# 14

# From Equal State Consent to Equal Public Participation in International Organizations

## *Institutionalizing Multiple International Representation*

SAMANTHA BESSON AND JOSÉ LUIS MARTÍ*

## 14.1 INTRODUCTION

International organizations[1] (hereafter IOs) have become pivotal to international law-making.[2] It is difficult, as a result, to imagine the international institutional order of, let us say, 2050 incorporating fewer or weaker IOs. One may not predict how IOs will evolve, of course, but it is easy to understand that they will, and probably should, become more pervasive and more powerful.

Admittedly, what IOs achieve today does not quite match the peoples of this world's expectations. It is a widely shared assessment that the law and institutions of existing IOs are not effective enough to address complex transnational challenges such as climate change, pandemics, war, hunger or extreme poverty. We need stronger IOs, able to adopt and implement

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[1] '*International* organizations' are understood here as *inter-State* organizations (sometimes referred to, far too restrictively, as 'intergovernmental') or, more exactly, as *inter-public* ones. As we will argue, indeed, those IOs should be re-instituted as truly public international institutions, comprised of States and possibly of other public institutions (such as cities, regions) that may work as pivotal public institutional frameworks representing the 'peoples' or self-governing political communities: see Samantha Besson, 'Democratic Representation within International Organizations: From International Good Governance to International Good Government' (2022) 19 *International Organizations Law Review* 489–527; Samantha Besson, *The Public & Private Relation and International Law* (Leiden: Brill, in press, 2024), ch. 5. The chapter will draw no further distinctions between those IOs, including by reference to their scope, size or resources, and even when they present themselves as 'technical' and not 'political' as a result. Democratic legitimacy should be expected of all of them when they claim to adopt international law, albeit in different ways, of course.

[2] Because the answer to the analytical question of the 'legality' of international law cannot entirely be separated from that to the normative question of its 'legitimacy', we abstain from specifying the concept of international 'law-making' at this stage.

international law and exert institutional power to deliver effective solutions to those problems. True, some IOs already exert significant power over our lives, not the least through international law-making. Paradoxically, however, they are also often criticized for doing so, especially with respect to their lack of legitimacy. Most of the time, indeed, the powers they exercise in such cases are acquired by circumventing their Member States – or, at least, a majority of them to the advantage of a minority of powerful States – and the law they adopt outside their official intergovernmental procedures is usually referred to as 'informal' or 'soft' as a result. We certainly need our IOs to be more powerful. However, delegating some of our States' powers to them to make them more effective is often perceived as too dangerous, unless we are able to secure and strengthen their democratic legitimate authority in the first place.

It is against this background that this chapter develops its argument to enhance the democratic legitimacy of IOs.[3] It does so by focusing on one of its main articulating principles: the principle of equal State consent.[4] The equal acceptance of an IO's international law and decisions by its Member States *qua* main international representatives of their peoples is, indeed, often regarded as echoing the role of equal individual consent of those States' citizens in domestic democratic self-government. From a democratic self-government perspective, consent is one way to link the authorship of the law to the latter's legitimate authority.

Our main claim is that the principle of equal State consent should be approached as part of the problem, when addressing the effectivity and the democratic deficits of IOs, but also as part of the solution due to its democratic value.

At first sight, indeed, the principle of equal State consent seems to be strangling IOs from within. In many instances, States are not only the institutions that have prevented IOs from gaining more power and being more effective, but they have also not been very good at making them democratically accountable either. For instance, should we blame the World Health Organization (hereafter WHO) for not having been able to coordinate not only more effective, but also more legitimate responses to the COVID-19

[3] For a first attempt at applying the proposed multiple international representation model to IOs, see Besson, 'Democratic Representation', fn. 1; Samantha Besson, 'L'égalité des États membres de l'Union européenne: Un nouveau départ en droit international de l'organisation des États?', in Edouard Dubout (ed.), *L'égalité des États membres de l'Union européenne* (Brussels: Bruylant, 2022), pp. 263–298.

[4] See Samantha Besson, 'State Consent and Disagreement in International Law-Making: Dissolving the Paradox' (2016) 29(2) *Leiden Journal of International Law* 289–316, at 290, 295.

pandemic knowing that certain States (or, at least, their governments) had been delaying, sometimes for years, the delegation of more powers to the organization and more extensive compulsory public funding? Should we hold the United Nations (hereafter UN) system itself responsible for not having done more to prevent war or extreme poverty when it has been systematically paralyzed at all levels by the veto of certain members of the Security Council? And, finally, whom should we blame for the absence of an IO specifically designed to develop and coordinate effective global strategies to mitigate climate change but States?

By action or omission, then, States, invoking the principle of equal State consent, have hindered their IOs to develop not only a more effective, but also a more democratically legitimate government.[5] At the same time, however, States undoubtedly remain the institutions setting up, organizing and controlling most IOs and, accordingly, the main drivers of international law-making therein. As such, they are also the institutions that have contributed to the increasing empowerment of certain IOs, such as the European Union (hereafter EU), and the ones actually best organized to ensure democratic representation of their peoples in themselves, but also through the public and private institutions they have gradually associated to their IOs' law-making processes.

To escape what one may refer to as the 'double bind' of equal State consent from the perspective of enhancing both the effectivity and the legitimacy of IOs and its paralyzing *cum* enabling consequences, the time has come therefore to revise the principle of equal State consent in the international law of IOs and to reassess what it should require in democratic terms.

Our argument in this chapter is four-pronged and builds on our previous work on international democratic representation.[6] By opposition to a well-established technocratic trend in the literature that understands the legitimacy

[5] For the distinction between 'governance' and 'government' and why it is better to refer to the good 'government' of IOs, see Besson, 'Democratic Representation', fn. 1.

[6] Parts of Sections 14.1–14.3 are based on Besson, fn. 4; Samantha Besson and José Luis Martí, 'Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (2018) 9(3) *Jurisprudence* 504–540; Samantha Besson and José Luis Martí, 'Cities as Democratic Representatives in International Law-Making', in Helmut Philipp Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (Cheltenham: Edward Elgar, 2021), pp. 341–353. Parts of Section 14.4 are based on Besson, 'Democratic Representation', fn. 1. A complete account of our proposal for the democratic legitimacy of international law is forthcoming in Samantha Besson and José Luis Martí, *Democratic International Law-Making* (Cambridge: Cambridge University Press, in press, 2024).

of IOs mostly as depoliticized and in terms of output legitimacy,[7] we characterize such legitimacy on classic input political legitimacy grounds, and especially democratic grounds. We regard democratic legitimacy as constituted by four basic democratic principles: the principle of ultimate, effective popular control; the principle of political equality; the principle of deliberative contestability; and the principle of human rights protection (Section 14.2). In a second part of the argument, we claim that States should remain central institutions in IOs' law-making and decision-making procedures, if the aim is to comply with these four democratic principles. Submitted to certain conditions, indeed, States are still the best institutions available to represent the peoples of the world and to institute them as the publics of international law. However, we also unpack and address the many deficits that afflict States and the principle of equal State consent from the perspective of the four democratic representation principles mentioned before (Section 14.3).

In the third prong of our argument, we turn to the growing role played in IOs by so-called 'non-State actors', both public (e.g. cities, regions) and private (e.g. non-governmental organizations (hereafter NGOs), transnational corporations (hereafter TNCs), religious organizations, unions). We claim that, despite their own respective democratic shortcomings and subject to certain conditions, those institutions and organizations may contribute to correcting or, at least, complementing the role of Member States *qua* main public representatives in IOs. In turn, this could improve the overall representation of the different 'peoples' of the world instituted as different 'publics' in the context of what we have referred to, in previous publications, as the 'multiple international representation system' (Section 14.4).

Finally, we argue for the re-institution of IOs as multi-public systems of representation capable of granting systemic democratic legitimacy to IO international law-making. After considering some of their institutional virtues in democratic terms such as publicity and generality, we also consider some of their institutional drawbacks in practice, including the paralyzing role of State consent and the circumvention of (most) Member States this has given rise to in IO decision-making processes. As a first and decisive step in the process of institutional reform of IOs, we argue that the principle of equal consent – whether it is applied to States or to other public representatives – is too narrow a principle of law-making: not only does it hinder the effective government of IOs, but, with the exception of a few cases which we specify, it is not required by their democratic legitimacy either, at least when taken in its strongest sense

[7] See Marieke Louis and Lucile Maertens, *Why International Organizations Hate Politics: Depoliticizing the World* (Abingdon: Routledge, 2021).

of a veto or, at least, of a refusal power. It is best replaced, we argue, except in a few institutional circumstances that warrant for refusal rights, by the principle of equal 'participation' of States, but also, and in an articulated way, of other public representatives. While we claim that the multiple instituted publics of the world should have a right to participate in IOs' everyday decision-making processes, we also argue that State representatives should remain their main representatives and be vested with the primary responsibility of articulating further public and private representation in IOs (Section 14.5).

