

**Wagner Artur de Oliveira Cabral**

**LEGITIMACY, AUTHORITY AND PUBLIC REASON**

A case for international stability for the right reasons

Tese de Doutorado

Orientador: Professor Associado Dr. Alberto do Amaral Júnior

**UNIVERSIDADE DE SÃO PAULO**

**FACULDADE DE DIREITO**

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Tese apresentada à Banca Examinadora do Programa de Pós-Graduação em Direito da Universidade de São Paulo, como exigência parcial para obtenção do título de Doutor em Direito, na área de concentração Direito Internacional (DIN), sob a orientação do Prof. Associado Dr. Alberto do Amaral Júnior.

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**To my father**

**To my mother**

**To my sister**



The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts. Aristocratic and caste societies are unjust because they make these contingencies the ascriptive basis for belonging to more or less enclosed and privileged social classes. The basic structure of these societies incorporates the arbitrariness found in nature. But there is no necessity for men to resign themselves to these contingencies. The social system is not an unchangeable order beyond human control but a pattern of human action.

- John Rawls, *A Theory of Justice* (1971)

Life is short and truth works far and lives long: let us speak the truth.

- Arthur Schopenhauer, *The World as Will and Representation* (1818)



## **ABSTRACT**

The objective of this research is to assess how International Law is influenced by challenges of legitimacy and authority. Drawing from the recent outbreak of a number of social and political movements questioning globalization worldwide, this research attempts to understand how institutions of international governance are related to the lives of the people. By canvassing the traditional sources of International Law and how they are shaped by interpretation, and also by inspecting various existing instances of international administrative control, we try to delineate the complicated outlook that jeopardize public awareness and involvement, raising issues of legitimacy. As an answer to this situation of detachment, this work delves into the writings of John Rawls in order to propose how a well-ordered society could be structured from the active participation of its citizens, striving for a social balance that can be sustained at a distance. For this purpose, not only Rawlsian theory is presented, but also its historical antecedents in contractarian theory. Finally, we propose a discussion on how international institutions could be designed with an aim at accommodating concerns about democracy, transparency and inclusiveness.



## RESUMO

O objetivo desta pesquisa é avaliar como o Direito Internacional é afetado por questões de autoridade e legitimidade. A partir da recente irrupção de vários movimentos sociais e políticos mundo afora rechaçando a globalização, esta pesquisa tenta entender como as instituições de governança internacional estão relacionadas à vida das pessoas. Examinando as fontes tradicionais do Direito Internacional, e como elas são moldadas pela interpretação, assim como também inspecionando várias instâncias existentes mas pouco conhecidas de controle administrativo internacional, tentamos delinear o panorama complexo que põe em desafio a conscientização e o envolvimento do público, levantando assim questões de legitimidade. Como resposta a esta situação de distanciamento, este trabalho investiga os escritos de John Rawls, a fim de propor como uma sociedade bem ordenada poderia ser estruturada a partir da participação ativa de seus cidadãos, lutando por um equilíbrio social que seja estável e sustentável. Apresenta-se não só a teoria Rawlsiana, como também seus antecedentes na teoria contratualista. Finalmente, propomos uma discussão sobre como as instituições internacionais poderiam ser projetadas com o objetivo de acomodar preocupações sobre democracia, transparência e inclusão.





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# 1. FAST TIMES AT INTERNATIONAL LAW

## Introduction

To say that International Law is at a time of crisis has been a frequent understatement and a literature cliché that, however, must be faced once again, bearing the usual calls of distress and confusion, amid bleak descriptions of the unknown future. Reality presents itself with several challenges that perplex and amaze international lawyers, unable to predict developments such as the electoral victories of Brexit or Trump, both championing political platforms rooted in the vocal disdain for a globalization project strengthened and deepened throughout the 20<sup>th</sup> century. Economical debates defending liberalism and international trade have migrated from academy and international institutions such as the International Monetary Fund (IMF), World Bank (WB) or World Trade Organization (WTO) to take part of what is currently understood as “common sense”, at least under a Western perspective. A world with freer trade is, in general, a freer world. For some reason, or more likely a confluence of them, the citizens of those democracies seem to reject that notion as an evident truth, choosing to protect some other values deemed as more important for them. It is relevant to underscore that those voices don’t necessarily come from countries that are marginalized, or widely perceived to be injured by economic liberalization. In fact, Great Britain and United States are usually recognized as champions of liberalization and reapers of its profits. Cohen suggests an explanation for the relation between that effect (anti-globalization movements) and its supposed cause (international integration): that the former reflect the successes of the latter<sup>1</sup>.

The great multilateral institutions of the post-World War II world—the General Agreement on Tariffs and Trade (GATT) and the WTO, the United Nations, human rights treaties, the Rome Statute of the International Criminal Court—reflected efforts to increase and spread global wealth, stability, and peace (among other goals). And while much work remains to be done, these institutions have in many ways succeeded. Wealth and power are now widely dispersed across

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<sup>1</sup> Harlan Grant Cohen. *Multilateralism’s Life Cycle*. *The American Journal of International Law*. Vol. 112. Issue 1. 2018. p. 48-49.

the world. Human rights remain under serious threat (in some places, more than before), but institutions have developed tools that can be effective, at least some of the time. Success, however, has fundamentally changed the calculus of individual states, and in turn, their views of global goals and multilateral strategies. The success of multilateralism may have made that strategy more difficult over time.

The international political and legal regime that blossomed in the 20<sup>th</sup> Century has, also according to Cohen, proceeded into fostering a “true global multipolarity”, that multiplied the number of States that aren’t so small as to strategically depend on a traditional power, neither are relevant enough to act as hegemons<sup>2</sup>. In this context, alliances get even more circumstantial, with several issues ascribing different relative values to States, whereas no countries are relevant enough to emanate a gravitational pull towards a policy convergence, thus producing an overall diminishing value of issue linkages. At the same time, international organizations, a policy tool for both the weakest combined and the strongest acting in a coordinating role, started losing a distinct usefulness. Other regional and local arrangements slowly started gaining traction, sometimes dehydrating global regimes. In the end, the distribution of power across the global power seems to have been changing the course of international relations towards uncharted waters. A recent example of the new dynamics in play was the withdrawal of the candidacy of Sir Christopher Greenwood, a British national, to a seat on the International Court of Justice in 2017. He was replaced by Indian national Dalveer Bhandari, making it the first time a UNSC permanent member failed to secure a member at the bench of the World Court<sup>3</sup>.

Consequences of recent developments are complex, and their analysis would benefit from a thorough various assessments of the impact of behaviors of international actors. One could argue that we stand before an international arena of crescent activity and integration – especially fostered by cultural and economic convergence – that is developed in two levels. The first and foremost level is the institutional, where norms and standards are set in a myriad

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<sup>2</sup> Harlan Grant Cohen. *Multilateralism’s Life Cycle*. The American Journal of International Law. Vol. 112. Issue 1. 2018. p. 49.

<sup>3</sup> The Guardian. “No British judge on World Court for the first time in its 71-year history”. November 20, 2017. Link: <https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history>.

of discursive fora, following several different processes, which constitute an ecology of diverse organisms that have themselves been established and developed through time.

The other level of operation of this international system is the one that affects its indirect subjects which exist in the world, albeit in a different legal capacity. Natural persons, or other physical subjects (such as wildlife or flora), are subject to international norms without directly participating in their creation. Human beings, especially, may be singled out as indirect participants of the international normative process under liberal theory. Theories of political representation affirm that those subjects participate in international dealings inasmuch as they take part into a social contract via a political society that has a representative structure usually organized by periodic displays of priorities and/or consent – the electoral processes. Upon the practice of consultations, consent is established and renewed, and the mandate bearers are supported or rejected, based on their performance at the task of attending to the desires of the electorate. This cycle of empowerment and evaluation is a basic feature of any self-proclaimed democratic regime to the extent that even authoritarian regimes usually try to present the government as being for the people and by the people.

This research will delve into the aforementioned cycle, raising some questions about its adequacy as a description of theory and practice for international relations, especially in International Law. It starts from a feeling of disquiet about how democracies behave towards International Law. What is the extent of the ingrained practices and underlying rationales into this process? Bearing in mind the evocation of principles of the Charter of the United Nations, which proclaim a determination not only to “save the succeeding generations from the scourge of war”, but also “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”, a pivotal role is played by the presence and promotion of international stability.

