

The Geology of International Law – Governance, Democracy and Legitimacy

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I. Preface: International Law and Democracy

Much of classical international law has been premised on, *inter alia*, the proposition that States (and their governments) are in the business of governance. International law is in a different business: The business of setting a legal matrix for coexistence and community among and of States ensuring order and justice.

To the extent that this is true it has conditioned different orders of legitimacy for domestic law and international law. In domestic settings though the concepts of both Democracy and the Rule of Law are under-specified terms in the vocabulary of political theory and social science, both have become at least since the second half of the 20th Century inextricably linked, indeed interdependent. In our modern practices, the Rule of Law encapsulates, among other things, the claim to, and justification of, obedience to the law. Such obedience can neither be claimed, nor justified, if the laws in question did not emanate from a legal system embedded in some form of democracy. Democracy, on this reading, is one (though not the only one) of the indispensable normative components for the legitimacy of a legal order. In a departure from previous understandings, if obedience, as a matter of fact, is secured without the legitimacy emanating from the practices of democracy, we are no longer willing to qualify such as the Rule of Law. A dictatorship that followed strictly its internal legal system, would be just that: A dictatorship following legal rules. It would not qualify as a system upholding the Rule of Law. The reverse is also true: It is to rules of law that we turn to define whether the practices of democracy have indeed been followed and, more generally, the Rule of Law, with its constraint on the arbitrary use of power, is considered an indispensable material element of modern democracy. An attempt to vindicate even verifiable expressions of popular will outside legally defined procedures is regarded by us as the rule of the mob, rather than democracy.

* 1999-2004. This paper has evolved over the last years through a series of unpublished versions presented at workshops or conferences at Michigan Law School; Duke Law School; the Legal Theory Section of the ILA London 2000 meeting; the Gulbenkian Foundation Conference on Globalism, Lisbon; The Globalization and Its Discontents Colloquium, NYU Law School. A published version, (in which I. Motoc joined me as coauthor, Taking Democracy Seriously, the Normative Challenges to the International Legal System) appeared in: S. Griller, (ed.) International Economic Governance and Non-Economic Concerns (Wien 2003). Each of the stages has marked a distinct evolution in the thinking which has been influenced by the many comments and criticisms received which are gratefully acknowledged.

Such is not the case with the “rule of international law”. Since it is not, traditionally, understood and self-understood as a system of governance, there may, without paradox, be a norm of international law which requires States (at least new states ...) to adhere to some minimal concept of democracy without requiring the same of itself. It would be tempting to conflate the principle of Consent, so deeply rooted in the normative discourse of international law and its principal legitimating artifact, with democracy: A phrase such as: A customary law cannot emerge without the consent, active or tacit, of [all states bound by it]; [the principal legal families]; [those most affected by the norm] etc. sounds very much like democracy at the international level. But, in fact and in law, in theory and in practice, this is part of a very different vocabulary, namely that of sovereignty and sovereign equality (and inequality)¹. It is, in some ways, the opposite of democracy, since it is based on the legal premise, even if at times a fiction, that the collectivity has neither the power nor, certainly, the authority to impose its will on individual subjects other than through their specific or systemic consent, express or implied. Put differently, it is based on the premise, an extreme form of which claims that there is no collectivity with normative power, and, in less extreme form claims that even if there is such a collectivity, there is an inherent power of opting out – through non-signature; reservations, persistent objector etc. This, of course, is the opposite of any functioning notion of democracy which is based on the opposite premise, however justified in political theory, that a majority within a collectivity, a demos, has the authority to bind its individual members, even against their will.

Is democracy, then, a relevant category for the international legal process itself? It might be to the extent that international law in general or parts of it can and should be understood as governance. But even if this was so, it does not automatically mean that one of the principal instruments for legitimating domestic governance is, and can be, transferable to international governance.² But to the extent that international law displays features of governance, even if democracy does not become the legitimating instrument, at least some other comparable device must be sought.

The following is a sketch for examining these questions.

International law and the international legal system are not static and have changed over time. This, of course, is trite. No less importantly, the understanding of legitimacy over the exercise of normative power has not been static and has changed – both as an empirical social phenomenon and as a normative concept. How, does one relate these two moving targets to each other? I employ the metaphor of geology. This is not just a cutesy affect but represents a serious methodo-

¹ Kingsbury, *Sovereignty and Inequality*, EJIL, vol. 9 (1998) No. 4, 599-626 repays careful study as a fundamental text on these issues.

² Indeed, there is a growing critical literature skeptical of the very use of democracy in international discourse – both dogma and praxis. See, e.g., Carothers, “Empirical Perspectives on the Emerging Norm of Democracy in International Law”, ASIL Proc, 84 (1992). Koskenniemi, “Intolerant Democracies: A Reaction”, Harv.Int’L.J., 231 (1996). Marks, “The End of History? Reflections on Some International Legal Theses”, EJIL vol. 8, 449-478 (1997).

logical commitment. It signals a particular approach for dealing with time, with history.