Methodologically, what this chapter proposes is an argument in normative international legal theory: it puts forward an interpretation of international law and institutions, especially IOs, that best fits and justifies their practice. More specifically, it defends a democratic interpretation of that practice. Although the proposed democratic approach to international law relies, at least in part, on some ideal theorization, the argument is primarily an exercise in non-ideal normative theory: it reacts to deficits in political legitimacy in the international legal and institutional order, and especially in democratic representation, by making proposals. It is to be expected therefore that some of its proposals may suffer from legitimacy shortcomings of their own.

A final remark pertaining to the scope of the chapter is in order. To the extent that our topic is democratic legitimacy and representation *in* IOs, we will not be discussing consent *by* IOs.[8] As of late, however, certain IOs have become members of other IOs and, more generally, active participants in international law-making processes that take place outside of the IO. When doing so, those IOs themselves should be regarded as representatives of their Member States' peoples, which adds another layer to the system of multiple international representation articulated in this chapter.[9] That additional layer of public representation cannot be addressed, however, before the role of

[8] On consent by IOs, see Brölmann, Chapter 4 in this volume; Bordin, Chapter 11 in this volume.

[9] This is a source of confusion in the literature where the term 'representation' is used to refer to different relations in IOs: (i) the participation of Member States and their representation in the IO *qua* members (through their accredited officials and hence 'representatives' *stricto sensu*) (see, e.g., Laurence Dubin and Marie-Clotilde Runavot, 'La représentativité et la légitimité des institutions internationales', in Evelyne Lagrange and Jean-Marc Sorel (eds.), *Traité de droit des organisations internationales* (Paris: LGDJ, 2013), pp. 77–103, pp. 82–88; Stephen Mathias and Stadler Trengove, 'Membership and Representation', in Jacob K. Cogan, Ian Hurd and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016), pp. 962–984); (ii) the (political) representation of Member States' peoples through the participation of those States (and their representatives) and other public and private institutions within those IOs (see, e.g., Dubin and Runavot, fn. 9, pp. 88–93); and (iii) the representation of Member States and/or their peoples by the IO outside of the organization (see, e.g., Louis and Maertens, fn. 7, pp. 157–169).

those IOs as background public institutions in the multiple international representation system is fully unpacked. And the latter is this chapter's purpose.

## 14.2 THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL ORGANIZATIONS

This chapter understands (input) political legitimacy, in quite a standard way, to refer to the normative questions of who has the right to rule (or the right to adopt legal norms or participate in the adoption of such norms) and how such a right to rule should be exerted in order to generate obligations for those subject to such rule.[10]

An opposite view, quite fashionable in normative international legal theory, grounds such obligations in what is called 'output legitimacy'. It refers to the substantive merits of international legal norms, be it their substantive justice or efficacy or both. We do not discuss that view here. It suffices to note that, regardless of the output and substantive merits of international law-making, the questions of who should rule and how still make normative sense and need to be addressed separately.

Turning to the values that may constitute the normative standard of political legitimacy, we assume here that any plausible standard of political legitimacy should be democratic.

In this respect, we distance ourselves from another fashionable view in normative international legal theory: the view that addresses the normative question of the legitimacy of international law-making by reference to the Razian account of authority.[11] Times precludes discussing that view here.[12] It suffices to stress that Razian accounts of the legitimacy of international law address an important, albeit different normative question: that of the circumstances under which international law may provide moral reasons for individuals and/or States to conform with its rules. Even if supporters of the Razian

[10] See Besson and Martí, 'Legitimate Actors', fn. 6, at 508–509.

[11] See, for example, John Tasioulas, 'The Legitimacy of International Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 97–117; Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31(3) *Sydney Law Review* 343–380; Joseph Raz, 'The Democratic Deficit' (2018) *King's College London Dickson Poon School of Law, Legal Studies Research Paper Series, No. 2018-07*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3101720#, last accessed 19 October 2022; Lefkowitz, Chapter 2 in this volume.

[12] For a view of political legitimacy that is very similar to ours, see Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).

view also claim to be interested in the questions of who has the right to rule and of how that right should be exerted, they usually assume that such a right to rule is correlated with a duty to obey the corresponding rules. We do not share that assumption. We consider them as two logically distinct questions and grant conceptual priority to the first one. It is only once we have clarified who – which institutions – possess the right to rule and how – through which procedures and which forms of participation – those institutions should exert it, that we may ask the further question of the conditions under which the decisions made with legitimate authority may provide the people(s) subject to them with moral reasons to comply. In turn, and as we will argue in detail, this difference explains why (State) consent may be relevant to the first set of questions relating to the political legitimacy of international law, and not to the second one.

More specifically, we propose that the democratic legitimacy of any law-making institution should be assessed by reference to four basic, scalar abstract principles.[13] This also applies at the international level given the identity of the ultimate individual subjects to both domestic and international law.[14]

First of all, the principle of *ultimate, effective popular control*. It derives directly from the ideal of popular sovereignty or self-government: all peoples[15] subjected to international law should have a say in the process of making that law. They may, of course, delegate that power to representatives. The peoples should, however, retain ultimate, effective control over their representatives (who may otherwise only claim to be such) and, through them, over international institutions and decision-making processes in order to make popular sovereignty or self-government possible. This may take place through periodic elections, but not only. Second, the principle of *political equality*. The peoples represented should have an equal say, directly or through their

[13] See José Luis Martí, 'Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law', in Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017), pp. 724–745, pp. 733–735.

[14] See Besson, 'The Authority', fn. 11, at 349–350.

[15] In this chapter, we understand a 'people' as a political community or citizenry and, more specifically, as a 'public', that is an instituted people, by opposition to a 'nation' or 'society' or any community pre-existing its institution. This covers the peoples or publics of States, as much as those of subnational, international or supranational public institutions that re-institute the same peoples into different publics. There is, as of yet, no global people or public for lack of a global institution of global law. See also Besson, *The Public & Private Relation*, fn. 1.

representatives, in holding that ultimate power of control.[16] This means that no people should be able to impose its views unilaterally or have significantly greater political power to determine the law than others.

Third, the principle of *deliberative contestability*. The peoples – or their representatives – should be able to contest, through deliberation, the laws and decisions made internationally. They should also have the capacity to engage in deliberative interaction with each other, thus promoting public (formal and informal) debate.[17] Fourth, the principle of *human rights' protection*. Individuals' human rights that are constitutive of their basic moral equality and enable them to exercise ultimate control should also be protected in international law-making processes and institutions in order for the latter to be democratically legitimate.

What are those four principles' implications for the legitimate institutions of international law-making, including IOs? The first democratic principle is quite clear in this respect. Given that a system of direct popular decision-making is impossible at the international level, all peoples subjected to international law necessarily have to delegate their powers to representatives. This turns the question of the democratic legitimacy of international law into one of democratic representation. Accordingly, the assessment of the democratic legitimacy of current or potential institutions of international law-making crucially depends on whether those institutions, and IOs in particular, can be said to be representative of the peoples subjected to the decisions to be made, and, more importantly, on whether the peoples enjoy access to effective mechanisms of ultimate control over their representatives and over the decision-making system as a whole.

In our traditional (modern) understanding of representative democracy, at least when it applies to domestic law-making, these four principles have required the existence of a parliament with fundamental powers of legislation whose members are elected democratically, a directly or indirectly elected executive and an independent and self-standing judiciary, among other democratic institutions. Nothing like this, of course, exists (as of yet) at the international level, including in most IOs. To that extent, the proposed conception of the democratic legitimacy of IOs cannot, and probably should not, be that of a worldwide or global democratic State with a single global people or

[16] See Thomas Christiano, 'Democracy', in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy* (2015). Available at: https://plato.stanford.edu/archives/spr2015/entries/democracy, last accessed 1 July 2021, s. 2.2.3.

