

INTERNATIONAL LAW AS
INTER-PUBLIC LAW

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I. INTRODUCTION

In this essay, I seek to take some steps toward the development of a theory of international law that is an alternative—I hope a better alternative—to the standard account of international law simply as *jus inter gentes*, the law established between governments of states to regulate relations between states as juridical entities. I do not here present anything approximating a full alternative theory, but I try to indicate some features such an alternative theory could have. I argue that international law should be theorized as the law between public entities outside a single state, these public entities being subject to public law and to requirements of publicness. I focus in this paper on the entities whose practice counts in making international law, on the processes whereby these entities make international law, and some implications about the content of international law. My account incorporates most of the substance and institutions of the established *jus inter gentes*: much international law is indeed made by the agreements or the practices of national governments among themselves. But I offer a different view of the reasons for treating that as international law, a broader view of the entities responsible for making international law, and a more demanding view of what is needed to make international law. My project is concerned with the generation and modification of inter-

national law. I do not in this essay propose any different view to the prevailing one on the question of who is or could be regulated by international law: states, corporations, individuals, inter-state organizations, private standard-setting organizations, and so forth.

A. Problems Calling for an Alternative Theory

I begin by highlighting three features of the contemporary world which pose deep puzzles for the prevailing *jus inter gentes* model of international law. First, the concept of the state as a juridical unit, a central concept in the model of international law as *jus inter gentes*, does not adequately reflect the quality of states as public law entities, a quality that distinguishes them from mere "rational actors." Second, the *jus inter gentes* model of international law does not account adequately for the burgeoning activities of regulatory entities that are neither states nor simple delegates of states. Third, efforts to get beyond the obvious limitations of the *jus inter gentes* model of international law (e.g., proposals to refer instead to transnational law, or global law) have had the quixotic effect of buttressing that model: this is because these alternative ideas are generally not framed conceptually, and so do not set meaningful conceptual limits to what they include, making them unconvincing catchalls. In the next few paragraphs, I will elaborate on each of these three puzzles, and argue that they impel the effort to develop a viable alternative theory of international law, of the sort this paper seeks to advance.

1. States and Other Public Law Entities

Traditional *jus inter gentes* theories of international law (of the type represented by Lassa Oppenheim's 1905–1906 treatise on international law) embrace a coarse but robust statism, which analyzes the state as a legal personality with a single directing mind.¹ Such theories, however, do not take account of the fact states are producers of national rules which are increasingly required to meet conditions for law which go beyond those of command backed by sanction: these national rules have a quality of publicness in their orientation. When states—as public law entities and committed to publicness in law—come together with each other in an international legal rule-making and decision-making normative

process, the results are not identical in form or meaning to what would result from a comparable process among unitary rational non-public actors.

This idea makes more space to meet democratic demands by institutions and groups within the state to have greater influence on and roles in global regulation. It offers scope to encompass legal governance forms adopted in inter-societal relations (e.g., cross-border governance institutions of co-religionists), in transnational relations among elements of states (e.g., networks of government regulators, such as the Basel Committee of central bankers), and in the jurisgenerative work of bodies that do not depend on states. Rather than treat the entities that act in such legal contexts as if they were externalized Hobbesian sovereigns-*manqué*, or as if they were simply delegates of such sovereigns under a statist theory, I propose treating them as public entities. These entities, along with the states that are the archetypical public entities, are the actors in an inter-public order that is, I suggest, the basis for a concept of international law preferable to the prevailing statist one.

2. Transnational Normative Governance That Is Not Traditional Inter-State Law

A vast amount of normatively framed regulatory practice does not fit within the standard model of international law as the law between states. Patterns of transnational regulation and its administration in global governance now range from regulation-by-non-regulation (*laissez-faire*), through formal self-regulation (such as by some industry associations), hybrid private-private regulation (for example, business-NGO partnerships in the Fair Labor Association), hybrid public-private regulation (for instance, in mutual recognition arrangements where a private agency in one country tests products to certify compliance with governmental standards of another country), network governance by state officials (as in the work of the Organization for Economic Cooperation and Development [OECD] on environmental policies to be followed by national export credit agencies), inter-governmental organizations with significant but indirect regulatory powers (for example, regulation of ozone depleting substances under the Montreal Protocol), and inter-governmental organizations with direct governance powers (as with determinations by the Office of the UN High

Commissioner for Refugees of individuals' refugee status). Instead of neatly separated levels of regulation, a congeries of different actors and different layers together form a variegated "global administrative space" that includes international institutions and transnational networks as well as domestic administrative bodies that operate within international regimes or cause transboundary regulatory effects.²

A theorist informed about all of this practice might answer simply by stipulation: international law is *jus inter gentes*, and any other norms and practices are not international law but something else. This has the merit of delimiting the field. More important, adherence to a positivist conception of international law sourced in the will and consent of states may be the best way to maintain legal predictability and to sustain rule of law values in international relations.³ It may be preferable to retain a unified view of an international legal system than to countenance the deformalization and the mosaic pattern that some of the likely alternative approaches may entail. But I will argue that a theory of international law must be concerned with the normative production and the regulatory activities of such entities, at least when they exercise governing powers.

3. Limits to an International Law That Is Not

Confined to *Jus Inter Gentes*

Any theory of international law that accounts for more than just traditional inter-state law must be coherent and set cogent limits to the concept of international law. Herbert Hart pointed to the problem of treating international law simply as morality (in the way Austin does): the result is that morality becomes "a conceptual wastepaper basket into which go the rules of games, clubs, etiquette, the fundamental provisions of constitutional law and international law, together with rules and principles which we ordinarily think of as moral ones."⁴ Treating every normative assertion in transnational governance as international law, on condition only that it is made with a claim to authority and establishes a sense of obligation, seems certain to lose many of the useful distinctions that the concept of international law presently helps to draw. I share Hart's view that a theory of international law, like a theory of law in general, should distinguish law from coercion

(or, more generally, from the expression of coercive power), and should distinguish law from morality. Thus it is to be expected that there will be rules and principles of political order that are not legal rules and principles. (Indeed, the rules and principles of political order can handle some international issues better than legal rules and principles could.) Likewise, many moral rules are not rules of international law and many international law rules are not in themselves moral.

Yet while Hart directs attention to the right problem, the approach he takes to international law in chapter 10 of *The Concept of Law* does not seem to provide the basis for a solution. It was perhaps tenable to say in 1961 that a set of rules, not unified by any rule of recognition and hence not a "system" in his sense, might nevertheless be a bounded set, given that the rules he addressed were associated with perhaps 100 states and a small number of significant inter-state organizations. The dominant line among international lawyers now is to update chapter 10 by proposing a rule of recognition to render international law a unified system, rather than the mere set of rules Hart concluded it was. One retort is that for practical purposes "international law" is rightly divided into different substantive areas, or different clusters of institutional practices, or different sets of participants, and no grand unity is needed. But I doubt it is possible over a long period to sustain such fragmentation. Some reasons for this are political and social—recurrent war and violence in high politics spill into low politics, the gross illegitimacy or injustice of one part of an institution colors the work of its other parts. Others are to do with the understandings of international lawyers that their subject is general—it is a unified formation, with common resources of method and authority, not flints lying in a pile. In an environment with weak institutions and little organized coercive power, law's claim to authority is acutely difficult to sustain without some colorable claim to a unity or system of law.⁵ Thus I agree that the unity of international law calls for a unity of understanding and of justification (this leads me to put my claim in this paper in general terms). But a convincing rule of recognition for a legal system that is not simply the inter-state system has not been formulated, so far as I am aware. Even if a convincing formulation could be devised, the updated Hartian concept of international law would probably still

be too austere. Hart's jurisprudential critics have not, for the most part, focused on the applicability of their criticisms to problems of international law. This is much to be regretted, as international law, although in many ways a special case, is also in some respects a limiting case. In my view, more is needed for an adequate concept of international law than chapter 10 can provide. I try to sketch some further elements in this paper, without returning much to Hart's Concept of Law and the body of work connected to this, but acknowledging the considerable influence of that corpus on the argument that follows.