First, this approach to the past is instrumental. I am interested in the past not *per se* but primarily in the sense that it can illuminate the present.

Second, and more importantly, whereas the classical historical method tends to periodize, geology stratifies. History emphasizes change; geology emphasizes accretion. Typically, a geological snapshot is taken and then the accumulated strata of the past are identified, analyzed, conceptualized. By stratifying geology folds the whole of the past into any given moment in time – that moment in which one examines a geological section. This method turns out to be crucial for this particular understanding of the international legal system. For the proverbial reasons of time and space I am unable to provide here the full empirical apparatus on which this analysis is based. But can provide an illustration.

I took, to give but one example, a snapshot of international treaty making and more generally international law making in 1900-10 in 1950s and 60s and in 1990-2000.

In the first decade of the 20th century one discovers a predominance of bilateral, contractual treaties and a very limited number of multilateral law making treaties. One also discovers, in that earlier part of the century, a very sedate, almost “magisterial”, and backward looking practice of customary law typified by a domestic US case such as *The Paquete Habana* which leisurely takes in four hundred years of state practice in order to affirm the existence of a binding rule. A case such as *The Lotus* is also typical as an illustration of the typical use of the methodology of custom to privilege the status quo and chill change.

In mid-century one discovers a huge enterprise of actual and in-the-making multilateral law making treaties ranging from the Law of the Sea to Human Rights and even what may be called “constitutional” treaties. Customary law reincarnates itself into the so-called New Sources. The New Sources, though often using (indeed, piggy-backing on) notions of classical custom to justify the emergence of a binding norm, were the opposite of custom in that the sedate, backward looking and magisterial were replaced by an aggressive, cheeky and forward looking sensibility, privileging change and transformation and in which both treaty and “custom” often prized the communal and universal over the particularistic.³

Towards the end of the century, in addition to the bilateral, multilateral and constitutional layers of law making, one detects the emergence, or thickening, of a fourth layer, which has perhaps been less, discussed. This is a regulatory layer. It is

³ The literature is immense. We particularly profited from de Aréchega, Custom, in: A. Cassese/J.H.H. Weiler, Change and Stability in International Law-making, European University Institute, Berlin/New York 1988; Meron, Human Rights and Humanitarian Norms as Customary Law, Oxford 1989; Lillich, The Growing Importance of Customary International Law, 25 GA.J. Int’L & Comp. L, 1, 8 (1995-1996); Reisman, The Cult of Custom in the Late 20th Century, 17 Cal. W.Int’L.J. 133 (1987); Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, AJIL, Vol. 95, 757-791 (2001). Van Hoof, Rethinking the Sources of International Law, 1984.

notable in the fields of trade with the explosion of Regional Economic Agreements (whose numbers are in the hundred) as well as the new WTO and associated agreements, and in other similar fields: Environment, Asylum, Finance. In terms of content the regulatory layer addresses issues associated with the risk society in which we live.

The regulatory layer is distinct from its predecessors in a variety of ways: Its subject matters tend to be away from what traditionally was considered high politics and more towards what was traditionally considered low politics. (They are typically neither about Security nor even about Human Rights.) The obligations created are often positive in nature, not simply negative interdictions. Certain things have to be accomplished – note for example Article 16 of the WTO or the “conditions” imposed by the IMF and World Bank. The regulatory regime is often associated with an international bureaucratic apparatus, with international civil servants, and, critically, with mid-level State officials as interlocutors. Regulatory regimes have a far greater “direct” and “indirect” effect on individuals, markets, and more directly if not always as visibly as human rights, come into conflict with national social values.

One notes, too, in that period a much higher index than before of a new kind of “Practice” – not the old style State practice but “International Practice” of a variety of bodies ranging from well established international organizations to allusive entities such as the Group of Seven – a practice covering even classical fields such as security and human rights which can best be described as international management.

Couple the regulatory layer of treaties with the international practice of management and a new form of international legal command may justifiably be conceptualized as governance.

Analogies to domestic law are impermissible, though most of us are habitual sinners in this respect. We can present the geology of international law as replicating to some extent the geology of domestic law – the turn from the 19th Century very contractarian emphasis, to the interventionist State of the Mixed Economy, to the Constitutional State (which is mostly a post World War II phenomenon) to the Administrative State of the 70s, 80s and beyond.