[17] See John Parkinson and Jane Mansbridge (eds.), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge: Cambridge University Press, 2012); Samantha Besson and José Luis Martí (eds.), *Deliberative Democracy and Its Discontents* (Aldershot: Ashgate, 2006).

instituted public represented by various directly or indirectly elected officials organized in legislative, executive and judicial authorities.[18]

However, this does not imply that the principles of democratic legitimacy cannot be respected in other ways. If creating a world parliament and calling for a global election is not an available option in current, far from ideal, circumstances, we should explore other ways by which people can exert ultimate, effective control over international law-making and do so in conditions of political equality, deliberative contestability and human rights' protection. This is the larger project of which this chapter is just one part, with its specific focus on democratic representation in IOs.[19]

## 14.3 THE DEMOCRATIC AMBIVALENCE OF STATE CONSENT IN INTERNATIONAL ORGANIZATIONS

### 14.3.1 *The Democratic Value of States in the International Institutional Order*

The most obvious answer to the international democratic legitimacy challenge is that the legitimate institutions of international law-making *qua* representatives of the peoples of the world be their States. This also applies to those peoples' representation in IOs to the extent that most IOs are State-based: they are still largely dependent on their Member States for their institution, operation and control.

States-based representation in IOs usually means representation by a State's government (and a delegation or mission thereof) to the extent that the latter has the right, under the domestic constitutional order of most States and as confirmed by the international general rules on treaty-making powers (e.g. Articles 7(2), 8 and 46 of the Vienna Convention on the Law of Treaties (hereafter VCLT)), to conclude international agreements under the international law of treaties, to bind their States in the latter's external relations, and hence to speak for the people of those States on the international plane. This does not, however, exclude other forms of legislative or judicial representation of the same States in IOs. This is actually confirmed by the

[18] See, for example, Robert A. Dahl, 'Can International Organizations Be Democratic? A Skeptic's View', in Ian Shapiro and Casiano Hacker-Cordon (eds.), *Democracy's Edges* (Cambridge: Cambridge University Press, 1999), pp. 19–36; Mathias Koenig-Archibugi, 'International Organizations and Democracy: An Assessment', in Luis Cabrera (ed.), *Institutional Cosmopolitanism* (Oxford: Oxford University Press, 2018), pp. 154–185.

[19] See fn. 6.

modalities of State representation in certain IOs that, for instance, encompass parliamentary delegations in some of their law-making organs.

The fact that States continue to play a central part in international law-making, including in IOs, is uncontroversial from a descriptive point of view. But how should we evaluate this normatively?

There are, to quote Thomas Christiano, at least two reasons for considering States as the primary democratically legitimate institutions of international law-making at this relatively early stage in the development of IOs: 'one, States are still by far the most effective systems for making power accountable to persons',[20] and to do so in the greatest possible respect of political equality, deliberative contestability and human rights. Second, 'these States are in a position to represent their members to the larger community'.[21] They remain, accordingly, the most important institutional mechanism for making large-scale political institutions directly accountable to people.

Of course, States have been legally instituted in the course of time so as to best fit the requirements of democratic representation domestically. This is also true under the contemporary international law of statehood. That law guarantees the dimensions of statehood that best match some of the factual conditions for the justification of political equality and of the claim to democracy in the first place.[22] Those dimensions are, in particular, a territory, a stable population whose members (nationals) share an effective connection to one another and hence equal and interdependent stakes, and the capacity for effective government.[23]

Importantly, the inherent democratic qualities of statehood under contemporary international law also expand outside domestic borders to apply to international relations. This is, for instance, the case of the principle of 'sovereign equality', first guaranteed in writing in the 1945 UN Charter (Article 2(1)), and which expressly ties State sovereignty to State equality.[24] With the re-institution of States as equals in the 1945 international

[20] Thomas Christiano, 'Replies to David Alvarez, David Lefkowitz, and Michael Blake' (2016) 4 *Law, Ethics and Philosophy* 221–236, at 223.

[21] Ibid., at 223.

[22] Samantha Besson, 'Investment Citizenship and Democracy in a Global Age: Towards a Democratic Interpretation of International Nationality Law' (2019) 29(4) *Swiss Review of International and European Law* 525–547, at 534–536.

[23] Thomas Christiano, 'Democratic Legitimacy and International Institutions', in Besson and Tasioulas, fn. 11, pp. 119–138, pp. 121–122.

[24] Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) *The Yale Law Journal* 207–220, at 208; Ulrich K. Preuss, 'Equality of States: Its Meaning in a Constitutionalized Global Order' (2008) 9(1) *Chicago Journal of International Law* 17–50, at 27; Marcelo G. Kohen, 'Article 2, paragraphe 1', in Jean-Pierre

institutional order, sovereign equality became closely related not only to peoples' equality in collective self-determination, but also to individual political equality within those States.[25] Of course, individual and State equality are not fully transitive and treating States equally may not lead to treating all individuals equally.[26] As we will see, democratic correctives (for instance, proportional voting, weighted majorities) are required to ensure the equality of domestic citizens even under conditions of perfect State equality in international law-making.[27] And the same may be argued about human rights to protect individual equality even in those circumstances. All the same, the guarantee of State equality under international law and State's equal rights in IOs in particular make the representation by equal States in IOs the best approximation of the equal representation of their peoples.

The main instrument, albeit not the only one, for the equal participation of States in international law-making, and hence for the representation of their people in that process, has been equal State consent. While State consent clearly has democratic value (Section 14.3.2), it also suffers from democratic deficits (Section 14.3.3), however.

### 14.3.2 *The Democratic Value of State Consent in International Organizations*

Even though it has changed in nature over time, and other chapters in this volume assess the depth and extent of that change, State consent still plays an important role in international law-making.[28] It is widely recognized as a principle of international law. To this day, indeed, international legal obligations are, but for a few exceptions, not imposed on a given State without its

Cot, Alain Pellet and Mathias Forteau (eds.), *La Charte des Nations Unies: Commentaires article par article*, 3rd ed. (Paris: Economica, 2005), pp. 402–404.

[25] Samantha Besson, 'Sovereign States and Their International Institutional Order: Carrying Forward Dworkin's Work on the Political Legitimacy of International Law' (2020) 2(2) *Jus Cogens* 111–138, at 113, 127. See also Larry Siedentop, 'Political Theory and Ideology: The Case of the State', in David Miller and Larry Siedentop (eds.), *The Nature of Political Theory* (Oxford: Oxford University Press/Clarendon Press, 1983), pp. 53–73.

[26] Lora Anne Viola, Duncan Snidal and Michael Zürn, 'Sovereign (In)equality in the Evolution of the International System', in Stephan Leibfried, Evelyne Huber, Matthew Lange, Jonah D. Levy, Frank Nullmeier and John D. Stephens (eds.), *The Oxford Handbook of Transformations of the State* (Oxford: Oxford University Press, 2015), pp. 221–236, pp. 231–232.

[27] On the relationship between individual equality, the equality of peoples and State sovereign equality under international law, see Besson, 'L'égalité des États membres de l'Union européenne', fn. 3.

[28] Besson, fn. 4, at 298–305; Besson, Introduction in this volume.

consent.[29] The requirement of State consent to international law is not only an observable reality, but also one that we argue is democratically justified.[30]

At this stage, it is worth emphasizing, however, that just as individuals' consent cannot be either a condition of the validity of domestic law or a moral reason to obey it,[31] State consent to international law, understood here as acceptance of that law, does not amount to a requirement of either the validity or the legitimate authority of international law understood in this limited, Razian way. Still, it is this chapter's argument that the role of State consent goes beyond merely enhancing general respect and compliance with international law, however.[32] Even if State consent does not give rise to an actual reason for that State to obey international law, its central role in contemporary international law has to do with its contribution to the latter's democratic legitimacy.[33] And even more so in the circumstances of widespread and persistent reasonable disagreement that characterizes international law-making today.[34]

At first, of course, such an argument for democratic State consent may sound paradoxical. Indeed, domestically, the role individual consent may play in furthering democratic legitimacy has long been disparaged precisely because of reasonable disagreement.[35] As a matter of fact, the equality-based justification of democracy accounts for majority rule instead of unanimity or even minority rule, thus making consent to law, at least when it is understood as a veto right, procedurally irrelevant to the latter's democratic legitimacy.

Importantly, however, democratic considerations in international law should not be conflated with domestic ones. Indeed, and contrary to what one often reads, States *qua* democratic representatives of their people cannot be treated as equal individual members of an international democratic polity in the same way as individuals are to be considered as equal members of a domestic democracy. Still, the importance of democratic legitimacy

[29] See, for example, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226, para. 21.

[30] See, for a full argument, Besson, fn. 4, at 305–309; Samantha Besson, 'Law beyond the State: A Reply to Liam Murphy' (2017) 28(1) *European Journal of International Law* 233–240, at 238–240.

[31] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 88–94.

[32] Liam Murphy, 'Law beyond the State: Some Philosophical Questions' (2017) 28(1) *European Journal of International Law* 203–232, at 229–232; Lefkowitz, Chapter 2 in this volume; Besson, 'The Authority', fn. 11, at 371–372.