In this scope, the United States of America (USA) have recently begun a strong march for the modification, reversal or annulment of international legal and diplomatic positions, thus presenting an interesting demonstration of quick policy variations. For this reason, we shall proceed to recall some of the main events which occurred on the first semester of the Trump administration<sup>4</sup>. Some of the acts are legally binding and some are

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<sup>4</sup> I am greatly indebted to professor's Jack Goldsmith's account of the chronology of these facts. See Jack Goldsmith. “The Trump Onslaught on International Law and Institutions”. March 17, 2017. Link: <https://www.lawfareblog.com/trump-onslaught-international-law-and-institutions>.

not, but all of them communicate valuable information about perceptions of Law that differ from *status quo*. This brief exercise shall exemplify how far and wide acts of authority (in a sense, acts of vested authorities) can reach. For this reason, the official acts performed by the Trump administration will be, accordingly, referred as acts performed by USA. This interplay between public officials' behavior and a State's recognizable stance is of relevance for this research, so it should be watched closely. Afterwards we shall return to the subject, discussing the relations between the two levels of that previously alluded political cycle.

*A working sample: The Trump Administration and foreign policy reversals*

a) Soon after the presidential inauguration, USA formally abandoned the **Trans-Pacific Partnership (TPP)**<sup>5</sup>. The twelve-nation mega regional trade agreement (RTA) was negotiated across seven years and constituted the largest trade treaty ever drafted. According to a World Bank study, this treaty would raise member countries GDP an average of 1.1 percent by 2030 and increase trade in 11 percent in the same period<sup>6</sup>. While the North American Free Trade Agreement (NAFTA) countries would attain more modest gains (around 0.6 GDP), smaller countries such as Malaysia and Vietnam would receive larger increase in GDP (8 and 11 percent, respectively, at the same time frame of 2030). Some non-party countries might be adversely affected, though (mostly South Korea, Thailand and some other Asian countries, who might be affected in a region of 0.3 GDP loss). Members of the TPP amount to 40 percent of global GDP, and 20 percent of global trade. Nevertheless, the USA has decided to abandon it, just three days into the new administration.

b) Not many days later the press leaked a memo from the Trump administration detailing an Executive Order (EO) which imposed a moratorium on new multilateral treaties<sup>7</sup>. This executive order was aimed at tackling the “proliferation of multilateral treaties that purport to regulate activities that are domestic in nature” whereas “these treaties are used

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<sup>5</sup> New York Times. “Trump Abandons Trans-Pacific Partnership, Obama’s Signature Trade Deal”. January 23, 2017. Link: [https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?\\_r=0](https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?_r=0).

<sup>6</sup> World Bank Group. “Global Economic Prospects, January 2016: Spillovers Amid Weak Growth”. 2016. Link: <https://openknowledge.worldbank.org/handle/10986/23435>.

<sup>7</sup> New York Times. “Moratorium on New Multilateral Treaties”. Link: <http://apps.washingtonpost.com/g/documents/world/read-the-trump-administrations-draft-of-the-executive-order-on-treaties/2307/>.

to force countries to adhere to often radical domestic agendas that could not, themselves, otherwise be enacted in accordance with a country's domestic laws". Exemplifying this phenomenon, the EO text singles out two of such problematic treaties: The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>8</sup> and the United Nations Convention on the Rights of the Child (UNCRC)<sup>9</sup>. While the former could be interpreted to "prohibit the celebration of Mother's Day and require the decriminalization of prostitution", the latter could also be interpreted to "prohibit spanking". Multilateral treaties would only be admitted after a review by a "high-level executive branch committee". There is, however, a similar procedure already in force, called Circular 175, in which a commission thoroughly evaluates all the commitments entailed by any given treaty modification (accession, modification or termination)<sup>10</sup>. An exception to the moratorium is granted for treaties about "national security, extradition, and international trade", which are, according to the explanatory text, of "international concern". Reinforcement of the evaluation procedure for new treaties, as the designated reevaluation of already signed and effective treaties, signal the recent position from the USA to both abstain from new commitments and put the current obligations under the stress of uncertainty.

c) This feeling of uncertainty is not uncalled for. President Trump has quickly called **the Joint Comprehensive Plan of Action**, the Iran nuclear deal woven by the previous Administration in 2015, "a failure"<sup>11</sup>. While the USA at first certified the maintenance of the deal<sup>12</sup>, it has later denied to do so, withdrawing<sup>13</sup> from the Joint Comprehensive Plan of Action on May 8<sup>th</sup>, 2018. This ambivalence reflects poorly on the investments in the region, prone to security issues. NAFTA has also been similarly called "a catastrophe"<sup>14</sup> by

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<sup>8</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Link: <http://www.un.org/womenwatch/daw/cedaw/>.

<sup>9</sup> United Nations Convention on the Rights of the Child (UNCRC). Link: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

<sup>10</sup> Circular 175 Link: <https://www.state.gov/s/l/treaty/c175/>.

<sup>11</sup> ABC News. "Trump administration keeps Iran deal alive, but with new sanctions" May 17, 2017. Link: <http://abcnews.go.com/International/trump-administration-iran-deal-alive-sanctions/story?id=47466388>.

<sup>12</sup> Bloomberg. "Trump Just Came Very Close to Killing the Iran Deal". July 18, 2017. Link: <https://www.bloomberg.com/view/articles/2017-07-18/trump-just-came-very-close-to-killing-the-iran-deal>.

<sup>13</sup> New York Times. "Trump Abandons Iran Nuclear Deal He Long Scorned". May 8, 2018. Link: <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>.

<sup>14</sup> CNN. "Trump wants to 'speed' up NAFTA talks, calls deal a 'catastrophe'". February 2, 2017. Link: <http://money.cnn.com/2017/02/02/news/economy/mexico-nafta-negotiations-90-days/index.html>.

President Trump and is up to what seems to be a strong overhaul according to the USA new priorities published by the US Trade Representative<sup>15</sup>.

**d)** Additionally, the USA has recently decided to withdraw from the Paris Agreements, at a public statement in which the President determined immediately to “cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country”<sup>16</sup>. Most of the impact data provided as a justification for the withdrawal comes from the National Economic Research Associates (NERA)<sup>17</sup>, from a report titled Impacts of Greenhouse Gas Regulations on the Industrial Sector<sup>18</sup>. This research, while conducted by a prestigious private consulting firm, was financed by the American Council for Capital Formation, a private think-tank, in turn funded by undisclosed private corporations, enterprises and associations. When citing another research institution, the Massachusetts Institute of Technology (MIT), the President Trump was criticized as being outright misleading<sup>19</sup>. President Trump mentioned in the speech that "even if the Paris Agreement were implemented in full, with total compliance from all nations, it is estimated it would only produce a two-tenths of one degree Celsius reduction in global temperature by the year 2100". Conversely, an MIT researcher added that "If we don't do anything, we might shoot over 5 degrees or more and that would be catastrophic". While full compliance may not do much to redress the present damage to environment, choosing to neglect climate change may amount to a catastrophe far worse. Such unclear junction of studies and interpretations of studies led the USA to reject the Paris deal.

**e)** Regarding International Organizations (IO), another memorandum was leaked, titled “Auditing and Reducing U.S. Funding of International Organizations”<sup>20</sup>. This EO, also still unissued at this point, likewise created a commission, this time aiming to improve allocation of public funds to IOs, to “help identify and eliminate wasteful and

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<sup>15</sup> United States Trade Representative. Summary of Objectives for the NAFTA Renegotiation. Link: <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>.

<sup>16</sup> White House. Statement by President Trump on the Paris Climate Accord. June 1, 2017. Link: <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord>.

<sup>17</sup> National Energy Research Associates. Link: <http://www.nera.com/>.

<sup>18</sup> NERA Economic Consulting. Impacts of Greenhouse Gas Regulations on the Industrial Sector. Link: <http://www.nera.com/publications/archive/2017/impacts-of-greenhouse-gas-regulations-on-the-industrial-sector.html>.