Similar results emerged from soundings in the area of dispute settlement. I can afford to be even more synoptic here, for this story is even better known than the law making story: Here too one sees an initial stratum of horizontal, dyadic, self-help through mechanisms of counter-measures, reprisals and the like. This is still an important feature of enforcement of international legal obligation. Then, through the century we see a consistent thickening of a triadic stratum – through the mechanisms with which we are all familiar – arbitration, courts and panels and the like. The thickening consisted not only in the emergence of new areas subject to third party dispute settlement but in the removal of optionality, in the addition of sanctions and in a general process of “juridification”. Dispute Settlement, the hall mark of diplomacy, has been replaced, increasingly, by legal process especially

in the legislative and regulatory dimensions of international law making.⁴ And there is, here too, a third stratum of dispute settlement which may be called constitutional, and consists in the increasing willingness, within certain areas of domestic courts to apply and uphold rights and duties emanating from international obligations. The appellational constitutional may be justified because of the “higher law” status conferred on the international legal obligation.⁵

Based on these findings, one’s initial temptation would be to characterize the turn of the last century as a period of transactional legal relations, to look at the mid-century, especially the decades following World War II as one characterized by emergence of Community and the *fin-de-siècle* as the period of international governance. (I will, in short order, give more thickness to these labels – transaction, community and governance). But on closer look at the data one stumbles on the obvious: Even in the early part of the 20th century there were, alongside the thick stratum of bilateral, transactional treaty making, already thin strata of the multilateral and even of governance style of international command. Equally, one notes, that mid-century, and *fin-de-siècle*, alongside the constitutional and law making treaties there continued a very rich practice of the bilateral and transactional, that for every assertion of the New Sources and Communal values there was an old style *Texaco* a dignified late century heir to *The Lotus*. Change, thus, would not be adequately described as a shift from, say, bilateralism to multilateralism. What had changed was the stratification. Bilateralism persists and even thrives as an important stratum of international law throughout the century till this day. Thus, geology allows us to speak not so much about transformations but of layering, of change which is part of continuity, of new strata which do not replace earlier ones, but simply layer themselves alongside. Geology recognizes eruptions, but it also allows a focus on the regular and the quotidian. It enables us to concentrate on physiognomy rather than pathology. As is always the case, the vantage point, the prism through which the subject is examined determines in no small measure the picture which emerges. The geology of international law is, thus, both the window and the bars on the window, which frame and shape our vision.

⁴ See, e.g. Slaughter/Helfer, Toward a Theory of Effective Supranational Adjudication, Yale Law Journal, 107 (1997); Stone/Sweet, Judicialization and the Construction of Governance, 31 Comp. Pol. Stud. (1999); Kupfer/Schneider, Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations, 20 Mich. J. Int’l L. 697 (1999); Reich, From Diplomacy to Law: The Juridicization of International Trade Relations, 17 Nw. J. Int’l L. & Bus. 775 (1996–1997); Weiler, The Rule of Lawyers and the Ethos of Diplomats, Reflections on the Internal and External Legitimacy of WTO, <<http://www.Jeanmonnetprogram.org/papers/2000/001901>>. Generally see the special issue of International Organization Legalisation and World Politics, International Organization, no. 54, vol. 3, 2000.

⁵ Cf. Cass, The Constitutionalization of International Trade Law: Judicial Non-Generation as the Engine of Constitutionalization, *EJIL*, vol. 2, no. 13, no. 1, 39–77 (2001). Petersmann, Constitutionalism and International Organizations, 17 Nw. J. Int’l L. & Bus. 398 (1996–1997). For a different approach, Trachtman/Weiler, European Constitutionalism and its Discontents, 17 Nw. J. Int’l L. & Bus. 354 (1996–1997).

Against this background I develop the current theses of this presentation. The ideas behind these theses are conventional enough and I hope, of course, that they will appear persuasive to the reader. They do, however, involve multiple strands and require keeping several balls in the air simultaneously. Here then is a little nutshell.

Firstly, and put bluntly, I believe that an approach which examined democracy in relation to “international law” or the “international legal system”, and ask “Is International Law Democratic? Should it be Democratic?” etc. are less than optimal because of the monolithic assumption on which they are typically based. The ways and means of international norm setting and law making, the modes in which international law “commands”, are so varied, sometimes even radically so, that any attempt to bring them into the laboratory of democracy as if belonging to a monolithic species called “international law” will result in a reductionist and impoverished understanding of international law, of democracy and of the actual and potential relationship between the two.

Much can be gained, in this context, by conceptually unpacking international law or the international legal system into different co-existing ‘command’ modes which the “geological” survey reveals: International law as Transaction, international law as Community, and international law as Regulation. Each one of these modes presents different normative challenges, entails a different discourse of democracy and legitimacy, and, eventually, will require a different set of remedies. What is critical is that I will refract each of these command modes as an instance of Governance which, thus, requires some form of legitimation.