[33] Besson and Martí, 'Legitimate Actors', fn. 6, at 514–515.

[34] Besson, fn. 4, at 305–312; Thomas Christiano, 'The Legitimacy of International Institutions', in Andrei Marmor (ed.), *The Routledge Companions to Philosophy of Law* (New York: Routledge, 2015), pp. 380–394.

[35] Christiano, fn. 34.

domestically implies that we should try to respect the principles of democracy in the way we make international law, and especially the political equality of the peoples of democratic States.

In that context, State consent remains the most important means to protect the value of domestic self-government.[36] It amounts, after all, to the right to consent of a public and sovereign institution claiming to represent and bind a people and to institute it as a public domestically.[37] The way to link international law-making processes to domestic democratic legitimacy is precisely to respect the equality of each democratic State *qua* (States) people and *qua* equal (States)people. The requirement of equal consent of States enables small and weak States to resist the domination and the hegemony of large and powerful States or coalition of States. In turn, States' equal consent protects the individual citizens of those States' right to an equal voice in the broader international decision-making process they are participating in through their States as representatives.[38]

As a matter of fact, it is because democratic State consent should be considered an important dimension of the democratic legitimacy of international law that there also are inherent democratic limits to it.[39] Those limits, also sometimes referred to as *jus cogens* limits to State consent, amount to the protection of the basic conditions of democracy, that is political equality (including States' sovereign equality) and human rights. This explains why State consent may not be invoked as a democratic justification for the renouncement to equal participatory rights in an IO.[40]

### 14.3.3 *The Democratic Deficits of State Consent in International Organizations*

State consent also suffers from serious shortcomings from a democratic perspective. There are, we submit, at least six sources of concern with State consent by reference to two of the principles of democratic legitimacy

[36] Christiano, fn. 23, pp. 123–124; Pettit, fn. 12, pp. 157–160; Philip Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective', in Besson and Tasioulas, fn. 11, pp. 139–161, pp. 151, 155–160.
[37] Besson, fn. 4, at 304–305; Timothy Endicott, 'The Logic of Freedom and Power', in Besson and Tasioulas, fn. 11, pp. 245–259, pp. 255–259.
[38] Christiano, fn. 23, pp. 135–136.
[39] Ibid., pp. 133–135; Besson, fn. 4, at 309–312.
[40] Besson, 'L'égalité des États membres de l'Union européenne', fn. 3; Kohen, fn. 4, p. 402.

introduced in Section 14.2: ultimate, effective popular control and political equality.[41]

To start with, and in a nutshell, there are two main democratic deficits of State consent with respect to the democratic requirement of *representativeness* or effective, ultimate popular control.

First, the *existence of non-democratic States*. State consent only protects democratic self-government provided the State itself is democratic. Non-democratic States may claim to represent their people, but their claim is unwarranted for the latter cannot exercise ultimate, effective control over their State government's actions. The problem is that, currently, at least one half of the States in the world are non-democratic, according to very modest standards of democracy – for example, those of the Democracy Index.[42] Granting those non-democratic States a right to consent to international law leaves their citizens unrepresented.

Second, the *limited accountability of State governments*. State consent is blind to the actual domestic democratic accountability of State governments regarding international law-making, whether that control occurs indirectly through parliament (e.g. parliamentary approval of treaties) or directly through the people itself (e.g. popular referendum on treaties). To that extent, being a democratic State does not guarantee that its government is effectively representing its citizens. The problem then is that, since the international actions of State governments' officials are not necessarily submitted to ultimate, effective control of the people under domestic law, it is difficult to say that the consent of the government of a democratic State always ensures the international representation of that State's people.

Furthermore, even if the governments of all States in the world were democratic and internally accountable to their people, there are at least four further sources of democratic deficit of State consent that need to be addressed, this time with respect to the democratic principle of *political equality*.

First, *disproportions in demography*. Equal State consent does not pay sufficient attention to individual political equality by not being proportional to the demographic composition of States. To that extent, State consent treats the citizens of different States unequally. The problem is that, if all States have an equal right to State consent, then States with a very small population and

[41] On the democratic deficits relating to the other two democratic principles, see Besson and Martí, 'Legitimate Actors', fn. 6, at 519–520.

[42] The Economist Intelligence Unit Limited, 'Democracy Index 2021' (2022). Available at: www.eiu.com/n/campaigns/democracy-index-2021/, last accessed 20 October 2022.

their citizens hold, proportionally, much more power than those with larger ones, and this violates the principle of political equality. In effect, and without adequate correctives, the rule 'one State, one vote' in IOs tends to produce political inequalities between individuals across States. This is an implication of the lack of transitivity between individual and State equality mentioned in Section 14.3.2.

Second, the *imbalance of informal power among States*. Equal State consent does not pay sufficient attention to individual equality by not being sensitive to the power imbalance among States. To that extent, equal State consent treats the citizens of different States unequally. The problem is that, in IOs, more powerful States – in economic, military or cultural terms – are generally able to impose, formally or informally, their views and interests onto less powerful ones.[43]

Third, the existence of *permanent minorities*. Even in IOs in which State consent is not used as a veto power and to impose minority rule, there is a permanent risk of producing entrenched, persistent or permanent minorities. The problem is that even when State consent is put into practice through a mechanism of majority rule, the world can, and normally does, divide into regional or trans-regional coalitions or groups of interests. There is a risk, as a result, that some majorities and minorities of States freeze over time and over certain issues, preventing their taking turns on a broad range of issues that is required for democratic representation in law-making.[44] What this implies is that some people(s) will permanently be on the losing side in international decision-making processes because their State representatives are practically excluded from international law-making, thus violating the principle of political equality.

Fourth, the *unequal distribution of views*. State consent does not adequately reflect all views to the extent that those views are not necessarily distributed equally among States. Consequently, State consent may treat the citizens of different States unequally. For instance, the most vulnerable people according to global standards constitute a wide majority of citizens worldwide. However, they tend to be concentrated in a few, very populous countries that constitute a minority of States. As a result, and even if they share similar interests across countries, these most vulnerable people are represented very poorly by equal State consent and international law-making may be said to be unequally biased against them.

[43] Christiano, fn. 23, pp. 132–133.
[44] Ibid., pp. 133–134.

## 14.4 FROM STATES TO PUBLICS: MULTIPLE REPRESENTATION IN INTERNATIONAL ORGANIZATIONS

It should be clear by now that there are strong arguments of democratic legitimacy in favour of the representative role of States, especially democratic States, in IOs. Given the deficits of democratic State consent, however, the challenge is to improve the representation of the peoples who are currently under-represented by their States in IOs. This may be done by addressing two questions.

The first question pertains to the identity of the *subjects* who are to be represented in IOs' law-making processes. Contrary to a widespread understanding of IOs,[45] the subjects who should be represented by State officials in the institution and procedures of IOs are not States *per se*, but the 'peoples' that those States are particularly apt to represent internationally.

Accordingly, and to the extent that they should aim at ensuring ultimate, effective popular control, international democratic procedures cannot and should not be reduced to the kind of inter-State democracy propounded by (usually non-democratic) States that regard State equality and the principle of 'one State, one vote' in international law-making as the only requirement of international democratic legitimacy. On the contrary, from a democratic perspective, when States participate in international law-making, especially as members of IOs, it is as officials and representatives of their peoples, and not as such and in themselves.[46] Since the way those peoples are represented by their States in IOs is democratically deficient, we need to identify additional ways of representing the same peoples that may correct and complement State-based representation.

This raises a second question: could State-based representation co-exist with other *representatives* of the same peoples and, if so, which ones exactly? We argue that the same peoples may be instituted and re-instituted many times as *publics* by many different public institutions. Those public institutions may also serve as multiple representatives of those same publics in IOs, therefore. And the same may be argued about private organizations that

[45] On representation at the United Nations see, for example, Catherine Amirfar, Romain Zamour and Duncan Pickard, 'Representation of Member States at the United Nations: Recent Challenges' (2022) 26(6) *ASIL Insights*. Available at: www.asil.org/insights/volume/26/issue/6, last accessed 20 October 2022.

[46] Besson, 'The Authority', fn. 11, at 361–362; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22(2) *European Journal of International Law* 315–343, at 329–330.

do not-reinstitute the same peoples as publics, but may contribute to their political representation all the same.[47]

As a matter of fact, many other public and private institutions or organizations already take part, in various capacities, in IOs procedures, including in the international law-making processes of IOs. Those other institutions are sometimes referred to as 'non-State actors' in international law. This denomination does not only reveal the latter's incomplete institutionalization under international law,[48] but also the need to differentiate them more adequately from States and then to articulate them to one another. Those non-State public institutions include, in particular, cities and regions, some elected and some not, but also other IOs. Private organizations include, for instance, NGOs, TNCs, religious organizations and trade unions.

