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No International Democratic Representation without Institution

Lifting the Democratic Veil of Functionalist, Incorporation, and Agency Theories of Representation by International Organizations

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12.1 INTRODUCTION

Many contemporary international organizations (IOs) are empowered to adopt international law that claims to bind their Member States (and, directly or indirectly, their peoples). Certain IOs have also become members of other IOs or, at least, active participants in international lawmaking processes that claim to bind those IOs and their Member States (and their peoples). Generally speaking IOs play a central role in contemporary international lawmaking: they institutionalize most of the processes through which international law is adopted today, be it through international conferences, international courts, or as IO secondary law. From the perspective of the democratic legitimacy of international law, this raises the question of the conditions under which those IOs may be regarded as democratic representatives of their Member States' peoples and, accordingly, under which the international law they have the right or discretion to adopt inside and outside of IO organs and processes may claim to bind those peoples legitimately.

When one knows how powerful and even dominating certain IOs and, within those IOs, certain States and their governments (usually not the most democratic ones) have become,[1] the stakes of those IOs' democratic representativeness are

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[1] See Andrew Hurrell and Nicholas Lees, 'International Organizations and the Idea of Equality', in Bob Reinalda (ed.), *Routledge Handbook of International Organization* (London/New York: Routledge, 2013), pp. 106–118; Lora A. Viola, *The Closure of the International System: How*

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extremely high. As a matter of fact, the stakes of the democratic representativeness of IOs are not only international.[2] As we know by now, the deficit in democratic representation by and in IOs has also fuelled the so-called 'crisis' of democratic representation domestically, including its populist critique of both governments and parliaments.[3] The future of domestic representation is therefore bound to that of international representation, and vice-versa.

Curiously given the importance of those international and domestic stakes, however, the democratic representativeness of IOs does not seem to be much of a concern of IOs and their Member States, at least if one refers to the international law of IOs and the related international law scholarship.[4]

There are many reasons for the contemporary sidelining of the question of democratic representation by and in IOs.

One of the main reasons for the neglect of democratic representation *by* IOs is that their capacity to represent has mostly been approached as 'non-political' in international law.[5] Representation by IOs is indeed often organized so as to follow a functional approach to legitimacy by output only: it should ensure the implementation of delegated State functions and hence the protection of their Member States' interests. When it is exceptionally framed by reference to input legitimacy, representation by IOs remains functional, moreover. It relies on IOs' integrated or independent organs' expertise, for instance, in implementing States' functions and protecting their interests.

Moreover, to the extent that IO Member States, but also other public and private institutions participate in IO procedures and hence are to be represented *in* IO organs according to IO law, it is usually as such, and not

Institutions Create Political Equalities and Hierarchies (Cambridge: Cambridge University Press, 2020); Samantha Besson, 'L'égalité des États membres de l'Union européenne: un nouveau départ en droit international de l'organisation des États?', in Édouard Dubout (ed.), *L'égalité des États membres de l'Union européenne* (Brussels: Bruylant, 2022), pp. 261–298.

[2] On the continuity between domestic and international democracy, see Samantha Besson, 'The Authority of International Law: Lifting the State Veil' (2009) 31(3) *Sydney Law Review* 343–380; Samantha Besson, 'Investment Citizenship and Democracy in a Global Age: Towards a Democratic Interpretation of International Nationality Law' (2019) 29(4) *Swiss Review of International and European Law* 525–547.

[3] See Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Cambridge, MA: Harvard University Press, 2019); Joachim Blatter and Johannes Schulz, 'Intergovernmentalism and the Crisis of Representative Democracy: The Case for Creating a System of Horizontally Expanded and Overlapping National Democracies' (2022) 28(3) *European Journal of International Relations* 722–747; Kilian Spandler and Fredrik Söderbaum, 'Populist (De) Legitimation of International Organizations' (2023) 99(3) *International Affairs* 1023–1041.

[4] On the reasons for the similarly meagre discussion of representation in international democratic theory, see Besson, Chapter 1 in this volume.

[5] See also Marieke Louis and Lucile Maertens, *Why International Organizations Hate Politics: Depoliticizing the World* (London: Routledge, 2021). See Section 12.4.1 below.

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necessarily as political representatives.[6] In the increasing number of cases where their representativeness in IOs is actually required, it is mostly functional, however, and measured by reference to certain characteristics of States or civil society organizations (CSO) that may be of instrumental relevance for the IO. One may think here of the economic, financial, military, or technoscientific power of some of its Member States (usually a few of them) in the IO's interstate organs, on the one hand, and of the expertise and financial resources of some CSOs (usually just a few as well), on the other. For the rest, the democratic emphasis in that debate has been placed on ensuring more 'participation', 'deliberation', and 'inclusion' in IOs,[7] for instance of the so-called 'affected persons' and other 'stakeholders'.[8] This assumes that there could be participation or deliberation without representation. Participation is usually organized indeed without reference to the representative credentials of those participants in IO processes except as self-representing or as self-appointed representatives, and without any concern about their impact on the concurrent representation of the very same people(s) by States within those IOs.

It is this gap that the present chapter purports to fill. To do so, it builds upon our previous work on international democratic representation and brings our argument in favour of IOs as 'multiple international representation systems' one step further.[9] Our earlier publications addressed various issues pertaining to the deficit of the democratic representation by States and by other public

[6] There are exceptions, of course, such as the ILO's representative tripartism (see Marieke Louis, *Qu'est-ce qu'une bonne représentation? L'Organisation internationale du travail de 1919 à nos jours* (Paris: Dalloz, 2016); Marieke Louis, 'Who Decides? Representation and Decision-Making at the International Labour Organization' (2019) 11 *International Development Policy* 40–58), but they are rare. See Section 12.4.2 below.

[7] See Anne Peters, 'International Organizations and International Law', in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds.), *The Oxford Handbook of International Organizations* (Oxford: Oxford University Press, 2016), pp. 33–59, pp. 51–52; Klaus Dingwerth and Patrizia Nanz, 'Participation', in Cogan *et al.*, ibid, pp. 1126–1145.

[8] See Terry Macdonald, 'Citizens or Stakeholders? Exclusion, Equality and Legitimacy in Global Stakeholder Democracy', in Daniele Archibugi, Mathias Koenig-Archibugi and Raffaele Marchetti (eds.), *Global Democracy: Normative and Empirical Perspectives* (Cambridge: Cambridge University Press, 2011), pp. 47–68; Coline Ruwet, 'Que représentent les *stakeholders*?' (2010) 60(6) *Revue Française de Science Politique* 1115–1135; Jochen von Bernstorff, 'New Responses to the Legitimacy Crisis of International Institutions: The Role of "Civil Society" and the Rise of the Principle of Participation of the "Most Affected" in International Institutional Law' (2021) 32(1) *European Journal of International Law* 125–157, at 141ff.

[9] See Samantha Besson and José Luis Martí, 'The Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (2018) 9(3) *Jurisprudence* 504–540; Samantha Besson, 'COVID-19 and the WHO's Political Moment' (2020) *EJIL:Talk!* www.ejiltalk.org/covid-19-and-the-whos-political-moment/, last accessed 28 August 2023; Samantha Besson and José Luis Martí, 'Cities as Democratic Representatives in

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and private institutions *in* IOs and in their various organs in which those States and other public and private institutions are represented and arguably represent the same States' peoples,[10] on the one hand. There, we also discussed democratic representation *through* IOs and the legal and institutional requirements the latter could and should posit to the democratic representativeness of States and other public and private institutions and of their respective representatives inside IOs' lawmaking organs and processes so as to both correct and complement their respective democratic deficits and organize a multiple international representation system,[11] on the other. What has been left out from the scope of our inquiry so far is the further question of democratic representation *by* IOs, in and of themselves. The time has come to address it directly since the three forms of democratic representation are intimately related.

The issue of democratic representation by IOs is a broad one. What we will focus on here therefore are two questions: the subjects represented (the *who* of democratic representation by IOs) and the representation relation (the *how* of democratic representation by IOs). Scope precludes addressing the related

International Law-Making', in Helmut P. Aust and Janne E. Nijman (eds.), *Research Handbook on International Law and Cities* (London: Edward Elgar, 2021), pp. 341–353; Besson, 'L'égalité des États membres de l'Union européenne', fn. 1; Samantha Besson, 'Democratic Representation within International Organizations: From International Good Governance to International Good Government' (2022) 19(3) *International Organizations Law Review* 489–527; Samantha Besson and José Luis Martí, 'From Equal State Consent to Equal Public Participation in International Organizations: Institutionalizing Multiple International Representation', in Samantha Besson (ed.), *Consenting to International Law* (Cambridge: Cambridge University Press, 2023), pp. 314–346; Samantha Besson, 'Pour une représentation démocratique multiple au sein de l'Organisation mondiale de la Santé', in Olivier de Frouville and Dominique Rousseau (eds.), *Démocratiser l'Espace-Monde* (Le Kremlin Bicêtre: Mare & Martin, 2024), pp. 199–218; Samantha Besson, 'The Politics of Regional International Organizations: A New Dawn for the Political Legitimacy of International Law' (2024) 21(1) *International Organizations Law Review* 87–114; Samantha Besson, 'We the Peoples of the United Nations: From Single Separate Instituent Powers to Multiple Nested Instituted Publics', in Peter Niesen, Marcus Patberg and Lucia Robinelli (eds.), *The Oxford Handbook of Constituent Power* (Oxford: Oxford University Press, 2026), pp. 531–544; Samantha Besson and José Luis Martí, 'Republican Sovereignty', in Mortimer Sellers and Frank Lovett (eds.), *The Oxford Handbook of Republicanism* (Oxford: Oxford University Press, 2026) (online edition, Oxford Academic, 23 January 2024, https://doi.org/10.1093/oxfordhb/9780197754115.013.35, last accessed 16 January 2026).

