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The Politics of Regional International Organizations

A New Dawn for the Political Legitimacy of International Law

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Abstract

International lawyers can no longer afford to ignore the growth of regional orderings under the umbrella of international law and their political consequences. There are, the author argues, at least two concerns RIOs may help us address when thinking about the future of the international institution of (States) peoples and organising it to secure more political legitimacy: sovereignty and democracy. With respect to sovereignty *qua* ultimate political authority, first, RIOs enable us to consider the virtues of multiple and shared external sovereignty in international relations and the possibility of a regional ordering of dispersed sovereignty as a shield to protect the same albeit multiply reinstituted peoples *qua* publics against domination, and this both inside their States and in their international relations. Second, with respect to democracy, RIOs enable us to approach international democracy, and especially international democratic representation, in a pluralistic albeit systemic way: peoples may be reinstituted into different publics by multiple institutions over time, such as their States, but also by one or more RIOs in their region, and giving those representative institutions a role in international law-making could strengthen political equality by compensating demographic and power imbalances between States while also requiring those RIOs to become more egalitarian and accountable in return.

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> Today, as in past eras, competing claims to exercise control over regions are justified and enabled by international lawyers. […] The way that international lawyers participate in framing and making meaning of those negotiations and processes plays a significant role in bringing new regional orders into being and giving them legitimacy. […] Thinking about regional order as a juridical concept […] can help to […] draw attention to the political stakes of assembling regional orders through international law. […] International lawyers could take the representational issues involved in creating regional orders as seriously as we take them in relation to thinking about the state or sovereignty. What might a just, democratic, egalitarian, or legitimate regional order look like? What interests and values should be prioritised in a particular region? International lawyers currently have no real language or framework for thinking about who participates in shaping regional orders and what this means for old concepts like self-determination.[1]

Introduction

Regional international[2] organizations[3] (RIO) have been neglected for too long in international law scholarship. It is the aim of the essays gathered in

1 Anne Orford, 'Regional Orders, Geopolitics and the Future of International Law' (2021) 74(1) *Current Legal Problems* 149, 191, 192 and 194.

2 '*International* organizations' are understood here as *interpublic* organizations (sometimes referred to, far too restrictively, as 'intergovernmental'). As I have argued elsewhere, indeed, 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(3) *International Organizations Law Review* 489 ('Democratic Representation'); Samantha Besson, *The Public & Private Relation and International Law*, Brill Research Perspectives in International Legal Theory and Practice (Brill/Nijhoff, forthcoming), ch. 5 ('Public/Private').

3 As defined in this special issue's introduction, see Besson and Kassoti, in this issue.

this special issue to consolidate a legal concept of RIO and address the legal questions those organizations raise in and for international law. The same may be argued about the political stakes of the organization of such regional orderings. International lawyers can no longer afford to ignore the political implications of the growth[4] of those RIOs, both in number and in impact,[5] under the umbrella of international law.[6] To the extent that international law orders RIOs, indeed, it should contribute to vesting those RIOs and their international law[7] with political legitimacy.[8]

This is an even more pressing concern as the development of RIOs questions central tenets of the contemporary international institutional framework, a framework that was set up to adopt international law and thereby presumably contribute to its political legitimacy. This is especially the case of the constitutive oppositions between the universal and the domestic, between the functional and the territorial, and between the technical and the political. Those distinctions constitute the binary opposition between two types of public institutions under contemporary international law: (domestic, territorial and political) States, on the one hand, and (universal, functional and technical) international organizations (IO), on the other.[9] Under contemporary international law, RIOs have been organised and participate in international law-making, but, while doing so, they fall between those two main institutions. With their increasing territorial claims[10] and, most importantly, with their

4 Of course, even if RIOs are a late institutional occurrence, regional orderings and the tension between the universal and the regional have always been part of international law. See Samantha Besson, 'Du droit de civilisation européen au droit international des civilisations: instituer un monde des régions' (2021) 31(3) *Swiss Review of International and European Law* 373; Orford (n 1). See also Sinclair, in this issue.

5 See Besson and Kassoti, in this issue.

6 For exceptions, see Samantha Besson, 'Reconstructing International Law starting from Regional Organizations' (2021) 2 *Revue européenne du droit* 65; Besson (n 4); Orford (n 1).

7 On the various contributions of RIOs to international law-making, see Bordin and Odermatt, in this issue.

8 On the relationship between the validity and the legitimacy of international law, see Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 163–185.

9 See Besson and Kassoti, in this issue. See also Catherine Brölmann, 'Review of Laurence Boisson de Chazournes (2017) Interactions between regional and universal organisations: a legal perspective' (2020) 114(2) *AJIL* 335. For a more nuanced view, see Brölmann, in this issue.

10 On the territory of IOs, see Gail Lythgoe, *The Rebirth of Territory* (Cambridge University Press, 2024). Note, however, that the author alleviates the tension between State's territory and IO's function by proposing what could be read as a functional reading of IO 'territory' and, by extension, of State territory. Her reading could thereby be said to contribute to

steadying political organization,[11] however, RIOs question States' exclusive political standing under international law. They thereby shed a new light on the existing lack of political legitimacy of IOs in general,[12] albeit an even more glaring one by sheer virtue of their number and influence. They reveal the growing gap between those two statutes of public international law or, rather between the dominant one, that of statehood that remains largely minimal in any case, and a still embryonic one, that of IOs.[13]

As a matter of fact, and precisely due to the exclusive connection that has been made between politics and statehood in international law, RIOs have been regularly accused of posing a threat to the political legitimacy of international law. That critique is usually twofold and pertains to two principles of legitimacy under contemporary international law still associated to the State as the exclusive political reference: sovereignty and democracy.

First of all, certain RIOs have been accused of impinging not only on their Member States' internal *sovereignty* through their autonomous legal orders or merely through their law, but also on those States' external sovereignty by developing concurrent international relations with third States, RIOs or universal international organizations (UIO) and even, in some cases,

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the growing de-politicisation of statehood itself through the de-territorialisation of law. On the latter, see Samantha Besson, 'Why and What (State) Jurisdiction: Legal Plurality, Individual Equality and Territorial Legitimacy' in Jan Klabbers and Luigi Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press, Cambridge, 2019) 91–132.

11 See Fredrik Söderbaum, 'Old, New and Comparative Regionalism: The History and Scholarly Development of the Field' in Tanja A Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press, 2016) 16–38, 18; Tanja A Börzel and Thomas Risse, 'Three Cheers for Comparative Regionalism' in Tanja A Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press, 2016) 621–648, 623–630.

12 See for a recent discussion, see Besson, 'Democratic Representation' (n 2); Samantha Besson, 'L'égalité des Etats membres de l'Union européenne: un nouveau départ en droit international de l'organisation des Etats?' in Edouard Dubout (ed), *L'égalité des Etats membres de l'Union européenne* (Bruylant, 2022) 263–298; Samantha Besson and José L Martí, 'No Democratic Representation without Institution. Lifting the Veil of Functionalist, Incorporation and Agency Theories of Democratic Representation by International Organizations' in Samantha Besson (ed), *Democratic Representation in and by International Organizations* (forthcoming); Marieke Louis and Lucile Maertens, *Why International Organizations Hate Politics. Depoliticizing the World* (Routledge, 2021).