Representation by those other public and private institutions may actually compensate for some of the democratic deficits of State-based representation in IOs by both correcting those deficits in certain cases and by complementing State-based representation of the same peoples in others. For instance, other non-State public institutions such as cities are often elected or, at least, more directly accountable to peoples than States, including with respect to international matters and even in non-democratic States. As to NGOs, they often protect the interests of domestic or international minorities and may correct some of the political inequalities of State-based representation.

Importantly, however, for this kind of complementary international representation to take place, those other public and private institutions should also be controlled effectively by the peoples they represent. More generally, they should comply with the four principles of democratic legitimacy presented in Section 14.2. This should be emphasized particularly for private organizations such as NGOs, which may only be considered as 'participants' in international law-making in a representative capacity, and not as such and in themselves. This approach certainly differs from what many authors seem to consider,[49] especially when they refer to 'civil society' or 'stakeholder' 'participation' in

[47] On the distinction between the 'public' and the 'political' and the distinction and articulation between public and private political representation, see Besson and Martí, 'Legitimate Actors', fn. 6, at 520–526, 529–533; Besson, *The Public & Private Relation*, fn. 1, ch. 1.

[48] Samantha Besson, *Reconstructing the International Institutional Order* (Paris: OpenEdition Books/Editions du Collège de France, 2021), paras. 81–82; Besson, *The Public & Private Relation*, fn. 1, ch. 5.

[49] See, for example, Dubin and Runavot, fn. 9, pp. 86–88.

IOs as a form of 'direct democracy' and independently from the question of democratic representation.[50]

Once we look at those non-State public and private institutions or organizations as representatives, however, it becomes clear that they actually not only suffer from democratic deficits akin to those of States, but also from some of their own. It is the case of non-State public institutions like cities that may not represent all peoples in the world equally, leaving rural population under-represented and over-representing urban interests and views. It is clearly also the case of private organizations such as NGOs, which are not equally distributed geographically and tend to over-represent certain groups of people. Nor are they usually controlled by those they claim to represent – provided they even claim to do so.

Due to their respective democratic deficits, therefore, neither public nor private institutions involved in international law-making should be considered as sufficient, taken on their own, to represent the peoples of the world in a way that may be considered democratically legitimate. This is what we have called elsewhere the 'insufficiency argument'.[51] In reaction to those deficits, we developed a second, systemic argument claiming that those public and private representatives should be approached not only as multiple in themselves with many publics, but also private institutions representing the same peoples at the same time, but also as constituting, together, the continuous and complementary parts of a Multiple International Representation System (hereafter MIRS).[52]

The MIRS reacts to the under-representation of peoples that characterizes the current international institutional order, including most IOs, where States

[50] See, for example, Anne Peters, 'Dual Democracy', in Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), pp. 263–341, pp. 300–301, 332–333; Martin Krajewski, 'International Organizations or Institutions, Democratic Legitimacy' (last updated March 2019) in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (Oxford: Oxford University Press, 2008). Available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e495?rskey=okrplA&result=2&prd=OPIL, last accessed 13 December 2022, para. 19. Contra: Besson and Martí, 'Legitimate Actors', fn. 6, at 526–529 and 537–539; Martine Beijerman, 'Conceptual Confusions in Debating the Role of NGOs for the Democratic Legitimacy of International Law' (2018) 9(2) *Transnational Legal Theory* 147–173.

[51] Besson and Martí, 'Legitimate Actors', fn. 6, at 533.

[52] On the corresponding argument for multiple sovereignty, see Samantha Besson and José Luis Martí, 'Republican (Multiple) Sovereignty', in Mortimer N. Sellers and Franck Lovett (eds.), *The Oxford Handbook on Republicanism* (Oxford: Oxford University Press, in press, 2023).

often still have the monopoly of representation, albeit in a way that addresses and articulates the democratic strengths and weaknesses of the various non-State public and private institutions increasingly involved to compensate for that under-representation. It proposes to maximize the representation of peoples by enabling a variety of public and private institutions to play different, complementary representative roles by understanding those roles as part of a system of multiple or multi-public representation.

The multiplicity of representatives we endorse does not, however, equate with mere plurality. The proposed system[53] differs, therefore, from radical pluralist accounts of the international order which see that order, both descriptively and normatively, as the mere aggregation of several, separate institutional orders lacking any common set of rules. Multiple representation is not about aggregating representatives randomly in the hope of increasing the representativeness of the whole. Unless there is a clear articulation of those multiple representative institutions, allowing private institutions, such as TNCs or NGOs, to gain deliberative or even decision-making power in an IO in which other types of public representatives – for instance, States, regions and cities – are already representing the same peoples might end up undermining the overall representativeness of the particular IO.

As a matter of fact, and furthermore, multiplying international representative institutions without a systemic aspiration would also leave IOs exposed to a variety of conflicts among those multiple representatives. The only way to articulate competing claims to represent the same peoples is to approach IO representation primarily as a State-based system from the perspective of which Member States *qua* instituting powers of those IOs may decide on the complementary role of each further representative institution, public or private, so as to effectively enhance the democratic legitimacy of the IO. One of the implications of the systematicity of the MIRS, therefore, is that public representation should take priority over private representation, on the one hand, and that States should take priority over other non-State public representative institutions, on the other hand.

[53] Jane Mansbridge, James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis F. Thompson and Mark E. Warren, 'A Systematic Approach to Deliberative Democracy', in John Parkinson and Jane Mansbridge (eds.), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge: Cambridge University Press, 2012), pp. 1–26; Felipe Rey, 'The Representative System' (2020) 25(1) *Critical Review of International Social and Political Philosophy* 1–24.

## 14.5 RE-INSTITUTING INTERNATIONAL ORGANIZATIONS: FROM EQUAL STATE CONSENT TO EQUAL PUBLIC PARTICIPATION

### 14.5.1 *International Organizations as Multi-Public Systems of Representation*

IOs possess many institutional virtues that make their re-institution as multi-public systems of international democratic representation possible.

This is true as much with respect to the institutional correctives, within a given IO's law, to the individual democratic shortcomings of each public or private institution representing the peoples of this world in the IO (e.g. regional quotas of NGOs), as to the mutual compensation of deficits between those multiple representative institutions through the articulation of complementary representation (e.g. additional, remedial representation by the cities or other territorial collectivities of non-democratic States).[54]

IOs present two institutional characteristics that should be emphasized in this respect. First of all, they are *public* organizations. Having States as main institutional members, IOs have the capacity to guarantee the central place and, as argued in Section 14.4, the priority of public representation in international law-making over the one exerted by private organizations. Their publicity makes them well suited, in turn, to require and to articulate the ultimate, effective popular control of the instituted publics over their multiple representatives, public or private. Second, IOs are *general*, whether they are universal or regional. They are not primarily organized as clubs, therefore, but are open to the membership of any State in the region or the world that is willing to join. This is one of the reasons why they are well suited to protect political equality,[55] not only by granting each State a seat and a vote, but also by reducing the existing political inequalities among (States)peoples through demographic correctives.[56]

Whatever the general virtues of IOs for the institution of a multiple international representation system, one should also warn against some of their in-built institutional defects that threaten that prospect by undermining

[54] For a detailed analysis, see Besson, 'Democratic Representation', fn. 1.
[55] Besson, 'L'égalité des États membres de l'Union européenne', fn. 3.
[56] See, for example, Boutros Boutros-Ghali, 'Le principe d'égalité des États et les organisations internationales' (Volume 100) *Collected Courses of the Hague Academy of International Law*, 1960, pp. 9–71.

their publicity,[57] generality, and hence their own overall democratic representativeness.[58]

In turn, this actually explains why, in spite of their formally general and egalitarian legal framework, IOs have had a mixed record in terms of protecting political equality in practice. IOs' capacity to correct political inequalities between States and between the peoples they represent as publics is as high nowadays as their ability to multiply those inequalities and even entrench or institutionalize them. This may be exemplified by various types of 'hierarchical' and/or 'exclusive' multilateralism at work inside contemporary IOs.[59]

The reasons for this state of IOs lie primarily in the depoliticized and largely technocratic original institutional set-up of IOs, mentioned in the introduction of this chapter, and in its reliance on output legitimacy or on expertise-driven input legitimacy. As a result, State membership of IOs is mostly approached through a 'principal–agent' lens and not as a case of political institution and representation. The situation has worsened with the various 'good governance' and managerial measures adopted to contain the increase in IO powers since the 1990s and which have been criticized for their further depoliticizing effects.[60]

Ironically, what makes the situation even more difficult to criticize from a democratic perspective lies in the compensatory modes of association of non-State public and private institutions or organizations in IO processes adopted in the past few years in reaction to concerns for the political legitimacy of IOs. Those mechanisms are only political in name and not in content. They are usually justified by vague references to the need for greater 'inclusion' or

[57] Thus, in light of their growing deformalization and public–private hybridization, IOs need to be re-instituted as public institutions so as to actually embody by law the public position they claim to hold and be vested by the instituted publics with the 'public authority' they claim to exercise in their 'public interest': see Samantha Besson, 'The International Public: A Farewell to Functions in International Law' (2021) 115 *American Journal of International Law Unbound* 307–311, at 311; Besson, *The Public & Private Relation*, fn. 1.