<sup>19</sup> Reuters. “Trump misunderstood MIT climate research, university officials say”. June 1, 2017. Link: <http://www.reuters.com/article/us-usa-climatechange-trump-mit-idUSKBN18S6L0>

<sup>20</sup> Auditing and Reducing U.S. Funding of International Organizations. Link: <https://assets.documentcloud.org/documents/3424650/Read-the-Trump-administration-s-draft-of-the.pdf>.



counterproductive giving”. This commission must recommend "strategies to reform international organizations of which the United States is a member in such a way the international organizations transition from a funding mechanism derived from mandatory assessments to one derived from voluntary contributions", bearing in mind that "the United States could selectively fund the specific parts of an international organization that align with U.S. interests" coupled with an outright 40 percent decrease on overall voluntary funding. The committee shall pay special attention to funding of practices that may involve, among several other elements of national interest, “resolutions or sanctions that single out the State of Israel”, or “the International Criminal Court”. There are also some activities directly excluded from receiving American funding, such as institutions that enable "the performance of abortion or sterilization as a method of family planning or the provision of incentives to motivate or coerce any person to undergo an abortion or sterilization", or "any United Nations affiliate or other international organization that grants full membership to the Palestinian Authority or Palestinian Liberation Organization”. All the findings of this committee would be reported to the President.

f) Despite that EO never coming to be issued, several IOs have been in some manner recently disqualified or criticized by the USA. In late May 2017, at the occasion of the unveiling of memorials dedicated to NATO Article 5 and to the Berlin Wall, President Trump made strong comments about the Alliance, especially on the matter of funding<sup>21</sup>. He declared that “NATO members must finally contribute their fair share and meet their financial obligations, for 23 of the 28 member nations are still not paying what they should be paying and what they’re supposed to be paying for their defense”. That situation, according to the President, “is not fair to the people and taxpayers of the United States”. The shared burden of 2 percent of GDP spent with defense is actually more of a guideline, since it can mean more or less depending on the performance of the economy of the country. Those remarks are representative of an uncharacteristic diplomatic speech with a scolding tone towards allies, which failed to mention Article 5, the cornerstone of the shared burden of collective defense that is crucial to the NATO collective security system. Secretary-General Jens Stoltenberg quickly declared that NATO does not interpret such omission as significant,

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<sup>21</sup> White House. Remarks by President Trump at NATO Unveiling of the Article 5 and Berlin Wall Memorials - Brussels, Belgium. May 25, 2017. Link: <https://www.whitehouse.gov/the-press-office/2017/05/25/remarks-president-trump-nato-unveiling-article-5-and-berlin-wall>.

whereas his address at the unveiling of the memorials sent a strong message of commitment to the Atlantic alliance<sup>22</sup>.

**g)** Similarly, Ambassador Nikki Haley, Permanent Representative at the United Nations, spoke at the United Nations Human Rights Council in early June<sup>23</sup>. At that occasion, the Ambassador also signaled a change of stance towards the organ, stating that “the United States is looking carefully at this Council and our participation in it”. Also in strong terms, the representative declared that “it’s hard to accept that this Council has never considered a resolution on Venezuela, and yet it adopted five biased resolutions in March against a single country, Israel. It is essential that this Council address its chronic anti-Israel bias, if it is to have any credibility”<sup>24</sup>.

**h)** Budget cuts should also cause impactful changes to American international policy. According to the Budget Request for the Fiscal Year 2018, several international programs will be diminished or totally cut<sup>25</sup>. These cuts are distributed in several areas such as global health programs (2bi, p. 70); IOs contribution (0.7bi, p. 71); Food aid (1.7bi, p. 73); Peacekeeping (1.6bi, p. 74) and Climate change (1.5bi, p. 75).

**i)** Funding, however, is not the only relevant contribution of USA to IOs. International Criminal Court's (ICC) Prosecutor, Fatou Bensouda, has voiced concern for the lack of cooperation from USA, and the hindrance it may represent for the functioning of the ICC<sup>26</sup>. Although not a member of the Rome Statute, USA has been instrumental in bringing suspects to justice, with cooperation in programs like Rewards for Justice, where money is awarded to those who present relevant information regarding international criminal or investigation targets. In the occasion of the distancing between the USA and the ICC, the Prosecutor Office would probably be seriously affected.

Several other contributions could be presented, but I believe we’ve already covered much ground regarding the public impact of actions by a given government, in a very limited

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<sup>22</sup> NATO Press Conference. May 25, 2017. Link: [http://nato.int/cps/en/natohq/opinions\\_144098.htm](http://nato.int/cps/en/natohq/opinions_144098.htm).

<sup>23</sup> Ambassador Nikki Haley Addresses the U.N. Human Rights Council. Link: <https://geneva.usmission.gov/2017/06/06/ambassador-nikki-haley-address-to-the-u-n-human-rights-council/>.

<sup>24</sup> Idem

<sup>25</sup> White House. Major Savings and Reforms - BUDGET OF THE U. S. GOVERNMENT - Fiscal Year 2018. Link: <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf>.

<sup>26</sup> Voa News. “ICC Urges Supporters to Rally if Trump Pulls Support”. January 26, 2017. Link: <https://www.voanews.com/a/international-criminal-court-urges-supporters-rally-trump-pulls-support/3695055.html>.

period, raising doubts about the source of authority of such decisions, its legitimacy and consent. There may be more relevant events – in both number and impact, such as the Executive Order No. 13780, titled “Protecting the Nation From Foreign Terrorist Entry Into the United States”, also infamously known as “Travel Ban”, which arguably violates individual rights from both Americans and foreigners<sup>27</sup>. For now, however, let us focus on acts of public policy that do not amount to a direct effect on domestic individual rights – which are, naturally, more closely protected by judicial review. Those events, although international in nature, can be settled in domestic processes. Suffice to say that our attention will be mostly directed at those actions that present a necessary relation between the two levels of the cycle, with international institutions and authority relaying norms and obligations that impact other subjects, largely non-participant of the process of elaboration of these norms.

One could possibly describe the occasions recollected above as a *tour de force* of Executive Power without needing to assess the merits of each single measure adopted or envisaged. The sheer variety of explorations on limitations of the executive branch is, by itself, impressive, especially given the short span of time when it all took place. We shall now try to succinctly evaluate how legitimacy takes place in each occasion<sup>28</sup>. There is no necessity to delve deeper at this point, since it is not an extensive exploration, but an exposition of the degree of complexity resultant of several uncertainties laid bare.

The most striking case comes from the events (**a – TPP**), (**c – Iran deal**) and (**d – Paris Agreement**), in which the Executive Branch has decided to reverse the course set recently by previous administration, despite the existing (though obviously disputable) evidence of the benefits of the deal. Given the fact that the decision was carried out so early in the mandate (without time for additional research or public consultations) one could interpret the act as meaning one of the following: **i)** The previous administration was acting against public interest, and the electoral process corrected it; **ii)** The previous administration was acting according public interest, but that changed in the electoral process, meaning that keeping that policy was now against public interest; **iii)** The previous administration was acting according public interest, and the current administration decided against public

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<sup>27</sup> White House. Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States. Link: <https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states>.

<sup>28</sup> It is not necessary, at this point, to elaborate on the concept of legitimacy, employing its common usage. The argument here is presented just as a token of the complexity at play, without need of conceptual refinement.

interest by reversing the policy; and **iv**) The previous administration was acting against public interest, as does the current administration, both unconcerned by legitimacy issues. We do not have enough information, at this point, to assess which was the case. Either way, such a sharp policy turnaround raises questions about whether a reasonable portion of the American electorate could be persuaded in a short space of time to change their convictions. This leaves us with the possible conclusion that the electorate either did not consent to what was going on before, does not consent to the new direction taken after the election, or even worse, that their consent is irrelevant to the matter – which is, as already stated, of great economic and social importance. Furthermore, it is important to underscore that such change of convictions will strongly impact all other treaty signatories, to whom the obligations prescribed by the norm were settled and expected as an important commitment.

Event (**b – Moratorium on Multilateral Treaties**), in turn, signals the disposition of the Executive Branch to disregard long established treaty commitments (CEDAW<sup>29</sup> was ratified in 17.7.1980, while UNCRC<sup>30</sup> was signed in 16.02.1995 and is yet to be ratified by USA). However, it is not a full rejection of the treaties in their entirety, but of possible interpretations of their text. Given that multilateral norms require a collective interpretive effort by their parties – interpretation which might possibly have been misconstrued –, they merit an additional safety procedure, one that, given Circular 175, is arguably redundant. At this point, the Executive Branch chooses to both reevaluate previous agreements (several of which have been already ratified in Congress) and impose a new burden to future ones. It is important to point out that the claimed disputed interpretations have not come from judicial bodies, but from regular international bureaucracy. Although that understanding shared by diplomats and others bureaucrats may affect obligations assumed by the USA, it will most probably be at a non-binding level. This situation also presents complications concerning the assessment of legitimacy variations through time and the perception of precisely what the State is bound to. What is the level of consent (and maybe legitimacy) that needs to be present in order for a norm to be considered binding? Can a unilateral declaration of the interpretation of a treaty, or rejection of a specific interpretation, be used to delineate Law, even without recourse to the usual instrument of reservations or interpretive notes?

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<sup>29</sup> United Nations Treaty Collection. Status of CEDAW members. Link: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

<sup>30</sup> United Nations Treaty Collection: Status of UNCRC members. Link: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en).

Meanwhile, at events (**e – Funding Audit**), (**f – NATO shared burden**), (**g – UN behavior**) and (**i – ICC**) the Executive Branch shows willingness towards revising its collective commitments to international institutions. In general, the USA has recently signaled that the country does not feel indebted to commitments the Executive Branch perceives as unjust, entailing inadequate burden of financing or insufficient performance of these IOs. These perceived shortcomings do not result from a collective assessment inside the institutions, but from one member. Although such vision may be echoed by other members, save from event **i**), its debates weren't originated in regular bureaucracy.