Second, and put simply, we believe that democracy, too, cannot be treated monolithically. In this case it does not require unpacking but the opposite – repacking as part of a broader discourse of legitimacy. In municipal settings the absence of “democracy” (at least in the narrow sense of the word) in all aspects of domestic governance, is not always a lacuna, nor even a “necessary evil” and does not in all situations *per se* delegitimize such domestic systems. Legitimacy encompasses other elements too.

What complicates the matter is, as mentioned above, that notions of, and sensibilities towards, the legitimacy of international law have changed too.⁶ Transactionalism was a prominent layer of early 20th Century international law. It was legitimated by reference to that old world and its prevailing norms. Transactionalism persists to early 21st Century international law and is a prominent layer also today. But to the extent that its old world legitimating features still accompany it, we have the makings of the legitimacy crisis in this respect. Communitarianism is most prominent as in Mid 20th Century international law and finds its original legitimating features in that epoch. It is still an important layer in the universe of 21st Cen-

⁶ See Franck, “Legitimacy in the Legal System”, AJIL, vol. 82 (1988); Georgiev, Politics of Rule of Law: Deconstruction and Legitimacy in International Law, 4 EJIL (1993); Weiler/Paulus, The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?, 8 EJIL 545 (1997) and literature cited therein.

tury international law, but its legitimacy raises new Questions. And finally, Governance, though present in earlier epochs emerges as a thick and critical layer towards the end of 20th Century international law. It requires an altogether new discourse of legitimacy.

II. Transaction, Community, Constitution and Regulation and the Emerging Legitimacy Crisis of International Law

1. Interpreting Transactionalism as Governance

Historically transactional international law was the predominant command mode. It is still a large and important part of the overall universe of international law. In its purest form it is dyadic and represented best by the bilateral transactional treaty. It is premised on an understanding of a world order composed of equally sovereign states pursuing their respective national interest through an enlightened use of law to guarantee bargains struck. There can even be multipartite expressions and even international organizations which are an expression of dyadic transactional international law. The Universal Postal Union to give an ancient but still extant and relevant organization and the GATT in its 1947 incarnation are such examples. Although multipartite in form (and suggesting, thus, a more multi-lateral communitarian self-understanding of the international legal order), they are in substance just more efficient structures enabling their parties to transact bilateral agreements. Many other examples abound.

How then to view the transactional command mode as a phenomenon of Governance? Is it not on its face precisely the opposite: The expression of private, bilateral contracting?

It often is, and when it is calling it governance would not be illuminating. If every instance of norm creation is to be regarded as part of international governance the term would lose any explanatory and normative significance as compared with international law generally.

But there are instances, past and present, where whilst the form of norm creation is indeed private and bilateral, the resultant phenomenon may usefully thought of as in the category of international governance. Transactionalism may/might manifest itself as governance in two distinct ways:

The first is indeed in the realm of private, bilateral arrangements like so many bilateral riparian treaties or, say, bilateral treaties for management of bridges which span a border. The governance element in such treaties rests in the fact that they extend beyond an “executory” type of contract terminated upon completion of the transaction and they extend beyond a “normative” type of contract which leaves the parties freedom to act but which will place curbs on such freedom and define certain actions of the parties as unpermitted. Instead here we would have a regime of management – creating longer term obligation of care, and in fact putting in

place an administrative apparatus for maintenance and management of a common resource. Both parties can be seen as involved, albeit bilaterally, albeit privately, albeit modestly *rationae materiae*, in a governance regime. The practice is not exceptional. It is main stream. Its importance to us is not so much in the normative challenge it raises but in the understanding it gives us to the phenomenon of governance. Not only, important as this may be, in the historical and conceptual sense of trying to understand all principal forms of international governance, but also in a phenomenological sense. Bilateralism may have been the laboratory, the exercise ground, the test tube whereby States (and other actors) assume in gradual sense the habits of international governance.

In its second mode, bilateral transactionalism should be understood as governance in that it results in a general regime of both legislation and management. The phenomenon is not exceptional. Consider first the following examples: The old US Friendship, Commerce and Navigation Treaties many still extant, or the modern Free Trade Area Agreements of which the European Union has an enormous practice. Bilateral Investment Treaties are a third example.

In all these cases we have what is in form bilateral, private agreements. In the first two examples (unlike the BITs) there is no internationally approved template. If we look at the modern FTA, we will also note that it is of very considerable socio-economic significance involving culture and hence identity defining choices. Microscopically these are, indeed, bilateral private contracts among states. But telescopically, taken in aggregate they define a multilateral regime. In all instances the US and the EU use a template. The negotiating room for their “bilateral” partners is extremely narrow – very often limited to the temporal dimensions such as entry into force but not touching the material obligations, the regime of responsibility, dispute settlement and sanctions. They are in many respects the international equivalent of domestic Standard Form contracts. They are characterized by the same inequality of bargaining power familiar from domestic settings and raise, *mutates mutandis*, similar normative issues.