[58] For a detailed analysis, see Besson, 'Democratic Representation', fn. 1.

[59] Lora A. Viola, *The Closure of the International System: How Institutions Create Political Equalities and Hierarchies* (Cambridge: Cambridge University Press, 2020), pp. 187–188, 205–209; Viola *et al.*, fn. 26, pp. 230–231; Franck Petiteville, 'Bilan contrasté des organisations internationales', in Bertrand Badie and Dominique Vidal (eds.), *Un monde d'inégalités* (Paris: La Découverte, 2017), pp. 121–131; Besson, 'L'égalité des États membres de l'Union européenne', fn. 3.

[60] Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds.), *The Exercise of Public Authority by International Public Institutions: Advancing International Institutional Law* (Berlin: Springer, 2010), pp. 777–806, pp. 789–792.

'participation' of (more or all) 'stakeholders'[61] or of the 'most affected persons',[62] but without a truly political agenda. They do not articulate any representative claims, neither in themselves nor, and that is particularly striking, by reference to those of IOs' Member States.[63]

Multiple international representation cannot simply occur by chance, however. It calls for careful and systematic political reform of existing IOs and for a detailed institutional design of future ones. Those democratic reforms of the international institutional order need to be driven by the peoples represented by IO's Member States and by the other non-State public and private institutions or organizations at play, and hence by the corresponding sovereign publics themselves. This is the only hope to constrain the various public and private powers in place in the long run.

Given the centrality of States in IOs, we propose, to launch what amounts to a long series of necessary institutional reforms of IOs with a transformation of the role currently granted to equal State consent in the government of IOs. In order to launch such a democratic re-institution of IOs, equal State consent should not only be replaced, we argue, by a conception of equal State *participation* (Section 14.5.2), but the latter should also be expanded, more generally, to include the equal *public* participation of other non-State public representative institutions (Section 14.5.3).

Of course, the institutional design of international representation depends largely on the context, and there can be no 'one (institutional) design fits all'. The scope of this chapter precludes, however, addressing each IO in detail and our main albeit not exclusive example in this section will be the WHO. In several respects, indeed, the WHO exemplifies the democratic strengths and weaknesses of equal State consent in IOs,[64] not the least because of the

[61] See, for example, Joost Pauwelyn, Martino Magetti, Tim Büthe and Ayelet Berman (eds.), *Rethinking Participation in Global Governance: Voice and Influence after Stakeholder Reforms in Global Finance and Health* (Oxford: Oxford University Press, 2022).

[62] For a critical assessment, see Jochen von Bernstorff, 'New Responses to the Legitimacy Crisis of International Institutions: The Role of "Civil Society" and the Rise of the Principle of Participation of "The Most Affected" in International Institutional Law' (2021) 32(1) *European Journal of International Law* 125–157, at 152–155.

[63] Besson, 'Democratic Representation', fn. 1.

[64] See, for example, Samantha Besson, 'COVID-19 and the WHO's Political Moment' (2020) *EJIL Talk!*. Available at: www.ejiltalk.org/covid-19-and-the-whos-political-moment/, last accessed 13 December 2022; Oswald Jansen, 'Increasing the Legitimacy of the World Health Organization' (2020) *The Regulatory Review*. Available at: www.theregreview.org/2020/04/22/jansen-increasing-legitimacy-world-health-organization/, last accessed 13 December 2022; Hai Yang, 'Contesting Legitimacy of Global Governance Institutions: The Case of the World Health Organization during the Coronavirus Pandemic' (2021) 23(4) *International Studies Review* 1813–1834; Samantha Besson, 'Pour une représentation démocratique multiple au

unique international law-making powers of the World Health Assembly (hereafter WHA) (of States).[65]

### 14.5.2 *From Equal State Consent to Equal State Participation*

As explained in Section 14.3.2, States' representation role in IOs have been exercised primarily through State consent. Because the principle of equal State consent in IOs was originally understood in a strict sense as a right to veto, it quickly became incapacitating for the daily government of IOs. In turn, this explains why many IOs and their Member States have moved away from the strict enforcement of equal State consent in the internal organization and government of IOs. State consent has first turned unequal at the initiative of a few (more powerful) States. More generally, functionalism and its predominantly instrumental, expertise-oriented, and output-based approach to IO legitimacy[66] have contributed to make State consent itself largely dispensable in IOs' decision-making processes to the benefit of other original or emerging public and private powers.[67]

If loosening IOs from the grip of equal State consent has made them more effective in some respects, it has also left them out of control from their Member States' peoples. This has come at a very high cost in terms of political equality and of the other principles of international democratic legitimacy of IOs that equal State consent contributes, we have argued, to protecting. It may be time, therefore, to reinstate equal State consent in the institution, operation and control of IOs, albeit in a revised democratic understanding thereof that may correct its various democratic shortcomings.

So far, we have defined the principle of equal State consent in international law as 'acceptance', that is, as the equal right of States to accept the norms of international law to which they and their represented and instituted publics are subject to. The question, however, is what exactly should be understood by

sein de l'Organisation mondiale de la Santé', in Olivier de Frouville and Dominique Rousseau (eds.), *Démocratiser l'Espace-Monde* (Paris: Pedone, in press, 2023).

[65] See, for example, José E. Alvarez, *The Impact of International Organizations on International Law* (Leiden: Brill, 2017), pp. 198–202; David P. Fidler, 'International Law and Global Public Health' (1999) 48 *Kansas Law Review* 1–58, at 20.

[66] In the WHO context, see, for example, Jan Klabbers, 'The Normative Gap in International Organizations Law: The Case of the World Health Organization' (2019) 16 *International Organizations Law Review* 272–298, at 290–294. For a preliminary albeit very limited recent reckoning in this respect, see, for example, Lukasz Gruszczynski and Margherita Melillo, 'The Uneasy Coexistence of Expertise and Politics in the World Health Organization' (2022) *International Organizations Law Review* 1–31.

[67] See, for example, von Bernstorff, fn. 60, pp. 776–800.

that right to accept international law, both in the practice of IOs and from a democratic perspective.

In its strongest, original version, the principle of State consent amounts to the capacity of States to exert a veto power over any legal norm or decision arising about or within an IO. It is famously exemplified by the five permanent members' veto right in the UN Security Council. Exercising such a veto in the Council means that a single State may block any decision or resolution. That right goes beyond enabling the States vested with that veto power to refuse to enter into an agreement or that a certain legal resolution agreed by others be binding for them. Indeed, their right also amounts to the capacity to prevent all others from reaching that agreement and hence from adopting any law. Interestingly, this strong version of the principle of State consent is not practised very much anymore in the internal organization of IOs. Member States' right to consent is mostly conceived of as a right of refusal or refusal power. It is also construed sometimes as a simple right to opt out at a later stage. Such refusal powers only pertain to that State's own obligations: they do not prevent other Member States in the IO from reaching an agreement and from adopting law.

This evolution of State consent in IOs from veto to refusal power is justified from a democratic perspective. The democratic value of State consent we argued for in Section 14.3.2 does not indeed require IOs' Member States to hold a veto power in that strong sense. It is enough for States to be granted a limited capacity to 'refuse' certain basic institutional decisions when they apply to them, and, for the rest, an equal capacity to participate in the making of other decisions.

The scope of this chapter precludes going into a full discussion of the egalitarian justification of majority rule in circumstances of reasonable disagreement,[68] especially when compared to minority rule or veto. Let us simply state that, first, minority rule endows minorities with more power proportionally to their number than majority rule. Second, minority rule protects organized minorities better than insular ones, although the latter need more protection against majorities than the former. Finally, although deliberation encourages the exchange of reasons, minority rule can induce minorities to use their veto to safeguard naked interests rather than reasonable opinions and convictions. By contrast to majorities, which have to be constituted in each case by deliberation, minorities know from the start that they can wave their veto and need not abide by the same deliberating rules as others.