Finally, in event (**h – Budget cuts**) a set of programs and policies of international reach have been diminished or completely scraped. Of all the elements noted, this is certainly the commonest. It represents the frequent practice of unilateral non-binding commitments that affect citizens from several countries, but do not entail an obligation from the investing country. While this is a legally valid change of policy, the amount and chosen areas for cessation of projects could also be subject to public scrutiny and evaluation.

All these events have in common the fact that they signify changes of foreign policy resulting from shifts in domestic political landscape. Brazil, for instance, has recently witnessed several changes to its foreign policy upon the victory of Jair Messias Bolsonaro at the 2018 Brazilian Presidential Elections. The appointed foreign minister has publicly stated “anti-globalist” views, though is not clear, at this point, what exactly that means. He has, however, voiced strong pro-Christian ideals, denounced concerns of climate change as a “Marxist plot”, among other accusations<sup>31</sup>. Moreover, Bolsonaro administration has, at the time of this writing, already supported major changes such as: The withdrawal from United Nations' Global Compact for Safe, Orderly and Regular Migration<sup>32</sup>; The renunciation of the fight against climate change<sup>33</sup>; and the relocation of Brazilian embassy to Israel from Tel Aviv to Jerusalem<sup>34</sup>. Those are all significant reversals of foreign policy that represent a

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<sup>31</sup> The Guardian. “Brazil's new foreign minister believes climate change is a Marxist plot”. November 15, 2018. Link: <https://www.theguardian.com/world/2018/nov/15/brazil-foreign-minister-ernesto-araujo-climate-change-marxist-plot>.

<sup>32</sup> Al Jazeera. “Bolsonaro threatens to withdraw Brazil from UN migration pact”. January 9, 2019. Link: <https://www.aljazeera.com/news/2019/01/bolsonaro-threatens-withdraw-brazil-migration-pact-190109190423306.html>.

<sup>33</sup> Foreign Policy. “Brazil Was a Global Leader on Climate Change. Now It's a Threat”. January 4, 2019. Link: <https://foreignpolicy.com/2019/01/04/brazil-was-a-global-leader-on-climate-change-now-its-a-threat/>.

<sup>34</sup> Reuters. “Brazil moving its embassy to Jerusalem matter of 'when, not if': Netanyahu”. December 30, 2018. Link: <https://www.reuters.com/article/us-brazil-israel/brazil-moving-its-embassy-to-jerusalem-matter-of-when-not-if-netanyahu-idUSKCN1OT0G5>.

departure from established policies, will probably receive closer inspection from researchers from Brazil and abroad.

### **On the outskirts of Democracy**

The way the States behave is widely understood as both a demonstration of intentions (it is one of the elements of the establishment of international custom) and an indication of what the future will be. However, it is unconventional to witness an impetuous and drastic policy realignment so widespread, especially from an important international player such as the United States. More interestingly, this specific case represents a development originated in a country with democratic credentials in accordance with its political processes, which raises issues about how foreign policy is domestically rooted and, to a level, justified. It even begs the question of whether it is possible to expect stable commitments from countries with weaker institutions and fragile public political discourse, apart from the leadership of autocratic leaders. Furthermore, one might wonder what the connection is between democratic accountability and the development and nurturing of international agreements.

On the domestic level this is already a thorny issue, presenting a considerable challenge of passing the baton of State policies from one government to the next, and maintaining commitments from one generation to the following. As Mark Button recalls;

One of the central insights of the social contract tradition, as I read it, is the recognition that the making of a compact or promise is one (fairly easy) thing, keeping a promise – in the face of the vagaries and uncertainties of time, the opacity of human motives, and the perpetually unfinished character of human becoming and identity – is another. As Benedict Spinoza declared, “the preservation of the state chiefly depends on the subjects’ fidelity and constancy,” yet he admitted that “how subjects ought to be guided so as best to preserve their fidelity and virtue is not so obvious.”<sup>35</sup>

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<sup>35</sup> Mark E. Button. *Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls*. Pennsylvania State University Press, 2008. p. 3.

This is far from a new problem, ancient as the idea of States itself. But it has been aggravated by the rising complexity of global interactions, given that the concept of society has been tweaked with enlarged socioeconomical boundaries, managed by increasingly sophisticated institutions, wherein the usual structures of representation – and, concurrently, oversight – have not fully developed. One could easily argue that the very idea of inclusiveness and transparency is deemed foreign to international affairs<sup>36</sup>.

Democratic accountability and stability are prolific research topics, but seldom in a clear connection to studies in International Law, an area more frequently than not identified as too specific, technical, or even elitist. In this sense it is worth recalling an important research conducted by the **Brazilian Center for Planning and Research – CEBRAP** entitled “Brazil, Americas and the World – according to the public and leaders’ opinion<sup>37</sup>”, part of the international project “Las Américas y el Mundo<sup>38</sup>” coordinated by the Mexican institution **Centro de Investigación y Docencia Económicas – Cide**<sup>39</sup>. In the 2014-2015 edition of the project, those institutions, among a few others<sup>40</sup>, surveyed public opinion using the same basic questionnaire, which encompassed questions on 13 international issues such as: interest for international issues; proximity to the exterior; identity; political culture; foreign policy and government performance; international economy; migration, international rules and international organizations; Latin America; United States and other regions and countries of the world; and Human Rights<sup>41</sup>. The aim is to make a comparison not only among those participant countries, but also in different points in time, using data gathered in different electoral years.

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<sup>36</sup> A summary of the main criticisms in that direction has been presented at: Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik. *Democracy-Enhancing Multilateralism*. International Organization. Vol. 63. Issue Winter. 2009.

<sup>37</sup> Research information can be found here: <https://cebrap.org.br/pesquisas/brasil-as-americas-e-o-mundo-opinia-o-publica-e-politica-externa/>.

<sup>38</sup> See: <https://www.lasamericasyelmundo.cide.edu/>.

<sup>39</sup> See: <https://www.cide.edu/>.

<sup>40</sup> In addition to CEBRAP and CIDE, that edition also included participation of researchers from Instituto de Relações Internacionais da Universidade de São Paulo (IRI-USP) from Brazil, Universidad de Los Andes from Colombia, Facultad Latinoamericana de Ciencias Sociales (Flacso) from Ecuador, Instituto de Opinión Pública y la Escuela de Gobierno da Pontificia Universidad Católica de Peru and Universidad de San Andrés, from Argentina.

<sup>41</sup> Every participant research group was allowed to supplement that basic survey with country-specific questions.

The respondents were screened using two reference questions<sup>42</sup> in order to evaluate their interest and knowledge, and then allocated in two groups: those interested and informed about international affairs (PII) and those not interested and uninformed about international affairs (PDD). One of the topics was the interest for domestic and international issues<sup>43</sup>. Among the respondents, the interest for domestic issues was found to be great on 39.3% on PDD, and 62,1% on PII. On international issues the survey found that great interest was declared by 22.1% of PDD and 41.6% of PII. Those are far from negligible results, and merit further study. Moreover, the research also indicates a high perception of great relevance of international issues on everyday life (31.2% PDD, 26.9% PII), and an also high perception of great relevance of international issues for Brazil as a country (60.7% PDD, 63.4% PII)<sup>44</sup>. Especially remarkable are the results of the question regarding the influence of the United Nations over human rights in Brazil, considered to be very good by 35.4% PDD and 43.1% PII<sup>45</sup>. Researches such as the project “Las Américas y el Mundo” represent a promising avenue for inquiry, improving our overall understanding of International Affairs and International Law through a methodology of quantitative analysis.

While the research on public opinion and foreign policy progresses, and the ways the interconnection of the global society happens get progressively more evident, there are plenty of avenues to explore. Recent events – as represented by those already mentioned, though not limited to them – suggest international instabilities in liberal democracies, amidst incoherence between public opinion and globalizing liberal projects, as developed by international instances for drafting and upholding commitments.

One possible research question is that of how international obligations are currently understood – not only how they are agreed upon, but how (and when) their content is defined. The emergence of new participants in the processes of norm drafting and interpretation may lead to altered outcomes and require new evaluation strategies. This leads to an enticing debate among the stakeholders in International Law and in International Society in general on who gets to have a say, and under which power and influence. Another interesting area of discussion is that about which mechanisms are currently in place to make sure these

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<sup>42</sup> The reference questions were the interest on international affairs and the capacity to recognize the meaning of the acronym “UN”.

<sup>43</sup> CEBRAP. *O Brasil, a América e o Mundo - Segundo a opinião do público e dos líderes*. Universidade de São Paulo, 2017. p. 15.

<sup>44</sup> *Idem*. p. 24.