B. Framing the Argument

The aspiration of this project is to build, eventually and imperfectly, a theoretical account of international law which is both normatively attractive and practically operable. The normative and the practical possibilities are acutely constrained by the heterogeneity of interest, beliefs, aspirations, and life possibilities among the vast array of actors who have a stake in any such global project. A further constraint is that a theory of international law ought to make reasonable sense of the actually existing rules, institutions, and practices of transnational governance and international politics, including the aspirations and possibilities that lie within these. Such a theory must speak in the language, and encompass the patterns of thought and argument that international lawyers share or recognize, else it will not recruit them to the enterprise embodied in such a theory. The theorist must thus look at once to normative theory and positive practice, blurring putative separations between these, a technique which is both a comparative advantage of international law and a comparative oddity.

Thus such a project is immediately confronted with a set of problems about how to build a theory of international law given the conflicting pulls toward moral universalism and pluralism. One approach begins at the pluralist end, with independent actors constrained by no external law, and envisages the building of law by their acts of will. Such an approach might begin with a dyadic analysis of the legal relations between every pair of actors in the system (an approach emphasizing the bilaterality of legal relations, the applicable rules depending on what each particular

pair of states have agreed), then look at the gradual construction of dense lattices of bilateral obligations (particularly treaties) treaties that are tied to each other (e.g., through most-favored nation provisions, and through replication and reliance) so that extrication of a single one from the structure is scarcely tenable, then at the eventual sedimentation of these into a fused mass of general international law.⁶ Another approach begins at the universalist end, deriving general legal norms from core moral requirements, then attenuating these to make them operable in practical contexts, including not only the accommodation of institutional and informational shortfalls and situation-specific problems, but also the resolution of apparent conflicts between different moral imperatives or with different religious and cultural understandings. I am going to argue for a model of international law that envisages universalist engagement but amongst normative sites each embedded in their own specific moral and legal-institutional contexts. This emergent inter-public model is cosmopolitan and universalist in its normative community, and local and pluralist in specific decisions, but is neither strongly universalist nor radically pluralist in the authoritative derivation of norms or in their application. The key point is that the normative content of law arises not in its derivation from or consonance with universal moral principles, nor in the self-governing power of each and every politically organized community, but in the public nature of law itself.

A second set of problems concern the normativity of international law, which I will explicate and defend on the basis of a three-part typology: distinguishing between realist regularity and Grotian normativity on the one hand, and between Grotian normativity and cosmopolitan morality on the other hand. I will present a view of international society and its law as a structure of "inter-public" public law, an alternative both to realist understandings of international law and institutions as the mutable product of interactions between rational actors based largely on the pursuit of their different interests under the existing distribution of power, and to a cosmopolitan universalism which aspires to a global constitutional order. In contrast to the realist model of unitary rational egoistic interest-maximizing states, in which international law is an epiphenomenal summary of the configuration of power among states at any particular moment, I argue that international law does have

a normative dimension that shapes its content and that pulls and constrains states and other actors—it thus helps constitute and embody a modest international society. In contrast to cosmopolitanist accounts of international law, which define the ideal content of international law by reference to free-standing universal moral principles (sometimes formulated as principles on which agents reasonably could agree or could not reasonably reject), and then formulate principles for the non-ideal world of international law in terms of the approximation or facilitation or non-obstruction of eventual attainment of this ideal, I argue that the normative content of international law is immanent in the public quality of law in general and in the inter-public quality of international law. It emerges through the practice of seeking law-governed relationships rather than as a deduction from a priori principles of morality. The content that emerges through this repeated practice has general and recognizable features that function to constrain actors in their myriad interactions with one another. These regulative norms are identifiably present in multiplying sites of international and transnational decision-making. They appear whenever there is a felt demand for presenting decisions as non-arbitrary, as more than the result of power-inflected bargains between parties in a contractual arrangement.⁷

The paper makes two major arguments. The first argument is that law—especially public law—has a distinct quality of publicness, which refers to the claim of law to stand in the name of the whole society and to speak to that whole society even when any particular rule may in fact be addressed to narrower groups. I argue that this quality is increasingly part of the concept of international law, and that this quality is having a transformative effect on the sources of international law, reducing the significance of voluntarism, bilaterality, and opposability, and increasing the significance of generality, solidarity, and the integration of international law into a conception of world public order. The second argument is that international law is shaped by the inter-public nature of the various processes in which states and certain other public entities come together to establish rules and institutions. My intuition is that states, being themselves creatures of public law, and being producers of national rules which have a quality of publicness in their orientation, come together with each other in an internation-

al legal rule-making and decision-making normative process that is not identical to a comparable process among unitary rational non-public actors. This intuition runs against standard rational-actor bargaining models of international lawmaking. Whether it also runs against contemporary cosmopolitan universalism is more complex. My argument is not inconsistent with a public of publics, or a society of societies, or even (to use John Rawls's phrase) a community of communities. But proponents of these formulations generally envisage a greater unity in international society than I do—in my discussion I will emphasize the irreducible pluralism of publics, and international law as a form of *relationship* between them rather than an overarching order, something that lies between publics while at the same time integrating them through the relational quality integral to law. This inter-public law consists, in part, of the internationalization of public law, and in part of an international law dimension of public law. In both cases the relevant normative practices are conducted at multiple sites, each site subject to local considerations as to legal principles, institutional meshing, and sources of authority, so that there is neither a simple unified global hierarchy on the internationalist model, nor a complete disjunction between different sites of law.

After this introduction, the next two sections of the paper present the two arguments noted in the previous paragraph. A further section distinguishes the view I am espousing from a commitment to democracy in international law. The conclusion returns briefly to the implications of my view for universalism and pluralism.

II. PUBLICNESS AS A NECESSARY QUALITY OF LAW: INTERNATIONAL LAW ISSUES

A. *Publicness in the Legal Theory of Modern Democracies*

I begin here with a core jurisprudential idea: "publicness" is a necessary element in the concept of law under modern democratic conditions. The claim is that the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence.⁸ By publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters

of concern to the society as such.⁹ This quality of aspiration to publicness is, as Jeremy Waldron has observed, what Weber misses in his means-oriented definition of the state (as the monopolist of legitimate violence), and what analytical jurisprudence misses in its formal analysis of legal systems.

Publicness might be simply another way of referring to the specific attributes of law that Lon Fuller enumerated: generality, publicity, non-retroactivity, clarity or intelligibility, non-contradiction, non-impossibility of compliance, constancy through time, and congruence between declared rule and official action.¹⁰ Clearly they overlap. But the idea of publicness as used here goes beyond these largely procedural attributes. It goes to the way law speaks to those it addresses, and to the orientation and amplitude society expects of its law. These are relational qualities. I will turn shortly to elaborate on the meaning of the requirement of publicness.

Before doing that, a brief note on the legal theory problems I am not going to address here. Lon Fuller regarded the attributes in his list as representing an "inner morality" of law—whereas Joseph Raz has argued that these attributes are not moral, but are simply instrumental, making law effective for whatever purposes it is being used for.¹¹ A broader conception of publicness may raise more challenges than this for theories of law. Such a quality of publicness is not, of course, sufficient for law—many theorists would argue that it must be supplemented by (inter alia) an efficacy condition. Efficacy is difficult to achieve or sustain without the subjects of law feeling a sense of obligation that is not mere compulsion, or self-interest, and the quality of publicness described here may be incorporated into legal theory as part of the way in which law generates this sense of obligation.¹² This kind of "publicness" may also be incorporated into the kind of rule of recognition proposed by H. L. A. Hart.¹³ But the fit is not exact.¹⁴

B. Public Law as a Special Case of the Requirement of Publicness in Law

"Public law" may be subject to different requirements as to publicness than other kinds of law.¹⁵ The reasons for this are both functional and normative. Public law, like the organization of politics, is concerned above all with managing problems of deep disagreement. Public law is also centrally concerned with the organization

and delivery of security, services, education, religion or religious opportunities, and welfare—the modern equivalents of Cicero's *salus populi*.¹⁶ These concerns can be framed in Hobbesian terms by reference to the self-interests of the citizenry. But modern states play a further role in enabling citizens to discharge some of their moral duties toward others, or to achieve their aspirations of altruism. Legal structures for benevolent services typically have both interest-based and altruistic strands woven through them¹⁷—welfare is understood as both social insurance and charity. Public law, and politics; are also concerned with varieties of liberty: libertarian freedom from unnecessary constraint and intrusion, freedom to make and live out choices that might be described as autonomy and measured in terms of capabilities, freedom to participate and to shape the public sphere that might be described as republican citizenship. These concerns of public law provide special functional as well as normative reasons for requirements for publicness in national public law. These requirements could be to better advance the wider public interest by in some ways mobilizing, and in others channeling and restricting, state power for public purposes. Or they might be requirements giving effect to what many public lawyers in common law systems argue is a distinct set of public law values, that may give special meaning to “publicness” in this context. Demands for similar requirements of publicness are increasingly evident in public international law, although the realization of such demands is presently very uneven, and will not become prevalent without considerable further development.

