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## Reply to Andreas L. Paulus Consensus as Fiction of Global Law

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## REPLY TO ANDREAS L. PAULUS CONSENSUS AS FICTION OF GLOBAL LAW

Andreas Paulus reminds us correctly that narratives “of a world of sovereign states loosely cooperating in ‘coalitions of the willing’ no longer tell the whole story.”<sup>1</sup> One of the achievements of the 20th century has been the insertion of a vertical dimension within horizontal international law; a dimension created by the ICJ’s *Traction* decision and the Vienna Convention of the Law of Treaties, and within which we can observe “obligations arising for states without or against their will.”<sup>2</sup> Any narrative that characterizes these legal norms as a simple product of interstate consensus is particularly thin if analysis focuses upon the genesis of international legal norms. Real world processes are far more complex: states are only one of many actors who seek to invoke the existence of international legal norms, and even the ICJ accentuates generalizability rather than real-world uniformity:<sup>3</sup>

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the existence of a new rule.<sup>4</sup>

One of the consequences of this development is, that Paulus’ premise—interstate consensus as the source of the legitimacy of law—is extremely questionable in relation to international legal obligations. More importantly, however, denying the legal dimensions of communication between non-state actors likewise precludes a large number of social phenomena. In other words, analysis is incomplete if one ignores the fact that:

[w]e are currently witnessing serious challenges to nation-state sovereignty from three directions. First, supra-national norms and structures (international human rights law, the WTO) impinge upon sovereignty in unprecedented ways. The claim here is not that states have been hermetically sealed up to this point; it is

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1. Andreas Paulus, *Commentary to Andreas Fischer-Lescano & Gunther Teubner The Legitimacy of International Law and the Role of the State*, 25 MICH. J. INT’L L. 1047 (2004).

2. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 197 (1993).

3. For a deconstructive analysis, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL ARGUMENT 6 *passim* (1989).

4. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 62, para. 186 (June 27) [hereinafter *Nicar. v. U.S.*].

rather that interference in state sovereignty is now being justified in legal terms that carry increasing weight around the world. Second, subnational groups are demanding (and receiving) increasing degrees of autonomy [ . . . ] I will label the third dimension along which sovereignty is under challenge as ‘transnationalism’—the presence within state borders of communities of non-nationals with significant ties across borders.<sup>5</sup>

This cannot be said to result in the death of statehood; it can however be said to reflect upon a fundamental change of social differentiation.<sup>6</sup> Consequently, we would like to answer Paulus’ critique of the “functional appropriateness perspective” with brief reference to the *Yahoo!* case named in his response, which deals with cyberspace crimes.

### CASE EXAMPLE: CYBERCRIME

Following the judgment of the Paris Grande Instance, Yahoo! is required to deny French users access to auctions of Nazi memorabilia.<sup>7</sup> The case touches upon the fundamental issue of a universal right of access to digital communication.

#### A. *Functionality versus Territoriality*

One of the most decisive responses of the international political system to these challenges was the conclusion of a European Cybercrime Conven-

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5. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197, 201–02 (2000).

6. Thus, international law literature is increasingly concerned with differentiation of law and politics. See, e.g., Uwe Kischel, *The State as a Non-Unitary Actor: The Role of the Judicial Branch in International Negotiations*, 39 ARCHIV DES VÖLKERRECHTS 269 (2001). Anne-Marie Slaughter underestimates the drama and polycontextuality of differentiation processes, applying a form of network theory that restricts itself to an area of formal social organization and disregards a spontaneous social sphere. This results in various democratic problems. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER 12 passim* (2003).