13 See 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 ('Dworkin'); Samantha Besson, *Reconstructing the International Institutional Order, Inaugural Lectures of the Collège de France* (OpenEdition Books/ Collège de France, 2021) ('Inaugural Lectures'); Besson, 'Public/Private' (n 2) ch. 5.

concurrent membership therein.[14] Second, certain RIOs, often established by one or a few powerful States in a region to enhance their power on a regional scale, but also on the universal plane, have been criticised for eroding the equality of other States in international law-making,[15] and, by extension, the form of interstate *democracy* that often passes for international democracy in contemporary international law.[16]

Of course, there have been variations in those critiques depending on the RIO and the region, and especially on the origins of those expressing the critiques.[17] Moreover, to the extent that RIOs have been left to grow in the shadow of the international institutional order to embody a plurality of very different power alliances, those critiques have usually emanated neither from the most powerful States nor from the weakest ones in each region, thereby making any change in the *status quo* difficult to achieve.[18]

Instead of approaching those developments as undesirable ones or as intractable necessities, this article proposes to treat them as possible triggers of change and as empowering virtues for the future of the international institutional order and the political legitimacy of international law. Well re-ordered by international law, indeed, RIOs could contribute to enhancing the political legitimacy of the international law that they both adopt and influence.

If international lawyers decide to take their legal blindfolds away and face international law's role in instituting or re-instituting regional orderings of States through RIOs, the re-ordering of RIOs may help us address the two

14 See Henry G Schermers and Niels M Blokker, *International Institutional Law. Unity Within Diversity* (Brill, 4th ed, 2021) ch. 8, 1181, 1197 and 1204, ch. 12. See also Brölmann, in this issue.

15 See Lora A Viola, *The Closure of the International System: How Institutions Create Political Equalities and Hierarchies* (Cambridge University Press, 2020) 171, 228.

16 See Markus Krajewski, 'International Organizations or Institutions, Democratic Legitimacy' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008, article last updated in 2019) 1102–1107, para. 5.

17 On this ideological double standard both in official and scholarly reactions, see Orford (n 1) 152.

18 See Viola (n 15) 31; Andrew Hurrell and Nicholas Lees, 'International Organizations and the Idea of Equality', in Bob Reinalda (ed), *Routledge Handbook of International Organization* (Routledge, 2013) 106, 113; Besson, 'Democratic Representation' (n 2); Besson (n 12). On States' inconsistent reactions to IOs on the question of the latter's defects in terms of rule of law and political legitimacy in general, see 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* (Springer, 2010) 777–806.

issues mentioned before and hence comply with the two principles of political legitimacy at stake, that is sovereignty and democracy.

With respect to *sovereignty*, first, RIOs enable us to consider the virtues of multiple and shared external sovereignty in international relations and the possibility of a regional ordering of dispersed sovereignty as a way to re-institute the same peoples many times into different publics by multiple institutions, such as their States, but also by one or more RIOs in their region, and thereby as a shield to protect the same albeit multiple reinstituted peoples against domination, and this inside their States and in their international relations. Second, with respect to *democracy*, RIOs enable us to approach international democracy, and especially international democratic representation, in a pluralistic albeit systemic way: giving each of the multiple institutions representing the same peoples a complementary role in international law-making could strengthen political equality by compensating demographic, epistemic and power imbalances between States, while also requiring those RIOs to become more egalitarian and accountable in return.

Those two issues are addressed in turn in this contribution's two parts: first, RIOs and dispersed sovereignty for more self-government (1.); and, second, RIOs and multiple democratic representation for more political equality (2.). The proposed argument for a dispersed conception of external sovereignty and, on that basis, a multiple conception of international democratic representation fits the legal guarantee of sovereign equality in the United Nations (UN) Charter, that is already a plural one. However, it justifies it by reference to popular sovereignty and takes it one institutional step further by making that sovereign equality non-State exclusive and by re-ordering political equality at an additional intermediary institutional stage between the State and UIOs such as the UN: that of RIOs.

As it should have become clear by now, this article's focus is on *political* legitimacy or legitimate authority. Political legitimacy is approached here, and 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.[19] It is a form of legitimacy that is not descriptive or subjective and cannot be reduced to popular acceptability, but is *normative* or objective. More specifically, it is a form of normative

19 See Samantha Besson and José L Martí, 'Legitimate Actors of International Law-Making—Towards a Theory of International Democratic Representation' (2018) 9(3) *Jurisprudence* 504, 508–509.

procedural legitimacy. It focuses on the procedural aspects of law-making and should therefore be distinguished from more substantive forms of normative legitimacy, such as justice. Under the standard account, the question of political normative and procedural legitimacy has usually been given a *democratic* response, and it is the case here as well. This means, still broadly speaking, that law-making should ultimately be attributable to the people subject to the law (according to the principle of self-government or popular sovereignty), with some additional democratic requirements (including political equality).

1 RIOs and Dispersed Sovereignty

The external sovereignty of instituted peoples is mostly approached as 'concentrated' and 'exclusive' under international law and as being invested in States only. This contrasts with existing conceptions of internal sovereignty, especially in federal States, where sovereignty has also long been considered as 'shared' and 'multiple'. Internally, this kind of dispersed sovereignty has actually been deemed both a guarantee of self-government and the best protection against domination.

This section's argument is that RIOs enable us to consider the virtues of dispersed sovereignty in international relations as well and the possibility of ordering it as a shield to protect the same peoples, albeit peoples reinstituted into a multitude of publics, against domination. And this, both inside those people's States and in their IOs. The argument proceeds in two steps: by arguing, first, for dispersed external sovereignty in general (1.1.) and, second, for the partial sovereignty of RIOs (1.2.).

1.1 *From Popular Self-Government to Dispersed External Sovereignty*

To understand this section's argument, it is important to start by defining 'sovereignty'. By sovereignty, this section means the 'supreme political authority' of a given public institution, usually a State.

It is common to distinguish between the internal and external dimensions of State sovereignty. The internal dimension of sovereignty refers to the fact and proposition that the political power of States is ultimate *vis-à-vis* other internal institutions that operate within their borders. The external dimension of sovereignty, by contrast, refers to the fact and proposition that the political power of States is ultimate *vis-à-vis* other institutions operating within the international order.

A further distinction is usually made, this time between two very different conceptions of the internal dimension of sovereignty: classical and dispersed sovereignty.

The so-called *classical* conception of sovereignty[20]—defended by Bodin and Hobbes[21] and later by Rousseau or Schmitt[22]—is the one according to which sovereignty should be understood as concentrated, absolute and unlimited power. The idea of 'concentrated power' implies that the sovereign institution is a single agent, individual or collective, capable of imposing its ultimate will on others, at least within its territorial limits. 'Absolute (or exclusive) power' implies that the sovereign institution has the right to rule over anyone in its territory without having to compete with other institutions. Finally, and relatedly, 'unlimited (or ultimate) power' means that a sovereign institution should know no legal or political limits, either material or formal, on the decisions it can make. This implies that, by definition, no constituted authority can be considered sovereign: its authority derives from the constitution and may only be exercised within the limits imposed by that constitution. The sovereign, in this classical understanding, can only be the constituent power, that is the authority with the ultimate power to change the constitution.