Interesting variants of this phenomenon are indeed, as mentioned above, those treaties, such as the WTO/GATT which in form are multilateral but certain dimension of which, like the all important setting of bound tariffs, are simply an aggregate of bilateral arrangements – extended universally through the principle of Most Favored Nation. The current WTO, resultant from the Uruguay Round is often criticized as having been unfair or unjust in the balance between developed and developing countries. Often this critique is but the expression of general frustration with globalization and the inequality in the wealth of nations – phenomena which should be associated with international regimes with certain care. (Often times the international regime is not the cause, but should more appropriately be thought of as the response to the problem).

In the case of the WTO/GATT the claim of unfairness and injustice can be linked to the phenomenon under discussion, namely the bundling of bilateral agreements in the context of a multilateral “Single Undertaking”. For therein lies a hard kernel of critical truth. It is the imbalance between the overall normative, or-

ganizational and administrative umbrella provided by the Single WTO Undertaking accepted by all Members, developed and developing, which extends to, legitimates with the aura of multilateralism, and enforces a series of often mean spirited, ungenerous package of bilateral tariff agreements. This imbalance is compounded of course by the huge economic differentials among the parties. The only veritable arms length negotiations is among the giants – EU, USA and a handful of others. For the rest it is mostly a take-it-or-leave-it affair.

This goes beyond the metaphor of the domestic Standard Form Contract. It would be the equivalent of a Standard Form Contract given the legitimacy and force of a legislative act approved by a parliament without, however, that parliament ever reading its actual content.

It is interesting to explore the legitimacy, both internal and external, of the dyadic, transactional international legal obligation. The key interlinking concepts underlying this mode of command were Sovereign Equality, Consent and *Pacta Sunt Servanda*. Sovereign Equality is critical for the transactional world view since in it is encapsulated the rejection of a community which can impose its will on its members. Consent is, in similar vein, not just a technical condition for obligation, but a reference to status and a signifier of the self-understanding of the (non)system. And *Pacta Sunt Servanda* is not just the indispensable and tautological axiom of obligation, but a signifier of the world of honor in which the equally sovereign understood themselves to be in. Indeed, in our view, the transactional mode of international law in its early historical context owed its deepest roots and claim to legitimacy to the pre-state chivalrous world of feudalism. Although transformed to the State, the vocabulary, rhetoric and values of sovereign equality, consent and *Pacta Sunt Servanda* were picked up almost intact.

There were huge pay-offs for this rootedness of international legal obligations in that pre-modern world of chivalry. There was, first, a confluence of internal and external authority of the State the legitimacy of each feeding on the other. It was also, paradoxically, a way of actually legitimating war against and subjugation of other states. As in chivalry where only other knights – peers – were legitimate targets for force (subject to ritualistic challenges etc.) the elevation of all states to the formal category of Sovereign and Equal is what allowed the playing out of the real life inequality among states.

The principal legitimacy concern of this “slice” of the international legal system concerns on the one hand the continued centrality of dyadic transactional international law which is situated, on the other hand, within a “normative environment” to which the old formal legitimacy has little traction.

I will only hint at some of the normative problems. One major problem is the confluence between external and internal sovereignty exhibited in the very notion of national interest. There maybe some continued currency to national interest in matters of, say, war and peace and consequently in their reflection in things like mutual defense pacts and the like. But no one can today credibly argue that bilateral treaties of the “Friendship, Navigation and Commerce” type of which, say, the United States continues to have a plethora, or the bilateral “free trade areas” which

the European Union has with more than half the countries of the world are a non-contested manifestation of the “national interest”. They are agreements rooted in a certain worldview, which vindicate certain internal socio-economic interests. This, in turn, presents two delicate issues: One is the measure of democratic scrutiny, which treaties such as these receive, in developed democracies such as the USA or the EU. They often receive far less democratic scrutiny than domestic legislation with the same socio-economic redistributive impact. This is certainly quite commonly the case in Europe and not at all infrequent in the USA. The second problem is that Economic giants such as the USA and the EU can impose such Treaties on lesser states not only leaving them with little or no margin of negotiation, but with even less concern to their (the would be partner’s) internal democratic scrutiny.

2. The Constitutional and Legislative: International Law as Community⁷

An interpretation of the legislative and constitutional strata of geological map yields the much noted, and positively commented upon phenomenon of the emergence, in certain areas, of some form of international community. There are both structural and material hall marks to the emergence of such community. Structurally we detect the emergence of new types of international organization. Some international organizations, say, the International Postal Union, is mostly a mechanism to serve more efficiently the contractarian goals of States. At the other extreme, you take the UN or the EU and you find organizations whose objectives articulate goals a part of which is independent of, or distinct to, the specific goals of its Member States. They are conceived, of course, as goals which are in the interest of the Member States, but they very often transcend any specific transactional interest and are of a “meta” type – i.e. the overall interest in having an orderly or just international community.