<sup>45</sup> *Idem*. p. 159.



interpretations and interpreters are known to the public. Conversely, how many institutions have been designed according to the democratic principles of democratic inclusiveness, participation and transparency? Furthermore, is such influence of democratic principles even desirable in international relations? What do they have to offer? Is that even a goal worthy seeking?

### **Delineating the research problem**

The present research tries to answer some of the questions above, and it does so throughout an examination of aspects of the inner workings of International Organizations (in the broadest sense) and of International Law itself.

Our working hypothesis is that there are obstacles between the final recipients of international laws (the public) and norm creators (drafters and interpreters) that could be at least attenuated vis-à-vis a more stable and transparent international society. We, therefore, aim to contribute to the International Law scholarship by developing a study on how institutions could overcome these informational obstacles and therefore contribute to an increase in the legitimacy of International Law.

This research explores the path of a qualitative analysis of institutions and their suitability to democratic governance, as the means to a stable equilibrium. It does so with support of existing scholarship of different focuses, hoping to propose a workable convergence. We stand over a tripartite foundation, with each pillar also representing a gravitational field of correlating research.

Our first pillar is represented by the research proposed by Armin von Bogdandy and Ingo Venzke, among other scholars from the Max Planck Institute for Comparative Public Law and International Law. This scholarship delves into the Theory of International Law providing valuable insights regarding its current applications, while also drawing attention to issues of legitimacy and authority present in norm drafting and, more importantly, interpretive acts.

The second pillar is expressed by the scholarship united under the banner of the so-called Global Administrative Law (GAL), mainly a collective work developed under New York University's Institute for International Law and Justice (IILJ), which focuses attention

on the legal challenges presented by a plethora of administrative actions taken by several international actors, most of which lack proper transparency and accountability.

Lastly, the third pillar is represented by the work of John Rawls, inasmuch as his scholarship presents normative guidance, investigating the role of principles in social mechanisms capable of bringing them to reality in the framework of the “Justice as Fairness” theory. Rawls’ work interrogates the role of institutions into developing a Well Ordered Society, which is in turn a community of free and equal citizens, capable of fashioning a cooperation scheme that achieves stability for the right reasons, not just a basic *modus vivendi*. Rawls follows a long tradition of scholars focused on the idea of social contract as a guideline for the political community, most of them conferring specific responsibilities and concerns to the citizen in order to maintain a good society. Some of these antecedents will be presented along with their impact on Rawlsian theory.

It’s important to stress that the concept of Legitimacy will be based on the writings of Max Weber, as understood and developed by John Rawls, and will be associated with the concept of Authority as proposed by Ingo Venzke<sup>46</sup>, in the sense that it is not enough to analyze whoever has legitimacy to establish norms, but also who, in an environment of discursive disputes, is able to infuse the norms with meaning capable of attaining adherence by other actors. While Legitimacy stands as a *sine qua non* condition to norm validity, in International Law some interpretations gather more salience than others. We’ll try to grasp a better understanding of this phenomenon.

This adherence – the recognition of the authority of an argument – is consubstantiated in the Rawlsian notion of Overlapping Consensus<sup>47</sup>, that aims to accommodate the diversity intrinsically linked to democratic societies by the collective setting of norms that can be widely accepted. The public reason acts in the sense of providing the justification for the actions developed in the public sphere, favoring dialogue and convergence. In a context where public reason has been adequately developed, there is room for greater political autonomy of the citizens, bridging the gaps between the Law and its final subjects. One way of summarizing the Rawlsian thinking on this issue was proposed by Samuel Freeman, who states that “political autonomy is only achievable when citizens act upon laws fairly and

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<sup>46</sup> See on page 40.

<sup>47</sup> This will be further explained on page 83.

legitimately enacted on the basis of public reasons under conditions of equal political power”<sup>48</sup>. Therefore, under the influence of fair institutions and principles of justice widely recognized, it is possible to achieve what Rawls defines as a cooperation scheme superior to mere *modus vivendi*, the much more resistant “stability for the right reasons”.

This demand for a stronger role for the citizens in international affairs is connected to the perception that contemporary developments in the international legal system and bureaucracy have built an institutional system that could benefit from features of domestic ordered societies, where public oversight and engagement greatly improve the efficiency and efficacy of public services, contributing to better societies in general. We hope that this research may contribute to provide answers, and, if we succeed, raise additional questions in search of a deeper understanding of International Law.

### **Research organization**

Some questions need to be raised in order to properly assess this conundrum, and they will be offered following this proposed organization.

The first part of this analysis aims to evaluate who, in modern International Law, has the power or authority to assume obligations. This is a traditional inquiry from the Theory of Sources, specifically, where normative content can be found. The traditional role performed by the State in this matter shall be discussed, along with its limitations. Such argument must be dealt with in two parts: it is necessary to identify who is responsible for establishing the Law, and who is responsible for applying it. Given the fact that it is impossible to bring Law unto effect without interpretation, it is then necessary to entertain some ideas regarding the role of the interpretive acts and the continuous development of International Law. The objective of the first chapter is, then, to grasp some of the issues regarding rulemaking, exposing some of its limitations and anachronisms. We must assert who gets to define the content of a legal obligation and under which influencing factors, including the presence (or not) of democratic ground and/or oversight.

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<sup>48</sup> Samuel Freeman. Rawls. Routledge, 2007. p. 401.

The second chapter will delve a bit further into the uncertainties and complexities raised on the previous section, now under the analysis of the Global Administrative Law (GAL), before exposing some of the limitations of accountability currently in effect. We will explore the question of how the Global Administrative Space can be repurposed according to democratic guidelines and investigate possible mechanisms of improvement.

In the subsequent chapter, we will step back for a while and try to entertain a more philosophical discussion, exploring the relationship between a Well Ordered society and the demands of public reason. Before proposing an application of bureaucratic practices aimed at fostering accountability and legitimacy, it is important to evaluate what is the desired concept of citizenship able to benefit from those mechanisms and practices. We thus borrow from Mark Button's insight that "contract makes citizens, never the other way around", to analyze the contributions of contractarian theory to the role of the citizen to promote and protect a just society. If citizens have a key role being active participants of the development of a virtuous domestic society, it may be said that this responsibility is connected to its acts abroad. Thus, the choice of restricting the research to institutions in democratic States was deliberate, motivated by the perplexity caused by recent events as already recalled, which produce uncertainties regarding the dynamics between international obligations and domestic conscience.

In the final chapter, we will then draw this research to a momentary conclusion, by focusing our analysis on International Courts and exemplifying ways through which these organizations aim to improve their efficiency by better informing their objectives and processes to internal and external audiences.

## 5. INTERNATIONAL COURTS AS CITIZENSHIP BUILDERS

### Introduction

When we set out at the start of this research various political facts seemed to almost overwhelmingly arise from several aspects of global governance (and international life), leading to a sense of perplexity, almost as if International Law represented a dam, shielding us from authoritarian dangers (amidst other perils enshrined on UN Charter preamble as a testament of the nightmares of our times). Nowadays this dam appears to be in a bad shape, with infiltrations proliferating, putting into question the reliability of whole sections of its structure. Will it break? Will it prevail? Prof. Jutta Brunnée delivered a keynote at the 112<sup>th</sup> Annual Meeting (2018) of the American Society of International Law (ASIL), where she provided a rough description of the prevailing concern, adding her take on the issue:

Interactional law<sup>273</sup> is surprisingly resilient and many actors can defend and strengthen it. But when norms come to be widely challenged and when they are no longer effectively defended, they will change, or decay. The same is true for the principles and understandings that underpin international law itself. I want to suggest that the former type of change is inherent, even necessary, in law. The stability and resilience of a legal system depend on its capacity to change, even if that change is often incremental and existing rules may prove hard to displace.

We may not always like the changes that are brought about, or we may even be concerned about new rules and norms that are being promoted. But, to date, we have also known that we can rely on the constraints inherent in legality and legal interaction to resist certain types of changes – much as Harold Koh outlined in his remarks.

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<sup>273</sup> Prof. Brunnée defines interactional law in the same speech as: “(...) in order for an international legal order to exist, it must provide universally, or perhaps somewhat less ambitiously put, generally applicable principles of conduct and interaction. These principles include those that define what counts as ‘law’ in the first place, and that enable as well as discipline argumentation and justification that is ‘legal’ in nature. Elsewhere, in my work with Stephen Toope, I have elaborated on what I consider to be the distinctive – and constitutive – traits of law and legal interaction. We have come to think of international law as ‘interactional law.’”

Professor Koh seemed fundamentally optimistic about the power of what he calls “transnational legal process.” Yet, he too acknowledged that we may be at a cross-roads, witnessing “a deeply consequential struggle between competing visions of world order.”