7. T.G.I. Paris, Nov. 20, 2000, Ordonnance de Référé, UEJF, LICRA v. Yahoo!, Inc., No. 00/05308, available at <http://www.juriscom.net>, translated at <http://www.cdt.org/speech/international/001120yahoofrance.pdf>. This judgment confirms the earlier judgment of May 22, 2000, in which Yahoo was required to prevent access to Nazi memorabilia auction pages. T.G.I. Paris, May 22, 2000, Ordonnance de Référé, UEJF, LICRA v. Yahoo!, No. 00/05308, 00/05309, available at <http://www.juriscom.net>. For the resulting enforcement proceedings before US courts, see *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 145 F. Supp. 2d 1168, 1171 (N.D. Cal. 2001); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 169 F. Supp. 2d 1181, 1192 (N.D. Ca. 2001) (both courts holding the French judgment unenforceable). For instructive discussion on this issue, see Marc H. Greenberg, *A Return to Lilliput: The LICRA v. Yahoo! Case and the Regulation of Online Content in the World Market*, 18 BERKELEY TECH. L.J. 1191 (2003).

tion (Cybercrime Convention or Convention).<sup>8</sup> The Cybercrime Convention is the first international treaty that concerns itself with the particular characteristics of offences that are committed deploying the internet and other computer networks. In particular, it regulates copyright infringement, the pursuit of child pornography, computer-related fraud and assaults on network security. As enunciated in the preamble, its most important goal is the promotion of a “common criminal policy aimed at the protection of society against cybercrime, inter alia by adopting appropriate legislation and fostering international co-operation.”<sup>9</sup> A first appendix to the Convention concerns itself with cases of racist or xenophobic propaganda.<sup>10</sup> The most important Convention rule that deals with the issue of the criminal use of the Internet concerns the issue of jurisdiction. Article 22 of the Cybercrime Convention foresees that:

Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2–11 of this Convention, when the offence is committed: (a) in its territory; or (b) on board a ship flying the flag of that Party; or (c) on board an aircraft registered under the laws of that Party; or (d) by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.<sup>11</sup>

This provision is augmented through the creation of a limited obligation to act in cases of overlapping jurisdictions: “When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.”<sup>12</sup> Overlapping jurisdiction will be the rule rather than the exception, however,

8. Convention on Cybercrime, *opened for signature* Nov. 23, 2001, S. TREATY DOC. NO. 108-11, Europ. T.S. No. 185, *available at* <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm> [hereinafter Cybercrime Convention]. The Convention was adopted at the 109th session of the ministerial committee of the European Council on the 8th of November 2001 and presented for signature at the international conference on cybercrime on the 23rd November 2001. The convention is also open to non EU member states and has already been signed by more than thirty states including the US, where President Bush sent it to the Senate on November 17, 2003.

9. *Id.* at pmb1.

10. Additional Protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, *opened for signature* Jan. 28, 2003, Europ. T.S. No. 189, *available at* <http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>; The following entities helped with and can be referred to for the preparation process: European Committee on Crime Problems (CDPC), Committee of Experts on the Criminalisation Acts of Racist or Xenophobic Nature Committed through Computer Networks (PC-RX).

11. Cybercrime Convention, *supra* note 8, at art. 22.

12. *Id.* at art. 22, para. 5

since the territoriality principle stated within Article 22, Paragraph 1(a) of the Convention possesses a double character which can relate both to the criminal act and to the occurrence of illegal consequences. This is also made clear in the explanatory protocol on Article 22:

Paragraph 1 *litera a*) is based upon the principle of territoriality. Each Party is required to punish the commission of crimes established in this Convention that are committed in its territory. For example, a Party would assert territorial jurisdiction if both the person attacking a computer system and the victim system are located within its territory, and where the computer system attacked is within its territory, even if the attacker is not.<sup>13</sup>

As regards the limited obligation to act detailed in Article 22, Paragraph 5, the explanatory protocol declares that:

In the case of crimes committed by use of computer systems, there will be occasions in which more than one Party has jurisdiction over some or all of the participants in the crime. For example, many virus attacks, frauds and copyright violations committed through use of the Internet target victims located in many States. In order to avoid duplication of effort, unnecessary inconvenience for witnesses, or competition among law enforcement officials of the States concerned, or to otherwise facilitate the efficiency or fairness of the proceedings, the affected Parties are to consult in order to determine the proper venue for prosecution. In some cases, it will be most effective for the States concerned to choose a single venue for prosecution; in others, it may be best for one State to prosecute some participants, while one or more other States pursue others. Either result is permitted under this paragraph. Finally, the obligation to consult is not absolute, but is to take place 'where appropriate.' Thus, for example, if one of the Parties knows that consultation is not necessary (e.g., it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.<sup>14</sup>

Even the most cursory of reviews confirms that this attempt to coordinate national legal orders by means of the application of the territoriality principle will not solve the conflicts problem. Accordingly, alternative solutions are sought within political consultation mechanisms, or a *pactum de*

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13. Explanatory Report, Convention on Cybercrime, Nov. 8, 2001, art. 22, para. 233, Europ. T.S. No. 185.

