

# DIVERSITY OR CACOPHONY? THE CONTINUING DEBATE OVER NEW SOURCES OF INTERNATIONAL LAW

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## I. INTRODUCTION

The existing body of international law is rooted in the state as both its subject and its object. Be it the result of formal agreement, custom, consensus or dominance, states have long argued and fought over the scope, form and reach of international law and molded it to both serve

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and constrain the cardinal norm of sovereignty.<sup>1</sup> But in today's interconnected world, the map of international law looks increasingly like a mosaic of disconnected pieces: shaped by many hands, interpreted by many voices, colored by numerous contexts, made up of a huge variety of materials. The traditional sources of international law must now make room for what has been referred to in this issue, in shorthand, as "the new sources of international law"<sup>2</sup>

We have reached a point when lawyers' commissions are summoned to discuss the consequences of *legal* proliferation as an ill threatening the standing of international law through incompatibility or irrelevance. Should this trend towards fragmentation be reversed? Should we devise a legal non-proliferation treaty? Or should we, conversely, welcome the current diversification in the sources of law as reflecting the realities of today's world, as a reflection of the flexibility and adaptability of law when the norm of sovereignty on which it is based is itself undergoing considerable recalibration? In short: how should we deal theoretically as well as practically with the diversification of sources of law?

Addressing the dilemma of cacophony versus diversity requires returning to some of the prior questions that have long occupied the energies of the international law community.<sup>3</sup> The concern over diversity

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1. There are of course countless contemporary analyses of the changing shape of sovereignty. See e.g., STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); DANIEL PHILPOTT, *REVOLUTIONS IN SOVEREIGNTY: HOW IDEAS SHAPED MODERN INTERNATIONAL RELATIONS* (2001); Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40 J. COMMON MKT. STUD. 743 (2002).

2. The traditional sources of international law generally stem from:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevens 1153, 1187, available at <http://www.icj-cij.org/icjwww/basicdocuments/basicstatute.htm>. In the domestic sphere, the split between state and moral law is clear. However, in international law, it is becoming far less clear, hence the sudden increase in new norms created by non-legal principles (i.e., not created by a legislative body or by court precedent) not included in the traditional sources listed in the ICJ statute.

3. Numerous scholars have analyzed and discussed the direction of international law. See Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919 (1999); David Kennedy, *My Talk at the ASIL: What is New Thinking in International Law*, 94 AM. SOC'Y INT'L L. PROC. 104 (2000); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999). Compare Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983), with Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT'L L. 305 (1993).

is of course grounded in the waning of state sovereignty generally but it is, simply and more pragmatically to start with, a concern intrinsic to law itself and the possible conflicts induced by multiple arenas and jurisdictions where law is shaped and applied. One of the starting assumptions here is that external relevance of the law, its capacity to “speak truth to power” is in part a function of its internal consistency as well as the legitimacy of the processes that preside over its elaboration. This is at least, the concern prevalent in the legal community. In the Introduction, Bruno Simma tells the story of the UN Commission on the “fragmentation of international law” and how its agenda evolved from denouncing the “risks” of fragmentation to simply assessing “difficulties.”

We recognize three overlapping underlying concerns in this agenda. First, and most pragmatically, lawyers fear a growing overlap and confusion of mandate between different legal regimes and, as a result, a duplication of efforts and a waste of resources. Second, we see a further concern about competition between various legal orders or regimes perhaps developed by different courts or responding to different issue areas or geographic spheres. As different actors compete to be the most relevant or influential, their actions or pronouncements may enter into conflict. And with conflict of laws or legal regimes and no higher appellate authority, law becomes unpredictable and a poor recourse. Third, as a result of the previous two, a fear emerges of the weakening of legitimacy for law in general. The lack of consistency, thus exposed, puts in doubt any pretense of “legal objectivity” or “normative absolutes,” which help inspire compliance among the actors involved. Once these three categories of concerns are acknowledged, however, the question is: can the problems be addressed by curbing fragmentation/diversity, or is it impossible to “put the genie back in the bottle” so that solutions must be found within, rather than in denial of the new state of affairs.

The *Michigan Journal of International Law* brought together twenty-five scholars and practitioners for its 25th Anniversary Symposium to tackle some (and only some!) of these issues. By the end of the day, most questions remained unanswered, as is the essence of scholarship.

In this concluding Article, we attempt to give a glimpse of our debates. We begin by describing the object of the debate, namely what diversity means in international law.<sup>4</sup> We then turn to the preeminent question of the symposium, does diversity mean cacophony or should it be music to our ears? In particular, we recognize that lawyers and

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4. Kennedy describes international law within the idea of a professional discipline. Kennedy, *supra* note 3. By setting the stage in this manner, scholars can examine international law through a different lens. The authors have tried to apply this concept to bridge the international relations and law arenas.

political scientists have different standpoints when they ask whether diversity is good or bad, or if it should be promoted or counteracted. We suggest three normative benchmarks for the debate: effectiveness, justice and democracy. Finally, we highlight some of the many avenues opened for further enquiry by the discussions—in particular, the promise that lies with the notions of horizontality and mutuality and we advocate bringing politics back in. In the end, we believe with others that diversity does not spell the end of the international legal world, but rather calls for a redefinition and refocusing of the original ideals of international law.

## II. THE MEANING OF DIVERSITY: CHANGING SHAPERS AND SHAPES OF INTERNATIONAL LAW

Diversity, or diversification, means all things to all people. It is generally infused with positive feelings—not simply in the international legal sphere. Diversity in friendship is usually synonymous with open-mindedness and forward-thinking. At the same time, the perception of a darker side of diversity is never far, in the form of loss of cohesion and increased chaos.<sup>5</sup>

So what does “diversity” mean today in the international legal sphere? First, it simply means that, compared with its origins four centuries ago, a lot more actors “do it:” more states and more non-state actors. Second, these various actors do it across an increasingly broad array of issues and using an increasingly broad spectrum of instruments. Third, and most importantly, the nature of the law itself has changed dramatically in comparison with what we call the traditional “international law core.”

### A. *From the End of the Colonial Legal Order to the Demise of Sovereignty: New Subjects of International Law*

There is of course a vigorous debate over the original source of international law, including how and to what extent it was shaped by Westphalia.<sup>6</sup> Yet, some authors would argue that international law as we know it was shaped a century earlier by Francisco de Vitoria who first initiated the turn from religious to secular law. Vitoria was the first theologian to challenge the reigning medieval idea of the Pope’s universal

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5. The University of Michigan where the symposium took place recently witnessed an intense dispute over affirmative action where the arguments exchanged across the table tellingly reflected the Janus-faced character of diversity. See *Grutter v. Bollinger*, 539 U.S. 982 (2003).

6. Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 MICH. J. INT’L L. 981 (2004); Stephen Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT’L L. 981 (2004).

jurisdiction by virtue of his divine prerogative to spread Christian “law.” Instead, he argued, a new system of international law must be premised on the need to promote freedom to travel and trade, thus in passing spreading Christianity through other means. However, in his view, the sovereign, that is the entity entitled to wage a “just war,” could never be an “Indian.” The Indian was only included in his system to be disciplined under the law. In order to be ruled according to the interests of the home country, the “Other,” in essence, had to be subjugated. Thus, the Conquistador replaced God as the ultimate source of law “across borders.”<sup>7</sup>

This construct, picked up by Grotius and “Westphalianised,” shaped for centuries to come a uniquely Western idea of the rights and duties of colonizing states and colonized peoples and the implied requisite for order in international relations.<sup>8</sup> In this sense, modern day international law originated from necessity.

If international law thus began as a western hegemonic project, as an elaborate secular rationalization for the subjugation of Europe’s “Others,” the first question to ask regarding new sources is to what extent international law is now written by these liberated “Others.” If the original purpose of international law was to impose the idea of *boundaries* and, in addition, project the reality of *European* boundaries onto the rest of the world, then these “Others” must be included, if only to make good the promise that the law has become an instrument to mitigate, rather than magnify, power asymmetries in the world.

Therefore, perhaps the diversification of sources of law addresses the continued asymmetry between states as both subjects and objects of international law, dealing with the challenge posed by the proliferation of states themselves as subjects of international law, with their different degrees of legal and political development.<sup>9</sup> But such proliferation in turn raises problems of its own, such as how international law can be written and applied by lawless countries. Furthermore, to what extent can transnational communities serve as sources of law in a world originally designed as a state-to-state game?

A postcolonial agenda for international law, an agenda that is still very much in the making, must try to acknowledge normative relativity (in Weil’s terminology) without falling prey to cultural relativism. It must grapple with the tension of international law as both a reflecting

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7. FRANCISCO VITORIA, *DE INDIS ET DE IURE BELLII RELECTIONES* (ON THE INDIANS AND ON THE LAW OF WAR) (Ernest Nys ed., John Pawley Bate trans. 1917) (1557).

8. HUGO GROTIUS, *DE JURE BELLII AC PACIS* (THE LAW OF WAR AND PEACE) (1646); see also ANDREW HURRELL & ROSEMARY FOOT, *ORDER AND JUSTICE IN INTERNATIONAL RELATIONS* (2003).

9. See P.S. Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation?*, 25 MICH. J. INT’L L. 929 (2004).

and mitigating power. It must build on what already exists: a world where international law can empower agents of the state (as well as non-state agents) across boundaries, as when a British court internalizes and applies the European Convention on Human Rights without the express stamp of approval of Westminster; or when a judge from a South African country rewrites the TRIPS agreement when no coalition of developing countries had been able to accomplish the feat.

Many analysts tend to skip the crucial and foundational issue of inter-state asymmetry of power in their capacity to shape as well as deflect international law, to move directly onto a ubiquitous post-Westphalian narrative which makes the all too simplistic “end of sovereignty” the be-all and end-all of current change in the international system. Who would deny that the vault of sovereignty has become unsealed?<sup>10</sup> Or that non-interference in internal state matters has become a highly contested norm?<sup>11</sup> The question is to what extent and with what consequences: Is sovereignty really an “endangered species”? Clearly, as Dan Sarooshi and Stephen Krasner argue, sovereignty has always been conditional and contested.<sup>12</sup> Powerful states have never had a “hands-off” approach to other states’ actions within the confines of their territorial borders. International organizations have long been in the business of managing such conditionality in every domain. What is new, however, is not the very partial and asymmetric constraining of states by each other, but the emergence of new subjects of international law. In short, the bursting of the sovereignty bubble is both the cause and effect of the proliferation of agents in world politics.

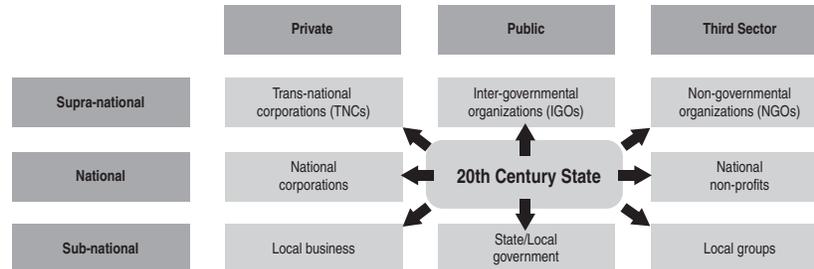
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10. See Philpott, *supra* note 6. Scholars have long debated the multifaceted status of sovereignty. See generally KRASNER, *supra* note 1; John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT’L L. 782 (2003); Richard H. Steinberg, *Who is Sovereign?*, 40 STAN. J. INT’L L. 329 (2004).

11. See Dan Sarooshi, *The Essentially Contestable Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 MICH. J. INT’L L. 1107 (2004).

12. See Sarooshi, *supra* note 11; Krasner, *supra* note 6.

FIGURE I  
DIVERSITY: PROLIFERATION OF ACTORS<sup>13</sup>



As illustrated in Figure 1, Joseph Nye has summarized this phenomenon as a twin governance shift from the state level both vertically (towards the intergovernmental or to the sub-national level) and horizontally (from the public to the private and third party sector).<sup>14</sup> Globalization increasingly leads to the transfer of governance functions from the state level to the intergovernmental or non-governmental corporate, regional and transnational sites of power. But if the state is not crowded out but remains at the center of a more crowded field, the state may still, to a certain extent, serve as the main channel for the diversification of sources of law. And if, as Dan Sarooshi points out, international organizations provide a forum where conceptions of sovereignty can be debated and contested rather than superseded, these organizations are not structurally inimical to new subjects of international law. Conversely, if private legal regimes create laws without the state, as analyzed in this issue by Gunther Teubner,<sup>15</sup> does this necessarily imply that global private law makers contest state boundaries? For instance, Internet service providers create law and artificial boundaries through cooperation with credit card companies and policing their clients.

In short, from Vitoria onwards, great international law scholars have attempted to create their own version of international law, thereby maintaining the supremacy of their own culture. But such attempts to impose a single unified theory from above unavoidably conflict with the efforts of those “in the real world” to do what they want: their actions can’t all be simply declared illegal! And while Vitoria’s times made it possible simply to deny the diversity that already existed, diversity today simply

13. JOSEPH S. NYE & JOHN D. DONAHUE, *GOVERNANCE IN A GLOBALIZING WORLD* (2000).

14. *Id.* In this scheme, “supranational” actors may consist of international organizations or tribunals—regional and global as well as specialized or universal institutions. Similarly the third sector shift ranges from transnational communities to advocacy networks.

15. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (2004).

won't go away. The increased potential for diversity in the sources of international law is the byproduct of rather fundamental developments in global and domestic political economy, technology and politics. *Supra-national governance* called for by trans-border problems and technology leads to the emergence of supra- or rather trans-national actors. *Democratization* leads to the questioning of state monopoly over the making or interpretation of law. *Privatization* opens up spaces for the private production of norms.<sup>16</sup> And *decentralization* at the national or regional level creates a demand for links between levels of governance that may or may not include the state. The question that concerns us here is how these trends in global politics ultimately affect the sources of international law.