I agree. What worries me is that we are witnessing not merely fights around particular rules and institutions, but sustained challenges to the very underpinnings of international law. That is not entirely unprecedented (...), but it is something that has been a rarity in modern history.<sup>274</sup>

We began by exemplifying this uncanny situation in the extremely fast pace that the Trump administration redirected – and even reversed – matters of International Law in the beginning of his presidency, in a conflation of policy changes that led – and is still leading – to rearrangements of power equilibria abroad, players and Asia and Europe have sought new roles. The same can be said of Latin America, where some of the measures entertained up North seem that could be replicated, given the election in Brazil of a president on steadfast support of this arising “Trump Doctrine”, even before formally taking office. Not only the speed was remarkable, but also the direction of changes. Described as an anti-globalist backlash, many of the measures seems to be a call to arms against the same globalization that strongly benefitted western liberal countries such as United States or even United Kingdom – that found its own crisis of consciousness at Brexit, in an arguably even more tormenting process. Events like those suggested that there were more at play than the drafting of “bad deals” by diplomats in foreign palaces.

One way of trying to understand the situation – that which was ultimately chosen as a research avenue in this dissertation – was of understanding the interplays of legitimacy in present-day International Law, or how its presence (or absence) could influence the upholding of the Law. Under liberal democratic societies, legitimacy is understood as to be transferred from citizens to those entrusted to perform international acts, but the question was (and certainly still is) how this movement happens. The main hypothesis is that obstructions on this flux led to a diminishing legitimacy of global governance, in such way

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<sup>274</sup> Jutta Brunnée. Challenging International Law: What’s New? – Keynote Speech. In AMERICAN SOCIETY OF INTERNATIONAL LAW. Proceedings of the 112th Annual Meeting. 2018. The full speech can be found at: <http://opiniojuris.org/2018/11/13/challenging-international-law-whats-new/>

that the citizen can barely recognize the outcomes of international agreements as a relevant product, leaving what was unwittingly done as easily undone<sup>275</sup>.

On the first part of research the work was divided in a twofold examination on the capacity of defining obligations, under two different approximations. The first part explored the question of how the content of obligations is defined<sup>276</sup>, the second canvassed fora where international governance acts on such obligations<sup>277</sup>. Both parts aim to present a more nuanced view of International Law, especially a more porous and less monolithic perception, attuned to the present role performed by States – still central, but complemented by several other actors and structures that influence the transnational legal processes in a myriad of ways and capacities. The sheer variety of acts and impacts described give purchase to the idea that the traditional account of legitimacy – as a simple and relatively straightforward sequence where legitimacy is bestowed from voters to mandate-keepers – incapable to encompass the complexities of the modern, integrated, globalized life. With several political and legal phenomena being conducted without democratic oversight, the conclusion of public mistrust or ignorance seems even understandable, if not justifiable.

The latter part starts from that sense of overload of international legal activity that it not adequately conveyed to public discourse. It presents the works of several political theorists that elaborated on the issue of public reason, on why it exists, and under which purpose. While presenting texts from fundamental authors from the contractarian tradition (Hobbes<sup>278</sup>, Locke<sup>279</sup> and Rousseau<sup>280</sup>) it proposes that such concern for legitimacy on public affairs is far from new, and also that there is room to argue that throughout the development of Social Contract theory there was always some concern over the role of the citizen, and how fundamental it was to create a stable society. From this standpoint we delve into one relatively recent contribution on this field, the Justice as Fairness theory of John Rawls, wherein such concerns are recognized in their importance.

As previously affirmed by the other authors, the way institutions are designed deeply affect not only their directly predicted outcomes, but also their relationship to citizenship. In

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<sup>275</sup> See on page 16.

<sup>276</sup> See on page 21.

<sup>277</sup> See on page 50.

<sup>278</sup> See on page 94.

<sup>279</sup> See on page 98

<sup>280</sup> See on page 105.

that sense we follow from Mark Button's insight that "contract makes citizens, never the other way around"<sup>281</sup>". Therefore, Rawlsian focus on public reason, vis-à-vis the fostering of values in citizenry that are conducive to the empowerment of a society resilience by imagining ways in which the Basic Structure could be adapted in order to create better citizens – which, in turn, herald a fairer and more stable society.

Rawlsian theory seems to provide room for an extension of this idea – which Mark Button denominates Transformative Liberalism<sup>282</sup>. If we understand that such tending of citizens is important for the maintenance of a stable society, and the sustenance of singular institution themselves, we might propose that international organizations have not only an interest, but a duty to foster public debate and improve on the capacities of citizens to evaluate and contribute to its work. Under this interpretation of International Law, international organs possess a double life, one as legal actors that create and uphold obligations, other as explainers and informers of such obligations, helping to shape cultures. We contend that both lives are equally important. The main thrust of this argument is that any democratic society that relies on transient legitimacy is at risk of sudden (and violent) upheaval of political conditions. The antidote of those uncertainties is indicated not to be magical nor definitive, but the long and slow cultivation of international institutions by shaping it's conduct under the premise that without inclusiveness it will probably fail on the long run.

This is not to say that advances have not been made on the issue of legitimacy and overall transparency, but the focus here is that those aren't features to be understood as mere facilitators of performance, or promoters of efficiency on the performing of its core functions, but as one of the main functions of these organizations by its own merits, inasmuch creating bodies of law can only guarantee a level of compliance as there is a legal and societal culture prepared to uphold that law, to participate in the interplay of meaning and thus to demand the equilibrium of the application of the law.

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<sup>281</sup> Mark E. Button. *Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls*. Pennsylvania State University Press, 2008. p.7.

<sup>282</sup> It is important to stress that Button's analysis has a different focus than this research, and his proposed solution, to exercise what he refers to "Democratic Humility", is not the goal recommended here. He defines it as "a cultivated sensitivity toward the limitations, incompleteness, and contingency of both one's personal moral powers and commitments and the particular forms, laws, and institutions that structure one's political and social life with others". Further information about that concept, its sources and applications, can be found at: Mark E. Button. *Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls*. Pennsylvania State University Press, 2008. pp. 229-236.



As the conclusion of this research, we will suggest one exemplary application of this proposal, analyzing democratic opportunities to be pursued by international courts, and how structural adjustments could amount to potential gains in transparency and legitimacy. This is far from an easy task. As Bogdandy and Venzke said:

The international debate is more or less at the same stage at which European integration found itself at the end of the 1980s. There is a growing realization that for international institutions the democratic question is becoming urgent, but there is great uncertainty about what persuasive answers might look like<sup>283</sup>.

Furthermore, we'll indicate other areas of future research that, to our understanding, could be investigated under the same premises: that a theory of International Law in line with Liberal Democracy principles must put public interest up front and center, renouncing any aristocratic veneer, and that it should do so by inviting participation, contribution, and more importantly, oversight. This aims to the advancement not only of the international institutions, but domestic democracy itself.

### **Questions of design: focusing on international courts**

Throughout the vast literature of International Organizations, it is widely accepted that they are a product of an expression of will, in lieu of an accidental action. While some of their defining features – or even entire organizations themselves – might have haphazard origins, they come to fruition as a deliberate act of one or several States. They are carefully planned in a constitutive document scrutinized by diplomats and international lawyers, in order to guarantee that they will be able to perform their intended roles. The foremost characteristic of these subjects of International Law, created by international treaties out of thin air, is that they have a function. They are anything but random. As Barbara Koremenos, Charles Lipson, and Duncan Snidal defined, International Organizations are “explicit

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<sup>283</sup> Armin von Bogdandy and Ingo Venzke. In *Whose Name? A public law theory of international adjudication*. Oxford University Press, 2014. p. 136.

arrangements, negotiated among international actors, that prescribe, proscribe, and/or authorize behavior<sup>284</sup>”

Explicit arrangements are public, at least among the parties themselves. According to our definition, they are also the fruits of agreement. We exclude tacit bargains and implicit guidelines, however important they are as general forms of cooperation. Institutions may require or prohibit certain behavior or simply permit it. The arrangements themselves may be entirely new, or they may build on less formal arrangements that have evolved over time and are then codified and changed by negotiation<sup>285</sup>.

Starting from the fact that every organization has a *raison d'être*, we can start to evaluate what are the objectives of those institutions, in order to investigate their role – if there is any – in fostering legitimacy, authority, and therefore, stability. If they are a product of choice, it matters what is being chosen and why.

Restricting our analysis to judicial bodies, we could follow from Leslie Johns' research, that listed six different ways that an international court can help its proponents, mostly helping them to improve collaboration<sup>286</sup>. First, they can “create expectations about appropriate behavior<sup>287</sup>”, signaling what is the right thing to do in a specific situation, fostering a sense of security on application of Law. Second, they can “provide information about the prior actions of state<sup>288</sup>”, informing third parties about the behavior of involved States and facilitating acts of reciprocity. Johns compares the benefits with the situation of medieval traders, whereas the lack of a central authority forced the development of a quasi-official network of professional honor.