This conception, however, has been challenged from its inception by another tradition of political thought, one that in fact pre-existed the classical conception and is generally associated with the republican origins of law and institutions: a *dispersed* conception of sovereignty that goes back to Aristotle and Cicero.[23] This conception asserts that sovereignty should be understood as shared, relative and limited power. The idea of 'shared power' means that no single agent, individual or collective, may claim ultimate authority. Instead, political power should be shared or distributed among a plurality of institutions. The idea of 'relative power' implies that no institution can claim absolute power over its territory. They may only claim partial power in relation to the power of others. Sometimes this distribution of power is clearly defined by the

20 See Christopher W Morris, *An Essay on the Modern State* (Cambridge University Press, 1998) 174 *et seq.*

21 See Jean Bodin, *On Sovereignty* (Cambridge University Press, 1992); Thomas Hobbes, *Leviathan* (Cambridge University Press, 1996) (orig. pub. 1651).

22 See Jean-Jacques Rousseau, *The Social Contract and Other Later Political Writings* (Cambridge University Press, 2nd ed, 2018); Carl Schmitt, *The Concept of the Political* (University of Chicago Press, 2007) (orig. pub. 1932); Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2006) (orig. pub. 1922).

23 Aristotle, *Politics* (The Modern Library, New 1943) (orig. pub. 4th-century BC), Books III-IV; Marcus Tullius Cicero, *On The Republic. On The Laws* (Harvard University Press, 1928) (orig. pub. 52 and 54 BC), On The Republic, Book II.

constitution, either territorially or functionally, or both. Very often, however, there is no clear criterion or standard of demarcation. 'Limited power' means that none of these authorities, including the constituent powers, can govern without limits. As constituted institutions, they may only act within the limits permitted by the constitution.

Federal systems (some of which even recognize the sovereignty of their federated States as it is the case under Article 3 of the Swiss Constitution), as well as so-called pluralist systems that protect the self-government of indigenous peoples, demonstrate that sovereignty can be shared, relative and internally limited without the concept of sovereignty becoming meaningless. It follows that the justification of the classical conception of sovereignty as concentrated, absolute and unlimited power should actually be considered as normative and needs to be argued for, in contrast to the strictly conceptual argument advanced by Bodin and Hobbes and their followers.

Let us now consider what the two conceptions imply for external sovereignty. The principle of external State sovereignty (theorised by Emer de Vattel, among others)[24] is one of the central tenets of modern international law. In short, the modern conception of external State sovereignty in international law implies two things: first, that there should be no institutions external to the State with competing power over the internal affairs of the sovereign State; and second, that the State should be able to speak with a single voice recognised as authoritative by other States in its international relations. One may therefore qualify the conception of external State sovereignty that underlies modern international law as *exclusive*, insofar as it considers States as the only sovereign institutions in the international institutional order. That conception has remained predominant over the last three centuries, although it has evolved in some of its associations as I will explain.

Under the spell of the modern analogy between the international personality of the State and that of its people, and hence of the separation of State sovereignty from popular sovereignty, however, the exclusive conception of sovereignty has always been a conception of the external dimension of sovereignty only. This point needs emphasising because this exclusive approach to external sovereignty does not seem to carry any weight at all in the debate around the two conceptions of internal sovereignty presented earlier. Evidence for this is that, while Bodin and Hobbes were advocates of both the modern, concentrated conception of internal sovereignty and the exclusive conception with respect to external sovereignty, many proponents of

24 Emer de Vattel, *Le droit des gens: Principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains* vol. I (Abraham Droz, 1758) ch. 1, para. 4.

dispersed internal sovereignty have in fact endorsed the exclusive conception only when it comes to external sovereignty.[25]

A third group of authors,[26] however, to which I belong, has extended the idea of dispersed sovereignty from the domestic to the international plane. The proposal is to abandon the idea that States are the exclusive sovereigns in the international order and to recognize a partial sovereignty of other non-State public institutions such as IOs, regions or cities. One may refer to this second approach to external sovereignty as *multiple* or 'multi-public' sovereignty.[27]

It is important to emphasise that these two conceptions of external sovereignty, either exclusive or multiple, have in common the rejection of a single global institution with concentrated, absolute and unlimited sovereignty. Such an institution does not exist, that is a fact. Not only is it unlikely to ever exist, but it should not exist, for normative reasons. Such a ruler would be too powerful and, in the very likely event that it became tyrannical, there would be no possibility of challenging or checking its power. In this respect, then, both conceptions of external sovereignty share a minimally pluralist understanding of sovereignty in the international order. The international order consists of a set of minimal legal rules governing the interactions between a plurality of sovereign institutions. These multiple sovereign public institutions are approached as co-authors of the norms of international law they adopt and co-institutors of international organizations, including RIOs. This fundamental plurality is reflected in the dogma of 'sovereign equality', first guaranteed in writing in the 1945 UN Charter (Article 2(1)) and which links the guarantee of the sovereignty of States conceptually and normatively back to a more foundational guarantee: that of their posited equality.[28]

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25 See, eg, Philipp Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012).

26 This alternative view of sovereignty goes by many different names besides multiple or dispersed sovereignty: divided sovereignty, distributed sovereignty, fragmented sovereignty or disaggregated sovereignty. See Thomas W Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103(1) *Ethics* 48; Ruth Lapidoth, 'Redefining Authority: The Past, Present, and Future of Sovereignty' (1995) 17(3) *Harvard International Review* 8; Neil MacCormick, *Questioning Sovereignty* (Oxford University Press, 2002); Hope M Babcock, 'A Civic Republican Vision of "Domestic Dependent Nations" in the Twenty-First Century. Tribal Sovereignty Re-envisioned, Reinvigorated and Re-empowered' (2005) 2005(2) *Utah Law Review* 443; Martin Loughlin, 'Ten Tenets of Sovereignty' in Neil Walker (ed), *Sovereignty in Transition* (Bloomsbury, 2006) ch. 3; Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Bloomsbury, 2006) ch. 1.

27 For a full argument, see Samantha Besson and José L Martí, 'Republican (Multiple) Sovereignty' in Mortimer Sellers and Frank Lovett (eds), *The Oxford Handbook on Republicanism* (Oxford University Press, forthcoming).

28 See Besson (n 12).

While plurality is part of both the exclusive and multiple conceptions of external sovereignty, what distinguishes them is the type of institutions to be considered sovereign in the international order: it pertains to States only in the exclusive conception, whereas it can be States and other non-State public institutions in the multiple sovereignty conception defended here.

In defence, advocates of the exclusive or statist conception of external sovereignty might invoke the democratic value of popular self-government or popular sovereignty. The latter, indeed, is generally seen, and rightly so, as intrinsically linked to the idea of State sovereignty and their sovereign equality.[29] In itself, however, multiple sovereignty is entirely compatible with popular sovereignty and, as I would like to argue, even more so in contemporary circumstances.

