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COMMENT

COMMENTARY TO ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER THE LEGITIMACY OF INTERNATIONAL LAW AND THE ROLE OF THE STATE

INTRODUCTION: FRAGMENTATION AND THE ROLE OF THE STATE

It will come as a surprise to many readers that Professor Teubner presented their fascinating contribution on regime collision¹ to the *Michigan Journal of International Law's* Symposium on a panel devoted to "the Role of the State in International Law." Indeed, one could not imagine better devil's advocates than Professor Teubner and Dr. Andreas Fischer-Lescano. They propose a radical break with a concept of international law and order based on the autonomous will of Nation-States. Accordingly, legal regulation does not only, if at all, emanate from Nation-States, but from a panoply of other public and, mostly, private actors. Thus, the authors dismiss all claims of an "organizational or dogmatic unity of international law."²

Professor Teubner and Dr. Fischer-Lescano do, however, not only challenge the "Westphalian system,"³ but also the recent advocacy of the Bush administration in favor of a world of sovereign Nation-States loosely cooperating in "coalitions of the willing."⁴ The experience with recent international rulings may confirm their viewpoint. For example, the Bush administration was forced to apply the WTO Appellate Body decision declaring U.S. steel tariffs illegal.⁵

However, such an explanation fails to recognize the element of choice. It was the United States that imposed the tariffs in the first place, in full knowledge of their doubtful compatibility with trade rules. It also considerably underestimates the possibility of irrational behavior in spite of the perfect knowledge of the threat of negative consequences. In any case, it was the

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

2. Fischer-Lescano & Teubner, *supra* note 1, at 1017.

3. See, e.g., Leo Gross, *The Peace of Westphalia: 1648-1948*, 42 AM. J. INT'L L. 20 (1948).

4. Secretary of Defense Donald Rumsfeld, Remarks as delivered at the Marshall Center 10th Anniversary in Garmisch, Germany (June 11, 2003) at <http://www.defenselink.mil/speeches/2003/sp20030611-secdef0285.html> (last visited Nov. 6, 2003).

5. See United States—Definitive Safeguard Measures on Imports of Certain Steel Products, Report of the Appellate Body, Nov. 10, 2003, WTO Doc. WT/DS248/AB/R, WTO Doc. WT/DS249/AB/R, WTO Doc. WT/DS251/AB/R, WTO Doc. WT/DS252/AB/R, WTO Doc. WT/DS253/AB/R, WTO Doc. WT/DS254/AB/R, WTO Doc. WT/DS258/AB/R, WTO Doc. WT/DS259/AB/R, all available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2003.

State which decided not only to accept the obligations in question, but also whether to implement the international decision or rather suffer the consequences.⁶

Nevertheless, the characterization of the present predicament as one of fragmentation of the public space into different issue areas conforms to the experience of most international lawyers. The unity of the Nation-State appears increasingly illusory. Legal specialization does not stop at national borders. Although States are represented in the vast majority of decision-making bodies, whether at the WTO or in the Basle Committee on Banking Supervision,⁷ it may be more important whether a State representative regards herself as trade lawyer, environmental lawyer, or human rights lawyer, than whether she represents the United Kingdom or Morocco. Thus, for many lawyers, globalization appears indeed characterized by a shift from territorial borders to functional boundaries.⁸ Most issue areas⁹ such as trade, environment, or human rights have left territorial boundaries behind and cannot be dealt with effectively at a national level.

But States continue to be the main unit of legitimacy and of, ideally democratic, debate and decision-making. For this role of the State, no substitute appears on the horizon. The “democratic deficit” of regional and international institutions remains unresolved; alternative models of legitimacy—such as pure functionalism and market rationality—are based on a standard of efficiency which is itself in need of justification. Systems of rules and norms constructed ‘bottom-up,’ that is, by a process of self-

6. This does not imply that such action would be compatible with WTO rules. See Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT'L L. 416, 416–17 (1996). For a convincing argument against Hippler Bello, see John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60 (1997); John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'?*, 98 AM. J. INT'L L. 109 (2004). Bello has modified her view since. See Judith Hippler Bello, Book Review, 95 AM. J. INT'L L. 984, 986–87 (2001) (reviewing JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO* (2000)); but see Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUDS. S179, S190 (2002) (endorsing Bello's earlier viewpoint).

7. On government networks generally, see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); for criticism regarding the lack of democratic accountability of these networks, see Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT'L L. 435 (1997).

8. NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 571 (1995); NIKLAS LUHMANN, *DIE GESELLSCHAFT DER GESELLSCHAFT* 158–60 (1997).

9. For the term, see, e.g., David W. Leebron, *Linkages*, 96 AM. J. INT'L L. 5, 6–10 (2002). To compare the term “regimes” as used by political scientists, see Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables, in INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1983). However, as Leebron shows, *supra* at 9, the latter definitions lie square to legal terminology.

ordering of a particular issue area,¹⁰ cannot legitimize outcomes, because they are self-imposed by the relevant power holders and power brokers—and thus open to challenges from all those not participating in the process, but subject to their decisions.

As Daniel Philpott's contribution to this symposium¹¹ has demonstrated anew, the stakes of this debate can hardly be overstated. The religious wars caused the Western nations to recognize the monopoly of legitimate violence in the State. After the horrific World Wars and Nazi crimes, international society extended, to a certain degree, this solution to the international level by requiring Security Council approval for the use of force by States except in self-defense.¹² Thus, no less is in question than the idea of the Nation-State as authoritative, but democratic arbiter of disputes between citizens, and as a locus of democratic struggle, debate and decision-making about the "public interest."

Of course, Teubner and Fischer-Lescano do not ignore the problem. They argue that each sub-system can itself develop the relevant decision-making processes in a transparent and democratic fashion. But this proposition pre-supposes an analysis of who is affected by the decisions within an issue area. Due to the uncertainty and fallibility of all consequential analysis, however, the effects of decisions in one subsystem on others will also be indeterminate and uncertain. Therefore, the presumption underlying the general competence of States—namely, that most decisions in the public sphere affect all citizens and must therefore be legitimized, directly or indirectly, by all of them—is also valid internationally, whether one deals with human rights, the environment, or trade and development.

Thus, the present contribution suggests that the appeal of Teubner's and Fischer-Lecano's model is diminished by a certain lack of attention to questions of democratic legitimacy. This argument reproduces, to a certain extent, the famous *Methodenstreit* between Niklas Luhmann and Jürgen Habermas at the international level.¹³ Nevertheless, the phenomena described by Teubner and Fischer-Lescano are real, and reaffirmations of orthodoxy will be of little help. The following comments suggest that, in spite of an

10. See Gunther Teubner, *Global Bukowina: Legal Pluralism in World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997).

11. Daniel Philpott, *Religious Freedom and the Undoing of the Westphalian State*, 25 *MICH. J. INT'L L.* 981 (2004).

12. Of course, recent developments may have unraveled this compact. See Michael J. Glennon, *Why the Security Council Failed*, 82 *FOREIGN AFF.* 16 (May/June 2003). For arguments against Glennon's views, see Mary Ellen O'Connell, *Review Essay: Re-leashing the Dogs of War*, 97 *AM. J. INT'L L.* 446, 447–48 (2003); Andreas L. Paulus, *The War against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 *MICH. J. INT'L L.* 691, 716–17 (2004) (containing further references).

13. See JÜRGEN HABERMAS & NIKLAS LUHMANN, *THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE: WAS LEISTET DIE SYSTEMFORSCHUNG?* (1971).

ever-growing functional differentiation, issue areas are held together by a minimum of common values and decision-making procedures¹⁴—in other words, by general international law which bases its legitimacy on decisions of, ideally democratic, national processes of decision-making.

LEGITIMACY PROBLEMS IN A WORLD OF MULTIPLE REGIMES

A. Pluralism as a Value—The Example of Religion

In a certain way, the approach suggested by Professor Teubner and Dr. Fischer-Lescano itself requires the recognition of some first principles common to all legal systems, from the application of legal method to the recognition of a pluralism both of values and issue areas. However, not all systems lend themselves easily to such recognition of their inherent limits. The most telling example is religion, and, as Professor Philpott has shown in his presentation, it was religion which brought about the necessity for a pluralist international system based on territory and the principle of *cuius regio, eius religio*.¹⁵ The terrorism promulgated by a certain branch of Islamic fundamentalism has recently shown that the universal recognition of religious pluralism remains precarious even in the contemporary inter-State order.