[10] See Besson, 'Democratic Representation within International Organizations', fn. 9; Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9.

[11] See Besson, 'Democratic Representation within International Organizations', fn. 9; Besson, 'L'égalité des États membres de l'Union européenne', fn. 1; Besson, 'Pour une représentation démocratique multiple au sein de l'Organisation mondiale de la Santé', fn. 9; Besson, 'The Politics of Regional International Organizations', fn. 9.

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issue of the democratic representation *of* IOs, that is, the democratic representativeness of the organs representing IOs for the latter to represent their Member States' peoples and other publics democratically. This includes very important questions, however, such as the required content of the minimal public organization law of IOs[12] and the separation of powers within IOs.[13]

Our claim in this chapter is that the protection of self-government and popular sovereignty against domination by IOs requires the public re-institution of IOs in international law so that they can represent the peoples of the world, and not only their Member States, and so that they can do so democratically, and not only instrumentally. More specifically, the chapter calls for a reform of the current international law of representation by IOs, including of its functional-democratic ambivalence for more input legitimacy, on the one hand, and of the private law analogies behind its agency-based and incorporation-based approaches to representation for more public legitimacy, on the other. Thereby, the chapter also contributes to current debates in democratic representation theory.[14] It is our claim indeed that international law and its complex institutional framework provide a unique opportunity to bring the twin instituting and authorizing dimensions of democratic representation back together again and make their necessary complementarity more visible domestically as well. This could help countering what some critiques have referred to as the contemporary reduction and 'flattening' of the tridimensional relation of political representation into a purely bidimensional and mirroring one between the represented people and their representatives.[15]

[12] See Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations', in Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann and Matthias Goldmann (eds.), *The Exercise of Public Authority by International Institutions: Advancing International Institutions Law* (Heidelberg: Springer, 2010), pp. 777–806; Besson, 'Democratic Representation within International Organizations', fn. 9.

[13] See Joana Mendes and Ingo Venzke (eds.), *Allocating Authority: Who Should Do What in European and International Law?* (Oxford: Hart, 2018); Miriam Cullen, 'Separation of Powers in the United Nations System? Institutional Structure and the Rule of Law' (2020) 17(3) *International Organizations Law Review* 492–530.

[14] For those critiques, see Nadia Urbinati, 'Representative Democracy and its Critics', in Sonia Alonso, John Keane and Wolfgang Merkel (eds.), *The Future of Representative Democracy* (Cambridge: Cambridge University Press, 2011), pp. 23–49; Sofia Näsström, 'Where is the Representative Turn Going?' (2011) 10(4) *European Journal of Political Theory* 501–510.

[15] See Pierre Musso, *Le temps de l'État-Entreprise: Berlusconi, Trump, Macron* (Paris: Fayard, 2019), pp. 133–137; Samantha Besson, *Reconstructing the International Institutional Order* (Paris: OpenEdition Books/Collège de France, 2021), para. 53.

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The structure of this chapter's argument is three-pronged. The first section sets the *conceptual* framework for the argument by presenting what is meant by international 'democratic legitimacy' and 'representation' in the chapter (Section 12.2). The second section specifies the *subjects* of democratic representation by IOs. It argues against an approach, now common both in international democratic theory and in the international law of IOs, that considers States to be the subjects of international representation as opposed to peoples, and States' peoples only as opposed to the multiple publics those peoples, but also others, are re-instituted into by different public institutions now involved in international lawmaking (Section 12.3). In the third and final section, the chapter turns to the *relation* of democratic representation by IOs. It criticizes three existing accounts of that relation for their lack of democratic legitimacy: functionalism, incorporation, and agency (Section 12.4).

Before we start, it is important to clarify what is meant by 'international organizations' in the chapter. Of course, specifying that notion raises a well-known difficulty to the extent that there are as many legal statuses of IOs[16] in international law as there are IOs. We consider that the corresponding categorical malaise[17] actually reflects the very 'institutional' problem with IOs this chapter purports to address, and especially the issue of their democratic representativeness.[18] Indeed, it is the proposed argument's premise that no complete conceptual clarification of the institutions referred to as IOs may be provided outside of a legal and hence normative argument about what kind of public institutions they should be and, more specifically, about how they should relate to the peoples whose legitimate law they claim to adopt. It is indeed the point of IOs *qua* institutions to be instituted, ordered, or literally 'organized' in a specific way.[19]

To the extent, however, that a preliminary clarification is required as to the identity of the IOs whose democratic legitimacy is at stake here, two delineations may be drawn. First, the chapter uses the term IO to refer to a legal understanding of IO with independent *legal personality*. Accordingly, it does

[16] See Laurence Dubin and Marie-Clotilde Runavot, 'Propos introductifs', in Laurence Dubin and Marie-Clotilde Runavot (eds.), *Le phénomène institutionnel international dans tous ses états: Transformation, déformation ou reformation?* (Paris: Pedone, 2014), pp. 5–17.

[17] See Angelo Golia and Anne Peters, 'The Concept of International Organizations', in Jan Klabbers (ed.), *Cambridge Companion to International Organizations Law* (Cambridge: Cambridge University Press, 2022), pp. 25–49.

[18] See Besson, *Reconstructing the International Institutional Order*, fn. 15, paras. 75–80.

[19] See Besson, 'The Politics of Regional International Organizations', fn. 9; Besson, 'We the Peoples of the United Nations', fn. 9.

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not examine forms of international institutional cooperation with no organizational independence, such as networks or mere conferences. The latter cannot adopt (binding) international law on their own. Within this first subset of IOs, second, this chapter concentrates on organizations whose members are States, that is, on so-called *public*, 'interstate', or 'intergovernmental' organizations. This excludes purely private organizations or hybrid and public-private ones even when they are active internationally. The chapter draws no further distinctions between the IOs just identified, including by reference to their scope, size, resources, or area of specialization, even when they present themselves as 'technical' and not 'political' as a result. Democratic legitimacy should be expected of all of them when they claim to adopt international law and engage politically therefore. Of course, the institutional design of international representation depends largely on context and there can be no 'one (institutional) design fits all'. The scope of this chapter precludes, however, addressing the institutional reform of each IO in detail.[20]

Methodologically, what this chapter proposes is an argument in normative international legal theory: it puts forward an interpretation of international law and institutions, and in this case IOs and their international law, that best fits and justifies their practice. More specifically, it defends a democratic interpretation of that practice. Although the proposed democratic approach to international law relies at least in part on some ideal understanding of democracy, the argument is primarily an exercise in non-ideal normative political theory: it reacts to deficits in political legitimacy in the international legal and institutional order, and especially in democratic representation, by making non-ideal reform proposals. It is to be expected therefore that some of its proposals may suffer from legitimacy deficits of their own.

12.2 THE CONCEPT OF DEMOCRATIC REPRESENTATION BY INTERNATIONAL ORGANIZATIONS

This first section sets the conceptual framework for the chapter's argument by presenting what it means by 'democratic legitimacy' (Section 12.2.1) and 'representation' (Section 12.2.2) in international law and institutions.

[20] Besson and Martí, 'The Legitimate Actors', fn. 9, at 538. On the WHO, see Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9; Besson, 'Pour une représentation démocratique multiple au sein de l'Organisation mondiale de la Santé', fn. 9. For an ILO/WHO comparison, see Besson, 'We the Peoples of the United Nations', fn. 9.

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12.2.1 *International Democratic Legitimacy*

The representation of peoples[21] by IOs is a question of *political legitimacy*. By political legitimacy, we mean a form of legitimacy that is not descriptive or subjective and cannot be reduced to popular acceptability, but is *normative* or objective.

More specifically, it is a form of normative *procedural* legitimacy we are concerned about. It focuses on the procedural aspects of lawmaking and should therefore be distinguished from more substantive forms of normative political legitimacy, such as justice. This brings us to another well-known distinction in the realm of political legitimacy: the distinction between input and output legitimacy. Theories of input legitimacy claim that the normative legitimacy of law derives from a combination of prior facts considered as 'inputs' into the lawmaking process. By contrast, output legitimacy refers to the substantive merits of international legal norms, be it their substantive justice or efficiency or both and therefore focuses on the 'outputs' of the lawmaking process. With its focus on procedural normative legitimacy,[22] this chapter sides, even if it objects to the terminology and to the distinction itself between output and input, with *input* accounts of political legitimacy.

This chapter understands political legitimacy, in quite a standard way, to refer to the normative questions of who has the right to rule (or the right to adopt legal norms or participate in the adoption of such norms) and how such a right to rule should be exerted in order to generate obligations for those subject to such rule.[23] Under this standard account, these questions have usually been given a democratic response, and it is the case in this chapter as well. Only democratic political systems, in very broad terms and perhaps with a few exceptions, are regarded as legitimate, while authoritarian or mixed regimes are considered illegitimate. This means, still broadly speaking, that

[21] In this chapter (see Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9), we understand a 'people' as a political community or citizenry and, more specifically, as a 'public', i.e. an instituted people, by opposition to a 'nation' or 'society' or any community allegedly pre-existing its institution, on the one hand, but also by opposition to the 'civil society' that may organize itself alongside its public institution, on the other. This covers the peoples or publics of States, as much as those of infranational, international, or supranational public institutions that re-institute the same peoples into multiple different publics. This conception of 'people' explains why there cannot be, as of yet, talk of a single global people or public for lack of a global institution of global law, a global law and institution one may argue would not be normatively desirable in any case.

[22] Both dimensions of normative legitimacy need not be entirely disconnected, however, as exemplified by the requirement of human rights protection in the account of democratic legitimacy proposed later in this section.