To start with, my point is not to dispute that States and their peoples should be regarded as sovereign, nor that they should be treated as sovereign equals accordingly. As I have argued elsewhere, and will explain again later in this contribution, their sovereign equality is a central contribution to the democratic legitimacy of international law in the contemporary non-ideal circumstances of international law-making.[30] The only argument made here is that States should not be considered as the sole sovereign institutions of the international order. Other non-State public institutions such as IO s should also be considered to have a share of that sovereignty.

Indeed, the rationale for the plurality of sovereign States and especially for their sovereign equality has evolved since the 17th century. Since the international re-institution of States in the international institutional order in 1945, sovereign equality has been linked to the political equality of both citizens and peoples (Article 1 of the UN Charter)[31]—through international human rights, for the former, and through the international right to

29 See Thomas Christiano, 'Democratic Legitimacy and International Institutions' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 119–138; Thomas Christiano, 'The Legitimacy of International Institutions' in Andrei Marmor (ed), *The Routledge Companions to Philosophy of Law* (Routledge, 2012) 380–394.

30 See Besson, 'Democratic Representation' (n 2); Samantha Besson and José L Martí, 'From Equal State Consent to Equal Public Participation in International Organizations—Institutionalizing Multiple International Representation' in Samantha Besson (ed), *Consenting to International Law* (Cambridge University Press, 2023) 314–346.

31 See Hans Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization' (1944) 53(2) *The Yale Law Journal* 207, 208; Ulrich K Preuss, 'Equality of States: Its Meaning in a Constitutionalized Global Order' (2008) 9(1) *Chicago Journal of International Law* 17, 27; Marcelo Kohen, 'Article 2, paragraphe 1', in Jean-Pierre Cot, Alain Pellet and Mathias Forteau (eds), *La Charte des Nations Unies: Commentaires article par article* (Economica, 3rd ed, 2005) 402–404. See also Besson (n 12).

self-determination, for the latter.[32] There is no longer any reason, therefore, to limit the collective self-determination of a people established as a public, together with its popular sovereignty, to a single public institution, that is the State, together with State sovereignty.

True, in such a system of multiple sovereignty, States would no longer enjoy the exclusive privilege of ultimate authority in international law. At present, in any case, their authority is already limited. As mentioned before, they can only exercise it within the limits of international law and of the equal authority of other States. In a system of multiple sovereignty, their authority would simply be further limited by the competing authority of other public institutions.

In the case of infranational regions and cities, this is relatively easy to imagine. The kind of shared internal sovereignty enjoyed by federated States or indigenous peoples, for example, could easily be extended to their international relations. It is true that this type of shared internal sovereignty implies a distribution of external powers that is usually organised, in a more or less detailed way, by the constitution of the federal State (as exemplified by Articles 54–56 of the Swiss Constitution). These powers do not, however, have to depend on the State constitution, nor do they necessarily have to be organised on a federal model either. Indeed, even if, in a given State, federated States, regions or cities are not granted such external powers by their State, they already exercise them in practice in a number of ways, thus representing their peoples in many international procedures, including within IO s.[33] This may even lead them, in some cases, to adopt decisions and agreements that contradict the official foreign policy of their State's government. Certain IO s even invite cities and regions to participate in their procedures, and encourage their States to revise their internal public law in order to strengthen the international representation powers of these cities and regions within the IO s.[34] It is clear that if this public law of multiple international representation were to be approached on a federal basis (which is possible,[35] but not necessary under the proposed account), it would have to be in the form of a common

32 See Besson, '*Inaugural Lectures*' (n 13); Besson (n 12).

33 See Samantha Besson and José L Martí, 'Cities as Democratic Representatives in International Law-Making' in Helmut P Aust and Janne E Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar, 2021) 341–353.

34 See Jacob Katz Cogan, 'International Organizations and Cities' in Helmut P Aust and Janne E Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar Publishing, 2021) 158–172.

35 See Olivier Beaud, 'Federation and Empire. About a Conceptual Distinction of Political Forms' (2018) 16(4) *International Journal of Constitutional Law* 1199.

federal law that is both domestic and international, rather than from the perspective of the external relations law of one federal State at a time.[36]

The self-government of the publics of these infranational institutions should, of course, be compatible with the self-government of each people first instituted as a public by the State. However, their shared sovereignties are not impossible to reconcile legally, both internally and externally (as exemplified by the mutual respect obligations under Articles 54–56 of the Swiss Constitution). Moreover, the recognition of the partial internal sovereignty of federated States, and by extension of cities and regions, is generally not regarded as a problem for the self-government of the peoples of federal States, especially from a republican perspective. On the contrary, the idea of internal sovereignty as dispersed, relative and limited ultimate power has been celebrated and supported precisely as a means of reducing the risk of public domination and abuse of power.[37]

1.2 *The Partial Sovereignty of RIOs and the Protection against Domination*

This section argues that non-State public institutions other than infranational ones, that re-institute the same people into multiple publics albeit this time on the international plane, should also be considered to have a share of that people's external sovereignty, even if it is only partial sovereignty and is not equal to that of States. Again, this is grounded in the right of those peoples to political self-government, including their right to do so under international law.

On the proposed account, external sovereignty should therefore also be shared with regional and universal IOs to the extent that they too may be organised so as to re-institute the same peoples as new publics under international law. This proposal is reminiscent of Jürgen Habermas' idea of 'dual sovereignty'. Although the German philosopher developed his argument to account for the democratic legitimacy of the European Union (EU), he also suggested in his subsequent writings that it could be extended to other IOs.[38]

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36 On the potential of such a common external relations law consolidated through comparative law, see Helmut P Aust and Thomas Kleinlein, 'Introduction: Bridges under Construction and Shifting Boundaries' in Helmut P Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (Cambridge University Press, 2021) 1–20, 8–9.

37 See Pettit (n 25).

38 See Jürgen Habermas, 'European Citizens and European Peoples: The Problem of Transnationalizing Democracy' in Jürgen Habermas, *The Lure of Technocracy*, translated by Ciaran Cronin (Polity Press, 2015) 29–45; Jürgen Habermas, 'A Political Constitution for the Pluralist World Society?' (2013) 40(5) *Journal of Chinese Philosophy* 226.

By contrast to Habermas, however, sovereignty would be multiple here, and not only dual, and would extend to multiple RIOs and UIOs re-instituting the same peoples into multiple publics under international law.

Among IOs, RIOs are particularly well placed to share States' external sovereignty to the extent that they may be instituted across the world and that all peoples in the world could be re-instituted by one or many RIOs in their region. This would not only preserve the plurality in sovereignty and co-authoring international law mentioned in the earlier section, but also the equality of sovereignty and hence the equal right to self-government of all peoples. In both those respects, RIOs are unlike UIOs and come closer to States.

Three specifications are in order, however. First of all, the proposed sovereignty of RIOs would only be *partial* to the extent that it should necessarily be shared with other representative institutions of the same publics, including States.