### B. Delegation Across Issues and Stages of Law

Given the proliferation of non-state actors, the question inevitably arises as to whether these actors compete or collaborate with the state. Or more specifically, to what degree and through which channel do these actors collaborate with the state at different stages or levels of law-making: formation, interpretation, enforcement, implementation (or internalization as Harold Koh terms).<sup>17</sup>

Joost Pauwelyn's contribution illustrates the difficulty of defining and assessing conflicts of law in light of the many dimensions along which law can be disaggregated, e.g., prohibition versus permission, command versus exemption. Pauwelyn specifically identifies four areas of potential conflict in the formation arena: 1) conflicts between or among established norms, 2) inherent normative conflict,<sup>18</sup> 3) prioritization of norms either through *lex specialis* or *lex posterior*,<sup>19</sup> and 4) treaty conflict where only one party is bound and compliance to one treaty will essentially violate the duties in the other.<sup>20</sup> Because law makers can also differ, conflict also stems from enforcement. Proliferation increases the number of different organizations, such as the WTO, that have jurisdic-

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16. See Thomas Carbonneau, *Arbitral Law Making*, 25 MICH. J. INT'L L. 1183 (2004).

17. Formation occurs when an international norm is created. Interpretation is how different bodies or states choose to understand that given norm. Enforcement is the international system as a whole imposing norms on given actors. Finally, implementation or internalization is how the actor chooses to execute the norm domestically or within the organization. See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000) [hereinafter *Legalization*]; Harold Hongju Koh, *The 1998 Frankle Lecture: Bringing International Law Home*, 35 Hous. L. REV. 623 (1998).

18. When two norms conflict and one is clearly illegal, the illegal norm is terminated. Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands*, 25 MICH. J. INT'L L. 903, 907 (2004).

19. *Id.* at 908.

20. See *id.* at 909.

tion over issues (for example, both trade and as an offshoot, the related environmental aspect). Once the body has jurisdiction, many different laws are often applicable. These laws may provide legitimate defenses which are not specified in that body, fill gaps in the procedure, or strip the body of jurisdiction. In some cases, other applicable laws may show that another body is more competent.<sup>21</sup> Furthermore, interpretation of treaties or norms never ceases—Pauwelyn, along with many others, views treaties as evolutionary interpretation rather than strict constructionist view.<sup>22</sup> In the end, Pauwelyn argues that all of international law is binding on these disparate bodies which may choose to exercise jurisdiction, and thus theoretically, there should be no conflict.

If the state delegates or if a non-state actor appropriates a role traditionally played by the state at a certain stage or in certain issue-areas, how does that delegation or appropriation affect other stages and/or other issue-areas? To complicate matters, not only do we have delegation or appropriation of state authority to make law, but also the progressive autonomy of the bodies within which such delegation takes place. The form and degree of power transfers varies across issue areas where widely different trade-offs between alternative values, goals and objectives shape the law. As Teubner discusses, how each of these spheres of autonomous global villages carve out their own rationality reflects broader processes of fragmentation in the global society.<sup>23</sup> In sum, the impact of delegation itself must be disaggregated to reflect the variety of stages in which it occurs and the ways in which these in turn interact to create more or less inconsistency between variants of the law spoken on these different stages.

At this stage, one can also investigate how the quality of processes at one stage of the process affects its quality at another, how the sources of law formation for instance affect its interpretation or enforcement. Along these lines Koh and others demonstrate in which ways the degree and mode of participation of various actors as reflected in transnational political processes significantly affects the quality of internalization of international law in the domestic realm.

Here, the reader will easily buy into the fears of cacophony picked up in this project: not only do we have too many instruments in the orchestra but the simultaneous participation of many orchestras, all following subtle variants of the international law score—itself a *symphonie inachevee* constantly being affected by the interpretation of the music by these many orchestras. Let us summarize all of the

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21. *Id.* at 911–13.

22. *Id.* at 908.

23. *See* Fischer-Lescano & Teubner, *supra* note 15.

complexity described above as movement along one dimension: increased delegation or proliferation of actors across functional areas. In this sense, “proliferation” of sources of law means not only moving away from the monopoly of the state as the subject of international law in a pre-delegation world, but perhaps and most importantly that the state that is making law on the international scene is itself disaggregated. Therefore, the state may act in many arenas at once without necessarily coordinating these actions.<sup>24</sup>

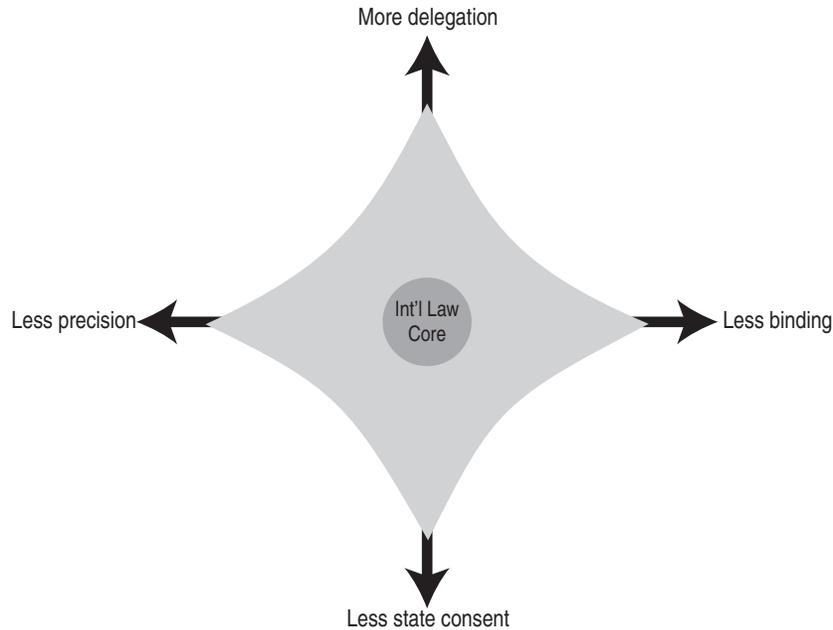
*C. Diversification along Four Attributes: Delegation,  
Consent, Precision, and Binding Nature*

The diagnosis of diversity does not stop here. What has long seemed problematic about diversification in the world of law has less to do with the “who” or the “how” and more to do with the “what,” the character of law itself. In this sense, proliferation as discussed above is the most obvious expression of diversity. In addition, it is also the *cause* of diversification of sources, understood as what now “counts” as the legitimate expression of international law. To greatly simplify, diversification may be described as the interaction between delegation or proliferation and the changing nature of the law itself. Likewise, this changing nature can be described along three attributes or dimensions, namely: 1) whether the law is based on state *consent*, 2) whether it is *precise* and clear, and 3) whether it is *binding* on the state and possibly other actors. Together, these four attributes constitute what we could call the international law “core.” Diversification describes the way in which international law is effectively moving away from this traditional core.