[23] See Besson and Martí, 'The Legitimate Actors', fn. 9, at 508–509.

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lawmaking should ultimately be able to be attributed to the people subject to the law,[24] with some additional democratic requirements we will revert to below.

Input legitimacy in general, and democratic legitimacy in particular, as they are understood here, are regarded as the standard way of legitimizing domestic law and institutions. On the international plane, however, discussions have taken a somehow different turn. In the last few decades, indeed, many authors have assumed that democratic principles cannot apply to international lawmaking processes. This has brought them to endorse output legitimacy as an alternative way to provide a normative justification of international law.[25]

This exclusive focus on the output legitimacy of international law and institutions is problematic. There is no doubt that the substantive quality of international law is a matter of utmost importance, including for its normative justification. The main problem with output legitimacy, however, is that it identifies legitimacy entirely with either justice or efficiency. By doing so, it can no longer address the distinctive and important normative question of who should rule and how. When the sole focus of legitimacy is on output, indeed, the only way to address that question becomes instrumental. If the unique goal is to maximize the probability of adopting good (e.g. just or efficient) laws, the answer can only be that such laws should be adopted by those with the most capacity to do so. Important as this consideration might be in deciding who should have representative power to make public decisions in the first place, it does not resolve the problem of whom those representatives should be accountable to and hence of whom they should represent.

As a matter of fact, considerations of output legitimacy do not exhaust our concerns about the legitimacy of law and institutions domestically. Whatever should be the exact balance between expertocracy and democracy in any particular context, indeed, our concerns about normative legitimacy at the domestic level are never exhausted by considerations of output legitimacy. The reason is that our concerns about input legitimacy are considered as self-standing and not only instrumental to output. Given the identity of the ultimate individual subjects to the authority of both domestic and international law, that is, the same peoples albeit re-instituted in different publics,

[24] The scope of the chapter precludes exploring the close ties between democratic legitimacy and representation and especially how representation has nowadays become constitutive of democratic legitimacy, but also how it is constrained by the latter. See on that mutually constitutive relationship, Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: Chicago University Press, 2006), pp. 4–6, 17–20.

[25] See Fritz Scharpf, *Governing Europe: Effective and Democratic?* (Oxford: Oxford University Press, 1999).

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those considerations about the self-standing importance of input legitimacy should also apply to the political legitimacy of international law.[26]

In this chapter, we propose that the democratic legitimacy of any lawmaking institution should be assessed by reference to four basic, scalar abstract principles common to most accounts of democracy.[27] First of all, the principle of *ultimate, effective popular control*. It derives directly from the ideal of self-government or popular sovereignty: all peoples subjected to law should have a relevant say in the process of making that law. They may, of course, confer that power to representatives. The peoples should, however, retain ultimate, effective control over their representatives (who may otherwise only claim to be such) and, through them, over institutions and decision-making processes in order to make self-government possible. Second, the principle of *political equality*. The people represented should have an equal say, directly or through their representatives, in holding that ultimate power of control. That means that no citizen or group of citizens should be able to impose their views unilaterally or have significantly greater political power to determine the law than others. Third, the principle of *deliberative contestability*. The peoples – or their representatives – should be able to contest, through deliberation, all the laws and decisions made. They should also have the capacity to engage in deliberative interaction with each other, thus promoting public (formal and informal) debate. Fourth, the principle of *human rights' protection*. Individuals' human rights that are constitutive of their basic moral equality and enable them to exercise ultimate control should also be protected in lawmaking processes and institutions in order for the latter to be democratically legitimate.

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

[26] The continuity between domestic and international democracy, including democratic representation, is actually required by international democracy law, and especially by international human rights law. See e.g. UN General Assembly (UNGA), 'Letter dated 17 December 1996 from the Secretary-General addressed to the President of the General Assembly' (20 December 1996), A/51/761, paras. 67–70, 72–73; UN Human Rights Committee (HRC), 'CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs and the Right of Equal Access to Public Service' (12 July 1996), CCPR/C/21/Rev.1/Add.7, para. 5; UNGA Res. 75/178 (16 December 2020) paras. 6(g), 6(h), 6(i). See also Nahuel Maisley, 'The International Right of Rights? Article 25(a) of the ICCPR as a Human Right to Take Part in International Law-Making' (2017) 28(1) *European Journal of International Law* 89–113; Hilary Charlesworth, 'International Legal Encounters with Democracy' (2017) 8(S6) *Global Policy* 34–43.

[27] See Besson and Martí, 'The Legitimate Actors', fn. 9, at 510–511.

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The first democratic principle is quite clear in this respect, and it is the one which we will pay attention to in this chapter.[28] Given that the peoples of the world cannot rule directly at the international level – in fact, they cannot do so at the domestic level either – they should confer their power to rule to representative institutions and to those institutions' organs. This turns the question of the democratic legitimacy of international law into one of democratic representation. Accordingly, the assessment of the democratic legitimacy of institutions of international lawmaking crucially depends on whether those institutions, and IOs in particular, can be said to have been conferred their powers by the peoples subjected to the decisions to be made (the so-called 'authorization') and, even more importantly, on whether the peoples may access effective mechanisms of ultimate control over their representatives and over the decision-making system as a whole (the so-called 'control').

It is important to emphasize that representation would be required even if direct popular participation were feasible internationally: not only does democratic participation require the primary institution of the people as such and hence a form of representation of that people in the first place, but representation is also required to guarantee political equality and to organize equal participation and deliberation all along. Contrary to what one often reads, therefore, the relationship between the concepts of democracy and representation is not instrumental and contingent, but intrinsic and constitutive.[29] This is an important point because various forms of compensatory participation and deliberation are often put forward precisely in lieu of international representation that is held too difficult to organize by many authors[30] – usually, moreover, because it is also wrongly identified with and reduced to electoral representation. What those authors do not understand, however, is that representation and participation are in a mutual and constant relationship to the extent that the represented should also be able to participate in representative lawmaking processes and deliberate continuously with their representatives and vice-versa for the latter to represent them.[31]

[28] On the others and especially political equality, see Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9; Besson, 'L'égalité des États membres de l'Union européenne', fn. 1.

[29] See Urbinati, *Representative Democracy*, fn. 24, pp. 4–6, 7–20; Ernst-Wolfgang Böckenförde, 'Demokratie und Repräsentation: Zur Kritik der heutigen Demokratiediskussion', in Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft und Freiheit. Studien zur Staatslehre, Verfassungstheorie und Verfassungsgeschichte* (Frankfurt: Suhrkamp Verlag, 1991), paras. 10–28.

[30] See e.g. Ian Johnstone, 'Deliberation', in Klabbers, fn. 17, pp. 173–198, p. 176; Dingwerth and Nanz, fn. 7, p. 1127; Peters, fn. 7, pp. 51–52.

[31] See Urbinati, *Representative Democracy*, fn. 24, p. 3.

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In our traditional (modern) understanding of representative democracy, at least when applied to domestic lawmaking, these four principles have required the existence of a parliament with fundamental lawmaking powers whose members are elected democratically, a directly or indirectly elected executive and an independent and self-standing judiciary, among other democratic institutions. Nothing like this, of course, exists (yet) at the international level, including in most IOs. This is even the case in the European Union (EU) where the directly elected parliamentary organ of the EU holds neither the lawmaking initiative nor the legislative monopoly and does not elect either of the two executive organs of the EU. To that extent, the proposed conception of the democratic legitimacy of IOs cannot be that of a worldwide or global democratic State with a single global people or instituted public represented by various directly or indirectly elected officials organized in parliamentary, executive, and judicial authorities.[32] As a result, whether or not one considers that such a cosmopolitan and monist account of international democratic representation is justifiable under ideal circumstances, it is clearly far from being possible in present, deeply pluralist, real conditions. Importantly, however, this does not imply that the principles of democratic legitimacy cannot be respected through other institutional configurations. Those principles albeit developed for States are actually general enough to adapt to the international institutional context.

Before turning, in the next sections, to the crucial two questions of whom IOs should 'democratically' represent and how, it is important to briefly specify what democratic 'representation' amounts to more specifically.

12.2.2 *International Democratic Representation*

The conceptions of political and especially democratic representation we use today are very recent: they are modern, even if earlier traces may be found, of course.[33] The origin of these modern conceptions, however, is medieval. They arose from numerous theological and legal permutations that took place in Europe from the twelfth century onwards.

[32] See e.g. Robert A. Dahl, 'Can International Organizations Be Democratic? A Skeptic's View', in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges* (Cambridge: Cambridge University Press, 1999), pp. 19–36; Mathias Koenig-Archibugi, 'International Organizations and Democracy: An Assessment', in Luis Cabrera (ed.), *Institutional Cosmopolitanism* (Oxford: Oxford University Press, 2018), pp. 154–186.

[33] See Samuel Hayat, Corinne Péneau and Yves Sintomer, 'Introduction', in Samuel Hayat, Corinne Péneau and Yves Sintomer (eds.), *La représentation avant le gouvernement représentatif* (Rennes: Presses Universitaires de Rennes, 2020), pp. 7–28, pp. 7–8.

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These so-called 'political-legal' conceptions of representation originated in the reception of Roman private law and constitute the core of the medieval *jus commune* of representation.[34] In short, they developed on the basis of two conceptions of representation elaborated by lawyers, first in canon law and then in civil law, especially in the Germanic and Italian traditions thereof.