That may also be a reason why human rights and religion occasionally have an uneasy relationship.¹⁶ For some, human rights consist of almost neutral, substantively empty principles protecting individuals against interference from the public. In that vein, human rights delineate the public and private spaces and do not express overarching values. Increasingly, however, human rights seem to fulfill, in the international system, a quasi-religious, ideological function, providing values for the international system and defining limits for legal regulation—a function, of course, which is embraced and not contradicted by Teubner and Fischer-Lescano.¹⁷ But if each and every subsystem must observe the values of human rights, equal participation, and even democratic governance, there is not only fragmentation, but also a considerable amount of “value-glue”—and therefore unity. That is exactly what international *ius cogens* is about—and the skepticism expressed by Teubner and Fischer-Lescano¹⁸ contrasts with their optimism regarding the emergence of similar processes within specific issue areas.¹⁹ But to the

14. For a practical example, see Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. INT'L L. 903 (2004).

15. Philpott, *supra* note 11.

16. Cf. Philpott, *supra* note 11.

17. Fischer-Lescano & Teubner, *supra* note 1, 1033 *passim*.

18. *Id.*

19. Of course, this does not imply that *ius cogens* in its current form can fulfill this function properly.

extent human rights are providing those values, they will occasionally conflict with other overarching systems, for example religion.

Of course, this comment does not suggest that religious freedom and pluralism are necessarily incompatible with each other. The challenge rather consists in devising a legal order that allows for the expression of different religions, albeit each of them claims to present a comprehensive system—in other words, in devising a legal order representing a Rawlsian “overlapping consensus.”²⁰ But religious fundamentalism demonstrates that functional pluralism is itself grounded on values. It thus cannot avoid questions of legitimacy by pointing to a miraculous “auto-poiesis” of subsystems that would automatically justify their separate existence. Teubner’s and Fischer-Lescano’s pluralism must itself rely on the recognition of overarching values by the participants of the system. In other words, for the avoidance of an all-out war between fragments claiming comprehensiveness and sovereignty, some unitarian principles for the relationship between different subsystems and issue areas are required. Thus, the discussion cannot be avoided about what establishes such a consensus—and whose consensus it is anyway.

B. *International Law as Overarching System*

This question thus leads us to the role of (international) law in the management of the systems and of their intercourse. One possibility to conceptualize the role of law—which seems to be espoused by Teubner and Fischer-Lescano—is to regard law as a meta-phenomenon, as following the development of the issue areas it applies to. Changes in the structure of other systems (such as politics or religion) will be reflected in the law applying to them.²¹ On the other hand, however, law itself is a system of its own, containing its own set of assumptions how to generate knowledge and to arrive at normative conclusions. The inherent characteristics and specificities of law provide for a minimum of unity and coherence, such as rules on law-making, law interpretation, and law enforcement.

As to international law, many observers have doubted its legal character, from John Austin²² to contemporaries like now Under-Secretary of State

20. JOHN RAWLS, *POLITICAL LIBERALISM* 133 *passim* (1993). For an extension of the overlapping consensus to the international realm, see THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 14 (1995); ANDREAS L. PAULUS, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT: EINE UNTERSUCHUNG ZUR ENTWICKLUNG DES VÖLKERRECHTS IM ZEITALTER DER GLOBALISIERUNG* 157–59 (2001) [hereinafter *INTERNATIONALE GEMEINSCHAFT*]; THOMAS POGGE, *REALIZING RAWLS* 227 (1989); BRAD ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 6 (1999).

21. Fischer-Lescano & Teubner, *supra* note 1.

22. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 117–26 (Wilfried E. Rumble ed., 1995).

John Bolton.²³ As H.L.A. Hart has put it, international law allegedly misses “secondary” rules of recognition, change and adjudication.²⁴ Some, such as Thomas Franck, have recently concluded that international law has now acquired these qualities,²⁵ only to have second thoughts on matters such as Kosovo and Iraq.²⁶ Niklas Luhmann was decidedly more optimistic. Noting the gap between societal development and its translation into legal form, the lawyer-turned-sociologist remarked with his characteristic irony: “But naturally, even lawyers have the courage to travel and to thereby step beyond the area of validity of their legal order.”²⁷ Teubner and Fischer-Lescano now seem to recognize a lot of law in separate functional issue areas, but not in the overarching system. In fact, their claim that law has to follow functional issue areas seems to care little about the specific characteristics and assumptions of a legal as opposed to a political or social order.