[68] See, for example Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999), pp. 114–115; Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1973), p. 164.

As explained in Section 14.3.2, however, one should not too quickly draw a parallel between deliberating citizens in a domestic democracy and States in IOs. The normative value of democratic State sovereignty and self-government explains the greater importance of (State) consent for the democratic legitimacy of international law than for that of domestic law. In turn, it gives us reasons to protect the refusal rights of States in a few residual areas of IO government. Outside those areas, the principles of political equality and deliberative contestability ground an interpretation of the principle of ultimate, effective popular control that may be reduced to granting (States)peoples an equal share in the control of international law-making in IOs.

Based on this qualified egalitarian defence of international majority rule, therefore, we propose moving from an understanding of the principle of State consent *qua* right to 'veto', to a principle of State 'participation' in IOs, on the one hand, qualified by a residual right to 'refuse' in a set of limited institutional circumstances, in which the cost for political equality is minimal, on the other hand.

Before clarifying our proposal and its egalitarian justification, it is useful to identify five key institutional moments or areas in the government of an IO in which States may be involved, ranging from the institution to the operation and the control of the IO: the *institution* of the IO – usually through a constitutive treaty such as the Constitution of the WHO; the *design and organization* of the IO, whether initially – through the constitutive treaty itself – or in the subsequent evolution and amendment of that design – either by amending the constitutive treaty or through the decision of the assembly of States or an equivalent body like the WHA in the case of the WHO; the *ordinary decision-making and law-making procedures* of the IO, which involves a great variety of decisions made by different bodies and at different levels – ranging from the WHA, Secretariat, General Direction or Executive Board, to lower committees, advisory boards or regional divisions, among others; the decision to *admit new members or exclude existing ones*; and the *control* of the IO, including responsibility mechanisms.

The distinction between those five institutional moments or areas is important to the extent that implementing a multi-public system of international representation in IOs calls for different solutions at each step of the institutional government of IOs. And the same applies to the role of State consent for purposes of democratic representation in those IOs.

First of all, Member States should be recognized a few, limited *refusal powers* in three sets of institutional circumstances: membership, exit and fundamental institutional decisions pertaining to the organization of the IO.

To start with, membership in IOs should not be mandatory. This means preserving the capacity of States to consent not only to institute an IO, but also to join an organization later on. Furthermore, this also implies preserving effective exit options for Member States. Finally, Member States should not have to leave an IO to refuse to take part in certain key normative developments. To that end, they should be guaranteed selective refusal rights pertaining to certain fundamental institutional obligations, for instance, through opt-out rights after a majority decision. This is, for instance, what Article 19 WHO Constitution foresees when it gives States the right not to approve the conventions or agreements adopted by a two-third majority in the WHA. What the WHO Constitution does not do, however, and we will get back to this later, is differentiate between opt-outs that pertain to fundamental institutional questions and others.

Granting refusal powers in those three instances does not amount to a serious infringement of the principle of political equality. On the contrary, not granting refusal powers to States in those circumstances would give every State a right to impose the conditions of membership to an IO on all others. This would be not only too important a departure from the current practice of international law, but would presumably benefit the most powerful States by allowing them to impose universal membership to IOs, which would result in greater political inequality. Granting equal refusal rights to every State, especially exit rights, might be the last, but crucial resort of weaker States seeking to escape the domination of more powerful ones in IOs.

Second, outside of that limited set of refusal powers, and for reasons pertaining to the democratic value of State representation, IO Member States should be guaranteed *rights to equal participation*.

This should not only apply to discussing the terms of the constitutive treaties, including the initial design of the IO, but also to the most important other decisions of the IO. Thus, those equal participation rights should include decisions to admit or to exclude a Member State and to hold the IO responsible. It is enough, in order to satisfy the requirements of democratic legitimacy, to guarantee all IOs' Member States an equal share in decision-making, that is, an equal seat, voice and vote in making those decisions.[69] Those decisions may, therefore, be adopted by majority rule, provided States have consented to that rule when instituting the IO in the first place.[70] As a

[69] *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier Between Turkey and Iraq)* (Advisory Opinion) [1925] PCIJ Ser. B No. 12, p. 29.

[70] Francis Cheneval, *The Government of the Peoples: On the Idea and Principles of Multilateral Democracy* (New York: Palgrave Macmillan, 2011), pp. 133–140.

matter of fact, two thirds of existing IOs today apply some kind of majority-based voting procedures. Scope precludes going into the detail of how best to design them in practice here.[71]

To illustrate our argument, it may be interesting to turn to the WHO again. States have the right to participate on an equal basis in deliberations and an equal right to vote in the decisions of the WHA, decisions that are adopted by majority rule (either a simple majority or a two-third one). As argued before in this section, it should, however, be considered democratically legitimate that those various applications of the right to equal participation do not also imply an additional veto or even a refusal power of each Member State.

Let us take the example of the United States (hereafter US) at the WHO. The US were free to join the WHO when it was instituted in 1946. And by virtue of its sovereignty, the US federal government may still decide to withdraw from the organization at any time, under the conditions established in the Constitution of the organization. For the rest, the US government has a claim to exercise its right to participate on equal terms in a number of important decisions about and in the WHO, such as decisions pertaining to how to amend its structure and organizations, how to finance it, which programmes should be most strategic, which further powers States should confer to the organization, whether a new member should be admitted or whether a current member should be excluded or, finally, whether to hold the organization responsible.

Imagine now that the WHA adopts a new treaty on pandemic prevention and preparedness that the US government considers contrary to its interests. Given that the US has the option to withdraw from the organization, the principle of equal State consent does not require, on the proposed account, giving the US, besides an equal right to vote, an additional right either to veto the convention or to opt out from that convention after the vote. Unfortunately, this is not what currently applies in the WHO. As mentioned previously in this section, the WHO Constitution grants every Member State a right to opt out from any convention or agreement adopted by a majority of the WHA (Article 20 WHO Constitution), including within the scope of the regulatory powers of the WHA (Articles 22 WHO Constitution). What this means therefore is that all Member States may exercise their consent as a refusal power. Thus, if the US considers that the proposed convention is contrary in any way to its interests, it may simply refuse it and it will not be bound by it.

[71] For a detailed discussion see, for example, Boutros-Ghali, fn. 56; Besson, 'L'égalité des États membres de l'Union européenne', fn. 3.

We consider this too strong an interpretation of what the principle of State consent requires from a democratic perspective. Certain exceptional topics that might impose a serious burden on States interests could and should be identified as such in the WHO Constitution and justify opt-out rights. In other cases, however, the WHA should be able to adopt new conventions by majority rule, as it currently does, but States in the minority should accept the result of the voting process without being granted a refusal power. They could indeed always withdraw from the organization. Admittedly, the distinction between fundamental issues that impose significant burdens on certain States' interests and those that do not, is not always clear and has to be identified specifically in each IO.

This example illustrates how the principle of State consent is often interpreted *qua* refusal power in the contemporary international law of IOs. This is also the case in universal, public and general IOs such as the WHO that have innovated by turning a veto right into a mere right to refuse and opt out at a later stage. To go back to our earlier analysis of the double bind of State consent in IOs, such a restrictive interpretation of State consent *qua* refusal power actually explains why such IOs and their Member States have found ways of disempowering or, at least, circumventing Member States' assemblies or other representative organs in practice, transferring some of their decision-making powers to less accountable technical bodies or secretariats or even to private organizations.

Against this background, the conception of the principle of State consent that we have defended here is, on the one hand, more restrictive, to the extent that it replaces, with a few exceptions, a refusal power with a right to equal participation. In so doing, the conception is, on the other hand, also more protective of State consent than the current practice of international decision-making within IOs that has mostly dispensed with equal State consent in regular decision-making processes. Our proposal's objective is to re-empower, within egalitarian limits, democratic States in their representative role in IO decision-making processes.

Note that even if State consent is understood along the proposed participatory lines and its role reformed in IOs on grounds of the political equality of States, additional reforms will be required to correct the other democratic deficits of State-only representation identified earlier in Section 14.3.3. This includes issues of demographic disproportions or permanent minorities and the further breaches of the political equality of peoples and individuals they give rise to despite the formal political equality of States.