C. Components of Publicness: General Principles of Public Law

General principles of public law combine formal qualities with normative commitments in the enterprise of channeling, managing, shaping, and constraining political power. These principles provide some content and specificity to abstract requirements of publicness in law. Principles potentially applicable within any system of public law, and in relations between different systems of public law, may include to different degrees some of the following. This is merely an indicative list, without any comparative or doctrinal analysis, but it is sufficient to suggest that the principles embodied in such a conception of public law are significant.¹⁸ These are nor-

mative principles, that do real work, yet they are not principles of substantive justice in the Dworkinian sense. In accepting the idea of the rule law, of the unity of basic normative principles rather than the rule of arbitrary power or the rule of the philosopher, this is the kind of list one gets:

(i) *The Principle of Legality.* One major function of public law is the channeling and organizing of power. This is accomplished in part through a principle of legality—actors within the power system are constrained to act in accordance with the rules of the system. This principle of legality enables rule-makers to control rule-administrators. The agent is constrained to adhere to the terms of the delegation made by the principal. In a complex system of delegation, it is often preferable to empower third parties to control the agent in accordance with criteria set by the principal, creating the basis for a third-party rights dynamic even in this principal-agent model. In the case of inter-state institutions, the states establishing the institution often style themselves as principals (severally or collectively), with the institution as agent, but their direct control of the agent may be attenuated, a problem they typically mitigate both by legal controls and by limiting the operational capacity of the agent. Thus international institutions usually depend on individual states to act as agents in operational implementation.

(ii) *The Principle of Rationality.* The culture of justification has been accompanied by pressure on decision-makers (and in some countries, on rule-makers) to give reasons for their decisions, and to produce a factual record supporting the decision where necessary. This is part of both political and legal culture. In both contexts it leads those institutions with review power into continuous debates about whether and on what standard to review the substantive rationality of the decision: manifestly unreasonable, incorrect, etc.

(iii) *The Principle of Proportionality.* The requirement of a relationship of proportionality between means and ends has become a powerful procedural tool in European public law, and increasingly in international public law, although some national courts (e.g., in the United Kingdom) have balked at unfamiliar arguments based on it.

(iv) *Rule of Law.* The demand for rule of law can mean many things. The dominant approach is proceduralist,¹⁹ meaning a general acceptance among officials (and in the society) of particular

deliberative and decisional procedures. This is *prima facie* in tension with a conception of the rule of law as simply a structure of clear rules, reliably and fairly enforced, without regard to their substantive content (the “rule book” conception), and with “the ideal of rule by an accurate public conception of individual rights” (the “rights conception”).²⁰ Proceduralists argue for adhering to procedures even at the price of unsatisfactory outcomes—but face problems in explaining why any decision taken in accordance with prescribed procedures should not then be part of the law which adherents of the rule of law must uphold.²¹ David Dyzenhaus has argued for an approach which shifts the focus of rule of law from law (and rules), to the element of ruling—so a breach of procedural requirements is not unthinkable, but involves a compromise of legality that must be carefully weighed.²²

(v) Human Rights. I mean here the basic rights the protection of which by the legal system is almost intrinsic (or natural) to a modern public legal system. This category overlaps a lot with the previous four categories, but I list it separately to leave scope for arguments that some human rights (perhaps of bodily integrity, privacy, personality) are likely to be protected by public law as an intrinsic matter (without textual authority), yet without being subsumed into “rule of law”.

D. Publicness in International Law

How does the requirement of publicness operate in relation to international law?

If publicness were simply publicity—openness to all to know—we might easily trace a liberal (Benthamite) project to make international law knowable to all, and in making it knowable, to increase accountability of particular makers of international law to others who have some claim on them. When Woodrow Wilson called for an end to “secret diplomacy” and a new order of “open covenants, openly arrived at” (a norm still embodied in the UN Charter requirement that treaties be registered with the UN Secretary-General for publication in the UN Treaty Series), he had in mind that this publicity, in causing leaders to take more account of public sentiment and to defend their international commitments in public debates, would democratize foreign policy and dampen

diplomatic tendencies to bellicosity. Almost every intergovernmental institution currently faces demands to increase the openness of its decision processes: the Basel Committee of central bankers now publishes drafts of its proposals to receive comments from interested private-sector groups before adoption, NAFTA arbitral tribunals now accept amicus briefs from third parties, and so on.²³ This political commitment to publicity as an element going to the legitimacy of governance is often expressed as a requirement that legal rules and decisions be made publicly accessible if they are to qualify as law. This claim has not completely dominated the field, but it has had the effect of raising doubts about the law quality of much secret or unpublicized state practice which a century ago would probably have satisfied the sources test for international law pedigree.²⁴ Many inter-state agreements and understandings on security matters and intelligence are kept secret, but much of this practice—e.g., the silent transfers of suspects without extradition processes, or promises to share intelligence information—is not generally analyzed as making international law or generating international legal obligation, in the way that other state practice is thought to do. The IMF keeps not only the deliberations of its own board secret, but also many pieces of “advice” to, and understandings with, borrowing countries. It seems to accept that doing this means these materials cannot easily be jurisgenerative. A different kind of case is the WTO Appellate Body, which issues important rule-based opinions employing legal reasoning just as a court does, but has had to resist characterization as a court issuing judgments, not only for WTO structural reasons, but also because it is constrained to hold almost all of its hearings behind closed doors, and is thus debarred from modern requirements of openness to the public in legal courts.²⁵

Yet publicness is not simply (nor does it always entail) publicity. Publicness is a way of describing that quality of law which entails law claiming both to stand in the name of the whole society, and to speak to that whole society. The idea of international law standing in the name of a wider society has long animated internationalist writers and legal scholar-practitioners. Many participants see international law as having an expressive function for the realities of international society, or the hopes for it. The language of international law is used not only to conduct international politics

(although international law certainly is a language of politics), but also to express a degree of commonality in some sort of world order system,²⁶ perhaps a human social system for general purposes,²⁷ or perhaps a series of social sub-systems for regulating specific issues in which participants in that sub-system are interested. Many people, particularly activist groups, seek to use international law as a means of articulating moral positions, in the absence of other universal languages for international affairs. Some of these moral commitments—in particular, non-discrimination—have become almost immanent in the way international law is understood.

The idea that international law should speak to the whole of society is evident in the continuous efforts to nudge the field beyond states-will theories of sources, beyond bilaterality and opposability, toward community norms, beyond a focus on managing disputes and adversarial proceedings, toward a deeper structure of normative enunciation and claims arising from neighborhood and impact rather than contract and technical legal interest. It appears in the idea of *jus cogens*—peremptory norms applicable to all, which no group of states can contract out of—and in other modern natural law ideas. It appears in the frequent resort to “general international law” rather than simply the specific agreement made by the parties in a dispute—for example, when the WTO Appellate Body applies principles of general international law such as proportionality, or a version of the precautionary principle, or a general principle about treaty interpretation. It appears in the 20th century quest for universality of participation and for equality among participants.²⁸ This idea is one of the main obstacles to the use of “club” models in international relations—the struggle between diplomatic-club and legalist-universal models has been a major theme in the WTO and several other institutions.²⁹

Practical examples of the operation of these two elements of publicness in international law are difficult to elucidate sharply in the flurry of pragmatics. I will offer two, while acknowledging that I am simplifying each rather drastically.

