Union: Are there Any Benefits to Integration', *European Law Journal*, 11 (2005), 173; Maduro, 'Where to Look for Legitimacy?' (above, n. 175).

¹⁷⁸ Pettit, 'Democracy, National and International' (above, n. 118), 302; Keohane, Macedo, and Moravcsik, 'Democracy-Enhancing Multilateralism' (above, n. 118).

This chapter argued that the international community ought to be conceived and constructed as multilevel, multilateral, and pluralistic. The controversial criterion of one's inclusion in the international political community and the question of the responsibility for inclusion were also refined to provide a clearer idea of those to be included into the legitimacy chain of international law-making. Unsurprisingly on such a fundamental topic, more questions have arisen than solutions and, as a result, little progress seems to have been made on more practical issues raised in current international law scholarship. It is crucial, however, not to place the cart before the horse. The key to the transformation from a pluralistic international legal order to a constitutionalized one arguably lies in the gradual democratization of international law-making.¹⁷⁹ This in turn requires understanding the process by which international law subjects can learn and explore collectively what their common interests are, how best to protect them, and, in other words, how to constitute themselves as a political community.

¹⁷⁹ Besson, 'Whose Constitution(s)?' (above, n. 130).