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24. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

FIGURE 2  
MOVING AWAY FROM THE INTERNATIONAL CORE



In a world defined by the international legal core, states consent to precise obligations with a narrow margin of interpretation by international and domestic courts, which are considered as binding. These characteristics are of course mutually reinforcing. Official state consent to the laws make binding character of those laws acceptable. The precision of the law stems from state involvement, because states are more likely than other actors to specify the obligations that will bind them. The question then becomes, how much deviation ought to be allowed from this traditional core or to what extent should law accommodate what Prosper Weil calls *normative relativity*.<sup>25</sup> Whether or not there should be a *numerus closus* for the formal sources of law is a question raised on the demand side, by the world in which we live, but should law makers in the guise of politicians, representatives, diplomats, judges or scholars accommodate such a demand, and supply the rationale for it?<sup>26</sup> How much variation from the core should now be tolerated or even encouraged?

To be sure, traditional law has long accommodated some variation along the precise versus vague spectrum in the form of hard and soft

25. Weil, *supra* note 3.

26. Fastenrath, *supra* note 3.

law.<sup>27</sup> So-called “hard” law defines rights and obligations while “soft law” is substantively vague.<sup>28</sup> Prosper Weil argues that the typology of the law has no bearing on whether the law is a legal norm which itself can be either soft or hard.<sup>29</sup> The law’s binding character has always varied, as norms can either be merely binding or peremptory—those which all participants agree cannot be broken (e.g., genocide). While originally recognition of a norm resulted in legal rights and obligations, now norms are relative.<sup>30</sup> Some have greater weight than others. Because the status of international legal personality now embraces international organizations (including for instance the European Union) and in some cases, even individuals, this flexibility has extended to the question of subjects of international law (e.g., the first dimension of delegation discussed above).

But the issue that most occupies legal scholars is probably that of consent. To what extent, they ask, can international law afford lesser consent and still be called international law? Lesser content can of course come in many guises: does it need to be explicit or can it stay implicit? Should consent be expressed multilaterally or only unilaterally? Individually or collectively, as shared sovereignty? Can we countenance a community of states accepting a new *jus cogens* without the need for consent at all? Or, at least, can we lay out agreed (“legal”) conditions under which consent can be bypassed altogether, as with the current debate over sovereignty as responsibility? In such a world, the right to make consent a prerequisite for compliance becomes a function of whether sovereignty is still deserved or not. Accordingly, not all states deserve an equal right to consent to laws that will then be enforced upon them. And if state sovereignty can be bypassed on the basis of so-called shared values, how specifically should such state values be expressed?

In the end, exploring the diversification of sources of international law requires a systematic exploration of the correlation, and indeed the causal linkages between these four dimensions, whereby each different bundle of variation gives us a different angle on such diversity. Which of these combinations matters most? What is the changing relationship between consent and the binding character of the law? Do laws necessarily become less binding as the need for consent lessens, or is the decrease in consent compensated through other attributes such as vagueness of the

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27. *Legalization*, *supra* note 17, at 409; Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000); Weil, *supra* note 3, at 414; see also David Kennedy, *My Talk at the ASIL: What is New Thinking in International Law?*, 94 AM. SOC’Y INT’L L. 104 (2000).

28. Weil, *supra* note 3, at 414.

29. *Id.* at 414.

30. *Id.* at 421.

law (as when the EU's move towards increased shared sovereignty goes along a move to soft law)? Under what conditions does the increased delegation to non-state actor require a lessening in the binding character of the law? And how binding should we consider unilateral (non-consent based) acts of states to be—like France in the ICJ decision on nuclear testing<sup>31</sup> (a question of particular interest to the International Law Commission)? This is not the place to summarize the numerous ways in which variants of these questions have been explored by legal scholars. Suffice to show that many ways exists in which diversity in the sources, and therefore, the character of international law can come about and evolve. Let us now turn to the next question: So what?

### III. INTERNATIONAL LAW V. POLITICS: DIVERSITY AS FRAGMENTATION OR ADAPTATION?

What then is the problem with diversity in international law? Is the blossoming of international law truly problematic, an unfortunate by-product to be managed, and a threat to be avoided?<sup>32</sup> If so, what is the problem to be worried about? In short: has diversity gone too far?

The question of course has been the object of debate among international legal scholars themselves, whose views range from benevolent—“let a hundred legal flowers bloom”—to the alarmists—“it’s a legal jungle out there.” Of course, the debate has moved on since 1983, when Prosper Weil viewed and denounced fragmentation as a pathological development. Nevertheless, a clash of opinion, even perhaps of culture, exists between those in the legal profession who fear a world where international law surrenders to uncontrollable subjective processes and those who see such developments as inherent in the very nature of international law. In between are those who say yes to the expansion of international law but ask: at what price?

Let us recall Prosper Weil’s seminal argument. Norms, as he saw it, are imposed on nations by the international community which determines their status and is inherently “different.”<sup>33</sup> The legitimacy of international law stems from the ideas of comity and *erga omnes* law. Nations abide by international norms because they represent the law of consensus<sup>34</sup> and are rarely reviewed by courts. Furthermore, international

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31. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20).

32. Rao, *supra* note 9.

33. Weil highlights the inherent structural differences between domestic and international law such as inadequate enforcement as well as indefinite norms. Weil, *supra* note 3, at 413–14. Because international norms can be either soft or hard, rather than clearly legal or illegal as in the domestic sphere, this vagueness creates imprecision in international law.

34. *Id.*

law originally stemmed from treaties. “The fundamental international legal principle of *pacta sunt servanda* means that the rules and commitments contained in *legalized international agreements* are regarded as obligatory, subject to various defenses or exceptions, and not to be disregarded as preferences change.”<sup>35</sup> Social agendas should not be imposed on states. Proliferation weakens international law as a system and a tool.

At the other end of the spectrum, scholars like Howard Koh, argue that international norms can and should come from many different places and sources.<sup>36</sup> Koh uses the examples of the twelve mile territorial sea and the landmine convention to show how the internalization of international norms depends in part on accepting such proliferation. Instead of a requirement of formal recognition of norms, which Prosper Weil advocates, Koh finds that different types of norm “champions” help create norms that are effectively internalized into the domestic sphere. Internalization can come from social, political and legal arenas with multiple actors promoting different norms.<sup>37</sup> Social internalization of international norms occurs when the public believes so greatly in an idea that it becomes a standard (landmine treaty). Political internalization occurs when the political leaders embrace and propagate an international norm. Legal internalization occurs when the international norm is disseminated through the domestic system either by judicial interpretation, or by legislative and executive action. Howard Koh’s description of norm creation takes in, for instance, the approach of “grassroots” political organization in the United States. Using all channels available to them, including the Web and even comic strip characters, norm champions rally public support for their norms. Instead of the idea of state compliance, Koh argues that states *obey* those laws which they deem legitimate.<sup>38</sup> Norm champions help create legitimacy which in turn is key to legal effectiveness.<sup>39</sup> As international law is interpreted through legislation and statutes and enforced through courts, policing and patterns of habits, diversity in its origins allows for a broadening of its reach.