The first example is the law of foreign state immunity. International law requires that a forum state (say Canada) grant immunity to a foreign state (say Argentina) if anybody tries to sue Argentina in Canadian courts, provided that the acts for which Argentina is being sued were public, rather than being commercial acts which a private

actor might equally well have undertaken.³⁰ This often involves examination of the public law of the state being sued, as well as examination of the nature of the acts themselves. Thus the United States was immune from suit in Canada over employment on a military base in Canada, Saudi Arabia was immune from suit in the United States over police brutality toward an American there, and Germany was immune from suit in the United States by an American over World War II reparations. But each of those decisions, despite showing respect for foreign public law actions, was criticized on grounds that this grant of immunity did not speak fairly for the whole society of the forum state, nor did the legal actions of the foreign state comply with the requirement of being fairly addressed to all those affected.³¹ The European Court of Human Rights, in very cautiously floating possibilities that forum states should override foreign sovereign immunity where necessary to allow individuals to pursue claims for violations of their human rights by foreign states acting in their public capacities,³² raises concerns about human rights and the minimum requirements of publicness of law which are both heightened and blurred by the principles of respect for the autonomy and political character of foreign public law.

The second example is the *Shrimp-Turtle* case.³³ The United States prohibited import of shrimp from India, asserting that Indian shrimp vessels did not meet U.S. statutory requirements concerning protection of turtles. The WTO Appellate Body did not hold that the United States acted contrary to GATT in refusing to treat Indian shrimp in the same way as identical shrimp from elsewhere, even though the text of GATT seemed to call for this. The Appellate Body deferred to a U.S. public law decision that demand from U.S. markets for shrimp was not going to be permitted to more grievously threaten turtles. But the Appellate Body held that the way in which the U.S. authorities took their legal decision was arbitrary or unjustifiable, in so far as the United States did not provide India with proper notice of its plans to find Indian vessels non-compliant, an opportunity to contest these proposed findings in advance, or a reasoned written decision it could challenge. In effect, the U.S. process did not meet some of the requirements for publicness in law, as these requirements were not limited to a public composed of U.S. citizens, but included affected Indian interests as well.

In giving these as examples, I do not mean to suggest that international lawyers have been uniformly committed to the view that publicness is necessary to international law. One branch of the grand tradition of the juriconsult locates the international law adviser inside the Foreign Ministry, moving seamlessly between legal advice and diplomacy but placing the national interest above all.³⁴ However, even among the juriconsults a different tradition holds the Foreign Ministry legal adviser as committed to basic values of the general applicability of international legal rules and the need for ministers to be able to explain a legally defensible position in a public context, even if the government chooses not to act on this legal advice—a tradition symbolized by Sir Gerald Fitzmaurice's advice to the British Foreign and Commonwealth Office against the Suez invasion in 1956.³⁵ That is, a public responsibility to uphold international law arises, for these national civil servants, from the public nature of the law. Outside the special context of government service, the idea of a quality of publicness as an aspiration in international law seems increasingly, although not universally, accepted by practitioners and professors of the field. But if this aspiration is widely shared, it is tempered by recognition of special functions of public international law in relation to politics. Public international law, perhaps even more so than public law in general, employs gaps and silences as part of the enterprise of establishing, maintaining, and regulating the political sphere.

E. Gaps and Silences in Public Law

The discursive practices of public law also include the use of gaps and silences to accommodate the political. International law, like all public law but often to a greater degree, has such gaps and silences. These gaps and silences are not usually total—they interact with positive principles and legal values in managing different questions in specific contexts. The gaps and silences may circumscribe, but do not necessarily negate, requirements of publicness in law; indeed, such bedrock requirements may help to give meaning to the gaps and silences. The following are illustrative examples of gaps, silences, and abstentions and of their relations to requirements of publicness in international law, in three different structural postures: 1. national public law on national issues; 2.

national public law on foreign policy or trans-border issues; and 3. legal competences of international institutions.

1. Examples of an international legal institution respecting the political dimension of national public law on national issues are readily found in the jurisprudence of the European Court of Human Rights. *Gorzelik v. Poland* illustrates a characteristic line of approach.³⁶ At the behest of government authorities, the Polish courts had rejected an application to register an organization called the "Union of People of Silesian Nationality" which in its memorandum of association claimed to be "an organization of the Silesian national minority." The EHCR ruled that this did not violate the right to freedom of association. The Court focused on the structure of Polish electoral law, which entitled parties of national minorities to enter Parliament even without reaching the normal 5% threshold, but was operated without any definition in Polish law of a national minority. The electoral procedures seemed to enable any organization registered by the government processes as a national minority organization to claim the benefit of this exemption without further process. The European Court seemed to accept this structure of Polish public law as being relevant to the international public law of the ECHR. The result was that the human rights claim was not allowed to displace the political process for dealing with what are, in Poland, weighty political issues, namely the issues of minority representation in the legislature.³⁷ In another decision in a similar pattern, the ECHR accepted Turkey's argument that the forced dissolution of the Refah Party in 1997-1998, preventing this Islamic party from contesting an election it may well have dominated, was justifiable because of what the Grand Chamber accepted was incompatibility between some statements of the party's MPs and core values of the Convention and of Turkey's secular democracy.³⁸ In earlier decades, the ECHR similarly upheld complex Belgian linguistic and region-based electoral arrangements, despite unfairness to some voters which in other circumstances might have been held to be rights-infringing, on the ground that Belgium had adopted a transitional compromise in a fraught political situation that ought not to be destabilized.³⁹

2. Illustrations of international law accommodating a special political quality of national public law on trans-border issues abound on security matters,⁴⁰ but a more representative illustration be-

cause not overwhelmed by security concerns is the ECHR decision rejecting a claim by Prince Hans Adam II of Liechtenstein. The property of the prince's father was expropriated by the Czechoslovak government in 1945 under the Benes Decrees, and the prince now objected that Germany was allowing this property to be treated as "German" property instead of helping him to recover it.⁴¹ In particular, when a painting from the expropriated collection was sent from Czechoslovakia to an exhibition in Cologne, German courts refused to allow the prince to claim it, on the grounds that Germany's 1952–1954 treaties put an end to Germany's rights to make World War II–related claims about German property. The ECHR accepted that the exclusion of his claim by German courts did not violate his human rights, broadly on the ground that the public law of the post–World War II settlement ought not to be unraveled by the ECHR.

3. As between international institutions, a comparable approach to public law is particularly evident in attitudes toward the UN Security Council. International courts are generally reluctant to engage in real judicial review of its actions on core security issues,⁴² and the limitations to its areas of competence under Chapter VII of the UN Charter have not been closely controlled by judicial bodies. There is indeed a general tendency in international law to allow institutions established by inter-governmental agreement to determine the bounds of their own competence (the power often called *Kompetenz-Kompetenz*), constrained mainly by political pressures from individual governments or from inter-governmental political bodies who often control the budget and some appointments.

F. Alternatives to the "Publicness of Law" Approach

Some alternative scholarly approaches imply that the approach I have just sketched, with its focus on building a tempered requirement of publicness in international law, is much too modest. Contending positions hold (by implication, albeit not explicitly) that the publicness of international law is just an incidental feature in the project of building a global constitution. I turn now to consider alternatives to the "publicness of law" approach sketched here, beginning with consideration of current approaches to global constitutionalism.

Perhaps the major alternative to the "publicness of law" approach taken here is that of the multifaceted Habermasian school. One line of thought in this school begins the quest for public law not with the relationship of governors and governed, but with the idea of a public, and in particular with the distinction between a weak public and a strong public. As Hauke Brunkhorst puts it, a weak public has communicative power but does not have legally organized access to administrative power—basic rights are respected so it can deliberate, but it lacks constitutional authority to take legally enforceable decisions.⁴³ By contrast, a strong public exists where protection of basic rights and constitutional arrangements together make a strong coupling between public deliberation and legally effective decision. A weak public emerges where basic rights are protected (whether in hard law or merely in the practice of soft law), and there exist the mass media, political associations, political culture, etc. necessary for common deliberation. A strong public needs these ingredients plus a constitution which organizes the public power legally to take and enforce decisions. This concept of the public draws on Dewey's problem-solving approach to the formation of a political public, and on Arendt's ideas about joint action. It celebrates the "people power" of revolutionary publics, in the Philippines after Marcos, in South Africa and Central Europe in 1989, etc. On this view, trans-border weak publics, or even a global weak public, already exist, within the scope of the general patterns of rights protection now prevalent. The deliberative powers of these publics are only very loosely coupled to any decisional power, but this coupling might be strengthened by the realization of various kinds of global constitutionalism.⁴⁴ These global constitutional proposals often involve the elaboration on a global scale of ideas developed to meet the constitutional challenges of European integration. One line of these proposals is promising in that it avoids the familiar traps of simply wishing into being a global public created by communicative action, or of relying on the charters and institutions of global organizations such as the UN or WTO to get constitutionalism going. This proposal seeks to build, around the increasingly dense structure of European institutions and rules, a thick constitutional patriotism, in which the citizens of an emerging European polity embrace and interpret the common values of European constitutionalism not in a uniform manner but