The first conception of representation relies on the notion of corporation or legal person such as a city or the Church (and the *pars pro toto* representation *by* this incorporated or legal person and, by extension, the representation *of* this legal person by a particular physical person therein, that is, its 'head' – *caput* – or 'organ'). The most famous discussion thereof was that of Marsilius of Padua in the thirteenth century.[35] We speak here of 'personal representation' or 'incorporation-based representation' because the representative acts 'as' or 'like' the represented: it stands as them (*stand as* representation). The second medieval conception of representation is that of the mandate or legal delegation (and the principal-agent relation) developed in particular by Bartolus of Saxoferrato in the fourteenth century.[36] We speak here of 'conventional representation' or 'agency-based representation' because the representative acts 'for' the represented: it acts in their place (*act for* representation).

With the advent of modernity, this medieval private law of representation gave rise, in domestic law, to the public law of political representation. The latter still bears the traces of the former's two conceptions of representation, however.[37] The first conception of incorporation-based representation gave rise, in the seventeenth century, to the political notion of the person of the State and its sovereign, and then of the sovereign State itself and its organs. The second conception, that of agency-based or delegation-based representation, gave rise to the democratic notion of the electoral and, more generally, to the political 'mandate' of the representative from the nineteenth century onwards. As we will explain in Section 12.4, the international law of representation actually bears the traces of the medieval private law of representation even more directly than domestic law.

A common feature of the various contemporary conceptions of democratic representation that ensued from this modern understanding is the idea that representatives should take into account and promote the interests of the

[34] See Yves Sintomer, 'Le sens de la représentation politique: Usages et mésusages du débat contemporain' (2013) 50 *Raisons politiques* 13–34; Hasso Hofmann, *Repräsentation: Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert*, 4th ed. (Berlin: Duncker & Humblot, 2003).

[35] See Alessandro Mulieri, 'La représentation-incarnation chez Marsile de Padoue' (2018) 72 *Raisons Politiques* 71–88.

[36] See Sintomer, fn. 34, at 20.

[37] Ibid.

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represented. This is clearly the case of contemporary agency-based conceptions in which the agent should act not only in the name of the represented ('as' them), but also to their benefit ('for' them).[38] However, it is also true of the so-called 'symbolic' and 'descriptive' conceptions of representation according to which the representative relationship depends on other, constitutive features that are related to the protection of their interests.[39] It even applies to the so-called 'constructive' or 'claim' conceptions of representation, according to which the only definitional requirement of representation is that an agent claims to represent another one in terms that might prove acceptable through a constructive process of the represented's interests and this, whether the latter have authorized and controlled those terms or not.[40]

To revert to our earlier discussion of input and output legitimacy, the fact that representatives should take into account and promote the interests of the represented in most contemporary accounts of democratic representation[41] does not, however, imply that the corresponding notion of political legitimacy is necessarily a substantive one and based on output only. Nor does it imply that input legitimacy should only be understood in instrumental terms. Many modern views of political representation, starting with Thomas Hobbes',[42] have indeed made the latter dependent on formal acts of authorization, whether ex ante or ex post. This is the case, for instance, of the so-called 'trustee' and 'delegate' models of representation.[43] In both cases, representatives act for the represented on the basis of some kind of authorization. They differ, however, in the degree of autonomy that representatives should enjoy in

[38] See e.g. Bernard Manin, *The Principles of Representative Government* (Cambridge: Cambridge University Press, 1997).

[39] See e.g. Jane Mansbridge, 'A Deliberative Theory of Interest Representation', in Mark P. Petracca (ed.), *The Politics of Interests*, 2nd ed. (New York: Routledge, 2018), pp. 32–57; Sintomer, fn. 34.

[40] See e.g. Michael Saward, *The Representative Claim* (Oxford: Oxford University Press, 2010); Jonathan W. Kuyper, 'Systemic Representation: Democracy, Deliberation, and Nonelectoral Representatives' (2016) 110(2) *American Political Science Review* 308–324.

[41] In any case, democratic representation does not, strictly speaking, have 'objects' to represent, but 'subjects'. The fact is, of course, that not all dimensions of the represented subject can always be represented, hence the common reference to an object to represent. In the history of democratic representation, these objects have been very varied: they have ranged from will, interests, and preferences to judgement. It is the latter, however, that seems the most relevant to the authorized and then controlled activity of representation. Representation is indeed a matter of authorizing and controlling political decision-making on what is the right thing to do and, in the case of lawmaking, of justifying the authority of law, and this implies an exercise of judgement.

[42] See Quentin Skinner, 'Hobbes on Representation' (2005) 13(2) *European Journal of Philosophy* 155–184, at 167.

[43] For a discussion, see Urbinati, *Representative Democracy*, fn. 24, pp. 30–35.

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order to effectively represent the represented. While the delegate model claims that representatives should operate under the tight terms of an explicit act of delegation or mandate, the trustee model relies on the representative's relative independence in order to best protect the interests of the represented.

Accordingly, and regardless of how those debates have evolved domestically and without entering into those details here, there are two conditions which political representation should comply with in order to be regarded as democratically legitimate, and which are of utmost importance to the institutional organization of international representation as well.

The first one derives from the principle of ultimate, effective popular control. Representatives should be *authorized* by the people they are meant to represent, and should also be ultimately and effectively *controlled* by those people.[44] Independently of the degree of autonomy representatives might be granted, the represented should always possess effective mechanisms to hold the representatives accountable and retain ultimate control over their actions. Periodic elections with electoral mandate have proven to be a relatively successful institutional mechanism to do so. However, they are neither a necessary nor a sufficient condition of democratic legitimacy. Indeed, elections do not necessarily guarantee ultimate, effective control by the people in domestic democratic systems. Moreover, there might be other mechanisms that could complement or even replace elections as instruments of ultimate, effective popular control. Many modern conceptions of representation have been excessively dependent on electoral accountability by making it a conceptual requirement of democratic legitimacy.[45] As a result, in contexts where such electoral control does not yet or simply cannot exist or is difficult to organize, as it is on the international plane, this has brought many to give up on democratic representation or, by extension, on democratic legitimacy altogether, as mentioned before.

The second condition is a consequence of the first one and is even more crucial to international representation than it is domestically. Democratic representation inherently possesses an *instituting* dimension. This has often been overlooked at the domestic level because the institutional framework of the State is long-lasting and usually taken for granted when organizing democratic representation. Political representation can only occur through law and institutions. It follows that democratic representatives should operate in institutional and legal frameworks and should be instituted themselves as such by

[44] See Jane Mansbridge, 'Clarifying the Concept of Representation' (2011) 105(3) *American Political Science Review* 621–630, at 624.

[45] For this critique, see Urbinati, *Representative Democracy*, fn. 24, pp. 1–3.

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those legal frameworks. To revert to a point made before, the way in which representatives are instituted and hence constructed is actually a mutual constructive process that also includes the institutional construction of the represented themselves as a people or a public in return.[46] Importantly, therefore, and even though there is something that has long been identified as paradoxical about it,[47] that process should also fall under the principle of ultimate, effective control and be adequately institutionalized. This is actually why the instituting dimension of democratic representation should not be separated from the authorizing one, and vice-versa.[48] This is another reason why participation and representation should always go hand in hand, as argued before.

To recapitulate, then, this chapter approaches democratic representation as a relation that institutes, authorizes, and holds power accountable under the ultimate control of the people and thereby contributes to the justification of political authority, including of lawmaking authority. It gives the representative a claim to act as and for the represented, leading to the attribution of those acts to the represented if the conditions of authorization and control are fulfilled.

12.3 THE SUBJECTS OF DEMOCRATIC REPRESENTATION BY INTERNATIONAL ORGANIZATIONS: FROM STATES TO MULTIPLE PUBLICS

As mentioned in the introduction, a prevalent understanding in international law is that IOs should represent the States that have organized them.[49] IOs are construed as inter-institutional systems that include other institutions as 'members', that is, States, and whose organs are mostly interstate, at least their plenary interstate organs in charge of lawmaking and their non-plenary interstate organs in charge of implementation and operations. This is sometimes under the assumption or, more rarely, under the condition that those States themselves adequately represent their peoples.

[46] Ibid., pp. 2–4.

[47] See Manuela Albertone and Michel Troper, 'Penser la représentation: Une introduction', in Manuela Albertone and Michel Troper (eds.), *La représentation politique. Anthologie* (Paris: Classiques Garnier, 2021), pp. 7–32, pp. 18, 23.

[48] See also Urbinati, *Representative Democracy*, fn. 24, pp. 23–25.

[49] See e.g. Laurence Dubin and Marie-Clotilde Runavot, 'Représentativité, efficacité, légitimité: Des organisations internationales en crise?', in Évelyne Lagrange and Jean-Marc Sorel (eds.), *Droit des organisations internationales* (Paris: LGDJ, 2013), pp. 77–103, pp. 89–93; Stephen Mathias and Stadler Trengove, 'Membership and Representation', in Cogan *et al.*, fn. 7, pp. 962–984, pp. 974–976.

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In previous publications, we have identified some weaknesses in this view and several deficits in the international democratic representation of peoples by their States. Given these democratic deficits of State-based representation of peoples *in* IOs, we have explored various ways to enhance the representation of those peoples *through* IOs and especially through IO law, in order to improve the democratic representation by States themselves inside IO organs, but also the compensatory democratic representation by other public institutions such as cities or regions or even by private organizations such as non-governmental organizations involved in IO lawmaking processes.[50] In this section, we summarize those arguments before bringing them one step further and explaining how that representation should also be ensured directly *by* IOs themselves.

This may be done, we would like to argue, by changing the current understanding of the subjects of international democratic representation in at least two ways: first, by focusing on *peoples* instead of their States in the representation by IOs and, second, by recognizing the importance of representing *multiple other publics* besides States' peoples. Not only is such multiple representation already partly at work de facto in the non-ideal world of IOs, with all the inegalitarian shortcomings that flow from those various forms of participation growing outside of any international legal status of those different publics. We also submit that it should be articulated further as a system of 'multi-public' representation and ordered de jure as such in future reforms of those IOs.