When a merchant violated a contract, his victim reported the violation to an individual known as the law merchant who kept a public record of all violations. Each merchant could then go to the

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<sup>284</sup> Barbara Koremenos, Charles Lipson, and Duncan Snidal. *The Rational Design of International Institutions*. International Organization. Vol. 55. Issue 4. 2001.

<sup>285</sup> *Idem*. p. 762.

<sup>286</sup> Leslie Johns. *Rational Institutions and International Law*. In: *Strengthening International Courts – The Hidden Costs of Legalization*. University of Michigan Press, 2015.

<sup>287</sup> *Idem*. p. 15.

<sup>288</sup> *Ibidem*.

law merchant prior to making a trade to see if his potential partner was a violator. If merchants refused to trade with violators, then merchants had no incentive to cheat. A system based on reciprocity can therefore reduce the temptation to violate because violators are excluded from future cooperation<sup>289</sup>.

The third and fourth contributions of international courts addressed by Johns are remedies to commitment problems. In a stricter sense of commitment, Johns contends that courts are helpful in constraining political leaders by reducing their leeway. Courts protecting foreign investment are a good example of this dynamic:

If I am the leader of a developing country, then I benefit if a foreign investor decides to build a shoe factory in my country. The factory will increase employment, generate tax revenue, and develop infrastructure. Before the investment is made, it is optimal for me to woo the foreign investor by promising to respect his property rights. However, after the factory is built, I have less incentive to abide by my prior promise. I may want to seize his factory and make it a government-run enterprise. Or I may wish to increase taxes or regulation to secure a larger share of the factory's profits. The foreign investor should be able to anticipate these temptations and he will not build the factory if he believes that my promise will be broken. So I can only lure in foreign investment if I can find a way to make my promise credible. I must find a way to "tie my hands" so that the investor knows I can't later grab his property.<sup>290</sup>

On a broader sense of commitment, States signalize a long-term disposition towards certain issues and positions by virtue of association to international organizations and systems of governance. This way, it ensures that the possibility of departure of these values – sometimes pursued in times of blue skies – is not taken light under dire straits. Therefore, by association to, for example, an Human Rights monitoring regime, a State can make it

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<sup>289</sup> Leslie Johns. *Rational Institutions and International Law*. In: *Strengthening International Courts – The Hidden Costs of Legalization*. University of Michigan Press, 2015. pp. 15-16.

<sup>290</sup> *Idem*. pp. 16-17.

harder for future administrations to violate dispositions of values under that generic umbrella. That is the fourth way indicated by Johns<sup>291</sup>.

The fifth way international courts are helpful is by adjudicating on legal gaps<sup>292</sup>. The contracting parties deliberately draft a treaty that will need further complement via interpretation. Thus, an impasse can be postponed, and a compromise – although a, admittedly precarious one – can be reached. Finally, the sixth way courts are used by States is that of playing the role of a stage for power politics<sup>293</sup>. In several different ways, an international court can provide a civilized veneer for the usual arm-twisting displays of International affairs. As Johns exemplifies (references omitted):

A powerful state may pressure a weaker state to sign a trade agreement, even if the agreement harms the weaker state. Similarly, some scholars believe that the International Criminal Court was created, at least in part, so that middle powers, like France and Germany, could limit the actions of more powerful states, like the United States. Interest groups can also use international law and courts to entrench their preferred domestic policies. For example, Moravcsik argues that after World War II, new democracies supported the European Convention on Human Rights because they wanted to prevent fascism and communism by constraining future politicians. Legalization can also promote the growth of interest groups that support compliance.<sup>294</sup>

All of those six objectives seem practical and realistic, as drivers of State interests to further their particular claims at any given time. Alas, they are not rooted on a democratic imperative of maintaining stability and are not designed to build adherence and legitimacy. How, if even possible, could an international court be designed in order to be democratic?

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<sup>291</sup> Leslie Johns. Rational Institutions and International Law. In: Strengthening International Courts – The Hidden Costs of Legalization. University of Michigan Press, 2015. p. 17.

<sup>292</sup> Ibidem.

<sup>293</sup> Idem. p. 18.

<sup>294</sup> Ibidem.

Armin von Bogdandy and Ingo Venzke sketched a possible answer inspired by the Treaty of the European Union<sup>295</sup>. That treaty contains four articles under the heading of “Provisions on Democratic Principles” that represent an outcome of democratic politics aimed at improving democracy at international level. Such articles shouldn’t be taken as an (another) European model to be copied, but only “clues that reveal which aspects should be paid attention to in developing the democratic principle in the international realm”<sup>296</sup>. Those dispositives represent, for Bogdandy and Venzke, four different areas of crucial importance<sup>297</sup>: citizenship (Article 9); representation (Article 10); transparency, deliberation, participation (Article 11); and reorientation of domestic parliamentarism (Article 12). We’ll proceed to assess how those areas could function in a more democratic court.

The first element is citizenship, or who are the subjects of this polity. Article 9 defines who should be considered as a target of European democratic concerns<sup>298</sup>. It doesn’t refer to any “people”, positioning all European citizens as equals (and thus entitled to “receive equal attention from [European] institutions, bodies, offices and agencies”), under the support of both citizenships of Member States and European Union. That means that individuals that are part of a domestic scheme of political representation, therefore regarded as citizens of those countries that chose to become Member States of the European Union, receive a status of a quasi-cosmopolitan affiliation, that stems not from the formation of a single identifiable People, but from the connection to this international political group<sup>299</sup>. Consequently, the international organization must take heed not only of the subjects of the States, but of individuals from those States as well. This could influence significantly the judicial activity, broadening the scope of what usually perceived as the common functions of international courts.

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<sup>295</sup> Armin von Bogdandy and Ingo Venzke. In *Whose Name? A public law theory of international adjudication*. Oxford University Press, 2014. p. 135.

<sup>296</sup> *Idem*. p. 136.

<sup>297</sup> *Ibidem*.

<sup>298</sup> The text of the Article 9 reads as follows: In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship

<sup>299</sup> This seems to be an approach opposite to what proposed by John Rawls in his theoretical proposal for International Law, the “Law of Peoples”, where the main building piece of international relations are peoples. See John Rawls. *The Law of peoples – with “The idea of public reason revisited”*. Harvard University Press, 2002.

On the whole, then, it seems possible and worthwhile to follow the approach underlying Article 9 of the TEU and to address the decision-making power of international courts from the citizenship perspective. It can inspire processes of judicial interpretation and law-making as well as doctrinal reconstruction. When it comes to justifying international judicial decisions, that should take place not only—and perhaps not even primarily—with a view to the states, but with a view toward the individuals who are, in the final analysis, affected by them—individuals who are not merely holders of defensive positions, but also political subjects, citizens<sup>300</sup>.

At this point Bogdandy and Venzke contend that the resulting situation is of a fundamentally different kind of democracy. The dual nature of the politics puts in direct comparison agreements that are fundamentally different. While domestic policy might have a majoritarian overtone, international politics under organizations such European Union is necessarily marked by diversity, creating a tapestry of different cultures and subjects that cannot be simply reduced to a “normal” majority. The great challenge is how to level such different societies, while themselves might be already discrepant. In this sense, Bogdandy and Venzke defend that the domestic legitimation of international acts will remain important. That legitimacy should be sought after under doctrines such as “margin of appreciation” or “subsidiarity”<sup>301</sup>, by preparing the domestic to deal with the diversity of the international, providing it with guidance and support.

Another aspect relevant is that of one of the main concerns for international democracy: political inclusion. This inclusion should go farther than theories of self-determination, requiring something else than traditional views of individual or collective self-determination. Bogdandy and Venzke contend that<sup>302</sup>

Such inclusion can take place in two ways: via mechanisms that incorporate the citizens collectively— this is the established path that builds on elections —and via mechanisms that provide for the inclusion of individual citizens and groups in specific decision-

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<sup>300</sup> Armin von Bogdandy and Ingo Venzke. In *Whose Name? A public law theory of international adjudication*. Oxford University Press, 2014. pp. 144-145.

<sup>301</sup> *Idem.* p. 146.

<sup>302</sup> *Idem.* p. 148.

making procedures. Courts can be built into this kind of understanding of democracy much more constructively than into models committed to the idea of political self-determination.

The second element proposed by Bogdandy and Venzke is that of representation, enshrined on Article 10, that defines representative democracy as a cornerstone of European Union<sup>303</sup>. Courts, however, are far from the projected *locus* for democratic representation – role more usually taken by the Legislative or Executive branch, or by organs that exercise similar functions. However, the existence of democratic parliamentary bodies, able to give room to the dual legitimacy scheme, and to a plethora of diverse participants, may in turn concede to international courts its legitimacy, in processes such as the election/appointment of judges, and the drafting of norms that will in time be interpreted as soft law by those magistrates<sup>304</sup>.