in ways that reflect different national politico-legal histories, different ethical commitments, and different politics.⁴⁵ Commitments to particular ideas on the purposes and limits of government, individual rights, rule of law, and even democracy are all thus placed at the core of European allegiance even while given detailed meaning in different ways in different national contexts. Even assuming that such an approach can succeed in Europe—a contested assumption—it is doubtful that international law on a global scale can proceed this way. It is very unlikely that any global constitutional-type instruments could soon command the type of allegiance and shared identification from a wide section of humanity that might get any sort of world polity going, even one accommodating considerable variation in interpretations and appropriations depending on variations in national traditions, ethics, and politics. In sum, I think the Deweyan problem-solving too soft and expert-oriented, the Arendtian joint action too limited and erratic, and the strong coupling of a global public with constitutionalist institutions too improbable, for this cluster of Habermasian approaches to be a likely platform for public law on a global basis in the near future, however helpful these ideas may be in world sociology.

Another important alternative to the approach to public law defended here is one that begins not with government and governmentality, nor with any claim for the autonomy of the political, but instead begins with spontaneous orderings in the private sector. Important work on contemporary juridification—the scholarship associated with Niklas Luhmann, Gunther Teubner, Christian Joerges, and others—can be understood as beginning with private ordering and advancing toward a conception of the public and of public law. This work anticipates that private orderings and official regulation will proceed not independently, but interdependently. Even if the rate of technological and market change is so quick that official regulation cannot keep pace, still a demand for elements of public regulation accompanies the more and more complex administration of matters affecting a wide public, particularly issues about risk. This kind of administration is celebrated the more it moves away from rigidified Weberian bureaucracy, and toward the open and flexible models of European Union comitology, the EU's Open Method of Coordination, or perhaps the evolving governance of cyberspace. But even if the form of administration is

not particularly Weberian, the new forms are still subject to Weber's insight about administration necessitating the deformation of law. This approach to transnational juridification thus casts doubt on the place for public law in any traditional sense. One response has been to revive a sources-based definition of private law, and of public law, then to call for a dialectical relationship between them.⁴⁶ I doubt, however, that a traditional sources-based account is adequate. My understanding of public law focuses on practice and principles as well as sources theory. It expects variation depending on the nature of the issues addressed as well as functional and value dimensions, and is not reducible to a sources-based definition of public or private law. I conclude that the transnational juridification approach, while illuminating for legal theory and generative of an important research agenda, is unlikely at present to provide a way to frame scope conditions for a re-theorized public international law.

III. THE INTER-PUBLIC QUALITY OF INTERNATIONAL LAW

A. *Law Between Public Entities*

The idea that international law is made by entities that are themselves public—operating under their own public law, and oriented toward publicness as a requirement of law—has implications for how we think about international law. Instead of international law simply as agreements between juridical units, it points to the possibility of understanding public international law as law meeting publicness requirements that is made between entities whose public nature qualifies them as having jurisgenerative capacity. This is, in short, the possibility of understanding international law as inter-public law rather than simply as *jus inter gentes*. The most important of these public entities are likely to be states. They are accustomed to the operation of the principles of public law of the kind in the indicative list sketched earlier. They are each equipped with a raft of institutions operating in a public law environment, and which will be involved in the international law process. Associations and citizens' groups within the state bring similar public values to their participation in international law. However, there is no strong reason to limit the category of public law entities—and of participants

in inter-public law—to states. As trans-border interactions among all such public entities increase, situations where they bump up against each other multiply, generating conflicts of laws arrangements in the public law sphere.

A conceptual shift of this sort, if accepted, would be fundamental, even though its practical consequences might be felt only very slowly. Such a shift would probably be operationalized primarily by specification of the relevant (types of) public entities, rather than by routine international law specification of publics. In relation to any particular entity (and especially states), the meaning of “public” for international law purposes would routinely be described in terms of a renvoi to the relevant entity’s legal and political arrangements, much as the ICJ in the *Barcelona Traction* case (1970) concluded that the identity and core governance rules of a “corporation” depend simply on the national law of the corporation, which international law recognizes and follows but does not tinker with. Thus one state may have a corporatist system, with political groups organized and represented by profession or industry or university, while another state has a mixed system of ethnic and territorial groupings and representation, and an industry governance association may have only regional peak groups as its members, but international law will simply accept the heterogeneity of forms and categories.⁴⁷ Efforts will be made to limit this tolerance. But they are unlikely to entail the robust commitment to political equality that has been embraced in most democracies for many decades; any prescription of equality would probably operate only to rule out egregious exclusions and abuses. Political equality would be at best a regulative ideal; and inter-region equity would be something less than that. Participation rules would also be loose. As is at present the case in global governance, some of the public entities might be virtually self-appointed.⁴⁸

Operationalization in terms of entities rather than publics is likely to be juridically much more practicable (much in the way that self-determination in international law has generally been applied to juridical units such as colonially defined territories with arbitrary borders, rather than to ethno-linguistic peoples). In practice, public entities and publics will often go together. But situations in which the public entity is not an adequate representative of the relevant public are common. For example, a public entity

with governing power may decide an issue, with full participation of its public under a deliberative model, and careful framing of arguments and reasons so as genuinely to encompass all of those who spoke; yet the decision may be taken by an entity whose public is not the public truly affected.

B. The Inter-Public Conception Illustrated: Global Administrative Law

I will offer here one example of this inter-public law in operation: the emerging field of global administrative law. A legal commonality is introduced to the innumerable permutations of contemporary global governance forms, through the idea that the various mechanisms for accountability, for participation, and for the strengthening or eroding of legitimacy in these different governance structures, are evolving not simply in parallel but in increasingly interconnected ways. This loose unity may be described as an emerging global administrative law, by which is meant the legal mechanisms, principles, and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make.⁴⁹ It is practiced at multiple sites, with some hierarchy, some inter-site precedent and borrowing of principles, but considerable contextual variation. Thus the WTO Appellate Body now requires (e.g., in the *Shrimp-Turtle* case, mentioned above) member states to follow certain administrative procedures before excluding imports, the Basel Committee of central bankers now puts out drafts of its proposals on capital adequacy for wide comment before adopting them, the UN Security Council has adopted a limited review mechanism to make it possible for people listed as terrorist financiers to be delisted, the World Bank operates a notice and comment process before adopting policies and has an Inspection Panel to hear complaints that it has breached its policies, and the International Olympic Committee follows an elaborate procedure for athletes suspected of doping and has a review process culminating in arbitration at the International Court of Arbitration for Sport. This body of practice is normative and cross-referential. It is influenced

by treaties and fundamental customary international law rules, but it goes much beyond these sources and in places moves away from them. It is a prime example of the inter-public international law of the era of global governance.

C. Implications of the Inter-Public Approach to International Law

Three implications of adopting such an inter-public approach to international law may be noted.

First, the inter-public approach may provide a way of encompassing jurisgenerative activity of market actors—activity that was placed largely outside the emerging *jus inter gentes* model as states (public) and markets (private) came to be separated in liberal theory. The inter-public approach may provide a basis, without great disruption of entrenched liberal positions, for addressing market actors as public actors when they exercise governing power (i.e., when they regulate), and for defining the relevant public in terms of those they govern.