Materially, the hallmark of Community may, in my view, be found in the appropriation or definition of common assets. The common assets could be material such as the deep bed of the high sea, or territorial such as certain areas of space. They can be functional such as certain aspects of collective security and they can even be spiritual: Internationally defined Human Rights or ecological norms represent common spiritual assets where States can no more assert their exclusive sovereignty, even within their territory, then they could over areas of space which extend above their air-space.

Explaining these common assets in contractarian regimes is, at best, unconvincing and at worst silly. One has to stipulate a community which is composed of, but

⁷ See generally the comprehensive and profound study of Simma, *From Bilateralism to Community Interest in International Law*, Rec. des cours 1994, Tome IV, vol. 250, 217-384.

whose objectives and values may be distinct from the specific objectives of, any one of its Members.

It is easier to understand the constitutional and legislative as forms of governance. After all, when we speak of governance we do not refer only to the administrative phenomenon. There is, however, limited explanatory added value, if all we do is to say that international norm setting, through treaties or otherwise should be adorned with the semantic mantle of governance.

The added value is I believe in a different focus notable in understanding how multilateral law making treaties often impinge on functions of domestic governance, or in turn, lead towards the setting up of international regulatory or management regimes in a way familiar from domestic setting – general legislation creating a logic which ends up with an administrative and regulatory Agency or Department of government.

For examples of the impact on government, one of the most fruitful areas is always derogation regimes. The GATT Article XXs of international law. I think the phenomenon is generic: The legal regime itself is “legislative” in nature creating certain obligations for the state which may be implemented through the State’s legislative regime. The derogations involve huge entanglements with domestic governance and administration. The impact of international law here is not in a direct regime of governance taking over from the State but in the impact on the governance functions of the State.

The process from Treaty to Agency is described in the next section of this paper.

In the area of Community, too, there are a myriad of legitimacy problems. We will list briefly only four: the fictions of consent, the closure of exit, the unpacking of the State and, finally, the existence of “Community” without Polity.

The growth in the number of States and the complexity of international legal obligations makes the forms of consent as a means of justifying norms increasingly fictitious, requiring the invocation of presumptions, silence, meta consent and the like. Many of those very norms which were the hallmark of community are often the very ones for which meaningful consent is little more than a fiction. This is particularly true for norms, the validity of which depends on some employment of “custom” or “general principles”.⁸

But this is also the case in relation to many multilateral treaties. Increasingly international regimes, such as, say, the Law of the Sea, the WTO are negotiated on a take-it-or-leave-it basis. WTO officials are always ready with the “what do you want: sovereign governments signed and ratified this” pleas. But for most States both the Take it is fictitious and the Leave it is even more. The consent given by these “sovereign” states is not much different to the “consent” that each of us gives, when we upgrade the operating system of our computer and blithely click the “I Agree” button on the Microsoft Terms and Conditions. One cannot afford to be out, and one cannot afford to leave. The legitimation that comes from sover-

⁸ Cf. the path breaking piece by Tomuschat, *Obligations Arising for States Without or Against their Will*, Rec. des cours, 1993, Tome IV, vol. 241, 195-374.

eignty is increasingly untenable. The ability to choose one's obligations has gone: The Single Undertaking; the No Reservations Treaty are today increasingly the norm, rather than the exception. It is either all, or nothing, and nothing is not an option, so it has to be all. So even those States where there is a meaningful internal democratic control of foreign policy are obliged, democratically, to click the "I Agree" button of, say, the WTO or the Law of the Sea.

Further, classical consent was based on a conflation of government with State. That conflation is no longer tenable. As noted, the breakdown in terms of subject matter between what is "internal" and what is "international" means that most international normativity is as contested socially as domestic normativity. The result of international law continuing to conflate government with State is troubling: You take the obedience claim of international law and couple it with the conflation of government and State which international law posits and you get nothing more than a monstrous empowerment of the executive branch at the expense of other political estates or an empowerment of those internal special interest who have a better capture of the executive branch.

Finally, despite the "progressive" values with which the turn to Community is normally associated – notably human rights and the environment – the absence of true polity is highly problematic.