In the end, however, debates which take place on the terrain of international law remain centered on the system itself, the desirability of its flexibility—the distance traveled from the core. Koh’s position takes us some way to a shift of criterion from one of internal consistency to

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35. *Legalization*, *supra* note 27, at 409.

36. Koh, *supra* note 17.

37. *Id.* at 642.

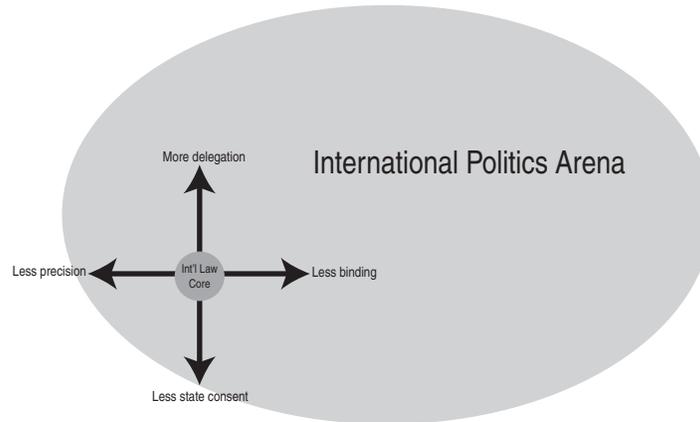
38. *Id.* at 680.

39. On the issue of compliance and effectiveness of international law, see for instance ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

external relevance. Diachronic openness, dynamic interpretation and flexibility provide a guarantee of relevance to the heterogeneous nature of the world. But, for a radical questioning of the importance of the debate itself, one must turn to another breed of scholars, one for which international law is not a starting point, but merely one element in a game of power and interest between states.

Mainstream political scientists in international relations confront this debate over diversity as somewhat of a storm in a teacup. They start, not with the international law “core” but with state behavior. And for them, to paraphrase Kagan, international law is a Kantian island in a Hobbesian world.<sup>40</sup> Law does not have causal forces unmediated by power and interests. Thus, the only relevant question is whether states or other actors in the international system are likely to find the island of international law *at all* as they search their way towards cooperation in an ocean of international anarchy. After all, we unlikely to see powerful actors in the world respect the principle of non-intervention in weaker states, where the domestic structure of the weaker state might threaten the national security of the powerful actors.<sup>41</sup>

FIGURE 3



In the journey of the state through the troubled waters of anarchy, David Kennedy’s legal cognitive maps may help, but actors must first find the island in the first place.<sup>42</sup> In other words, the most plausible

40. Robert Kagan, *Power and Weakness*, 113 POL’Y REV. 3 (2002), available at <http://www.policyreview.org/JUN02/kagan.html>.

41. Krasner, *supra* note 6.

42. Kennedy, *supra* note 3.

alternative to law-based inter-course between states is no agreement at all rather than a more unified law.

To be sure, international relations scholars vary greatly in their treatment of international law.<sup>43</sup> Realists—at least for those who accept that the legal island is more than a mirage—tend to side with legal realists and tend to prefer a single beacon emitting a loud and clear signal on the part of the most powerful players. In this light, Security Council resolutions are not born equal—Resolution 678 is normatively better than 1441.<sup>44</sup>

Functionalists and institutionalists on the other hand see diversity as the very precondition of what Robert Keohane et al. have called the legalization of world politics.<sup>45</sup> The bigger the island, the better—fragmentation equals variance; variance equals relevance. The breath of the legal repertoire allows states and other agents to formulate the appropriate approach to the issue at stake, or, in negotiation contexts to locate the ever illusive “zone of possible agreements,” and thus enter into cooperative deals. In other words: “if you build it they will come” as long as both sheds and palaces can be built on the international law island.

Liberals may not disagree, but they focus on whether there are enough different types of harbors around the island capable of handling the diversity of domestic demands and constraints. In his contribution William Burke-White discusses for instance mixed tribunals as great examples of delegation which are domestic enough to be legitimate, while remaining foreign enough to blame outsiders for turning someone in.<sup>46</sup> The link between supranationality and the impact of domestic structures on international law and order is in fact a theme pervading this volume, from Saskia Sassen’s discussion of denationalized structures<sup>47</sup> to Stephen Krasner’s weak structures<sup>48</sup> to Dan Sarooshi’s connection between these structures and the contestation of sovereignty.<sup>49</sup> These analyses converge in showing to what extent the diversification of the

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43. For a thorough review of the interaction between international law and international relations bringing together several strands in the field see the issue on legalization in INT’L ORG. (2000).

44. Compare Resolution 678, U.N. SCOR, 2963 mtg., U.N. Doc. S/Res/678 (1990), with Resolution 1441, U.N. SCOR, 4644 mtg., U.N. Doc. S/Res/1441 (2002). The 1990 resolution explicitly authorized use of force while the 2002 resolution merely gave Iraq “a final opportunity to comply with its disarmament obligations” or it would face serious consequences. The 2002 resolution was imprecise as to whether it authorized use of force.

45. *Legalization*, *supra* note 27.

46. William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT’L L. 963 (2004).

47. Saskia Sassen, *The State and Globalization: Denationalized Participation*, 25 MICH. J. INT’L L. 1141 (2004).

48. Krasner, *supra* note 6.

49. Sarooshi, *supra* note 11.

sources of international law itself is a product of the diversity of local realities. To be sure, there are definitely those among international relations scholars who share the same positivist mindset of some of the law scholars, attracted to hierarchical approaches and gripped with the Schmittian anxiety of disorder if one cannot identify who, or at least what ultimate norm, decides. But, in general, these concerns are overridden by an embrace of diversification of law as a reflection of the world around us rather than its perversion.

#### IV. THE NEW WORLD ORDER: WHAT NORMATIVE BENCHMARKS?

At a more general level, the debate in this issue is about our continuing quest for a sustainable world order where disagreements between contributors have to do in no small part with the extent to which each believes this quest rest with international law itself. Specifically, each author is engaged in positive or normative exercises in translation—translation between domestic and global legal systems—and in the context of this project asks how such translation is affected by the multiplication of sources of law.

Here we suggest that the normative assessment of diversity is generally based on one of three criteria: 1) effectiveness; 2) democracy; and 3) justice.

##### *A. Effectiveness*

While most agree that there is a greater need for specialization or division of labor globally, the debate really centers on labeling what is lost and should be recovered: consistency, predictability or unity of law. Inconsistency of the law affects its predictability and reliability and therefore leaves the field open to power politics. Yet, is it not impossible for the law to address the complexity of issues and contexts dealt with today at the global level without giving up its unity? Here, different strategies that try to reconcile effectiveness and complexity borrow significantly from different disciplinary metaphors, such as economics, physics and biology.