Second, given that RIOs re-institute the same peoples and share part of those peoples' sovereignty with States, there is and should be no requirement of *equality* between the sovereignty of RIOs and that of States under international law. In other words, claiming that RIOs should be regarded as partial sovereigns, *vis-à-vis* States and other public institutions, does not mean that their sovereignty should confer them the same rights as States in international law-making processes. Things are different, however, with respect to the sovereign (partial) equality between RIOs themselves. Depending on whether they re-institute the same peoples or not within the same region,[39] RIOs may or may not have a claim to sovereign equality among themselves. Even across regions, however, one may argue in favour of some form of sovereign equality between certain RIOs, for instance across functional lines and in certain regimes of international law.[40] This, of course, requires rethinking carefully what should be the future UN's relations to RIOs and the relations between RIOs themselves within the future UN. The idea of reforming the UN as an organization of 'united [nations and] organizations' in view of the pivotal albeit tacit role RIOs are increasingly playing therein has already been considered elsewhere.[41]

Finally, the proposed partial sovereignty of RIOs would, by definition, be *relative* or differentiated, and not absolute. As mentioned before, indeed,

39 On 'spaghetti bowl' RIOs, see Chalmers, in this issue.

40 For a discussion, see Besson (n 12). For a different approach, see Jeffrey L Dunoff, 'Is Sovereign Equality Obsolete? Understanding Twenty-First Century International Organizations' (2012) 43 *Netherlands Yearbook of International Law* 99.

41 See Orford (n 1); Schmalenbach, in this issue.

current RIO s are organised very differently from States. They may not institute and represent the same peoples in the same way, but only in a complementary fashion. Moreover, RIO s are also ordered very differently from one another and may not institute of represent their peoples in the same way. As a result, identifying what are the implications of the proposed account of partial but differentiated sovereignty for each RIO needs to be addressed in context.

The proposed conception of the shared and partial sovereignty of RIO s and its implications for the protection of all peoples' equal right to self-government allow us to consider the re-ordering of institutionalised international relations and propose an alternative to the current power-play and imperialism prevailing between existing regional orders.[42] The proposed conception may also work as an institutional shield to the denial of sovereign equality of each Member State within a given RIO by one or many imperialist States within that RIO. It certainly has a better ability to do so than the universal institutional order itself, including that of UIO s such as the UN.

Following Olivier Beaud, indeed, one may argue that there is a continuum between two types of regional political and legal orderings of States situated at each end of a spectrum: empires, on the one hand, and federations, on the other.[43] Federations are characterised by the equality of their States and conditioned by a certain degree of homogeneity: cultural, economic and political. Those are precisely the characteristics of RIO s, whether or not they are organised as federations: a legal ability to guarantee the equality of their Member States, and hence of the peoples they re-institute in the organization,[44] on the one hand, and a sufficient cultural, economic and political homogeneity or convergence among States in the region to be able to do so,[45] on the other.

Regional self-government and non-domination of this kind is something international lawyers can actually contribute to organise further in the international law of regional organizations. RIO s may indeed be ordered by the international law of the institution so as to cultivate the cultural, economic and political convergence of their Member States for the egalitarian and peaceful future of the region. This continuity between domestic and regional political regimes is something one may actually observe in most RIO s, whether

42 For a grim historical overview thereof, see Orford (n 1).

43 See Beaud (n 35).

44 On the equality of Member States of the EU and its potential for the regeneration of political equality in other RIO s, see Besson (n 12).

45 See Samantha Besson, 'Le droit international des civilisations—Ou comment instituer leur concertation' in Vinciane Pirenne-Delforge and Lluís Quintana Murci (eds), *Civilisation(s). Questionner l'identité et la diversité* (Odile Jacob, 2021) 345–370, 367. See further Chalmers, in this issue.

democratic or authoritarian actually.[46] True, this kind of continuity comes at the benefit, but also, depending on the perspective, at the price of the multiplication and dispersion of sovereignty in RIO s, and vice versa. And this may explain certain States' reluctance in this respect in any given RIO, usually the powerful ones, as mentioned in the introduction.

Someone may object that the multiplication of the number of (partially) sovereign institutions, such as RIO s, in the international order could make international procedures and RIO s themselves even more complex to organise and expose them to potential conflicts and disagreements. The boot is on the other foot, however. The dispersion of international power, including ultimate international power, is crucial to avoid the risk of domination from which the current institutional order, and some UIO s and RIO s in particular, already suffer from precisely because of their institutional complexity. Re-instituting peoples as the publics of partially sovereign RIO s may therefore contribute to consolidating the public status of RIO s under public international law and hence to submitting them at last to the international rule of law.[47]

Another critique pertains to the threat to the universality of international law. Some RIO s have been criticised for cultivating a form of exceptionalism or even imperialism through the development and even diffusion of their regional international law instead of or even, in some cases, *qua* universal international law,[48] or, at least, for leading through the regionalization of an otherwise universal international law to its fragmentation.[49] However, States should not have the monopoly of the legitimate contextualization of international law. Actually, RIO s enable us to resort to the formidable and more easily accessible resource of comparative law across regional conceptions of international law and can help build a transregional 'common' law from their convergence, a law that may eventually be deemed universalisable.[50] As a result, the proposed

46 See Börzel and Risse (n 11) 631–632, 639.

47 For a full argument, see Samantha Besson, 'The International Public: A Farewell to Functions in International Law' (2021) 115 *American Journal of International Law Unbound*, 307; Besson 'Public/Private' (n 2) ch 5.

48 See Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020). More generally, see *Barcelona Traction, Light and Power Company Limited* (*Belgium v Spain*) (Separate opinion of Judge Ammoun) [1970] ICJ Rep 286, 295.

49 See Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, Geneva, 13 April 2006, 195–219.

50 See Samantha Besson, 'The Influence of the Two Covenants on States Parties across Regions: Lessons for the Role of Comparative Law and Regions in International Human Rights Law' in Daniel Moeckli, Helen Keller and Corina Heri (eds), *The Human Rights*

conception of the shared sovereignty of RIOs enables us not only to make the most of the possibility of contextualising universal international law across regions and across RIOs, but also to do so while treating them as equal to one another and hence aiming at convergence on an equally universalisable law.

In fact, RIOs are not only a more feasible and equalising intermediary institutional layer between national diversity and international unity. They also amount to instituted 'regions'. Those regions are collective, cultural and continuous ensembles that come very close, as I have argued elsewhere, to 'civilizations' under international law.[51] Evidence for this lies in three shared features: the plasticity of both regions and civilizations, their normative or legal dimension, and their non-reducibility to a geographic area. By instituting a plurality of civilizations under international law and doing so equally, RIOs escape reducing civilization to universal international law (which has become the standard view), on the one hand, or leaving it to each challenging region-civilization only or, worse, to one 'civilization-State' or 'civilization-empire' only, on the other. This issue is all the more sensitive in a period of growing civilizational tensions in and about international law, characterised by the emergence of new universalising regional imperialisms.