### 14.5.3 *From Equal State Consent to Equal Public Participation*

Once the participation rights of States as representatives are revisited in the form of participation rights in IOs, it is important to explore not only how that

public participation may be articulated with representation by other non-State public institutions, but also what those other public institutions' (distinct) participation rights should be and what they should apply to. Note that we are not considering the modalities and contexts of equal participation of other non-State private representative organizations in this chapter.[72]

Interestingly, as mentioned in Section 14.4.4, certain IOs have started reforming and defining mechanisms for their so-called 'interaction' with what they usually refer to, in a bulk, as 'non-State actors'.[73] Most of those interactions, however, are not constructed as political, as explained in Section 14.5.1, and are certainly not approached from a representative perspective. As a matter of fact, those allegedly 'participatory'[74] mechanisms, including so-called partnerships with 'stakeholders', have not even been organized so as to be very effective in participatory terms: they are mostly advisory (e.g. they give them a 'voice', but no 'vote').

Among those new mechanisms' political deficits, one should mention, first of all, that they do not clearly distinguish the participation of non-State public institutions from that of non-State private organizations. Furthermore, most of those mechanisms do not propose a clear articulation of those other institutions' and organizations' 'participation' in IOs with Member States' own participatory rights in those IOs, and this despite the fact that they represent the same peoples. As a consequence, the other public or private institutions' distant involvement in IO processes somehow dispenses those IOs and their Member States from drawing the full institutional consequences of those newly included institutions' representative role.[75] Worse, the increasing involvement of those non-State public and private institutions in IOs has actually also often come at the price of the latter's Member States' own participatory rights.[76]

The relevance of some of those critiques are best exemplified by reverting to the WHO example. Indeed, the WHO belongs to one of the most active IOs

[72] On those non-State private actors' 'consent', see Duncan B. Hollis, 'Why Consent Still Matters – Non-State Actors, Treaties and the Changing Sources of International Law' (2005) 23(1) *Berkeley Journal of International Law* 137–174. See also Besson, 'Pour une représentation démocratique multiple au sein de l'Organisation mondiale de la Santé', fn. 64.

[73] Pauwelyn *et al.*, fn. 61.

[74] See, for example, Peters, fn. 50, pp. 269, 320–322; Krajewski, fn. 50, paras. 19–20.

[75] Peter J. Spiro, 'Accounting for NGOs' (2002) 3(1) *Chicago Journal of International Law* 161–169, at 166–167.

[76] Andrew Hurrell and Nicholas Lees, 'International Organizations and the Idea of Equality', in Bob Reinalda (ed.), *Routledge Handbook of International Organization* (Abingdon: Routledge, 2013), pp. 106–118, pp. 115–116.

in extending participatory rights to non-State institutions or organizations, both public and private.[77]

To start with, WHO law has been receptive to the need to organize various interactions with other IOs. This explains how the WHO has been able to reach significant agreements of collaboration, reciprocal representation and mutual control with other IOs. However, nothing comparable has yet been articulated regarding the WHO's interactions with other non-State public institutions such as regions and cities. This is surprising given the increasing *ad hoc* implication of cities in some other IOs' standard-setting processes.[78] Of course, under Article 8 of the WHO Constitution, the latter could become Associate Members of the organization. That provision refers, indeed, to the granting of rights and obligations to 'territories or groups of territories which are not responsible for the conduct of their international relations'. However, this would require a proposition by their respective Member State that is still regarded therefore as the sole representative of the people.

True, in 2016, the WHO was the first IO to adopt the so-called Framework of Engagement with Non-State Actors.[79] Sadly, and despite its name, the Framework focuses on private organizations only.[80] It does not address the participation of non-State public institutions such as cities or regions, and the complex but sophisticated ways in which various non-State public institutions may combine to correct and complement State representation at the WHO. Moreover, even with respect to private organizations, the Framework adopts a depoliticized cost–benefit approach and, within that context, mostly emphasizes the 'risks of engagement' rather than its benefits. Finally, the Framework focuses mostly on the risks of capture by the 'private sector' involved in public–private partnerships or privatization and does not consider the representative benefits of the inclusion of other non-profit private organizations such as NGOs.

Clearly, therefore, more work is needed in specifying the participatory rights of non-State public institutions in IOs and their exact scope. It is actually an ancient question to the extent that the first IOs were open to the membership

[77] See, for example, Pauwelyn *et al.*, fn. 61, s. III, and especially chs. 13, 18, pp. 245–269, 381–393.
[78] Katz Cogan, 'International Organizations and Cities', in Aust and Nijman, fn. 6.
[79] WHO, 'Framework of Engagement with Non-State Actors', Adopted by the World Health Assembly, WHA69.10 (28 May 2016). See also Besson, 'Pour une représentation démocratique multiple au sein de l'Organisation mondiale de la Santé', fn. 64.
[80] Ayelet Berman, 'Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors' (2021) 32(1) *European Journal of International Law* 227–254.

of other public institutions than States such as regions in particular.[81] Moreover, certain IOs have actually remained open to non-State institutions' membership or, at least, been revised in their constituting treaty so as to enable the inclusion of other IOs, such as the EU, as members.

Importantly, as argued in Section 14.5.2, the multi-public system of international representation does not commit us to the idea that all public representatives should enjoy the same status and rights in IOs as those of Member States.[82] Quite the opposite, actually. Two arguments may be made here with respect to political equality.

First of all, the principle of political equality should be instantiated *differently for different kinds of public institutions*.

For the reasons examined in Section 14.3.2, there are democratic reasons to grant distinct participatory rights to States only, such as the right to vote in an IO Member States' assembly. States are, after all, the primary international representatives of their peoples. Political equality therefore applies, first and foremost, to the reciprocal relations among those States. It requires that whatever rights are given to some of them, particularly in universal IOs, such as the WHO, are also granted to all other States on an equal basis.

Other types of public institutions may therefore be recognized rights different from States' without a violation of the principle of political equality. When applied to other non-State public institutions, the principle of political equality only requires that they be treated equally among themselves. For instance, if a universal IO like the WHO recognizes a city as an Associate Member with certain rights and obligations, it should grant similar rights and obligations to other cities around the world. There may be exceptions, of course, related to the remedial (and arguably temporary) role played by non-State public representatives in the current non-ideal circumstances of international law-making. It suffices here to mention the special remedial role US cities could play at the WHO in the context of a hypothetical US withdrawal from the organization. The representative role those cities would play would indeed be substantially different from that of other cities in other WHO Member States.

Second, the principle of political equality should be instantiated *differently for different processes and situations*. When we apply the principle of equal

[81] See, for example Jean-Marc Sorel, 'La prise en compte des collectivités territoriales non-étatiques par les organisations internationales à vocation universelle', in Société française pour le droit international (ed.), *Les collectivités territoriales non-étatiques dans le système juridique international* (Paris: Pedone, 2002), pp. 125–153.

[82] Besson and Martí, fn. 52.

participation to non-State public institutions, it is important to clarify what their participation consists in and what it applies to.

Thus, voting in a decision-making process, especially if it is in the WHA, cannot be identified with merely participating in a deliberative process. And the same may be said about the difference between voting on a treaty and voting on a recommendation, or voting for a lower level decision of the Board. Note, however, that the common distinction between 'having a voice' and 'having a vote' is not always very easy to make in practice. And there may be certain decisions that, even if they are crucial to the ordinary government of a particular IO, are not the kind of decisions made by its assembly of Member States. In such an instance, extending voting rights on those decisions to other public institutions, like regions, cities or even other IOs, might be the best way to enhance the democratic representativeness of the IO.

## 14.6 CONCLUSION

Even if, strictly speaking, consent can neither be a condition of international law's validity nor amount to a moral reason to comply with it, most obligations of international law are still regarded as 'based' on State consent and State consent contributes to the legitimacy of international law. In spite of its many drawbacks, including the slowing down of international law-making, there are, this chapter argued, good reasons for the principle of equal State consent to international law, especially from a democratic legitimacy perspective. If our concern is the democratic legitimacy of international law-making in IOs and their representativeness in particular, then equal State consent should not be dispensed with. If it is in many cases part of the problem for the effectivity of IOs, it is also part of a democratic solution thereto and should be revised accordingly.

Even in its qualified version of 'democratic State' consent, the principle of equal State consent in IOs suffers from important deficits from the point of view of democratic legitimacy. The chapter envisaged several institutional proposals to correct or, at least, complement the role of equal State consent in the institution, operation and control of IOs. While being aware of the high complexity and diversity of IOs, it developed a non-ideal normative argument for the latter's re-institution to enhance their democratic legitimacy. That process should start, it argued, with the replacement of the principle of equal State consent by that of equal public participation in IOs: doing so does not only avoid reducing State consent in IOs to State veto or even refusal powers, but it also extends the personal scope of those participatory rights to other non-State public institutions.

The chapter's proposal should be read as the first of many steps in the institutionalization of a system of multiple representation of the world's peoples *qua* multiple instituted publics. A lot remains to be clarified, however. More research is needed in particular on the increasing international representative role of IOs themselves, including in other IOs.