There is nostalgia but little appetite for the physics metaphor, where chaos is no bar to higher laws—where Mandel brought an infinite set of fractals which can all be defined by a single equation. At the other end of the spectrum the economics metaphor seems more relevant as it teaches that increasingly specialized tasks can be coordinated by market

mechanisms. In the legal sphere, this becomes a market for legal norms through regulatory competition.<sup>50</sup>

Most contributors, however, have a distinct preference for the middle ground thus turning to the biological metaphor where increased complexity calls for increased specialization (cells form organs, which together form systems) which in turn calls for more connections (between cells and organs) in order to create more complex, but single organisms. P.S. Rao<sup>51</sup> claims that with maturity comes specialization and with John Jackson<sup>52</sup> and Joost Pauwelyn<sup>53</sup> illustrates his point with the example of a WTO generally effective in resolving international trade disputes.<sup>54</sup> Yet we also know that WTO runs into trouble when having to deal with so-called “trade and . . .” issues where it needs to interact and overlap with other international legal regimes.

Hence if we ask what makes the cells work best together, the answer for most analysts has to do with the system itself, the kind of connections which exist between each task. Some of the authors in the volume seek to provide a heuristic to analyze this function, as with Gerhard Hafner’s formal mechanisms for conflict avoidance,<sup>55</sup> Gunther Teubner’s notion of “networked regimes,”<sup>56</sup> or Saskia Sassen “network of states.”<sup>57</sup> Alternatively, an optimal functioning of the system will stem from the inherent properties of the cells themselves. Do we need a single conductor or for the instruments to listen to each other better?

### B. *Democracy*

Beyond effectiveness which delivers what political scientists call “output legitimacy,” most authors agree that so-called “input legitimacy” or the legitimacy stemming from the process itself is paramount.<sup>58</sup> Aren’t we really trying to translate our understanding of the relationship between law and democracy from the domestic to the global sphere? The emphasis on the role of law helps to resist the easy analogies between

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50. See Fischer-Lescano & Teubner, *supra* note 15; John Jackson, *The Varied Policies of International Juridical Bodies—Reflections on Theory and Practice*, 25 MICH. J. INT’L L. 869 (2004); Sassen, *supra* note 47.

51. See Rao, *supra* note 9.

52. Jackson, *supra* note 50.

53. See Pauwelyn, *supra* note 18.

54. One further supporting factor is the number of countries participating in the WTO, as well as the number of countries that *wish* to participate.

55. Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT’L L. 849 (2004).

56. See Fischer-Lescano & Teubner, *supra* note 15.

57. Sassen, *supra* note 47.

58. THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaidis & Robert Howse eds., 2001) [hereinafter THE FEDERAL VISION].

global and domestic democracy which tend to adopt a narrow and impoverished view of democracy as a type of “competition for votes,” where diversity is acknowledged either through a world parliament or through purely domestic contestation and indirect accountability. Good laws may not necessarily emerge from a vibrant marketplace of ideas and NGO participation, but it is important to distinguish the value of intellectual competition from the contention that the “rational” basis for NGO participation is representation. Global democratization is about access and inclusiveness, not representation.

How should international law relate to states that are themselves disaggregated?<sup>59</sup> In effect, disaggregation is bound to be trans-national as soon as we acknowledge that domestic democracy can not do all the work. But who decides what should be the boundaries of the polity for the right level of aggregation of interests? To what extent should the production of law be freed from the considerations of the relevant “we” as discussed by Dan Sarooshi? Olli Lagerspetz’s account of the bias inherent in the choice of national symbols—who are “we”—makes clear once again the inherently constructed character of nation-states as a communities of identity and lays bare claims that they might hold a monopoly on legitimacy.<sup>60</sup> Why should such communities of identity be the only ones to be institutionalized through law? Increasingly, polities are being built around communities of project whereby groups of people—in some cases all of mankind—chose to confront risks and opportunities together.<sup>61</sup>

More often than not, discussions about global democracy turn into ones about procedural norms as interpreted by dispute resolution bodies. Keohane highlights three dimensions of international delegation crucial to the issue of dispute resolution: 1) independence; 2) access; and 3) embeddedness.

Independence is the freedom with which international adjudicators can render judgments independently of state influence. Selection and tenure, legal discretion, and financial and human resources are important factors in determining the independence of the adjudicators.<sup>62</sup> If the true ideal is to have legitimate decisions rendered by international adjudicators applying international norms, then the independence of those adjudicators is of paramount concern. Without legal independence, legitimacy will

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59. See SLAUGHTER, *supra* note 24.

60. Olli Lagerspetz, *National Self-Determination and Ethnic Minorities*, 25 MICH. J. INT’L L. 1299 (2004).

61. Kalypso Nicolaidis, *We, the Peoples of Europe . . .*, 83(6) FOR. AFF. 97 (2004) [hereinafter *We, the Peoples*].

62. Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 460–62 (2000).

never follow. “[A]ccess measures the range of social and political actors who have legal standing to submit a dispute to be resolved.”<sup>63</sup> Access can be extremely restrictive (as the ICJ represents—only states have access) to more permissive (as the ECJ represents—individuals have standing to come before the ECJ).<sup>64</sup> Keohane refers to the idea of enforcement as embeddedness.<sup>65</sup> Because international laws must be implemented by states, the more embedded the decisions are into the domestic structure, the more legitimacy the norm has. As with each factor, embeddedness ranges from low (where states may veto decisions *post facto* as in the former GATT) to high (where states respect decisions such as ECJ decisions). These procedures and rules help legitimize international norms and also display how disaggregated states and individuals may now play a role in norm interpretation.

Further, if international law was originally about preserving diversity within the confines of the state, as Stephen Krasner argues, thus supporting the liberal aim to curb the “tyranny of the many,” even while this may sometimes contradict the democratic project to curb the “tyranny of the few,” then should international law not be constructed to safeguard against the tyranny of global majorities as well? Karel Wellens’ discussion of how accountability rules should apply to international organizations provides an illustration of this dilemma.<sup>66</sup>

Perhaps the real question is not just who has the right or authority to create international norms—whether it be Jody Williams who got the landmine treaty off the ground<sup>67</sup> or George Bush who keeps the mines in the ground—but fundamentally to what extent the contested nature of sovereignty promotes democracy simply because it counters a monopoly of power. As Robert Howse argues regarding the WTO, what matters is less the international law itself and more the way in which these organizations generate meaning about the role of the state itself in our everyday lives.

### C. Justice

Third and last, even democracy can be considered as a means to an end—that of an international system which best combines order and justice beyond borders. From an international relations viewpoint, the combination of the end of the cold war and globalization has radically

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63. *Id.* at 462.

64. *Id.* at 462–64.

65. *Id.* at 466.

66. Karel Wellens, *Fragmentation of International Law and Establishing and Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. INT’L L. 1159 (2004).

67. Koh, *supra* note 17.

eroded the traditional divide between the pursuit of justice *within* the state and that of order *between* states.<sup>68</sup> Little by little, a global justice agenda is being shaped—whether retributive or distributive—even if international law is only part of it.