All the same, given the civilisational tensions already at work in international law, some may fear that the exercise of shared sovereignty by RIOs may exacerbate the divide between civilisations and reinforce a tendency to national-civilisational withdrawal, or at least encourage certain civilisational imperialisms rather than promote efforts to re-universalise international law. For the time being, however, the instrumentalisation of civilisation for imperial ends has mainly been the work of certain 'civilization-States' or 'civilization-empires' such as the United States, China and Russia.[52] In this context, re-ordering RIOs and inter-regional cooperation in international law-making could precisely be the way to defuse the monopolisation of civilisational claims by one or a few States only, making international law a regional issue to be deliberated over and then organised with all other States and peoples, first in the region and then across all regions. As a matter of fact, the emancipatory role played by RIOs, either in the emancipation of individuals and peoples

Covenants at 50: Their Past, Present and Future (Oxford University Press, 2018) 243–276; Samantha Besson, 'Comparative Law and Human Rights' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2nd ed, 2019) 1222–1249.

51 See Besson (n 45) 364–369; Besson (n 4) 392–399.

52 See also Orford (n 1).

from an authoritarian domestic government, or in their emancipation from another influential regional State, has long been recognised.[53]

2 RIOs and Multiple Democratic Representation

Re-ordering RIOs as partial sovereign institutions that re-institute their Member States' peoples also enables them to act as legitimate representatives of the peoples they institute as new publics, and may therefore contribute to enhancing the democratic legitimacy of international law rather than undermining it. This section's argument is two-pronged: it argues, first, in favour of a system of multiple democratic representation in international law (2.1.); and second, for RIOs' specific representative contribution in the proposed system of multiple international representation (2.2.).

2.1 *Multiple Democratic Representation in International Law*

Given the identity of the ultimate individual subjects to both domestic and international law, that are the same instituted peoples, considerations of democratic legitimacy developed under domestic institutional law should also apply to the democratic legitimacy of international law.[54] The continuity between domestic and international democracy, including democratic representation, is actually required by international democracy law, and especially by international human rights law.[55] Moreover, even if setting up democratic institutions of the same kind as those developed domestically might prove difficult, or even impossible in some cases,[56] this does not imply that general

53 See Damian Chalmers, 'Regional Organizations and the Reintegrating of International Law' (2019) 30(1) *European Journal of International Law* 163.

54 See Samantha Besson, 'The Authority of International Law—Lifting the State Veil' (2009) 31(3) *Sydney Law Review* 343, 349–350.

55 Boutros Boutros-Ghali (UN Secretary-General), *An Agenda for democratization* (The United Nations Department of Public Information, New York, 1996), paras. 67–70 and 72–73; UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, art. 25(a), para. 5; Resolution adopted by the United Nations General Assembly on 16 December 2020, A/RES/75/178, paras. 6g), 6h) and 6i). See also Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28(1) *European Journal of International Law* 89, 93–94.

56 See, eg, Robert A Dahl, 'Can International Organizations Be Democratic? A Skeptic's View' in Ian Shapiro and Casiano Hacker-Córdon (eds), *Democracy's Edges* (Cambridge University Press, 1999) 19–36.

democratic principles are not applicable *mutatis mutandis* to the international legal and institutional order, and to IOs in particular. Those principles albeit developed for States are indeed general enough to be adapted to the international institutional context.[57]

In a nutshell, and as I have argued elsewhere, the democratic legitimacy of any law-making institution, including IOs, should be assessed by reference to four basic, scalar abstract principles common to most accounts of democracy.[58]

First of all, the principle of *ultimate, effective popular control*. It derives directly from the ideal of popular sovereignty or self-government: all peoples subjected to international law should have a relevant say in the process of making that law. They may, of course, confer 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 self-government possible. Second, the principle of *political equality*. The peoples represented should have an equal say, directly or through their representatives, in holding that ultimate power of control.[59] That 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.[60] 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.

How do these four democratic principles apply to international institutions in general, and to IOs in particular?

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57 Besson and Martí (n 19); Besson and Martí (n 33); Besson and Martí (n 30).

58 See José L 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 University Press, 2017) 733–735.

59 See Thomas Christiano and Bajaj Sameer, 'Democracy' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Spring, 2015) subs. 2.2.3.

60 See John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012); Samantha Besson and José L Martí (eds), *Deliberative Democracy and its Discontents* (Ashgate, 2006).

To the extent that it should aim at ensuring ultimate, effective popular control, international democratic legitimacy cannot be reduced to the kind of interstate 'democracy' propounded by (usually non-democratic) States who regard State equality and the principle of 'one State, one vote' in international law-making as the only requirement of international democratic legitimacy.[61] On the contrary, from a democratic perspective, when States (and their representatives) 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.[62] Not only do those peoples need to exert an ultimate, effective control over those States, but the latter are not the only institutions involved in international law-making processes and that need to be controlled effectively. Indeed, when private or civil society institutions 'participate' in international law-making, it is also as representatives of the same peoples, and not as such and in themselves either. This differs from what many authors seem to consider,[63] especially when they refer to 'civil society' or 'stakeholder' participation in IOs, for instance through non-governmental organizations (NGOs), as a form of 'direct democracy'.[64]

In previous publications co-authored with José Luis Martí,[65] we provided a two-pronged argument in response to the question of how to ensure compliance with the four principles of democratic legitimacy by the various public institutions (for example, States, cities, regions, IOs) and private organizations (for example, NGOs and transnational corporations [TNCs]) currently involved as representatives in the international law-making system.

We started with an *insufficiency argument*. Due to their respective democratic deficits, neither public nor private institutions involved in international law-making should be considered as sufficient, on their own, to represent the peoples of the world in a way that may be considered democratically legitimate.

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61 See Besson and Martí (n 30).

62 See Besson (n 54) 360–363; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22(2) *European Journal of International Law* 315; Besson and Martí (n 12). This is a common confusion, however: see, eg, Laurence Dubin and Marie-Clotilde Runavot, 'Représentativité, efficacité, légitimité: Des organisations internationales en crises?' in Evelyne Lagrange and Jean-Marc Sorel (eds), *Droit des organisations internationales* (LGDJ, 2013) 77–103, 82.

63 This is another common confusion, however, see, eg, Dubin and Runavot, (n 62) 86–88.

64 See, eg, Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009) 263–341; Krajewski, (n 16) paras. 19 *et seq*. See Besson and Martí (n 19); Martine Beijerman, 'Conceptual Confusions in Debating the Role of NGOs for the Democratic Legitimacy of International Law' (2018) 9(2) *Transnational Legal Theory* 147.

65 Besson and Martí (n 19); Besson and Martí (n 33).

Among the democratic shortcomings of States as representatives, we identified the following six deficits with respect to the first two principles of democratic legitimacy. Regarding the principle of ultimate, effective popular control, first, one should emphasise the existence of non-democratic States and the limited accountability of State governments to people, even in democratic regimes, when it comes to external relations. With respect to the principle of political equality, second, one should mention disproportions in State demography, imbalances of informal political power among them, the existence of permanent minorities, and the unequal epistemic distribution of views geographically.

We then argued that representation by civil society or private institutions, such as NGOs, may compensate some of those democratic deficits in State representation. However, those institutions also suffer from their own, distinct democratic shortcomings. With respect to the ultimate, effective popular control principle, first, one should mention the fact that NGOs usually are not elected. Moreover, they are mostly not controlled otherwise by those they claim to represent (provided they even claim to do so, of course). As to political equality, second, and in the absence of an equal category and status of NGOs under international law, one should emphasise their unequal demographic and geographic distribution, the unequal distribution of interests they promote, and their unequal financial means and power.