Our argument is two-pronged and based, first, on the insufficiency of States as democratic international representatives of their peoples and, second, on the democratic virtues of the multiple representation of the same peoples albeit as multiple publics instituted and represented by many different public institutions besides States.

First of all, it is important to start by explaining why State-based representation of *States' peoples* in IOs cannot be regarded as sufficient and why those peoples should be represented directly *by* IOs as well.

At first sight, of course, one may consider that the subjects democratically represented by States *in* IOs and those who should be represented *by* IOs are in fact the same: States' peoples. The representation of States by IOs therefore seemingly equates that of those States' peoples. In practice, however, States are far from being perfect democratic representatives of the peoples they institute as publics. More specifically, the interests of representative organs within those States, such as governments or parliaments, and especially those of the

[50] See the references in fn. 10.

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elected or non-elected officials holding those representative positions might differ from the interests of the people they claim to represent.[51]

Of course, as we argued elsewhere,[52] in the non-ideal circumstances that currently prevail, States should still be considered as the most effective institutions to ensure the democratic representation of the peoples of the world, and especially the ultimate, effective popular control of those peoples over international lawmaking processes and institutions and their political equality. As such, they should play a primary role in the democratic representation of their peoples in their IOs' organs, be it in internal or external international lawmaking procedures. And, doing so, they can significantly contribute to those IOs' democratic representativeness.

Because of their many democratic deficits, however, we also argued that States should not be considered as the exclusive international representatives of their peoples *in* IOs.[53] The most obvious of those deficits is that many States are not democratic. As a result, the officials representing those States in IOs cannot be said to legitimately represent their peoples. In addition, even in democratic States, existing domestic mechanisms of ultimate, effective popular control over the external policy of States might prove to be insufficient for their peoples to control their international decisions. Indeed, international issues are usually less salient in domestic electoral politics, and other non-electoral mechanisms of popular authorization and control of State officials active internationally, especially over governments and diplomats, are usually absent. Finally, even when State officials are effectively accountable domestically for their international decisions, there might still be important democratic concerns with respect to the representation of stateless peoples (e.g. refugees) or even of certain peoples within States (e.g. indigenous peoples or regional minorities).

Importantly, as we also argued,[54] there are other institutions that might help both correct those deficits in the State-based democratic representation of peoples in IOs and complement their representation in those IOs. This is the case of other public institutions, such as regions or cities, but also of private

[51] See Besson, 'The Authority of International Law', fn. 2, at 361–362; Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22(2) *European Journal of International Law* 315–343, at 329–330.

[52] See Besson and Martí, 'The Legitimate Actors', fn. 9; Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9.

[53] See Besson and Martí, 'The Legitimate Actors', fn. 9; Besson, 'Democratic Representation within International Organizations', fn. 9; Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9.

[54] See Besson and Martí, 'The Legitimate Actors', fn. 9; Besson and Martí, 'Cities as Democratic Representatives in International Law', fn. 9; Besson, 'Democratic Representation within International Organizations', fn. 9.

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organizations, such as non-governmental organizations, transnational corporations, religious organizations or trade unions that are increasingly involved, in various participatory or deliberative capacities, in IOs' lawmaking processes. This is what we have referred to as democratic representation *through* IOs. As orchestrators of 'multiple international systems of representation' and of what one of us has coined 'multipartism' in IOs,[55] IOs can indeed contribute to enhance the democratic representation of the otherwise underrepresented peoples of their Member States. This can occur through reinforced requirements, in IO law, of democratic representativeness not only on the part of Member States' representatives, but also of those of all the other public institutions and private organizations involved.

The fact is, however, that none of these other public institutions or private organizations is free from deficits as democratic representatives. Not the least because most of them still lack a complete institutionalization under current public international law.[56] In addition, many of them, especially the private ones, also lack mechanisms of ultimate, effective popular control. This is why the creation of further mechanisms of ultimate, effective popular control *over* IOs themselves as democratic representatives and over their systems of multiple international representation should be a priority. For IOs to be able to claim to legitimately represent their Member States' peoples, they should themselves be organized so as to comply with the four principles of democratic legitimacy presented in Section 12.2.

Apart from this first argument for the direct democratic representation of States' peoples by IOs, however, there is also a second argument in favour of the representation of the same peoples *qua other publics* by IOs alongside States' publics.

As we argued elsewhere,[57] indeed, the same peoples may be instituted and re-instituted in different publics in a multiplicity of ways, and thus may be represented by multiple public institutions including infranational ones such as cities, regions, or indigenous peoples, but also by international ones like IOs. One of the advantages of approaching the issue through the proposed idea of multiple representation is that it breaks with the assumption that the only

[55] See Besson 'Pour une représentation démocratique multiple au sein de l'Organisation mondiale de la Santé', fn. 9; Besson, 'We the Peoples of the United Nations', fn. 9.

[56] See Besson, *Reconstructing the International Institutional Order*, fn. 15, paras. 81–82.

[57] See Besson and Martí, 'The Legitimate Actors', fn. 9; Besson, 'Democratic Representation within International Organizations', fn. 9; Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9; Besson, 'The Politics of Regional International Organizations', fn. 9. On the multi-public instituent powers of IOs, see also Besson, 'We the Peoples of the United Nations', fn. 9.

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instituted peoples or public to be represented in, through, and by IOs are States' peoples or publics.

Of course, approaching democratic representation in IOs as multiple might have a cost in terms of political equality, and hence of democratic legitimacy.[58] This could be the case, for instance, when some peoples are re-instituted many times by different public institutions and represented by them in IOs, such as by States and cities, while others, such as those living in rural regions, are not or at least without the corresponding inclusion of their second tier of institutions internationally. The representation of the same peoples as many publics by both States and cities in IOs in this case may lead to over-represent part of those peoples and underrepresent another.[59]

This is why we argued against a radically pluralistic approach to multiple international representation and for a systemic or ordered approach instead.[60] What we have advocated is that IOs should re-organize their internal processes and bodies in order to allow multiple public and private representatives to participate in their lawmaking processes, but should do so in a systemic way so as to take into account their respective shortcomings as legitimate representatives.[61] They should also aim at minimizing potential conflicts among representatives and at maximizing the overall representativeness of each of them, calling for constant adjustments and contextualization. This systemic balance, among other considerations, should generally give priority to public institutions over private organizations. However, no representative public institution, including States, may legitimately claim to democratically represent a people at the exclusion of others.

Even if such a system or ordering of multiple international representation in and through IOs were to be organized, the fact remains that all peoples and the re-instituted publics in the world also have a claim to be adequately represented by the different IOs' multiple international systems themselves. To that extent, IOs' democratic representativeness matters in itself. For this to be the

[58] The same objection has been raised with respect to popular sovereign equality for the latter has been wrongly reduced to States' (peoples') sovereign equality. For a full egalitarian and hence democratic argument in favour of multiple sovereignty, see Besson and Martí, 'Republican Sovereignty', fn. 9; Besson, 'The Politics of Regional International Organizations', fn. 9.

[59] See Besson and Martí, 'Cities as Democratic Representatives in International Law-Making', fn. 9, p. 351. On multiple representation in the WHO and the ILO, see also Besson, 'We the Peoples of the United Nations', fn. 9.

[60] On representative systems in general, see Felipe Rey, 'The Representative System' (2023) 26(6) *Critical Review of International Social and Political Philosophy* 831–854.

[61] See Besson, 'Democratic Representation within International Organizations', fn. 9; Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9.

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case, the ultimate, effective popular control by those peoples and their multiple publics over IOs should be secured.

12.4 THE RELATION OF DEMOCRATIC REPRESENTATION BY INTERNATIONAL ORGANIZATIONS: BEYOND FUNCTIONALISM, INCORPORATION, AND AGENCY

Besides its exclusive focus on States as the sole subjects of representation instead of States' peoples and multiple other publics, the international law of IOs may also be criticized for the way it contributes to the organization of the relation of representation by IOs. Indeed, it does so in functionalist as opposed to political terms (Section 12.4.1) and relies on private law models of representation by incorporation and/or by agency instead of public law ones (Section 12.4.2).

In this section, those two approaches to the relation of representation are assessed by reference to the democratic principles identified earlier: the functionalist approach to the legitimacy of IOs is criticized because it does not allow for input legitimacy, and the incorporation-based and agency-based approaches are qualified because they do not address IOs, nor their Member States as a matter of fact, as public institutions. Generally, what those approaches to the representation by IOs elude is the primary institutional role of representation by IOs in re-instituting their various Member States' peoples before those IOs' representative organs can even be authorized to represent them. Hence this chapter's title "No International Democratic Representation without Institution".

12.4.1 *Against Functional Representation by International Organizations: Input Matters*

To date, representation in the international law of IOs has been approached mostly as a form of instrumental representation of States' functions and framed as providing IOs with output legitimacy. To that extent, the legitimacy of IOs and the representation by IOs may be described as 'functional'.

Things are more complicated than that, however, and there is a certain ambivalence nowadays between functional and democratic legitimacy in IO law and hence between output and input legitimacy. One may distinguish two periods in this respect: a first one that goes from the foundation of the early IOs in the nineteenth century, and a second one that opens with the end of the Cold War.[62] While the second period has brought in a new emphasis on

[62] See von Bernstorff, 'New Responses to the Legitimacy Crisis of International Institutions', fn. 8, at 130–140; Besson, 'Democratic Representation within International Organizations', fn. 9.

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democratic input legitimacy, it has not succeeded in trumping functional output legitimacy entirely. As a result, both concerns coexist today in the international law of representation by IOs.