The third element, the public involvement present via transparency, deliberation and participation is present in Article 11 as an imperative of public authority<sup>305</sup>. The dialogue envisaged at item 11.2 could be fostered in courts, which not only settle disputes between litigants, but also proclaim an understanding of the meaning and importance of the Law. There is a role to be explored for courts as spaces for development of citizens' political

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<sup>303</sup> The text of the Article 10 reads as follows:

1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

<sup>304</sup> Armin von Bogdandy and Ingo Venzke. In *Whose Name? A public law theory of international adjudication*. Oxford University Press, 2014. p. 151.

<sup>305</sup> The text reads as follows: Article 11

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

conceptions, being exposed to a proceed designed exactly to contrapose better argument from litigant parties.

This renders it advisable to conduct judicial procedures, for example, transparently—and this not just for the parties, but also for the wider public that might be affected. But a transparent reasoning, too, offers a strategy through which a court can contribute to its own democratic legitimation. Such a justification allows the scholarly and general public to engage much better with a judicial decision<sup>306</sup>.

By rejecting distance and opacity in search of proximity and transparence, these institutions can gather support for their decisions, and muster both legitimacy and authority<sup>307</sup>. One might argue that there looms the danger of politicization of the courts, that could abandon their duty to interpret the Law changing into a different kind of institution, one that considers itself the interpreter of popular will. Bogdandy and Venzke defend that not only there are benefits in this kind of engagement with public discourse, but this might be a *sine qua non* condition for the maintenance of international judicial bodies.

It is one of our core insights that the success of many international courts leads to the need for an accompanying international politicization. If international courts succeed in promoting this kind of politicization, they can support their own democratic legitimation. To be sure, not every form of politicization holds democratic potential. A legally and institutionally unrestrained struggle for power has no such quality. But if the pursuit of interests takes place within legally hedged pathways, which are responsive to democratic requirements, then this holds promise<sup>308</sup>.

We shall now turn for some examples of active international courts on how they have been trying, with varied degrees of success, to better engage in outreach activities. Nicole de

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<sup>306</sup> Armin von Bogdandy and Ingo Venzke. In *Whose Name? A public law theory of international adjudication*. Oxford University Press, 2014. p. 152

<sup>307</sup> A very promising avenue of research regarding how transparency and participation improve democracy is present in: Theresa Squatrito. *The Democratizing Effects of Transnational Actors' Access to International Courts*. In: *Global Governance*, 2017.

<sup>308</sup> Armin von Bogdandy and Ingo Venzke. In *Whose Name? A public law theory of international adjudication*. Oxford University Press, 2014. p. 154



Silva has conducted a very thorough research of 23 operational courts, summarizing some of the main strategies of those institutions, based on their activity reports<sup>309</sup>. Surprisingly, eight of those 23 courts did not provide formal reports<sup>310</sup>. De Silva analyzed which of those courts have developed some sort of strategy of socialization, meaning “the process through principles ideas become norms in the sense of collective understanding of appropriate conduct, which lead to change in identities, interests, and behavior”<sup>311</sup>. In other words, how many of them actually sought to improve courts’ performance disseminating its values inwards (by improving it’s functioning) or outwards (via education and sensibilization). Most of the international courts employ some sort of socialization strategy. Only two of those fifteen courts that have reports available fail to mention any action in this direction<sup>312</sup>.

Almost all of the thirteen courts conduct activities aimed at the external public<sup>313</sup>. Some of them act in both internal and external strategies<sup>314</sup>. Only one judicial body is solely focused on internal strategies<sup>315</sup>.

The general assumption behind the policies and practices was that actors lacked understanding of (international courts’) norms, rules, and procedures, and different forms of communication and interaction could address this deficit.<sup>316</sup>

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<sup>309</sup> Nicole de Silva. *International Courts’ Socialization Strategies for Actual and Perceived Performance*. In: SQUATRITO, Theresa; YOUNG, Oran; ULFSTEIN, Geir; and FOLLESDAL, Andreas (Eds.). *The Performance of International Courts and Tribunals*. Cambridge University Press, 2018.

<sup>310</sup> Those courts are: 1) Benelux Court of Justice, 2) Central America Court of Justice, 3) Court of Justice of the Central Africa Economic & Monetary Community, 4) European Nuclear Energy Tribunal, 5) Judicial Tribunal of the Organization of Arab Petroleum Exporting Countries, 6) Mercosur Permanent Review Court, 7) Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, 8) Court of Justice of the West African Economic Monetary Union.

<sup>311</sup> *Idem*. pp. 289-290.

<sup>312</sup> Those would be the International Court of Justice (ICJ) and the Court of the European Union (CJEU). See Nicole de Silva, p. 312.

<sup>313</sup> Those would be: Andean Community Tribunal of Justice (ATJ); European Court of Human Rights (ECtHR); Economic Court of the Commonwealth of Independent States (ECCIS); European Free Trade Association Court (EFTAC); Interamerican Court of Human Rights (IACtHR); International Criminal Court (ICC); International Tribunal for the Law of the Sea (ITLOS); African Court on Human and Peoples' Rights (AFCHPR); Caribbean Court of Justice (CCJ); Common Market for Eastern and Southern Africa Court of Justice (COMESACJ); East African Court of Justice (EACJ); and ECOWAS Community Court of Justice (ECCJ). See Nicole de Silva, p. 313.

<sup>314</sup> Those would be: African Court on Human and Peoples' Rights (AFCHPR); Caribbean Court of Justice (CCJ); Common Market for Eastern and Southern Africa Court of Justice (COMESACJ); East African Court of Justice (EACJ); and ECOWAS Community Court of Justice (ECCJ). See Nicole de Silva, p. 313.

<sup>315</sup> That would be the World Trade Organization’s Appellate Body (WTO-AB). See Nicole de Silva, p. 313.

<sup>316</sup> Nicole de Silva. *International Courts’ Socialization Strategies for Actual and Perceived Performance*. In: SQUATRITO, Theresa; YOUNG, Oran; ULFSTEIN, Geir; and FOLLESDAL, Andreas (Eds.). *The Performance of International Courts and Tribunals*. Cambridge University Press, 2018. p. 313.

Of the six Courts that described internal socialization strategies, most of them developed some sort of new guidelines, codes of conduct or strategic plans aiming at improvement of performance. All of them, however, included in their strategies some kind of training for judicial and/or administrative officers<sup>317</sup>.

Regarding external strategies, twelve of those courts described practices of training and dissemination in order to further their legal regimes. Many of them aimed at promotion of dialogue with society at large, using multimedia content or social networks. They also promoted open sessions, local sessions, and even “judicial dialogues”.

Through these interactions, (international courts) envisioned that (their) officials) would improve relevant actor’ understanding and appreciation of their mandates and associated norms, rules, and procedures. Given the open-ended nature of these dialogues between IC officials and actors in their legal regimes, these interactions could have involved both persuasion and social influence and been oriented towards influencing IC’s actual and perceived performance<sup>318</sup>.

Another interesting issue is that several of those institutions devised training programs tailored to persuade legal professionals regarding their norms and customs, not only providing useful information to active judges and lawyers, but inspiring young professionals to share those values, professionally or not.

### **Further avenues of research**

If the claim that contracts make citizens have purchase, it follows that institutions must be reevaluated in order to assess their impact on democracy: if there is any, or even if any could be. International courts’ influence is varied, as the scholarship occupied in their examination. All of them could be studied in their socialization strategies, not only in search

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<sup>317</sup> Nicole de Silva. International Courts’ Socialization Strategies for Actual and Perceived Performance. In: SQUATRITO, Theresa; YOUNG, Oran; ULFSTEIN, Geir; and FOLLESDAL, Andreas (Eds.). *The Performance of International Courts and Tribunals*. Cambridge University Press, 2018. p. 314.

<sup>318</sup> *Idem*. p. 316.

of an optimal performance, but in order to fulfill a role of democratic support, allowing participation, fostering transparency and improving public reason.

The same can be said to other types of international organizations without a clear judicial mandate. In this sense, the United Nations Security Council represents the quintessential example of what is an international organization designed for secrecy and avoidance of public scrutiny, standing as a memento of an anachronistic United Nations that seems unable to reform itself, or to find its place in a world very different from that in which it was created. Moreover, several other quasi-administrative bodies have grown in importance, while remaining out of spotlights, and, especially, avoiding accountability.

If we happen to believe that developing better citizens may represent an opportunity of fashioning new tools for democracy, better equipping it to understand itself in 21<sup>st</sup> century, there are several avenues of exploration, many of which this research only suggested. The possibilities and challenges abound, as democracy remains an open-ended story, an ideal worthy of pursuit. It is my hope that this research, with all of its shortcomings, can contribute to such virtuous aspiration.

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