In reaction to those deficits, we developed a second, *systemic argument* claiming that those public and private representatives should be approached, first, as multiple in themselves with many public, but also private institutions representing the same peoples and, second, as constituting, together, the complementary parts of the Multiple International Representation System (MIRS).

According to this argument, the international order as a whole, *qua* system, should aspire to be democratically representative of all peoples of the world. This is precisely where the 'multiplicity' of the model lies. It sees a variety of public and private institutions of different kinds playing a legitimate part in representing the same peoples in the international law-making process. That multiplicity does not, however, equate with mere plurality or even equality. The model differs therefore from radical pluralist models of the international order, but also from purely federal ones. True, there should be different kinds of representatives endorsing different roles and forms of participation in different contexts and fora. However, all of them should, ideally, be organised

so as to complement one another in a unique and continuous representative system.[66]

Importantly, however, public representatives and, more specifically, democratically elected ones such as States should retain a central role in international representation. And this for two reasons, at least.

First of all, public and elected representation is, to this date at least, what States do best in the current non-ideal circumstances of international law. Not only do they match already instituted peoples worldwide, but they are the main institutions able to fulfil the factual conditions for political equality and the claim to democracy, that are the sharing of equal and interdependent stakes and the capacity for an effective government,[67] both of them being requirements of the international law of statehood.[68] Moreover, as mentioned before, the equality of States guaranteed under international law (for example, Article 2(1) of the UN Charter) is conceptually and normatively related to the international law principles of equality not only of peoples, but also of individuals within those States.[69] Of course, individual and State equality are not fully transitive and treating States equally may not lead to treating all individuals equally.[70] Democratic correctives (such as, for example, proportional voting) are required to ensure the equality of peoples even under conditions of perfect State equality in international law-making.[71] All the same, the guarantee of State equality under international law makes the representation by equal States the best approximation of the equal representation of their peoples in current circumstances.

A second reason to maintain public representative institutions at the centre of the MIRS lies in the important deficits of the other private institutions in

66 See Jane Mansbridge et al, 'A Systematic Approach to Deliberative Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press, 2012) 1–26; Felipe Rey, 'The Representative System' (2023) 26(6) *Critical Review of International Social and Political Philosophy* 831.

67 See Christiano, 'Democratic Legitimacy' (n 29); Christiano, 'The Legitimacy of International Institutions' (n 29).

68 See 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.

69 See Besson, 'Dworkin' (n 13) 113 and 127, based on Larry Siedentop, 'Political Theory and Ideology: The Case of the State' in David Miller and Larry Siedentop (eds), *The Nature of Political Theory* (Clarendon Press, 1983) 53–73.

70 See also Lora A 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 University Press, 2015) 221–236, 231–232; Besson (n 12).

71 See Besson and Martí (n 19); Besson (n 12); Besson and Martí (n 30).

terms of democratic representation, including NGOs. As a result, private institutions may only participate as representatives in certain adequate contexts and fora and in certain specific ways to the extent that is necessary to complement public representation and overcome public institutions' democratic deficits. This requires public representative institutions, and in priority States, in order to identify, constrain and organise the complementarity of private representative organizations in each case.

In conclusion, the MIRS proposes to remedy the under-representation of peoples that characterizes the current international system where States often still have the *de jure* monopoly of representation, albeit in a way that addresses the democratic strengths and weaknesses of the various other public and private institutions already involved *de facto* in international law-making, and this in order to complement State-based representation without over-representation. It proposes to maximise the representation of peoples by re-ordering the international law status of a variety of public and private institutions in order to enable them to play different complementary representative roles in international law-making processes.

This argument leaves many questions open, however. The most important one is how to organise the complementary representation by other public institutions than States in order both to enhance their respective democratic strengths and to correct and compensate their democratic deficits.[72] As I argued before regarding their partial and relative sovereignty, indeed, those other public institutions should not be regarded as representatives on an equal par to the States that represent the same peoples (although they may be among themselves, as exemplified by the international representation by infranational public institutions such as cities or regions). Their representing mandates are complementary, therefore, and need to be articulated with one another.

As I have argued elsewhere, IOs offer particularly able institutional platforms to implement and organise such a system of multiple international representation.[73] This is true as much with respect to correctives to the individual democratic shortcomings of each public or private institution representing the peoples of this world, as with respect to mutual compensation of those deficits between those multiple representative institutions. As I have also argued, however, IOs should actually be seen as a double-edged institutional sword in the current international representation system: they have the potential to be not only the guarantor of multiple international

72 On the complementary international representation by States and cities, see Besson and Martí (n 33).

73 See Besson 'Democratic Representation' (n 2); Besson and Martí (n 30).

representation, but also its main threat due to their current democratic deficits, especially in terms of political equality and ultimate, effective popular control, and their variations in institutional orderings.[74]

As a result, while IOs may provide important means to order a multiple international representation system *inside* their organs (democratic representation *in* IOs),[75] it is just as important to argue that they should be re-ordered so as to become democratic representatives in and of themselves and in complement to their Member States (democratic representation *by* IOs).[76] By virtue both of their transregional diffusion and of their degree of internal political organisation, RIOs have an interesting potential in this respect, as the next section explains.

2.2 *RIOs and the Protection of Political Equality*

This section argues that giving RIOs a complementary role in international law-making could strengthen the political equality of (States) peoples by compensating demographic, epistemic and power imbalances between their Member States, while also requiring those RIOs to become more egalitarian and accountable in return and, in short, more democratic since both dimensions go hand in hand.

As I have argued elsewhere,[77] one of the difficulties in guaranteeing the political equality of peoples in international law-making lies in the nature of their current representatives in international law, their States. Aside from its many democratic deficits in terms of ultimate, effective popular control and political equality mentioned in the previous section, State-based international representation does not necessarily ensure the equal political consideration of the broader but distinct civilisational communities that bring these peoples together. This deficit stems from the inequality in the geographical distribution of civilisational perspectives and conceptions of international law, and the epistemic inequality entailed by a more fragmented State-based and territorial representation.[78] Indeed, representation by States favours the representation of perspectives and conceptions of international law that are widely distributed throughout the world, rather than concentrated in particular regions.

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74 On the objection of institutional diversity of RIOs and its rebuttal, see also Besson and Kassoti, in this volume.

75 On multiple democratic representation *in* and *through* IOs, see Besson, 'Democratic Representation' (n 2); Besson and Martí (n 30).

76 See Besson and Martí (n 12).

77 On epistemic injustice in general, see Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, (Oxford University Press, 2007).

78 See Besson (n 4).

In order to correct this epistemic deficit in the international representation of peoples by States, we need to identify, as a complement to the latter, procedures that take better account of the different civilizations that make up the 'ecumene' of these peoples. By introducing such regional correctives and doing so through the organisation of complementary democratic representation by RIOs, UIOs could ensure that the unequal distribution of certain views across the world and the skewed representation thereof by States be corrected and especially that all legal civilisations be represented, and not only the most prevalent ones.