A second implication of the approach sketched here is that some things should be non-public. This will entail fundamental normative argument about where lines between public and non-public should be drawn, and what their consequences should be. Some will defend the non-public (not necessarily the same as the private) as a zone of freedom, and of voluntarism; others will criticize it as a zone of oppression and evasion. To give one example of the cashing out of this in practical international law doctrines, it has been argued that the standard for review by a national court of a private international commercial arbitration award should not be the same as the standard of judicial review of public acts of a state.⁵⁰

Third, an attribute of the inter-public approach is that it challenges a relatively untheorized but highly influential functional approach to transnational and international governance. In this functionalist view, there is nothing intrinsically (merely contingently) important about the state, nor even about an articulate conception of the public, as a basic unit in governance. This view favors any way in which governance can best be organized in terms of criteria such as efficiency, effectiveness, aggregate welfare maximization, and political viability. If in practice this means that

some strong states do most of the governing, and other states are eclipsed in many spheres by markets or by specialized international institutions or by private governance actors, nothing of great value is lost. If this counsels for particular attention to states at risk of failing, and to supplanting their institutions in order to protect basic human needs or suppress terrorism or drug trafficking, so be it. I believe that one of the costs of this approach is that it misses the intrinsic value for people of the public sphere—the value of performing, and debating, and updating public values—activities that coexist comfortably with markets and private associations but are not reducible to these. States often provide important elements for a public sphere; but some states barely do this, and public spheres are also being built in other forms under conditions of globalization. The inter-public approach expects that states and state institutions will feature prominently, and indeed provides normative and functional reasons for expecting them typically to be the primary jurisgenerative actors, but it emphasizes that public values and public orientation should also be features of other forms of governance.

D. Does Gunther Teubner's Global Legal Pluralism Offer an Alternative?

Gunther Teubner, wrestling with the problem of identifying law in 21st century practices called *lex mercatoria* or the law of cyberspace, produces a concept of law that is more radically unmoored from the state.⁵¹ However, the test of validity he proposes for this kind of governance is simply one of social coding: legal pluralism is “a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal.” This is a formal view that has the great merit of not reducing law merely to function (I return to this issue below). As he points out, law cannot simply be any arrangement of norms that perform such functions as social control, conflict resolution, coordination of behavior, shaping expectations, accumulation of power, private regulation, or disciplining and punishing bodies and souls. However, rejection of the relevance of such functional criteria limits the bases on which any content criteria for valid law might be generated. This is a major problem in the absence of any system of authoritative sources, an absence that is probably unavoidable given his assumption of plu-

ralism of normative discourse and networks. Teubner recognizes that the ability of diffuse global governance sub-systems to identify legal norms, or authoritative deciders, is weak. His idea is that such norms emerge in relatively autonomous cross-border social sub-systems, and are in effect self-validated through practices in these sub-systems that stretch the law over time, operate internal hierarchies, and externalize from the parties to arbitration bodies, professional and business associations, etc.

Teubner's account of extra-civil law has not overcome the basic problems of system and proof faced by theorists of international law from Grotius onward. Teubner tries to deal with the problem through anti-foundationalist analysis of discourses and social practices. Teubner's strategy is to shift practice out of domains of morality, or ordinary politics, and into sub-specialized communities of interest and expertise that are barely accessible to civil society or even to most of the educated elite. I do not accept this as a normatively defensible strategy for international law under modern democratic conditions. Instead, I believe it is normatively important to emphasize and build the (tempered) requirements of publicness in law, and I argue that the adoption of an inter-public approach to international law provides the conditions for this to be effectively pursued.

IV. WHAT ABOUT DEMOCRACY?

The idea that publicness is necessary to international law and to law in general is not in itself democratic, but it raises the question whether someone normatively committed to this quality of publicness should necessarily be interested in giving a normative priority in international law to democracy. The idea that international law has, and should have, inter-public features may well seem also to be a waypoint on the path leading to a commitment to democracy in international law. The possibility that these ideas of publicness in law and inter-public international law aggregate into a democratic commitment raises many challenges I cannot explore here. But several basic problems about the relations between these ideas and democracy should be noted.

The incentives for someone whose highest priority is assuring the flourishing of her own national democracy will not necessarily

lead her to support building and maintaining other robust and independent national democracies. The usual view is that each democracy is better off if there are more other democracies, because of the reduced risk of aggressive war between democracies, and because of democratic contagion and inter-democratic buttressing. But these gains may be outweighed by the realpolitik gains of having a pliant leadership installed in other countries of importance (for example, a dependent dictator may do a much better job of supplying oil abroad than does a precarious new democracy).⁵² To have the government of a foreign state on the payroll of one's own state dramatically changes the structure of relations with it from the normal posture of international relations, particularly between states with sharply diverging security and resource interests.⁵³ These gains from pliant leadership may also filter into the political structure of the democracy, enabling its politicians to deliver more benefits to the constituencies to whom they are accountable. Thus in powerful democratic states, in particular, it cannot be taken for granted that pro-democratic commitments nationally translate into genuinely pro-democratic commitments with regard to all other countries. If this is correct, it is to be expected that democratic leaders involved in making international law will vary in the degree to which they seek to make international law genuinely pro-democratic. Those leaders who have been elected by democratic processes in fragile democracies are likely to try to use international law and institutions to lock in their current democratic institutions and raise the costs for coup plotters or foreign invaders.⁵⁴ Leaders of strong states with well-entrenched democracies will seek an international law that is not incompatible with their own national systems and those of their allies, and are very likely to favor an international law that advocates electoral processes as a means of legitimating fragile governments elsewhere which they have helped to constitute. But they are also likely to want international law to allow some play for pursuit of their political interests while impeding pursuit of the conflicting political interests of others.

If those committed to national democracy in the national society cannot uniformly be relied on to seek to promote genuine democracy in all other countries, or to favor an international law system which gives high priority to this, can they nevertheless be

expected to favor democratic-type mechanisms and principles in transnational or inter-governmental governance? (I use the phrase “democratic-type mechanisms” here because I do not think there is any realistic scheme for international democracy on a global scale that is remotely comparable to the idea of democracy as understood nationally. So as a practical matter it is necessary to consider not an international analog of national democracy, but the application in international governance of some of the mechanisms and principles which currently help in the realization and operation of democracy nationally.) The starting point is that those who are committed to their own national democracy are right to see that globalization is potentially a threat to the realization of this commitment in its current form. It is true that globalization is in many respects operating to empower the state, and to increase aggregate wealth and welfare even if heightening intra-state inequalities as well as global inequality. But it remains the case that the people of state X are increasingly affected by, but unable to influence, decisions by policymakers of state Y or of intergovernmental or transnational networks: their votes do not elect these policymakers, their legislature often cannot legislate over them, their courts usually cannot judicially review them, and their power of the purse is seldom effectively exercisable to control them.⁵⁵ Given that isolationism is impractical or impossibly costly for most, the obvious response is to build stronger non-national systems of accountability in global governance, and to strengthen participation rules within transnational bodies. Paradoxically, in transnational governance this response is likely to intensify a particular kind of rule by technocratic experts, buttressed by other experts financed by industry or a few sophisticated NGOs with stakes in the issue—experts who are subject to forms of accountability related to professional reputation or to institutional financing, but who are largely beyond the reach of any general democratic politics. In so far as the oversight and checking of expert rule nationally has been a sustaining task of judicial review, and of small local groups organizing politicians and news media to intervene on an issue, the transfer of governance processes beyond their reach, to transnational expert groups, makes it more difficult for such vibrant national systems to thrive.⁵⁶ This may be a double loss—less and less governance is within democratic control, and the performative civic experience

of enacting democracy may be felt less widely if such institutions wilt from diminished significance.

So while those whose highest normative priority is national democracy may also be unreserved advocates of an international law system that promotes democracy elsewhere, and that builds democratic-type mechanisms and principles in international governance, there are strong reasons why these agendas do not uniformly march together. Therefore, I do not think the inquiry into the value of the quality of "publicness" in international law can have as its normative starting point the commitment to national democracy. The Habermasians go along with all of this, but then assert that it is now wrong to have as one's highest normative priority the maintenance of national democracy, because we now live in the era of the post-national constellation, and democratic normative projects must address this in framing ideas of international law. There is much to sympathize with in this approach. But with regard to the subject of the present paper, my view is that, since I do not think there is any imminent prospect of a true international democracy (in global terms; I leave aside the EU and any similar regional projects), I do not see the inquiry into the quality of publicness in international law as being in itself part of the quest for a democratic jurisprudence, even though the agendas overlap.