First period: the carelessness of *functional good governance*. When the first IOs were established in the late nineteenth century, they were to remain under the sovereign control of their Member States. Conceived from a functionalist perspective, IOs were simply to perform the 'functions' that their Member States had 'delegated' to them, as opposed to exercising the 'sovereign powers' those States could have 'conferred' to them.

In this context, expecting IOs to conform to the principles of democratic good government and represent their Member States' peoples would have been contradictory. Indeed, to the extent that States were to remain in charge of the sovereign 'government' of their peoples, IOs were not designed to 'govern' those peoples. According to that conception, if IOs were to be described as 'public', it was only so in a functional or instrumental way.[63] They could be considered public only insofar as they had been established to serve the 'public functions' of their Member States. As for their alleged 'public authority', it amounted at most to the exercise of a de facto authority. There was no claim that that authority was exercised on behalf of an instituted public that would have authorized its exercise, nor was it to be controlled by that public in return, a public that could not therefore be considered as the 'author' of IO law.

Clearly, then, and despite many rhetorical preambles (such as the United Nations (UN) Charter's reference to 'We the peoples of the United Nations'), IOs have not yet been organized or ordered by their Member States' peoples as political institutions representing them. Worse, many IOs have actually been organized by their States to remain 'apolitical'.[64] This explains why IO Member States did not initially consider it necessary to insert rules and principles of public law into the internal law of their IOs in order to organize the latter's good government, including their democratic representativeness.[65] For example, there was and still is no trace of a principle of separation of powers and even less of a democratic principle in most IOs but the EU.

[63] See Samantha Besson, 'The International Public: A Farewell to Functions in International Law' (2021) 115 *American Journal of International Law Unbound* 307–311. For an alternative argument, see Samantha Besson, 'In What Sense are International Organizations "Public"? A Plea for a Public International Law of Organisation' (2026) *Leiden Journal of International Law* in press; Samantha Besson, 'What can Public international Law do against Privatization?' (2024) 15:3 *Transnational Legal Theory* 341–369.

[64] See Louis and Maertens, fn. 5.

[65] See von Bernstorff, 'Procedures of Decision-Making and the Role of Law', fn. 12, pp. 781–783.

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No wonder then that the representation by IOs has mostly been organized so as to follow a functional approach to legitimacy by output: it should ensure the implementation of State functions and hence the protection of their Member States' interests. When it is exceptionally framed as input legitimacy, which is also sometimes the case, representation by IOs remains functional, however. It relies on the IO's organs' expertise, for instance, in implementing its Member States' functions and protecting their interests. The same applies to the representation of States or even of CSOs in IOs. The latter does not necessarily seek to represent the peoples of those States or the civil society organized through those CSOs. Their representativeness is measured by reference to certain characteristics of States or CSOs that may be of an instrumental purpose for the IO, such as the economic, military, or financial power of some of its Member States (usually a few of them)[66] and the expertise and financial resources of certain CSOs.[67]

This is problematic from a democratic legitimacy perspective that places emphasis on the distinct relevance of input legitimacy, as argued in Section 12.2.1. Even more so as the protection of the represented's interests through representation does not exclude the relevance of input legitimacy through authorization and control, as argued in Section 12.2.2. Important as it is to take into account the quality of output under such instrumental approaches to representation by IOs and to rely on experts within those IOs' organs when making law, securing ultimate, effective popular control over our representatives should also matter from a non-instrumental perspective of democratic legitimacy. Following Ernst-Wolfgang Böckenförde, one should consider democratic representation as a form of 'material' rather than merely 'formal' representation of pre-existing interests.[68] Representation enables the people(s) to specify, through their institutions' deliberation, what actually amounts to their public interest. One may argue therefore that the international 'public' and, by extension, its 'public interest' does not actually pre-exist international political representation.

Importantly, there was a turning point in the 1990s and a second period opened in the international law of IOs: the call for *democratic good*

[66] See Besson, 'Democratic Representation within International Organizations', fn. 9, at 495–498, 522. See also Cogan, Chapter 4 in this volume.

[67] See Besson, 'Democratic Representation within International Organizations', fn. 9, at 498–501. On the essentially functional representation by private organizations under the WHO's Framework of Engagement of Non-State Actors and especially its para. 4, see Besson, 'Pour une représentation démocratique multiple au sein de l'Organisation mondiale de la Santé', fn. 9.

[68] See Böckenförde, fn. 29, paras. 30–32.

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government. It was during that period indeed that many IOs became more autonomous in their international lawmaking procedures, subjecting States and, directly or indirectly, their peoples to their legal authority. Hence the growing need to justify that authority and hence to control their power in order to make it legitimate, including through democratic representation.

The end of the Cold War also corresponded to the rekindling of international democracy law, including in its application to the international institutional order.[69] The specific obligation of IO Member States to organize their IOs in a democratic manner may be grounded in the human right to democratic participation under Article 25(a) of the International Covenant on Civil and Political Rights.[70] Unfortunately, States are still deeply divided over the scope of application of those international democracy law obligations: Southern and Eastern States oppose its domestic application inside States and require more international democracy including in IOs, while Northern and Western States oppose its international application including inside IOs.[71]

Unsurprisingly, therefore, it is the new avatar of good government in domestic public law, that is, the public-private approach to 'good governance', that has been transposed to IOs.[72] This explains how the so-called process of 'constitutionalization' of IOs[73] has in fact largely turned into an exercise of technocratic 'rationalization'.[74]

What makes this current system of 'techno-democratic'[75] governance of IOs difficult to criticize, however, is that the appearances of democratic legitimacy have been saved. Terms are regularly borrowed from the lexicon of input

[69] See UNGA Res. 75/178, fn. 26, paras. 6(g), 6(h), 6(i).

[70] See Maisley, fn. 26, at 107–113.

[71] See Hilary Charlesworth, 'Democracy and International Law' (Volume 371) *Collected Courses of the Hague Academy of International Law*, 2015, pp. 43–152; Charlesworth, fn. 26.

[72] See e.g. Ayelet Berman, Tim Büthe, Martino Maggetti and Joost Pauwelyn, 'Introduction: Rethinking Stakeholder Participation in Global Governance', in Joost Pauwelyn, Martino Maggetti, Tim Büthe and Ayelet Berman (eds.), *Rethinking Participation in Global Governance: Voice and Influence after Stakeholder Reforms in Global Finance and Health* (Oxford: Oxford University Press, 2022), pp. 3–30.

[73] See Anne Peters, 'Dual Democracy', in Jan Klabbers, Anne Peters and Geir Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009), pp. 263–341; Anne Peters, 'Constitutional Theories of International Organisations: Beyond the West' (2021) 20(4) *Chinese Journal of International Law* 649–698.

[74] See von Bernstorff, 'Procedures of Decision-Making and the Role of Law', fn. 12, p. 797. For a similar concern, see Peter Niesen, 'Constituent Power in Global Constitutionalism', in Anthony F. Lang Jr. and Antje Wiener (eds.), *Handbook on Global Constitutionalism*, 2nd ed. (Cheltenham: Edward Elgar, 2023), pp. 318–330.

[75] For this term, see René-Jean Dupuy, 'L'organisation internationale et l'expression de la volonté générale' (1957) 59 *Revue générale de droit international public* 527–579, at 563.

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legitimacy, even if they are deprived of their original meaning. This is what Ayelet Berman has referred to as the 'false sense of legitimacy' of IOs.[76]

To be sure, 'participation' or 'inclusion' in IOs together with their 'accountability' are often emphasized in those proposals. However, and to start with the term 'participation', it is mostly used to refer to various types of partnerships with 'non-State actors' including those from the private sector, and not to the participation of citizens themselves.[77] It does not, moreover, and curiously, concern itself with the representativeness of those so-called 'participants'. Those non-State actors such as CSOs cannot indeed claim to participate in and of themselves and should somehow be related to the segment of the civil society they are contributing to organize and hence to represent. More generally, as mentioned earlier in the chapter, there can be no democratic participation without some form of representation in order to guarantee political equality and organize self-government.

As to the term 'inclusion', second, it usually refers to 'stakeholders' in that context, that is, pre-established interest groups.[78] Unlike the latter social groups, however, peoples institute themselves through their representatives in order to participate in their self-government and thereby to emancipate themselves as publics from their prior collectives.[79] And the same may be said of CSOs (e.g. trade unions) whose representative self-organization contributes to transform prior social groups (e.g. workers). Finally, 'accountability' is a curious in-between.[80] Its procedures are not usually approached as political unlike authorization or election, on the one hand, and its consequences are not political or even legal unlike responsibility, on the other.[81] It is achieved through various 'audits' and other self-referential effectiveness assessment mechanisms stemming from business management that allow IOs to provide evidence of their 'compliance' with 'good governance' standards.[82]

[76] See Ayelet Berman, 'Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors' (2021) 32(1) *European Journal of International Law* 227–254, at 229.

[77] See e.g. Pauwelyn *et al.*, fn. 72.

[78] Ibid.

[79] For this critique, see Urbinati, *Representative Democracy*, fn. 24, p. 4.

[80] See Koenig-Archibugi, fn. 32; Dominik Zaum, 'Legitimacy', in Cogan *et al.*, fn. 7, pp. 1107–1125.

[81] See Megan Donaldson and Surabhi Ranganathan, 'Accountability', in Klabbers, fn. 17, pp. 50–75.

[82] See Laurence Dubin and Pierre Bodeau-Livinec, 'La responsabilité des institutions internationales dans tous ses états', in Dubin and Runavot, *Le phénomène institutionnel international dans tous ses états*, fn. 16, pp. 231–261.