Thus, for instance, when scholars assessed fragmentation on the basis of the values underpinning sovereignty itself—they encourage us to look for ways to extend to international law domestic legal principles that have to do with human dignity and fairness. Likewise, when P.S. Rao defends the Law of the Sea tribunal as a way to nurture a new concept of “common heritage of mankind,” he encourages us to explore how other regimes may internalize this agenda.<sup>69</sup> When Daniel Philpott stresses that intervention is driven by a shared universal aversion to human suffering he encourages us to ask whether this imperative does not in fact allow for the bypassing of state consent, thus positing the existence of a normative international community over and above the international society of states, and whose greater solidaristic impulse reflected into norms ought to be considered legitimately as a source of international law. And when Jordan Paust argues that the expansion of a global justice agenda requires direct individual responses this does not exonerate state responsibility.<sup>70</sup> In the end, we are left with a fundamental tension between Daniel Philpott’s initial assertion that international law today comes close to a 17th century philosopher’s dream of finding common values to justify intervention (without denying sovereignty as a relative norm) and the fact that the many individual and collective rights embedded in international law often continue to be trampled on around the world.

We cannot in this conclusion delve into the many negative and positive links between these three normative levels. Democratization can be a prerequisite for effectiveness or it can be seen as a necessary cost. Contrast for instance the many cases of delegated authority where democratizing participation becomes a precondition for the hardening of soft law agreements (e.g., standardization bodies in the EU) and cases where democratization on the contrary calls for relaxing traditional law standards. Some ardent proponents of a global justice agenda may advocate a shift from procedural to substantive international justice but this in turn can contradict the essence of democratic accountability at more local levels. Here again, the recourse to soft law and more generally, diversification of the sources of law away from the “core” discussed

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68. HURRELL & FOOT, *supra* note 8.

69. See Rao, *supra* note 9.

70. Jordan Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT’L L. 1229 (2004).

above can serve as a way of getting around the tension. This issue explores some such strategies of *contournement* and suggests many more.

## V. CONCLUSION: INSTITUTIONALIZING DIVERSITY? FUTURE DEBATE

This issue does not have one single overarching set of positive or normative conclusions. Instead, let us suggest three areas where we believe some creative work can make a difference.

### A. *Deepening Horizontality and Mutuality: Managed Mutual Recognition and Global Subsidiarity*

One first impression of the challenge raised by the diversification of sources of international law is to consider such diversification as one expression of the growing unbundling between political territory and legal jurisdiction. With the mutual recognition of laws and their extraterritorial application, we increasingly recognize and accept that consumers, citizens or other kinds of actors may simply be exposed to several laws at once or sequentially on the same territory and that this is part of globalization. At the same time, fierce debates are taking place on the extent to which the application of rules of origins to the movement of professionals and not only goods may lead to social dumping and lesser consumer protection. This is why mutual recognition, when it is indeed applied, is “managed” in order to constrain some of its potential detrimental effects.<sup>71</sup> In effect, mutual recognition of laws is the legal analogy and institutionalization of what Saskia Sassen describes as transnational sovereignty whereby part of the “global” is endogenous to the state.<sup>72</sup> In this sense, legal pluralism is not only a normative commitment but a lens through which to analyze the world as it is evolving today. Outside observers need to understand for instance that European integration, for example, rests not on a dynamic of progressive convergence of different laws and regulations, but instead on the constant refinement of the techniques of managed mutual recognition. The EU has chosen not to adopt

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71. On managed mutual recognition, see for instance KALYPSO NICOLAIDIS, *MUTUAL RECOGNITION OF REGULATORY REGIMES: SOME LESSONS AND PROSPECTS* (1997); Kalypso Nicolaidis & Michelle Egan, *Transnational Market Governance and Regional Policy Externalities: Why Recognize Foreign Standards?*, 8(3) *J. EUR. PUBLIC POL'Y* 454 (2001). These contours of such “management” continue to be highly contested in the European Union. In March 2004, the Commission insisted that its single patent project was incompatible with the current system of mutual recognition of enforcement in national courts. See also the fierce debates in November 2004, around the so-called Bolkenstein directive on freedom to provide services across borders on the basis of the country of origin’s standards.

72. Sassen, *supra* note 47.

a single patent system but rather a system of mutual recognition of patent enforcement in national courts under the same approach adopted for most other parts of the single market.

There is a broader ontological underpinning to such an emphasis on recognition ought to apply to relationships between collective entities. In *The Federal Vision*, we called for a shift of emphasis from multilevel governance to multi-centered governance and multi-centered law.<sup>73</sup> Today, if the EU was founded on the discipline of tolerance—including what J.H.H. Weiler refers to as *Constitutional tolerance*<sup>74</sup>—then the EU constitutional project should not be founded on the assumption that everyone in the EU is part of a single demos in the making, but should instead be about recognizing, sharing, and confronting our different identities.<sup>75</sup> One may disagree on whether understanding the EU as democracy should lead one to reject a formal constitution. At a minimum however, the EU's new constitutional order should reflect that the character of the EU as an expression of legal pluralism and non-hierarchical governance. In short, the Constitution gets it right when it gives a direct role to national parts in the shaping of EU law through the subsidiarity test but gets it wrong when it fails to give due place to the open method of cooperation.

A celebration of diversity in the sources of international law goes hand in hand with that of horizontality in world affairs. What do we mean by that? If Westphalia is the story of a move from vertical order to a horizontal order based on state consent, managing diversity in today's world does not mean recovering the "paradise lost" of Westphalian state sovereignty, but rather deepening and expanding the horizontality that started with the Peace of Westphalia, through management of differences at the global level using both laws and institutions. We must resist the attraction of creating hierarchies of norms<sup>76</sup> and corresponding integrative institutions—such as a hierarchical court system some scholars advocate.<sup>77</sup> This issue suggests that the key question here is how to

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73. See *THE FEDERAL VISION*, *supra* note 58.

74. See J.H.H. Weiler, *Federalism without Constitutionalism: Europe's Sonderweg*, in *THE FEDERAL VISION*, *supra* note 58, at 54.

75. EU leaders approved the Constitutional treaty on June 18, 2004. However, each member state must ratify the constitution for it to come into effect. See *We, the Peoples*, *supra* note 61; see also Kalypso Nicolaidis, *The New Constitution as European Democracy?*, (The Federal Trust, Online Paper 38/03, Dec. 2003), at [http://www.fedtrust.co.uk/eu\\_constitution](http://www.fedtrust.co.uk/eu_constitution).

76. The symposium brought to light the rich contextual debate on the different methods of achieving the same benefit that hierarchy and institutional integration could bring. In some cases, hierarchy could create friction—as between different courts as Charles Koch argued or as Gunther Teubner argued that some of the most successful law-making results from "mutual irritation." See Charles H. Koch, *Judicial Dialogue for Legal Multiculturalism*, 25 *MICH. J. INT'L L.* 879 (2004); Fischer-Lescano & Teubner, *supra* note 15.