If cosmopolitan democracy is not presently viable, what of the traditional attraction of the current states system, namely that it is possible, and indeed normal, for the states all to assemble and deliberate? Assemblies continue to be held regularly among all of the states of the world (in the UN General Assembly, or in the vast range of conferences on great issues such as environment, development, habitat, equality of women, etc.), or all of the states interested in a particular topic (the diplomatic conference to draft and debate the Statute of the International Criminal Court, for instance) or which have agreed on a framework instrument for it (the Conferences of the Parties under many major treaties). The more the states are understood as primordial actors, rather than merely functional institutions among many others, the more it is possible to sustain the image of the assembly as one of primal participation rather than legislative representation. But once the state ceases to be coherently univocal, and once states cease to be monopolists, the image of the Athenian assembly breaks down. This

breakdown is by no means complete—but the topics in which it has occurred least, such as military security, are also those in which the assemblies have been least effective. In fields where the assemblies might work well, they cannot simply be redefined as representative legislatures, as they do not include all of the key actors and cannot generally assume the exclusive or preemptive hierarchical competence in the international lawmaking process that national legislatures typically claim.

The considerations just mentioned lead me to bracket the possibilities that a requirement of publicness in international law, or an inter-public approach to international law, or the two in combination, are intrinsically democratic. Democracy is an important aspiration, but I myself am only able to formulate the analytic implications of the two ideas discussed here much more cautiously.

V. CONCLUSION: INTER-PUBLIC INTERNATIONAL LAW AS PLURALISM-IN-UNITY

The approach to international law outlined in this paper, if coherent, holds at least three conceptual attractions. First, it provides a structure for theorizing the pursuit and actualization through law of distinctly public values, responsibility for which falls on the society and its public actors rather than on individual law-subjects. Second, it provides one of the elements needed in the important theoretical enterprise of distinguishing law from the morass of approaches to governance into which it threatens to disappear. Finally, and perhaps most important, it provides an organized way to connect law to democratic state politics and to the politics of governance institutions other than states.

The argument of this paper represents an aspiration for international law as a kind of pluralism-in-unity. The argument for a requirement of publicness provides a basis for an international law that accommodates separate publics and their values but within the unity of a solidarism of public values; in so doing it overcomes the voluntarist contractualism that informs an international law based on bilaterality alone. The argument for an inter-public conception of international law, with multiple sites that are separately constituted but normatively linked and with some inter-site accountability, makes space for a practical and institutional pluralism within

a shared global project. These arguments come together to build an international law that makes space for working democracy, but is not in itself democratic—rather, it is an international law of engaged pluralism, unified by a shared, if modest, requirement of publicness in international law.

NOTES

1. This approach to international law is sustained by a realist view of international politics that presumes that the (foreign) policy of the state and its enunciation in international assemblies is tightly controlled by a few key leaders and governmental agencies, that these state institutions are very strong vis-à-vis other institutions and social forces in the polity; and that the leadership acts rationally in identifying and pursuing a reasonably coherent view of the national interest. These presumptions are ideals—the realist tradition from Machiavelli has been much concerned with urging government leaders not to depart from these ideals, and statist international lawyers have built innumerable devices to keep idiosyncratic international institutions and legal arrangements intelligible within this framework. For details and references on statism, see Benedict Kingsbury, "The International Legal Order," in *The Oxford Handbook of Legal Studies*, eds. Peter Cane and Mark Tushnet (Oxford: Oxford University Press, 2003), 271, at 282-287; and Benedict Kingsbury, "Review of Stephen Krasner, *Sovereignty: Organized Hypocrisy*," *American Journal of International Law* 94 (2000): 591-595.

2. For example, the Forest Stewardship Council, a private entity, has developed detailed sets of criteria for sustainable forest use, and for certification of products from such forests, which are to some extent enforced by NGO monitoring and market pressure. The work of the International Standards Organization (ISO), which consists of one national standard-setting body (public, private, or hybrid) from each of country, is a further illustration. At present, this body goes almost unmentioned in general international law works. Yet it has set over 13,000 standards, including many with important economic, social, and environmental implications, and its insufficiently studied procedures include some 180 technical committees, 550 sub-committees, and 2,000 working groups, which altogether involve over 40,000 people. It has direct ties into *jus inter gentes*: while each country is in theory free to apply or not apply a particular ISO standard, the effect of WTO law is to insulate from challenge those national standards that are based on ISO standards, and to place considerable burdens of justi-

fication on countries that choose to set their own standards instead. It is also important in shaping markets. See Steven Bernstein and Ben Cashore, "Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention," in *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment, and Social Governance*, eds. John Kirton and Michael Trebilcock (Aldershot: Ashgate, 2004), 33-63; and Walter Mattli and Tim Büthe, "Setting International Standards: Technological Rationality or Primacy of Power?" *World Politics* 56 (2003): 1.

3. This argument is explored in Benedict Kingsbury, "Legal Positivism as Normative Politics: International Society, Balance of Power, and Lassa Oppenheim's Positive International Law," *European Journal of International Law* 13 (2002): 401-436.

4. H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), 227.

5. Gunther Teubner's account of law, in terms of the mutual checking between formal and informal elements in a series of self-validating social-economic sub-systems largely autonomous from politics, is one which seems to eschew any claim that a unified system of law is needed. See, for example, his contributions to Gunther Teubner, ed., *Global Law Without a State* (Aldershot: Dartmouth, 1996).

6. This is one of the lines of accretion illuminated by Joseph Weiler in his ongoing work on a "geologic" approach, see, for example, J. H. H. Weiler, "The Geology of International Law: Governance, Democracy, and Legitimacy," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (2004): 547-562.

7. In this paragraph and the preceding one I have drawn heavily on an elegant and economical summary of my argument by Melissa Williams, who in summarizing it also contributed much clarity to it.

8. Jeremy Waldron, "Can There Be a Democratic Jurisprudence?" (March 2004 revised draft of Wesson Lectures presented at Stanford University, Stanford, CA, January 21-22, 2004). I refer to this presently unpublished draft because its brief discussion of this issue is important and has been a stimulus to my project. But I do not here enter into debate about particular formulations.

9. This claim seems to sit uneasily with the role of many national democratic legislatures in adjusting entirely particular and private matters by legislation—the vast number of private bills in the U.S. Congress and state legislatures, for instance. But we might defend Waldron by saying that these private bills are classified as private, in the U.S. Congressional Record for example, precisely to distinguish them from public laws, which do indeed present themselves as oriented in the direction of the public good.

10. Lon Fuller, *The Morality of Law*, revised ed. (New Haven, CT: Yale University Press, 1969). See also Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999). The Lon Fuller-type claim that the orientation of law is toward the general, not simply to particular commands, is treated by Waldron as separate from the claim about publicness, but seems to me to fold into it.

11. Joseph Raz, "The Rule of Law and its Virtue," in *The Authority of Law* (Oxford: Clarendon Press, 1979), 210.

12. See for instance Samuel Pufendorf, *Of the Law of Nature and Nations: Eight Books*, 4th ed., trans. Basil Kennett (London, 1729; reprint, Clark, NJ: The Lawbook Exchange, 2005), I.vi.5: "Now, altho' there are many other Things which have an Influence on the Will, in bending towards one side rather than the contrary, yet *Obligation* hath this peculiar Force beyond them all, that whereas they only press the Will with a kind of natural Weight or Load, on the Removal of which it returns of its own Accord to its former Indifference; *Obligation* affects the Will in a moral Way, and inspires it inwardly with such a particular Sense, as compels it to pass Censure itself on its own Actions, and to judge itself worthy of suffering Evil, if it proceed not according to the Rule prescrib'd."

13. Hart, *The Concept of Law*.

14. Part of Waldron's argument for a greater interest in democratic jurisprudence is that topics such as the quality of publicness in law have been insufficiently attended to in recent analytic legal theory.

15. Jeremy Waldron suggests, en passant, that in a democracy it is the business of society to be concerned with the whole of the law that stands in its name, even law focused only on private actors, so that a requirement of publicness prima facie applies to private and public law without fundamental distinction. But his argument is made against those who would in some way insulate private law, or private property and markets, from ordinary public-political engagement. This does not necessarily reach the question whether special requirements might apply to public law.

16. Cicero, *De Legibus*, III.6; Hobbes, *De Cive*, XIII.2; Pufendorf, *De Officio Hominis*, II.xi.3.

17. Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28 (1979): 205; and his "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89 (1976): 1685.

18. See generally David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart, 2004), esp. Michael Taggart, "The Tub of Public Law," 455-480.

19. An illustration is Richard Fallon, "The Rule of Law as a Concept in Constitutional Discourse," *Columbia Law Review* 97 (1997): 1.