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Ironically for our purpose in this chapter, 'representation' is not usually mentioned expressly in this 'window dressing' exercise in the legitimation of IOs. This may be because of the ambivalence between functional output legitimacy and democratic input legitimacy: democratic representation requires popular input and hence ultimate, effective popular control of the represented over the representatives.

Clarifying this is particularly pressing as alternative forms of international democratic representation are currently discussed in democratic theory that are more output oriented and instrumental to the representation of interests. It is the case, for instance, of 'mimetic' or, at least, 'statistic' representation,[83] 'altruistic' representation[84] and/or 'epistemic' representation.[85] All three purport to represent pre-identified traits or interests to be promoted (functional output) or, at least, knowledge or expertise in how to do so (functional input). Those forms of representation are gaining traction in discussions of international democracy as well.[86] Not only, indeed, do they fit the prevalent functionalist approach to representation by IOs and its output legitimacy framework just described. They also claim to vest it with a democratic justification without, however, reverting to the proposed conception of democratic representation that requires authorization and control. This may be because the proponents of those alternative forms of democratic representation wrongly conflate the latter conception with electoral representation. In light of the many hurdles in the organization of international elections, they then disparage ultimate, effective popular control from the realm of realistic possibilities in international representation and hence revert to alternatives.

Whatever the virtues of those alternative forms of representation as complements to international democratic representation, they cannot be regarded as democratically legitimate in themselves, and actually amount to illegitimate 'shortcuts', to cite Cristina Lafont.[87] Those alternative forms of representation should never be regarded as substitutes for wider democratic deliberation and

[83] See e.g. Sintomer, fn. 34 (who refers to 'mimetic' representation). See also Yves Sintomer, *The Government of Chance: Sortition and Democracy from Athens to the Present* (Cambridge: Cambridge University Press, 2023); John Gastil and Erik Olin Wright, *Legislature by Lot: Transformative Designs for Deliberative Governance* (London: Verso Books, 2019).

[84] See e.g. Mansbridge, 'Clarifying the Concept of Representation', fn. 44 (who refers to 'gyroscopic' representation).

[85] See e.g. Philip Pettit, 'Representation, Responsive and Indicative' (2010) 17(3) *Constellations* 426–434 (who refers to 'indicative' representation).

[86] See e.g. Inigo Gonzalez-Ricoy and Felipe Rey, 'Enfranchising the Future: Climate Justice and the Representation of Future Generations' (2019) 10(5) *WIREs Climate Change* e598.

[87] Cristina Lafont, *Democracy Without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford: Oxford University Press, 2019).

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hence representation in the strong democratic sense. They cannot be regarded as legitimate in the absence of explicit and effective forms of authorization and control. Indeed, what authorization rules out, first, is the self-appointment of the representative, including in the form of self-representation by mimetism or statistical reproduction. The requirement of authorization also excludes the random selection of representatives by a third party (or by lot) unless there has been some form of ex ante authorization to that random selection. Second, control implies that the represented disposes of ultimate, effective means of supervision over the activity of the representative. The mere 'claim' to represent is not enough to respect the equal autonomy of the represented citizens, therefore.[88]

12.4.2 *Against Incorporation and Agency Representation by International Organizations: Publicness Matters*

If the international law of representation has generally made very little room for the political dimension of international representation, it is also because the private law analogies that have prevailed in the moulding of the modern law of public representation domestically have remained even more prevalent in international law. As a matter of fact, the public turn has not yet taken place in the international law of representation.

The reason for this is very simple: from the twelfth century onwards, and since the first diplomatic exchanges between Italian cities, the international law of representation has developed as a private law of representation in the mould of the nascent medieval *jus commune* of representation.[89] This was confirmed by the consolidation of classical international law in the seventeenth century, an international law conceived, yet again and more generally, on a private law model and which approached the rights and obligations of States by analogy with those of private individuals.

This actually echoes a more general feature of the international legal order. Because of what one of us has referred to as international law's

[88] Contra e.g. Saward, fn. 40; Kuyper, fn. 40. For the same critique, see Nadia Urbinati, 'Representative Constructivism's Conundrum', in Lisa Disch, Mathijs van de Sande and Nadia Urbinati (eds.), *The Constructivist Turn in Political Representation* (Edinburgh: Edinburgh University Press, 2019), pp. 182–202.

[89] On those origins, see Dante Fedele, 'Between Private and Public Law: The Contribution of Late Medieval *Ius Commune* to the Conceptualisation of Diplomatic Representation' (2020) 18 *Clio@Themis* 1–16; Niels F. May, 'Le cérémonial diplomatique et les transformations du concept de représentation au XVII[e] siècle', in Daniel Aznar, Guillaume Hanotin and Niels F. May (eds.), *À la place du roi: Vice-rois, gouverneurs et ambassadeurs dans les monarchies française et espagnole (XVI[e]-XVIII[e] siècles)* (Madrid: Casa de Velázquez, 2015), pp. 35–49.

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'methodological statism', the international law of statehood has eluded the political origin of the State and its publicity is simply built upon domestic public law.[90] As a result, until this day and most of the time, the public and, by extension, the political dimension of States has been ignored in the legal organization of their international representation. It has been relegated to the realm of domestic public law and hardly any corresponding international public law has developed on the issue. Sometimes, the question of the representativeness of States' international representatives is even relegated to the side, as a matter of 'fact' rather than law.[91] States being the 'original persons' of international law, it is their own representation that is at stake *qua* persons as opposed to public institutions, by analogy with legal persons of private law.

In turn, this explains why the international law of representation has been more concerned with the representatives *of* States than by States themselves as representatives – or only as representatives of other States. By analogy, this is also what applies to the representation *of* IOs rather than *by* IOs in the international law of representation. IOs are represented as 'persons' under international law as opposed to public institutions. Their representatives are not considered to represent peoples, as a result, hence actually the equivocation between IO 'organs' and their 'agents'.

To be sure, the question of representation *by* IOs also arises in international law. It does so only to address the representation *of States* by IOs, however, and not that of those States' peoples by those IOs. Even when IOs represent their Member States, indeed, and with exceptions such as the EU, IO law does not also position those IOs as representatives of the peoples of these States. Sometimes, of course, the representation of these States in their IOs' interstate organs requires that State representatives should also represent their peoples democratically. It is then organized by the internal law of some IOs so as to be democratic. One may think here of certain IO's parliamentary interstate bodies or of the democratic credentials required of State representatives of certain IOs at the time of accreditation or even for purposes of State accession/suspension/exclusion of the IOs.[92]

[90] See Besson, *Reconstructing the International Institutional Order*, fn. 15, para. 71.

[91] See Maurice Kamto, 'La volonté de l'État en droit international' (Volume 310) *Collected Courses of the Hague Academy of International Law*, 2004, pp. 9–428, p. 86; Jean Salmon, 'Representatives of States in International Relations', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2007).

[92] See Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38(4) *New York University Journal of International Law and Politics* 877–918, at 899–909; Alison Duxbury, *The Participation of States in International Organisations: The Role of Human Rights and Democracy* (Cambridge: Cambridge University Press, 2011), pp. 288–292.

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In all these cases, however, it is the representation *by States* in those IOs that should be democratic, that is, what we have referred earlier to as democratic representation *in* and *through* IOs, and not the representation *by* the IOs themselves – even if the former contributes to the latter, of course.

Again, the reason for this is straightforward under international law. An IO is considered a legal person distinct from its Member States and established precisely to represent its Member States. IOs are not usually ordered so as to institute the peoples of their Member States as new public institutions and, as such, are not considered to represent those peoples. This is considered to be the price of safeguarding their Member States' sovereignty and, by extension, sometimes those States' peoples' popular sovereignty, albeit wrongly so as we argued earlier.[93]

Just as the international law of representation of States by States, the international law of representation of States by IOs has been articulated around two models originating from the medieval *jus commune* of representation: *conventional* and *personal* representation. In what follows, we will assess them in turn, before criticizing their lack of combination in a third step.

First, *conventional* or agency-based representation. This type of international representation is inspired by the private law of agency and articulates the relation of delegation between a principal and an agent.

Conventional representation applies to representation between any persons or subjects of international law and, by extension, between IOs.[94] Conventional representation sometimes also applies to the representation of States by IOs. This is only the case, however, insofar as it does not concern relations of 'membership' of those States in the IO. Those relations, indeed, are in principle covered by the internal law of the IO, to the extent that the activity of the IO falls within the scope of the powers that its Member States have conferred to it. In such cases, it is the second type of personal or incorporation-based representation of States by the IO that applies. We will revert to this alleged incompatibility and tension between the two approaches to representation at the end of this section.

[93] For a full argument, see Besson and Martí, 'Republican Sovereignty', fn. 9. See also Besson, 'The Politics of Regional International Organizations', fn. 9.

[94] See Angelo Piero Sereni, 'La représentation en droit international' (Volume 73) *Collected Courses of The Hague Academy of International Law*, 1948, pp. 69–166; Riad Daoudi, *La représentation en droit international public* (Paris: LGDJ, 1980); Salmon, fn. 91. See also in International Relations theory, Zaum, fn. 80; Johnstone, fn. 30. For a critique, see Pieter Jan Kuijper, 'Delegation and International Organizations' (Volume 426) *Collected Courses of the Hague Academy of International Law*, 2022, pp. 9–240, pp. 23–25.

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Because conventional representation works along the lines of a delegation or mandate between two private persons, it does not take into consideration the representative dimension of these 'persons' themselves and hence their institutional dimension. And this, even if the represented person is also a public institution under domestic law and a democratic State as it is or should be the case of IO Member States. This is highly regrettable from a democratic point of view.