However, if (international) law is supposed to be a system of its own, it needs to have basic systemic rules in place. Teubner and Fischer-Lescano appear to believe that these rules are different from system to system, but they tell us little of how they come about. In fact, in almost all cases cited by them, whether the *Yahoo!* case, copyright or patent law, the legal regulations in question stem from the very State or inter-State bodies which have been dismissed before as increasingly irrelevant. Thus, a trend from territorial to functional tasks will be followed by functional rather than territorial conflicts of norms—but this also depends on the norms in question, not only on the problem to solve. It makes a difference whether one balances international labor law against trade law or national copyright laws against different national standards for the limitation of freedom of speech.

The parsimonious character of international law makes it quite malleable for the self-ordering of régimes—within certain limits. International law grounds its obligations either in consent or in custom—and recognizes certain general principles, either internationally or derived from domestic legal systems.²⁸ One may dispute whether such an order fulfills Hart’s requirements for a legal system,²⁹ but it certainly provides enough leeway for *leges*

23. John Bolton, *Is There Really “Law” in International Affairs*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 1 (2000). For a spirited defense of the legal character of international law, see Anthony d’Amato, *Is International Law Really “Law”?*, 79 *N.W. U. L. REV.* 25 (1985).

24. HERBERT L. A. HART, *THE CONCEPT OF LAW* 213–37 (2d ed. 1994).

25. See FRANCK, *supra* note 20, at 1–6.

26. For recent discussion, see THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002); Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 *AM. J. INT’L L.* 607 (2003).

27. LUHMANN, *DAS RECHT DER GESELLSCHAFT*, *supra* note 8, at 573 n. 40 (my translation). The German original reads: “Aber natürlich haben auch Juristen den Mut zu reisen und dabei den Geltungsbereich ihrer Rechtsordnung zu überschreiten.”

28. See Statute of the International Court of Justice, June 26, 1945, art. 38(1), 56 Stat. 1055, T.S. No. 993.

29. See *supra* note 23 and accompanying text.

speciales. The main problem does not lie in the international legal requirements for binding norms, but in the limitation of its law-making subjects to States. However, this problem is not impossible to overcome if one contemplates applying the same criteria—namely, the legally binding nature of formal commitments and of custom accompanied by a joint conviction regarding their legally binding nature—to the pronouncements of non-State actors.³⁰ However, non-State actors can only bind themselves. As soon as public interests are at stake, only public decision-making appears legitimate. Thus, the question of “who decides?” appears everything but “unimportant.”³¹

Teubner and Fischer-Lescano suggest substituting *ius cogens* by a regime-specific transnational *ordre public*. They are skeptical, although not quite hostile, towards recent claims of the “constitutionalization” of an “international community law.”³² The present author shares their skepticism if such constitutionalization attempts to artificially construct hierarchical legal orders independent of the actual international consensus.³³ But as far as *ius cogens* is concerned, Teubner and Fischer-Lescano are working with the same concepts as international lawyers do, in particular human rights and participation.³⁴ Different issue-related legal subsystems are far more likely to refer to general human rights-requirements than to create new ones—the transnational *ordre public* will thus appear as little more than an implementation of existing *ius cogens*. But even if such specific *ordre public* rules can be shown to exist, they do not take away the need for some common minimum standards for any legal subsystem. Some of these rules will be more of a formal nature—how rules are made and interpreted—others will be substantive, setting material limits to the self-ordering of subsystems.

Ultimately, of course, it is a matter of perspective whether one interprets the use of norms from other systems as an autonomous incorporation or as evidence for the existence of one common system.³⁵ Thus, one may understand Teubner’s and Fischer-Lescano’s presentation not so much as advocacy of fragmented systems without a minimum of common legal rules, but as an argument for a greater equilibrium between hierarchical and diverse views of international law—an argument which finds the enthusiastic support of the

30. For a discussion of the human rights obligations of corporations, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

31. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?* in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 16 (Christian Joerges et al. eds., 2004).

32. Fischer-Lescano & Teubner, *supra* note 1, 1014, 1033.

33. Cf. PAULUS, INTERNATIONALE GEMEINSCHAFT, *supra* note 20, at 285–318.

34. See, e.g., Teubner & Fischer-Lescano, *supra* note 1.

35. Cf. Andreas L. Paulus, *Beyond the Monism—Dualism Debate*, Paper presented at the Seminars on Theoretical Approaches to the Relationship Between International and National Law (Amsterdam, Jan. 17, 2003). I also thank Dirk Pulkowski for directing my attention to this point.

present author. On the other hand, however, the increasing recognition of the same body of non-derogable norms beyond the fall-back rules of international law demonstrates the 'staying power' of an international *ius cogens* over and above the ordinary norms of specific legal orders.