Few areas of contemporary international law have been presented as challenging the past and have excited as much rhetoric about transformation as human rights. The "turn" to the individual, the "valorizing" of the individual, the "piercing of the statal veil" et cetera. That international law has taken an interest in human rights as it has in the environment is of course an important material development. That it has defined them as common assets is an important structural development. Situating human rights along side the environment is helpful. For, seen through the prism of political theory, international law deals with humans the way it deals with whales and trees. Precious objects which require very special regimes for their protection. The surface language of international legal rights discourse may be neo-Kantian. Its deep structure is utterly pre-modern. It is a rights notion that resembles the Roman Empire which regards individuals as an object on which to bestow or recognize rights, not as agents from whom emanates the power to do such bestowing. It is a vision of the individual as an object or, at best, as a consumer of outcomes, but not as an agent of process. In one respect the international legal system is even worse than the Roman Empire: International law generates norms. But there are no, and cannot be, a polity and citizens by whom these norms are generated. The individual in international law seen, structurally, only as an object of rights but not as the source of authority, is not different from women in the pre-emancipation societies, or indeed of slaves in Roman times whose rights were recognized – at the grace of others.

And, of course, what gives a sharper edge to these issues is the frequent situation of all forms of international obligation in a far more effective and binding enforcement mechanism.

3. The Regulatory: International Law as Governance

Finally, interpreting primarily the regulatory dimension of international law, points at the end of the century not to the emergence of World Government (a horrible thought in itself) but something no less otiose: Governance without Government.⁹

What are the hallmarks of international governance?

- The increasing importance of the administrative or regulatory strata of Treaties. There is now increasingly international regulation of subject matter which hitherto was not only within the domain of States but within the domain of the administration within the State.

- There is increasingly new forms of obligation:

- Direct regulatory obligation where international norm replaces the domestic one.

What is interesting here is also to note new forms whereby increasing the obligation of international law is positive in nature, rather than a negative interdiction. Also, increasingly it requires not only obtaining certain results but insists on a specific process in working towards that result.

- Indirect regulatory norms where the international norm does not replace the government regulatory regime but seriously limits it. The most common example is the discipline of non-discrimination in trade regimes.

- Governance incentives, transforming to the international regime the US Federal invention of Grants-in-Aid. These can be financial – as is often the case with World Bank or IMF conditions are regulatory – as in the case of the Codex Alimentarius which promises material and procedural advantages to those who follow its norms. The State is free to follow, but it stands to lose a lot if it does not. All but the very rich and powerful can ill afford to say No.

- The emergence of International Civil Service and International Management.

- International Proceduralization and international insistence on domestic proceduralization.

- An invasion or subtle reversal of internal order of values – especially in the law of justification, burdens of proof and legal presumptions.

⁹ Cf. Rosenau/Czempiel (eds.), *Governance Without Government: Order and Change in World Politics*, Cambridge 1992. "... [T]he concept of governance without government is especially conducive to the study of world politics inasmuch as centralized authority is conspicuously absent from this domain of human affairs even though it is equally obvious that a modicum of order, of routinized arrangements, is normally present in the conduct of global life. Given an order that lacks a centralized authority with the capacity to enforce decisions on a global scale, it follows that a prime task of inquiry is that of probing the extent to which the functions normally associated with governance are performed in world politics without the institutions of government." (p. 7). The Governance without Government is associated with the literature, at times overstated, about the "disappearance" or weakening of the classical Nation-State or in the most minimalist version, its loss of total domination of international legal process. We have profited from and acknowledge a debt to, Spruyt, *The Sovereign State and Its Competitors*, Princeton 1995; Spruyt, *The Changing Structure of International Law Revisited*, 8 EJIL, 399-448 (1997); Schachter, *The Decline of the Nation State and Its Implications for International Law*, Columbia Journal of Transnl. L. 7 (1997); Ruiz-Fabri, *Genèse et disparition de l'Etat à l'époque contemporaine*, AFDI 153 (1992).

Here, too, what gives a sharper edge to governance, and to the normative problems that I will shortly explore, is the situation of these obligations and regimes and a much more effective enforcement regime.¹⁰

There is, thus, governance, but critically there is no government and no governed. It is Governance without government and without the governed – i.e. polity. At the international level, we do not have the branches of government or the institutions of government we are accustomed to from Statal settings. This is trite but crucial. When there is governance it should be legitimated democratically. But democracy presumes demos and presumes the existence of government. Whatever democratic model one may adopt it will always have the elements of accountability, representation and some deliberation. There is always a presumption that all notions of representation, accountability, deliberation can be grafted on to the classical institutions of government. Likewise, whatever justification one gives to the democratic discipline of majority rule, it always presumes that majority and minority are situated within a polity the definition of which is shared by most of its subject. The international system form of governance with government and without demos means there is no purchase, no handle whereby we can graft democracy as we understand it from Statal settings on to the international arena.

Moreover, the usual fall back position that this legitimacy may to be acquired through democratic control of foreign policy at the State level – loses its persuasive power here even more than in relation to international community values. Meso- and micro-international regulation is hardly the stuff of effective democratic control by state Institutions. The fox we were chasing in the traditional model was the executive branch – our state government. In the universe of transnational regulation, even governments are no longer in control.