As a matter of fact, resorting to principal-agent delegation as a model for democratic representation has been criticized in a domestic context as well.[95] Indeed, despite its historical origins, many authors consider that the relationship of political representation should now be distinguished from a relationship of mandate, delegation, or agency in private law. Among the difficulties raised by the agency analogy, one should mention, first of all, its reliance on the pre-existing legal personalities of both the representatives and the represented and, further, on their independence, as opposed to their mutual construction as political institutions, that is, both as representative institutions and as their peoples. A second difficulty pertains to the agency analogy's reliance on a one-way relationship of delegation from the principal to the agent and its absence of mutuality, as opposed to the constant participation and to-ing and fro-ing between political representatives and represented. Finally, a third difficulty lies in the agency model's voluntarist approach to authorization by simple consent or veto, as opposed to other modes of political authorization and control, for instance through participation.[96]

Once applied to IOs, those three difficulties are magnified. First of all, by treating IOs and States as distinct and independent persons of international law as opposed to composite institutions, the conventional model of representation neglects not only the institutional continuity between IOs and their Member States, but also their institutional ties to the publics they institute and re-institute. In fact, applying a private law analogy to the international representation by IOs is even more problematic than it is in the case of the international representation by States. There is indeed no internal IO public law to organize the representation by those IOs and hence no background legal and institutional framework. Merely resorting to analogies with Member States' domestic public law as a complement only makes things worse in this respect.[97] Indeed, those public law analogies suffer from the same neglect of

[95] See especially Urbinati, *Representative Democracy*, fn. 24, pp. 57–59.

[96] See Besson and Martí, 'From Equal State Consent to Equal Public Participation', fn. 9.

[97] For such analogies, see Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford University Press, 2005), pp. 14–17; Fernando Lusa Bordin,

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the composite institutional nature of IOs for they treat the latter as public institutions separate from their Member States and place them on an equal plane as comparable institutions.[98] Second, and it is related, the agency-based approach to representation by IOs, by conflating public and private powers, cannot prevent the confusion between the conferral of powers by States to IOs and their transfer by IOs to private persons. As a matter of fact, the confusion has been enhanced by the generalized recourse to the private law term 'delegation' to cover both cases,[99] and the public-private interchangeability of 'functions' the term seems to condone. The privatization of IO powers today may therefore be attributed in great part to the conventional understanding of representation by IOs.

The second type of international representation of States by IOs one encounters in the international law of representation is *personal* or incorporation-based representation. It relies on the second private law dimension of the medieval *jus commune* of representation, that is, the law of legal persons or corporations.

It is the most common of the two models of representation by IOs. Indeed, the IO and its distinct personality are not organized separately from its Member States for their own sake, but in order to personify the ensemble of its Member States and hence to represent them so as to bind them together through the internal and external actions of its organs. Still, one should not go as far as to resort here to the term 'institutional' representation used by Évelyne Lagrange[100] when referring to this understanding of the representation by IOs. And this, in order precisely to avoid any confusion with the representation that institutes or rather re-institutes a given IO's Member States' peoples as new publics. With some exceptions, such as the EU, indeed, the international law of IOs does not yet consider States' peoples as publics to re-institute and then represent in international law in the manner of new publics and sovereign international institutions. It does not treat IO Member States as re-instituted public institutions,[101] but only by analogy to private persons who become members of a private corporation and are re-personified as such.

The Analogy between States and International Organizations (Cambridge: Cambridge University Press, 2018), pp. 13–86.

98 See Samantha Besson, 'Review of Fernando Lusa Bordin's *The Analogy between States and International Organizations*' (2020) 31(2) *European Journal of International Law* 771–776; Besson, 'What makes International Organizations "Public"?', fn. 63.

99 See also Kuijper, fn. 94, pp. 74–76.

100 Évelyne Lagrange, *La représentation institutionnelle dans l'ordre international: Une contribution à la théorie de la personnalité morale des organisations internationales* (The Hague: Kluwer Law International, 2002), pp. 1–3, 8, 48.

101 On IO Member States as re-instituted States, see Samantha Besson, 'International Courts and the Jurisprudence of Statehood' (2019) 10(1) *Transnational Legal Theory* 30–64, at 49–50,

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This missing public institutional dimension of representation by IOs is the key objection to the personal model. It undermines their democratic legitimacy, especially with respect to ultimate, effective popular control. The incorporation-based representation of States by their IOs throws a 'democratic veil' over States at the same time as it knits a corporate or personal veil around IOs.[102] That veil interrupts the relationship of democratic representation that should link an IO's Member States to their peoples by interposing the screen of the IO's legal personality.

Besides those two critiques against the conventional and personal approaches to the representation by IOs separately, the most important and third set of critiques actually pertains to their lack of combination.

As mentioned in Section 12.2.2, democratic representation when it institutes and then authorizes and controls political power is a relation of mediation: it does not only bring together the represented and the representatives, but it also separates them at the same time.[103] When it institutes this power, democratic representation therefore constructs, by separating them, the subjects of representation which do not pre-exist their representation. It is through the institution of the State, indeed, that the State's people is instituted into a public. When, in a second step, democratic representation enables the represented to authorize and control the exercise of instituted power, it makes it possible to separate, once again, the representatives (this time, the parliamentarians or the government) from the represented (this time, the citizens or the governed) while tying them to each other.

Democratic representation thereby brings together two subjects in two successive and intertwined relations: first, it links the State, or any other institution of public law, to the people which the State institutes as a public, contributes to create as such and consequently represents (this is what one may refer to as 'institution-representation', whose ancestor is incorporation-based representation or 'stand as' representation); and, then, in a second stage, democratic representation connects the representatives of that State, that is to say its organs, to the represented people, that is to say the citizens (this is what one may refer to as 'authorization-representation', whose ancestor is the agency-based representation-mandate or 'act for' representation). Both

drawing on Christopher Bickerton, 'Nation State to Member State. Trajectories of State Reconfiguration and Recomposition in Europe', in Patrick Le Galès and Desmond King (eds.), *Reconfiguring European States in Crisis* (Oxford: Oxford University Press, 2017), pp. 45–61.

[102] On the latter, see Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Oxford: Hart Publishing, 2007).

[103] See Böckenförde, fn. 29, para. 32.

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dimensions are essential to democratic representation. Too often, indeed, contemporary discussions of domestic democratic representation are torn between two extremes: either they reduce representation, following a constructivist and almost neo-Hobbesian tendency, to the moment of the institution of the people without regard to the need for constant re-authorization and control thereafter between representatives and represented as guarantors of self-government and political equality;[104] or they reduce representation to the electoral mandate, following an ontological and neo-Schmittian move that ignores all too quickly that the people and the citizens do not pre-exist the figuration of representation and must first be instituted as such.[105]

In fact, it is the characteristic of the State's internal constitutional framework, a framework that is destined to last, that explains how easily it has become today to forget the first instituting dimension of representation in favour of the second, that is, the representation-authorization, which takes place much more regularly. Providentially, international law and its complex institutional framework gives us the opportunity to capture them together again. The multiplicity of representative institutions in the international legal order helps us re-connect the two dimensions of democratic representation and make them both visible again. Thereby, international representation by IOs may contribute to counter what some critiques have referred to as the 'flattening' of the tridimensional relation of political representation and its reduction to a bidimensional and horizontal authorizing dimension.[106]

For this to be the case, however, the instituting dimension of the personal model of representation by IOs and the authorizing dimension of the conventional model need not only to be fixed in themselves, as we proposed earlier in this section, but also brought together in future interpretations of the international law of representation by IOs. At the moment, indeed, they coexist as juxtaposed approaches to representation by IOs in the international law of representation without being articulated with one another.[107] The instituted IO is exempted from the need for further authorization and control, thereby giving rise to a risk of domination; and the authorized IO is taken to exist without a prior institution, thereby giving rise to a risk of political inequality.

[104] For a similar critique, see Urbinati, *Representative Democracy*, fn. 24, pp. 3–5; Näsström, fn. 14, at 507.
[105] For a similar critique, see Urbinati, *Representative Democracy*, fn. 24, pp. 4–6.
[106] See Musso, fn. 15, pp. 133–137; Besson, *Reconstructing the International Institutional Order*, fn. 15, para. 82.
[107] See e.g. Sarooshi, fn. 97.

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Worse, both dimensions of democratic representation are also opposed at times, and treated as incompatible as mentioned earlier in this section.

12.5 CONCLUSION

To date, there has been relatively little treatment of the notion of international representation from a democratic, non-formalist perspective. Moreover, the existing literature has mostly focused on the circumstances in which States and other public and private institutions may be regarded as legitimate representatives. Only a small portion thereof has focused on representation of those States' and other public institutions' peoples *in* IOs, for instance in some of their organs, and *through* IOs when the latter contribute to enhancing their Member States and other participating public or private institutions' representativeness. However, even fewer authors have provided an account of the conditions under which IOs themselves might be regarded as legitimate representatives of their publics, that is, the peoples that integrate their constituencies and which they contribute to re-instituting as publics.

Democratic representation *by* IOs is the gap in international democracy law and democratic theory the present chapter has purported to fill. The gist of the proposed conception of democratic representation by IOs has been institutional. The argument has spelled out the primarily re-instituting dimension of representation by IOs and hence its contribution not only to the authorization and control of IO representatives, but also to the multiple public re-institution of sovereign power internationally.

The proposed 'international turn' in democratic representation may actually also prove beneficial to the future of democratic representation in general. Instead of rushing to conclusions in terms of post-representation or towards alternative constructive or symbolic forms of representation, we should indeed consider the deficits in international democratic representation and the related crisis of domestic democratic representation as an opportunity for the future of democratic representation in general. They could and should trigger an in-depth and across the board revision of the electoral-only model of democratic representation and of the many private law analogies that have shaped our conceptions of democratic representation for too long and from which originate much of today's pushback against democratic representation, both domestically and internationally.

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