C. Collision-Norms and Democratic Legitimacy

The main problem with the theory of the autopoietic character of the law of new legal regimes most likely relates to its lack of attention for questions of legitimacy. Teubner and Fischer-Lescano create the impression that the stakeholders in each system can perfectly take care of questions of legitimacy themselves. Accordingly, legitimacy itself is a relative concept and must therefore be dealt with separately in each system. At times, Teubner and Fischer-Lescano seem to rely on a sort of materialist theory, according to which the solution follows quasi-automatically from the inherent characteristics of the functionalities involved. But such a claim hides rather than uncovers the basically political character of the decision: Balancing trade and animal protection may not always be possible, for example, by upholding both. Imagine you could catch tuna only by killing dolphins. In this case, compromise is impossible; either tuna or dolphin. Preferring the one to the other, however, requires a political choice. Such legitimacy can only come from a process which is considered legitimate by the international community at large. Criteria for legitimate decisions are of a general, not of a functional nature. Besides, by emphasizing the separate character of functional systems, Teubner and Fischer-Lescano seem to ignore that, in a globalized world, everything is somehow connected to everything else. As anyone who has watched TV reports on natural or political crisis can attest, global communication leads to some global responsibility. Thus, the separate character of each legal subsystem appears limited. To give an example: In the *Yahoo!* case, a French court decided that Yahoo! had to block a racist webpage as far as it can be seen in France because its display there violates sect. R.645-2 of the French Criminal Code.³⁶

Should we allow such questions to be decided by the "Web community," for instance ICANN, because a regulation by a territorial State alone is not fully possible and the Internet should be regulated internationally rather than nationally? Or should we allow the French courts to order *Yahoo!* to at least take those steps to block territorial access that appear technically feasible (which would block access in France to about 90 percent)? The result of the first solution would be a unified regulation probably in the interest of most Internet providers and most customers (but certainly not all, in particular those who favor continental European rather than Anglo-Saxon free speech

36. On the case see Mathias Reimann, *Introduction: The Yahoo! Case and Conflict of Laws in the Cyberage*, 24 MICH. J. INT'L L. 663-65 (2003) (containing further references).

standards). In the second case, 100 percent efficiency cannot be reached (if one does not allow for a complete shutdown of the Internet in France which no reasonable person would contemplate), but the majority of the French society which legitimizes the outlawing of neo-Nazi propaganda would win over the interests of the global Internet community.

However, the solution on the basis of Internet self-ordering appears illegitimate. The eighty-year-old Holocaust victim is affected (and offended) by neo-Nazi propaganda on right-wing-websites even if she does not use the Internet, but learns of the contents of the sites in her local newspaper. She is not represented, however, when the Internet community is allowed to regulate itself. Likewise, everybody, not only the potential Internet users, will be affected by the success of strategies to improve access to the Internet. This would require, in turn, that legitimate decisions need to include representatives of society of a whole.

Teubner and Fischer-Lescano tread on thin ice to only take care of the concerns of the insiders of the system, not of the outsiders. Because decisions made within many systems profoundly influence the fate of those not within the system, some general system of accountability and legitimacy seems preferable to functionally fragmented ones. At the very least, functional systems should be built by processes of a general nature—such as public international law treaties—and not by custom-designed, but not necessarily legitimate special procedures. In other words, the move from territoriality to functionality should not be accompanied by a move from democracy to technocracy. This ultimately requires a minimum of public control over the private exercise of power.

D. Fragmentation and the Role of the Lawyer

Finally, the system advocated by Teubner and Fischer-Lescano also raises questions with regard to the role of the lawyer. They counsel the lawyer to go beyond colliding state-set norms and thus to use their authority to devise new, functionally attuned rules.³⁷ However, this transforms the lawyer from a representative of society to an active rule-maker. It is of course unavoidable that lawyers devise rules in the absence of authoritative pronouncements by legislatures, in particular in cases of collision of different sets of rules and principles. However, this does not take away the duty of the lawyer to refer her authority back to the society which has empowered her under the condition of respect for the law as set by the competent political authorities. In the United States, we see currently a backlash against judges who openly assume “political” roles at the detriment of the legislature. As much as one may deplore the slow process of international

37. Fischer-Lescano & Teubner, *supra* note 1, at 1017, 1024.

rule-making by State consensus, there is no doubt that the lawyer is simply not entitled to ignore the existing norms emanating from democratically elected national legislatures.