As a matter of fact, the involvement of RIOs in international law-making may also compensate some of the democratic deficits identified earlier in State representation in a world of equal States. It is the case, in particular, with respect to the political equality deficit.

First, RIOs may compensate the *demographic* disproportions between populous and less populous States by representing the same peoples again and more equally through their encompassing regions. Second, RIOs may also rebalance the otherwise unequal *epistemic* distribution of views between States, including between States of the same region, by granting more weight to what would otherwise, be a minority view worldwide. Finally, RIOs may also contribute to correct *power* imbalances between States and the permanent majority/minority problem in international law-making, by protecting against the domination of one State in the region or in one or two other regions in the world.

Of course, RIOs themselves may suffer from important deficits in terms of democratic representation. Their complementary role to States in the multiple international representation system can only be legitimate, therefore, insofar as RIOs comply, in their own organisation, with the four principles of democratic legitimacy introduced before, and especially the principles of ultimate, effective popular control and political equality. Hence the need to re-order them so as not only to complement State-based representation in international law-making, but to do so in an egalitarian fashion.

First, the *inequalities between RIOs*. In view of the multiplicity of organisational forms RIOs may take under international law and the coexistence of many RIOs in the same region, they could be criticised for the risk of over- or under-representation of certain peoples depending on the region. As a result, political equality may not (yet) be guaranteed within each region and across regions in UIOs, and some RIOs may be granted more international voice than others (as one may argue is currently the case of the EU in international law-making, including at the UN).

For the reasons given in section 1.2, however, representation by RIOs can and should be considered as sufficiently egalitarian to compensate for the democratic deficits of the main egalitarian representatives of peoples, namely their States. For the rest, these complementary forms of representation should, of course, be framed and organised by States with a view to equality. What may be observed from the regionalisation of international law, indeed, is a constant diffusion of the regional model throughout the world,[79] through mutual emulation and relative positioning between regions. Today, each people in the world benefits from at least one form of regional representation as a RIO, and these regional representatives could therefore be extended equal rights of participation and therefore of representation in international law-making.

More attention should be placed, of course, on making sure similar kinds of RIOs are instituted in each region and enter into transregional relations with one another on equal terms, including in UIOs. The risk otherwise is to perpetuate the recourse to RIOs to entrench inequalities between States that cannot be formalised in UIOs. A good example is that of the economic power imbalances between World Trade Organization (WTO) Member States that brought some of them not so much to institutionalise those inequalities within the WTO itself, but to institute competing RIOs later on in order to preserve their privileges and entrench those imbalances.[80] The multiplication of regional IOs in certain areas of international law and in some regions only actually confirms this trend towards the selective inclusion of certain States and, accordingly, the promotion of the equality of some (regional) States at the price of the inequality of all States in the world.[81]

Second, the *inequalities within RIOs*. The internal organisation of RIOs itself may not be sufficiently egalitarian and may be bordering the imperialist end of the spectrum mentioned above (as it is currently the case in RIOs that are dominated by one regional State). Admittedly, the regional concentration of States with the same authoritarian or even imperialist ambitions, or at least in the service of those of one or two particularly dominant States in a region, may help to reinforce their influence over other States in a given region.[82] The

79 See Thomas Risse 'The Diffusion of Regionalism' in Tanja A Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press, 2016) 101–102; Börzel and Risse (n 11) 635 *et seq*, 639–640.

80 See Dubin and Runavot (n 62) 82–84.

81 On 'exclusive multilateralism', see Viola (n 15) 205 *et seq* and 228.

82 See Anastassia V Obydenkova and Alexander Libman, *Authoritarian Regionalism in the World of International Organizations. Global Perspective and the Eurasian Enigma* (Oxford

capacity of regional institutions to consolidate domestic regimes either way, whether democratic or authoritarian, is well established, indeed.[83]

What emerges, however, from initial studies of the new so-called 'non-democratic' regional organizations, particularly in Eurasia, is that they do not seek to cultivate a particular identity or solidarity, and therefore make no claim to correspond to any particular civilisation.[84] One solution would therefore be to limit the representative role of regional institutions to those that coincide with a legal-cultural or legal-civilisational project. For the others, it is conceivable that inter-regional deliberation and concertation, including and especially when it takes place within UIOs such as the UN, could contribute to tempering the imperialist impulses of certain regions in particular.[85] This requires, however, that inter-regional concertation within the UN be more firmly established and organised in an egalitarian fashion in order to counterbalance forms of regional imperialism in the form of a one-State regionalism,[86] which is not yet the case. This also requires, above all, that the political inequality inherent in the UN's internal institutional order be corrected, which is a thorny issue and one that is independent from the question of the re-ordering of the relations between RIOs inside the UN.

In any case, to condemn the development of RIOs and inter-regional cooperation simply on the grounds of alleged civilisational imperialism on the part of certain States therein would be misplaced for historical reasons. It would fall prey to the double standard that has prevailed for too long in this debate, as mentioned in the introduction.[87] The European region has been institutionalised in a variety of institutional forms, including RIOs, for almost a century, and is still very active on the international stage and in UIOs such as the UN. It continues to carry a great deal of weight in the production, interpretation and implementation of international law. The time has come for all regions to be able to do so on an equal footing, and within an institutional

University Press, 2019); Berthold Rittberger and Philipp Schroeder, 'The Legitimacy of Regional Institutions' in Tanja A Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* (Oxford University Press, 2016) 579–599.

83 See Börzel and Risse (n 11) 631–632, 639. See also Beaud (n 35).

84 See Obydenkova and Libman (n 82) 257–258.

85 See Hans Köchler, 'Regionalisation, Transnational Democracy and United Nations Reform: A Viewpoint' in Philippe De Lombaerde, Francis Baert and Tânia Felício (eds), *United Nations and the Regions: Third World Report on Regional Integration* (Springer, 2012) 84.

86 See Francis Baert, Tânia Felício and Philippe De Lombaerde, 'Introduction' in Philippe De Lombaerde, Francis Baert and Tânia Felício (eds), *United Nations and the Regions: Third World Report on Regional Integration* (Springer, 2012) 1–13, 5 *et seq*.

87 See Orford (n 1).

framework that could guarantee the equality of peoples of these regions both among RIOs and inside them.

Conclusion

International lawyers can no longer afford to ignore their constitutive role in the politics of RIOs. To the extent that international law contributes to the ordering of RIOs, including to their recent growth, both in number and power, indeed, it should do so, so as to vest those RIOs and their international law with political legitimacy.

Turning self-fulfilling State-centred critiques of the political legitimacy of RIOs *qua* threats to equal sovereignty and international democracy on their head, this contribution has argued for a dispersed conception of external sovereignty and, on that basis, for a multiple conception of international democracy. Grounded in popular sovereignty and the equal right to self-government, the proposed argument fits and justifies the legal guarantee of sovereign equality in the UN Charter. However, it takes it one institutional step further by making that sovereign equality non-State exclusive and by re-ordering political equality at an additional intermediary institutional stage between the State and UIOs: that of RIOs. RIOs are best re-ordered, the article has argued, as partial sovereign institutions alongside States and as complementary democratic representatives to them. Re-instituting RIOs in this way could mark a new dawn for the political legitimacy of international law.

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