Democratic theories also creak badly, be they liberal or neo-liberal, consociational or even Schumpeterian elite models when attempting to apply them to these forms of governance. Who is Principal, who is Agent? Who are the stake holders? We may define demos and demoi in different ways. But there is no convincing account of democracy without demos. Demos is an ontological requirement of democracy. There is no demos underlying international governance, but it is not even easy to conceptualize what that demos would be like? Network theory and constructivism are helpful in describing the form of international governance and explain how they work. But if anything they aggravate the normative and legitimacy dilemmas rather than solve them.

¹⁰ The “Regulatory” does not fully overlap with International Organizations as such. Nonetheless, some of the burgeoning literature on the legitimacy and democracy of international organizations is most helpful in understanding the democratic and legitimacy challenges to which the regulatory stratum gives rise. See *Stein*, International Integration and Democracy: No Love at First Sight, 95 AJIL 489 (2001); *Esty*, The World Trade Organization's Legitimacy Crisis, 1 World Trade Review (2002); *Howse*, “Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence”, in: Joseph H. H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*, 2000.

The “democracy” issue for international law is no longer whether there is a right to democracy – which would, for example justify denial of recognition, or even intervention to restore a denial of democracy through a coup. Instead the issue is how in the face of international community which “appropriates” and defines common material and spiritual assets and in the face of international governance increasingly appropriates administrative functions of the state, can establish mechanisms which, in the vocabulary of normative political theory, would legitimate such government. If an answer is not found to this, the huge gains attained in the systemic evolution of law making and law enforcement may be normatively and even politically nullified.

III. Conclusion: The Tragedy of Democracy and the Rule of Law in the International Legal Order

We end by returning to our point of departure: The nexus between the Rule of (International) Law and Democracy.

Over much of the 20th Century there has been a considerable widening and deepening in the scope of the international legal order. I tried to capture such widening and deepening by our reference to the transactional, the communitarian and the regulatory dimensions of international command modes buttressed by a similar widening and deepening of compliance mechanisms. I argued that the concept of international governance in important, if discrete, areas of international life is fully justified, albeit governance without government. We further argued that both a change in sensibility towards the legitimation of power generally and the turn to governance of international law create a considerable normative challenge to the international legal order in its classical (transactional) and more modern forms (communitarian and regulatory). And yet, we also argued that in all these spheres the challenge has been neither fully appreciated nor fully met. What’s more, given that the vocabulary of democracy is rooted in notions of demos, nation and state, there is no easy conceptual template from the traditional array of democratic theories one can employ to meet the challenge. A simplistic application of the majoritarian principle in world arenas would be normatively ludicrous. It is not a question of an adapting national institutions and processes to international contexts. That could work in only limited circumstances. What is required is both a rethinking of the very building blocks of democracy to see how these may or may not be employed in an international system which is neither State nor Nation and to search for alternative legitimating devices which would make up for the non applicability of some of the classical institutions of democracy where that is not possible.

I speak about the tragedy of the international legal order in an altogether non-sentimental way. On the one hand, as a matter of my own values, I believe that much of the widening and deepening of international law over the last century, especially in the accelerated fashion of the last few decades, has been beneficial to

mankind and has made the world a better place in which to live for a large number of persons.¹¹ I also believe, as indicated in the premises of this essay, that as in domestic situations where the rule of law is a necessary element and a condition for a functioning democracy, the same, *mutatis mutandis*, would be true for the international system. From this perspective I would regard as regressive a call for a wholesale dismantling of the international legal regime.

On the other hand, I believe too that in the international sphere as elsewhere the end can justify the means only so far. That a legitimacy powerfully skewed to results and away from process, based mostly on outputs and only to a limited degree on inputs, is a weak legitimacy and sometimes none at all.

The first sentiment would be a call for States, their internal organs (notably courts) and other actors to embrace international normativity. The second sentiment would be a call to the same agents to treat international normativity with considerable reserve. The traditional opposition to “internationalism” came from nationalism and was conceptualized as a tension between national sovereignty and international law. The opposition I am alluding to is, instead, not a concern with sovereignty – at least not with the classical sovereignty of the State. It takes the international legal order as an *acquis* – but it is unwilling to celebrate the benefits of that *acquis* when gained by a disenfranchisement of people and peoples. There is, thus, in my view a deep paradox in the spread of liberal democracies to an increasing number of States and populations around the world. This spread does not automatically go hand-in-hand with a normative call for a respect for international norms and for various degrees of constitutionalization of international regimes at least among and within the group of liberal States. It also means calling into question of those very norms by those very States in the name of that very same value, liberal democracy.

¹¹ There is, of course, much to qualify this statement. There are many international regimes, notably in the economic area, which overlook, compromise or even damage the interests and claims for justice of many people and groups. Universal justice, however it may be defined, is still far from being achieved.