In the end, the lawyer represents not functional systems, but human beings, human beings who are not—or at least should not be—the objects, but the subjects of the system. Although the human being belongs to several functional associations, she is a whole, not a functionally disaggregated entity. As such, she needs not only functional systems that serve her specific needs, but also a comprehensive representation which is able to weigh different interests against each other. Thus, States as representatives of the public appear not at all redundant. The disaggregated character of power in the European legal orders may sometimes appear to dissimulate the representative character of the democratic Nation-State, but the discussion of the democratic deficit of European institutions brings the point home. In the United States, there may be more space for self-regulation, but only public authorities are deemed to be entitled to authoritative law-making. The lawyer is bound to implement the presumed will of her constituents.

CONCLUSION: INTERNATIONAL LAW AND THE LASTING ROLE OF STATES

There is little doubt in the present author's mind that Teubner and Fischer-Lescano have identified the challenges for international law in the twenty-first century. Indeed, "uncritically transferring nation-state circumstances to world society" will not help at a time when new international actors make the old border between States and international society disappear in order to create a profoundly pluralist international community. Neither, as Professor Teubner has pointed out elsewhere,³⁸ will unlearning the constitutional experience do. No doubt, networking will play a central part in any solution to be found. Nevertheless, questions of democratic legitimacy and of a common value-base remain part of the agenda. The reliance on hierarchies, such as *ius cogens* or a constitutional reading of the Charter of the United Nations will not be sufficient and does not provide solutions in each and every value conflict. If no legal norm is in place, and no legal principle available, the lawyer cannot simply run away from her job but must find a solution by balancing both the norms and interests involved.

Where I depart company with Teubner and Fischer-Lescano is their reliance on and trust in apolitical, functionalist solutions to value-conflicts between different legal orders, and their apparent disregard for questions of political legitimacy. In a world in which international and regional organiza-

38. Teubner, *Societal Constitutionalism*, *supra* note 31.

tions suffer from the (in)famous “democratic deficit,” democratic accountability and responsibility is still concentrated in States. Thus, States remain the main source of legitimacy for political decisions. That is why international law still relies on State consent and inter-State consensus. States also play a central role in the protection of human rights, in spite of increasing international supervision.

Law in general, and international law in particular, does not only follow slavishly the needs of other systems such as religion or cyberspace, but is based on normative assumptions and values of its own. It is a system of its own and thus maintains a basic unity. The rules on law-making by State consensus provide, for the time being, for a certain formal unity of international law. Some of the products of this process, in particular the Charter of the United Nations and the *ius cogens* norms of human rights, peace, international criminal justice, and free trade, provide a substantive cohesion of an otherwise loose system permitting for a lot of derogation from its framework.³⁹ As long as there is no world State in place, the analysis of the breakdown of the State appears overstated—there is no international mechanism, neither globally, nor sectorally, which could substitute the legitimizing role of the State (system).

Let us make no mistake: Globalization is bringing about important changes in world governance, with an increasing importance of non-State actors and more independent international organizations, but also with an increasing insistence of world civil society on accountability and democracy of both international and domestic actors. But it appears to be no winning strategy, I would submit, to advocate changes which would bring about less accountability and democracy by taking away the instances of representation of the overall public. As such an institution, the State remains indispensable not only for regulating parochial local affairs, but also for striving to realize something akin to the common good, both domestically and, jointly with others, internationally.

When reading Teubner’s and Fischer-Lescano’s article more closely, the critical reader discovers many common threads in the different issue areas, such as the importance of human rights and of democratic and transparent decision-making procedures, as well as the recognition of the relativity of functional borders and hence of the necessity of accommodation. Thus, a case can be made for an international order based on the rule of law which does recognize, even celebrate, functional fragmentation, but does not lose sight of the necessity of a substantive coherence of laws and institutions

39. See Pierre-Marie Dupuy, *L'unité de l'ordre juridique international. Cours général de droit international public*, 297 RECUEIL DES COURS 9, 93, 207, *passim* (2002). For a development of common values in contemporary international law, see PAULUS, INTERNATIONALE GEMEINSCHAFT, *supra* note 20, at 250–70.

translating requirements of legitimacy into comprehensive legal norms and principles binding on all.

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