77. See *Abi-Saab*, *supra* note 3.

receive through other means, the benefits stemming from hierarchy and institutional integration (e.g., quality, clarity, transparency). Thus judicial *dialogue* should be preferred over formalized hierarchy (between courts) that exacerbates tensions. Teubner provides a provocative image of law making through mutual irritation and provocation between network nodes across regimes.<sup>78</sup> Howse and Nicolaidis have discussed how global subsidiarity calls for horizontal deference between functional institutions and courts while requiring at the same time mutual inclusiveness in each other's institutions or countries.<sup>79</sup> Nevertheless one may ask with Rao if vertical deference of a certain kind ("inspired but not bound") is not in the end the fundamental precondition for horizontal deference.<sup>80</sup> Likewise, Joost Pauwelyn's call for accepting interconnected but separate legal islands does not address situations with inherent normative conflicts or what Teubner describes as radically different rationalities.<sup>81</sup> Conflicts of law cannot solve all conflicts between systems of law.

Essentially, when we fear cacophony at the global level we must resist the temptation of seeking harmony—but rather, rejoice in the contrapuntal, playing together along different scores. As with chamber music, if the players listen to each other, they can do away entirely with a conductor.

### B. *Bringing Politics Back In*

The second line of enquiry which we see emerging from this project is that of the relationship between politics and law-making through courts in an increasingly globalized world. We believe that if international law's relevance is to survive its unavoidable fragmentation, we need more politics not less. This is not to echo classical realists', political scientists from Carr to Keenan, who criticized legalism as divorced from power and politics. In fact, international law has always played politics in any case by empowering some actors and disempowering others within domestic polity. Today, the normative justification for such empowerment must be made more explicit and grounded in a more fundamental political debate on the ethics of globalization.

How then should the interface between political and judicial law making be managed and by whom? What is the space for legitimate politicization between the delegation of conflict-management to groups of "wise men" and simply going to war? Is peace to be founded in Kojève's

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78. See Fischer-Lescano & Teubner, *supra* note 15.

79. Kalypso Nicolaidis & Robert Howse, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 *GOVERNANCE* 78 (2003).

80. See Rao, *supra* note 9.

81. See Pauwelyn, *supra* note 18; Fischer-Lescano & Teubner, *supra* note 15.

universal homogenous state where technical and legal adjudication determines acceptable differences? Or should the boundary between acceptable and non-acceptable difference be determined through political conflict and contestation between countries or groups of people? And if so, how do we avoid an international politics between closed groups promoting instead a diagonal politics where national debates interpenetrate each other?

If democratic coexistence is not about harmony per se, but rather about creative conflict or confrontation, then there are important prescriptive consequences such as Joost Pauwelyn's call for including more conflict of law clauses in treaties themselves, all the way to greater allowance for temporary opt-outs and safeguards, all ways of adjusting the binding character of international law to the circumstances that affect its internalization and ultimate legitimacy.<sup>82</sup>

The emphasis of international law should increasingly be on procedural rather than substantive justice, the latter being the domain of politics.<sup>83</sup> By making national democracy work better through local empowerment, a global politics is not a constraint on diversity but its guarantee. It may have a more radical effect than substantive edicts (aimed at outcomes rather than process) if previously disenfranchised groups are empowered in the process. In such a world, the role of the judge is to ensure that common rules of the game not to dictate outcome. If a country can demonstrate the truly democratic character of domestic choices including some degree of inclusiveness of non-domestic constituencies than these choices must trump requirements of legal consistency. This is what the EU is currently seeking to convey with the notion of "collective preferences." There are some cases where collective preferences have been turned into democratically grounded "collective choices" which at the domestic level are supposed to trump individual market choices (e.g., the U.S. ban on dolphin-unfriendly tuna or turtle un-friendly shrimp). In such cases, we must applaud when the WTO Appellate Body tells a country how to come to a decision rather than what decisions it is allowed to make. This is all the more important if we believe with John Jackson that the WTO provides guidance for the future rather than redress prior harm.<sup>84</sup> In this light, the idea of constitutionalizing the WTO to settle value trade-offs once and for all as a guide to judges may be misguided but we must explore alternative paradigm for

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82. See Pauwelyn, *supra* note 18.

83. See Kalypto Nicolaidis & Robert Howse, "This is My EU-topia . . .": Narrative as Power, 40 J. COMMON MKT. STUD. 767 (2002) [hereinafter *My EU-topia*].

84. See Jackson, *supra* note 50.

upholding ethical standards and human rights in the context of trade relations.<sup>85</sup>

There are of course many difficult questions to delve into under such assumptions. In particular, if the on-going involvement of external actors in domestic governance should not be about results but process how exactly does one measure the threshold of appropriate involvement? If international law is to establish what Teubner refers to as “collusion rules” to adjudicate between colliding rationality principles and address conflicts between regime under what conditions does this create a space for political dispute resolution rather than preempt politics altogether? Legal roadmaps are useful and even necessary but they cannot and should not pre-determine the twists and turns of the journeys that we make. The debate, no doubt, continues.

### C. Diversity as a Source of Power

Finally, let us highlight a question that has hardly been touched upon during this symposium, the idea that legal diversity can be a source of normative power. For example, “the clash of exceptionalisms” between the EU and the U.S., where the two international powers compete in exporting their political and legal model to the rest of the world. What are the factors that favor one exceptionalism over the other? Is the EU’s own version of inter-national law more relevant than the U.S.’ advocacy of its domestic law with universal appeal? Many in the EU believe so precisely because the EU sells itself as a benign model of international law offering a “toolbox” for the management of diversity.<sup>86</sup> The hypothesis here is that the EU’s power stems from, not the growing ability to speak with one voice (Iraq notwithstanding) as mainstream thinking has it, but rather its ability to offer a chorus of voices to the world.

But is that not a very complacent story on the part of the EU? If international law expands by making the preservation of diversity in the real world itself a common good<sup>87</sup> should legal diversity beyond the EU itself be preserved from this logic? If what is at stake is in Koch’s formulation “tapping the wisdom of the world’s legal cultures”<sup>88</sup> why should

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85. See Robert Howse & Kalypso Nicolaidis, *Legitimacy through “Higher Law?” Why Constitutionalizing the WTO is a Step Too Far*, in THOMAS COTTIER ET AL., *THE ROLE OF THE JUDGE IN INTERNATIONAL TRADE REGULATION: EXPERIENCE AND LESSONS FOR THE WTO* (2003).

86. While the U.S. sets up law foundations around the world to sell one united legal system, the EU, on the other hand, plugs the many different models it has to offer. See *My Eutopia*, *supra* note 83.

87. For a discussion on cultural heritage, see Lagerspect, *supra* note 60; Francesco Francioni, *Beyond State Sovereignty: the Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT’L L. 1209 (2004).

88. Koch, *supra* note 74.

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the EU still be “a model” as in Francesco de Vitoria’s time? In the quest for managed diversity isn’t the idea of the EU as a conductor or a model a self-contradiction, even if its claim rests on its own internal legal pluralism? What would it take to create a truly post-colonial vision of international law and what should be the role of the EU in this project? This is one of the many questions that must be explored next.