20. Ronald Dworkin, "Political Judges and the Rule of Law," in *A Matter of Principle* (Oxford: Oxford University Press, 1985), 12.

21. Jeremy Waldron, "The Rule of Law as a Theater of Debate," in *Dworkin and His Critics*, ed. Justine Burley (Oxford: Blackwell, 2004), 319, 323.

22. See David Dyzenhaus, "Aspiring to the Rule of Law," in *Protecting Human Rights: Instruments and Institutions*, eds. Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (Oxford: Oxford University Press, 2003), 195-209.

23. Steve Charnovitz, "The Emergence of Democratic Participation in Global Governance (Paris, 1919)," *Indiana Journal of Global Legal Studies* 10 (2003): 45; Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance," *Michigan Journal of International Law* 18 (1997): 183-286.

24. Société Française pour le Droit International, Colloque de Genève, *La pratique et le droit international* (Paris: Pedone, 2004).

25. In 2005 the Appellate Body for the first time held such a session in public, with the agreement of the disputing parties. Many other international rule-making and decision-making bodies try to find a way of both being jurisgenerative and not too constrained by the public, by finding ways to avoid publicity for their documents and proceedings while also not keeping them formally secret—they want to be part of international law, but they fear that their good work as technocratic experts will be slowed down by NGO agitators or self-serving industrialists.

26. Kai Alderson and Andrew Hurrell, eds., *Hedley Bull on International Society* (Basingstoke: MacMillan, 2000).

27. John Meyer et al., "World Society and the Nation State," *American Journal of Sociology* 103, no. 1 (1997): 144.

28. Georges Abi-Saab, "International Law and the International Community: The Long Road to Universality," in *Essays in Honour of Wang Tieya*, ed. R. MacDonald (The Hague: Nijhoff, 1994), 31.

29. Robert Keohane and Joseph Nye, "The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy," in *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, eds. R. Porter et al. (Washington DC: Brookings Institution Press, 2001), 264-294.

30. I say that international law requires this, because this is what most experts globally believe. But the U.S. Supreme Court in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) said that this is a matter of comity, not international legal obligation.

31. Not surprisingly, the subordination of foreign public autonomy to competing interests in pursuing claims against foreign states came initially with regard to financial markets. The U.S. Supreme Court holding in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), that Argentina had no immunity in U.S. courts when sued on bonds it had issued as part of a

restructuring to prevent financial collapse of the Argentine private sector, was based on the commercial nature of a bond default, without giving any weight to circumstance of the bonds being issued by the government acting for public purposes.

32. See dicta in *Al-Adsani v. the United Kingdom* (35763/97) [2001] ECHR (21 November 2001), Grand Chamber, although the Court held that the United Kingdom did not breach the Convention by applying foreign state immunity to prevent a Kuwaiti bringing a torture claim against Kuwait in UK courts. See also dicta in *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, in which the Court implied that in upholding immunity of an international organization from labor rights claims in a national court, it was relevant that other remedies achieving an equivalent level of rights protection were available against the international organization.

33. WTO Appellate Body, 12 October 1998, (1999) 38 ILM 121.

34. See, for example, the reflections of the then French Foreign Ministry Legal Adviser: Guy Ladreit de Lacharrière, *La Politique juridique extérieure* (Paris: IFRI, 1983).

35. Geoffrey Marston, "Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government," *ICLQ* 37 (1988): 773-817. Press reports of the resignation of Elizabeth Wilmshurst from the FCO legal department after the invasion of Iraq in 2003 indicated that she did not regard the invasion as lawful under international law.

36. *Gorzeliik v. Poland* (44158/98). [2004] ECHR 72 (17 February 2004), Grand Chamber.

37. The Court emphasized the roles of political parties and of all kinds of associations in the realization of democracy and pluralism, and noted that "freedom of association is of particular importance for persons belonging to minorities" (para. 93). But the Court was not prepared to condemn the structure of the Polish legal arrangements, even though they entailed non-recognition of a plausible group. In essence, the Court accepted that the state's actions (taken through the Polish courts) were to prevent disorder and "to protect the existing democratic institutions and procedures in Poland."

38. *Refah Partisi (The Welfare Party) v. Turkey* (41340/98) [2003] ECHR 87 (13 February 2003), Grand Chamber. The language and reasoning of parts of this judgment have very problematic aspects, discussed at the conference "The Turkish Welfare Party Case: Implications for Human Rights in Europe," Central European University, Budapest, June 12-15, 2003, proceedings forthcoming.

39. *Mathieu-Mohin and Clerfayt v. Belgium* (9267/81) [1987] ECHR 1 (2 March 1987).

40. For example, the resistance of the European Court of Human Rights to judging the legal merits of the military actions by various NATO states against Yugoslavia taken in 1999, *Bankovic v. Belgium* (2001) 11 BHRC 435; or the ECHR holding that a cross-border abduction of an accused person by one state with the connivance of the state from which the abduction occurs is not itself a breach of the human rights of the abductee, *Öcalan v. Turkey* (2003) 37 EHRR 238.

41. *Prince Hans-Adam II of Liechtenstein v. Germany* (42527/98) [2001] ECHR 463 (12 July 2001).

42. Bernd Martenczuk, "The Security Council, the International Court, and Judicial Review: What Lessons from Lockerbie?" *European Journal of International Law* 10 (1999): 517-548.

43. Hauke Brunkhorst, "Globalising Democracy Without a State: Weak Public, Strong Public, Global Constitutionalism," *Millennium* 31 (2002): 675-690.

44. For a social solidarity approach see Hauke Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community*, trans. Jeffrey Flynn (Cambridge, MA: MIT Press, 2005); and for a systems-theoretic approach, Andreas Fischer-Lescano, "Die Emergenz der Globalverfassung," *ZaöRV* 63 (2003): 717.

45. Jürgen Habermas, *Der gespaltene Westen* (Frankfurt: Suhrkamp Verlag, 2004); Matthias Kumm, "The Idea of Thick Constitutional Patriotism and its Implications for the Role and Structure of European Legal History," *German Law Journal* 6 (2005).

46. See, for example, Christoph Moellers, "Transnational Governance Without a Public Law?" in *Transnational Governance and Constitutionalism*, eds. Christian Joerges, Inger-Johanne Sand, and Gunther Teubner (Oxford: Hart Press, 2004), 329, 337: "The discussion on transnational constitutionalism can be reconstructed by a distinction between two forms of laws. A private law framework defines law as the result of spontaneous co-ordination efforts. A public law framework defines law as the result of a political process, which is not autonomous, but is intentionally steered. . . . But an adequate theory of law needs a dialectical synthesis of both approaches."

47. Consider the slowness of international law, and indeed of many national public law systems, to deal in a sophisticated way with political parties.

48. Thanks to Jeremy Waldron for discussion of these issues.

49. The Global Administrative Law Project of NYU Law School's Institute for International Law and Justice (www.iilj.org) focuses on the extent to which there are, or should be, principles and rules common to this diverse regulatory practice. See, for example, Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68 (2005).

50. Gus van Harten makes this normative argument in forthcoming work on national court review of NAFTA investor-state arbitral awards.

51. Gunther Teubner, "Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?" in *Public Governance in the Age of Globalization*, ed. Karl-Heinz Ladeur (Aldergate: Ashgate, 2004), 71-87; Gunther Teubner, ed., *Global Law Without a State* (Aldershot: Brookfield, 1997).

52. Bruce Bueno de Mesquita et al., *The Logic of Political Survival* (Cambridge, MA: MIT Press, 2003).

53. Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999).

54. Andrew Moravcsik, "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe," *International Organization* 54 (2000): 217-252.

55. Martin Loughlin, "The Impact of Globalization on the Grammar of Public Law" (paper presented at NYU-Oxford Workshop on Global Administrative Law, Oxford, United Kingdom, October 29-30, 2004).

56. This point has been incisively made in the work of Martin Shapiro. See, for example, Martin Shapiro, "Deliberative, 'Independent' Technocracy v. Democratic Politics: Will the Globe Echo the E.U.?" *Law and Contemporary Problems* 68 (2005): 341-356. See also Janet McLean, "Divergent Legal Conceptions of the State: Implications for Global Administrative Law," *Law and Contemporary Problems* 68 (2005): 167-187.