14. *Id.* at para. 239.

*negotando*. Nonetheless, and with simple regard to the existence of more than thirty signatory states to the Convention, the functionality of such a solution might be doubted. In addition, however, qualms might be expressed about the effectiveness of this political process in view of the fact that over 150 States within the international community are not party to the Convention. The difficulties of creating appropriate global legal norms for cybercrime are further increased since the claim that the Convention is codifying common legal norms of international law is difficult to justify. The effort to avoid much deplored visions of the neutralization of tension between freedom and security through the proverbial “race to the bottom” will require, above all, the development of transnational norms that anticipate the potential global effects that local and functional legal decisions may have. As we have described, judicial instances must conceive of themselves as a part of a transnational legal order and shift their horizons above nationally structured normative orders to include a transnational law-making process within which NGOs, international organizations and spontaneously coordinated societal actors are attempting to establish the legitimacy of global law with reference to a variety of sources.

*B. Polycentric Ius Non Dispositivum versus Uniform Ius Cogens*

All such actors seek to expound specific principles and to universalise values. The declaration of the Independence of Cyberspace reproduces the constitutional-political pathos of national constitutional acts and declaims to the:

Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. [. . .] the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.<sup>15</sup>

Similarly, the European Council’s Cybercrime Convention identifies as its leading principles:

the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights, as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, as well as other applicable international human rights treaties, which reaffirm

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15. John P. Barlow, *A Declaration of the Independence of Cyberspace*, Feb. 9, 1996, at <http://www.dtext.com/hache/indep.html>.

the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy.<sup>16</sup>

The principles evoked here do not form a part of the *ius cogens* in the sense established by Article 53 of the Vienna Convention. If the argument is really one of whether all rights identified within the “International Bill of Rights”<sup>17</sup> could or should be dignified with this status, then the tense relationship between the hierarchical and horizontal nature of the transnational law-making process—a tension which Paulus also recognizes<sup>18</sup>—would simply be resolved in favor of the hierarchical principle. Political consensus upon such an extension of *ius cogens* could never be achieved; as is well known the principle’s existing constellation has met with much national opposition from influential states such as France. Amongst other things, the dominant skepticism concerns any expansion in the jurisdiction and applicability of a provision, Article 53 Vienna Convention, which nonetheless—and this is emphatically confirmed—is seen as serving a useful role within international law and within the arena of international human rights, and which furthermore forms one of the most important constitutionalizing elements within this regime.<sup>19</sup>

A very different issue is the reference to global values in legal argument. The ICJ has referred to global values on countless occasions.<sup>20</sup> The limits to law are not jurisdictional, but are rather to be found within references to values that lie “‘above all fluctuating validity claims’ and which provide law with ‘a level of meaning [ . . . ] upon which necessary foundations—in modern terms, peaceful cohabitation—are formed.’”<sup>21</sup> Recognition within the doctrine of the international community<sup>22</sup> for common value references is thus, at least in part, correct, particularly since the existence of an “International Bill of Rights,” comprising both international human rights covenants

16. Cybercrime Convention, *supra* note 8, at pmb1.

17. The three principal instruments which are deemed the “International Bill of Rights” are: Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); The International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); and the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

18. Paulus, *supra* note 1.

19. Andreas Fischer-Lescano, *Die Emergenz der Globalverfassung*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 717, 737 (2003).

20. For references to ICJ jurisprudence, see Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, *General Course on Public International Law*, 281 RECUEIL DES COURS 46 (1999).

21. NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 527 (1993) (our translation).

22. For a comprehensive discussion, see ANDREAS PAULUS, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT* (2001).

and the Declaration of Human Rights, demonstrates that discussion on the universality versus the relativity of values is misconceived; after all, the merest glance at the rights catalogue reveals that an overwhelming number of international legal subjects give international legal recognition to such positive values.<sup>23</sup> Nonetheless, the work of the law only really begins at this point and the question of universal values and the human rights catalogue must be posed in a different manner; to what (rather than simply to themselves) do such values refer?<sup>24</sup> The only certainty is that positive values (freedom, peace and equality) take preference over their negations (lack of freedom, war and inequality).<sup>25</sup> Consensus upon an accepted hierarchy of values is just as elusive as is a mutual rejection of values, with the consequence that reference to a universal value community offers us little assistance.<sup>26</sup> The essential paradox of the social contract construction is reproduced within rights catalogues—the diffuse formula that “the rights of one party form obligations for another party” is now given positive form in clauses such as:

Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.<sup>27</sup>

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.<sup>28</sup>

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23. On the consensus on values, see Alfred Verdross, *Die Wertgrundlagen des Völkerrechts*, 4 ARCHIV DES VÖLKERRECHTS 129, 139 (1953–1954).

24. NIKLAS LUHMANN, GIBT ES IN UNSERER GESELLSCHAFT NOCH UNVERZICHTBARE NORMEN? 18 (1993).

25. On the problem created by the fact that different observers ascribe different meaning to the same value, see Charles Chaumont, *Cours Général de Droit International Public*, 129 RECUEIL DES COURS 335, 344 (1970).

26. On the troublesome consequences for the “International Bill of Rights,” see Surya Prakash Sinha, *The Axiology of the International Bill of Rights*, 1 PACE Y.B. INT’L L. 21 (1989).

27. Universal Declaration of Human Rights, *supra* note 17, at art. 29.

28. International Covenant on Civil and Political Rights, *supra* note 17, at art. 19, para. 3.

Rights catalogues will thus have little to say in cases of value conflict; that is, in exactly those cases in which values must prove their practical relevance:<sup>29</sup> they lose their directive value at exactly the moment when it is required most. And the same is true in reverse: judgments are always, and only, necessary where values give rise to conflicting demands, such that there are not rules for judgments.<sup>30</sup> Lawyers fondly refer to “value balancing”<sup>31</sup> and “practical concordat” in such cases.<sup>32</sup> These are formulas, however, that can only retain their unity to the exact degree that they do not divulge their own consequences and do not reveal what they do not say.<sup>33</sup> Their obfuscating potential is only strengthened through concepts such as the “margin of appreciation,”<sup>34</sup> which is designed to reflect cultural peculiarities and widen discretion.<sup>35</sup> In order to balance values, to promote practical concordats and to reach decisions in cases of conflict, we thus require a legal system in which reference to values may very well symbolize seeming subservience to a fictitious unity of the heterogeneous, but in reality only stabilizes behavioral expectations, not through the chimera of unity, but through a distinction of the legal from the non-legal:

[T]he *distinction* between system and environment replaces the traditional emphasis on the *identity* of guiding principles or values. Differences, not identities, provide the possibility of perceiving and processing information. The sharpness of the difference between system and environment may be more important than the degree of system integration (whatever this means), because morphogenetic

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29. Surya Prakash Sinha, *Legal Polycentricity*, in LEGAL POLYCENTRICITY: CONSEQUENCES OF PLURALISM IN LAW 31 (Hanne Petersen & Henrik Zahle eds., 1995).

30. LUHMANN, *supra* note 24, at 20.

31. ROBERT ALEXY, THEORIE DER GRUNDRECHTE 138 (Suhrkamp 1994) (1985).

32. KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND para. 72 (20th ed. 1995). For a reformulation of this thought from an international law perspective, see Dieter Blumenwitz, *Souveränität—Gewaltverbot—Menschenrecht. Eine völkerrechtliche Bestandsaufnahme nach Abschluß des nicht-mandatierten NATO-Einsatzes in Ex-Jugoslawien*, in POLITISCHE STUDIEN 30 (1999).

33. Niklas Luhmann, *Grundwerte als Zivilreligion*, 3 SOZIOLOGISCHE AUFKLÄRUNG 293 (Niklas Luhmann ed., 1981); LUHMANN, *supra* note 24, at 21.

34. Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240 (1996); ANNETTE RUPP-SWIENTY, DIE DOKTRIN VON DER MARGIN OF APPRECIATION IN DER RECHTSPRECHUNG DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE (1999).

35. Even the UN Human Rights Commission, in accordance with the ICCPR takes partial note of this formula developed by the European Commission of Human Rights. See International Covenant on Civil and Political Rights, *supra* note 17, at art. 28, para. 1, especially with regard to the interpretation of the human rights obligation of individual states, see Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 INT'L L. POL. 844 (1999).

processes use differences, not goals, values, or identities, to build up emergent structures.<sup>36</sup>

The “legal validity” of values within the global community is only observable to the degree that these values are distilled into legal operations. In other words, fundamental principles and human rights of the global community are therefore neither a consensual *a priori*, nor an accepted derivation from natural law, nor do they have the character of Kelsen’s *Grundnorm*. Instead, they are legal artifacts to which law reflexively refers. Thus, it is the law which decides the undecidable: the validity of values; along with collisions; concordances and heterogeneities between them: as well as the compatibilization of dissent.<sup>37</sup> By virtue of the internal differentiation of global law, however, conflicts judgments are always taken and “practical concordats” always concluded from the perspective of a specific legal regime. The notion of “liberty” within the context of the Internet or the ICCPR implies—even though we might regret this from a moral perspective—something very different from the “liberty of trade” evoked in the context of the WTO regime. Seen within a “regimes” perspective, the issue is not one of deciding upon conflicts between different values, but is rather a matter of maintaining compatibility between the different concepts of liberty found within different regimes. Thus, the reference to a “cohesive glue,”<sup>38</sup> or indeed to “overlapping consensus”<sup>39</sup> underestimates the fact that the issue is not a matter of factual consensus within the international community or the internet community. Instead, fragmented processes of norm creation each work with their own visions of consensus, possess their own textual references that are applied differently in different contexts and feign commensurability of the incommensurate through the re-entry of external rationalities.

### C. Constitutional Pluralism v. Unity of Global Law

Such a polycentric view of global society does not, however, place the establishment of a system of global law in doubt. The application of a common legal code stabilizes borders of the legal and non-legal and the most important task of global constitutionalism is that of maintaining the

36. Niklas Luhmann, *The World Society as a Social System*, in *ESSAYS ON SELF-REFERENCE* 175, 179 (Niklas Luhmann ed., 1990).

37. See Karl-Heinz Ladeur, *Prozedurale Rationalität—Steigerung der Legitimationsfähigkeit oder der Leistungsfähigkeit des Rechtssystems?*, 7 *ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE* 265 (1986); see also the description in MARCELO NEVES, *VERFASSUNG UND POSITIVITÄT DES RECHTS IN DER PERIPHEREN MODERNE: EINE THEORETISCHE BETRACHTUNG UND EINE INTERPRETATION DES FALLS BRASILIEN* 42 (1992).

38. Christian Tomuschat, *International Law as the Constitution of Mankind*, in *INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY: VIEWS FROM THE INTERNATIONAL LAW COMMISSION* 37, 45 (1997).

39. JOHN RAWLS, *POLITICAL LIBERALISM* 133 (1996).

independence of law as against politics, the economic, and religion. Inter-legality poses a challenge because “[t]he world community swarms with myriad legal orders (in today’s parlance we would call them ‘sub-systems’); they do not live by themselves, each in its own area, but intersect and overlap with each other.”<sup>40</sup> In other words, global law can only be recognized as fragmented because the legal regimes use the same code. At the same time, internal differentiation within the global law increasingly occurs upon functional rather than territorial lines. With regard to inter-legality, constitutionalization means that each regime is reflexively oriented to its own social environment and in this way incorporates an *altera pars*. Responsiveness can only be secured by means of the re-entry of external rationalities. Problems that arise are clearly similar to those found in the relationship of national law to international law within the Westphalian system of States. This relationship between State and international law is similarly paradoxical and the monistic, dualistic and the qualified dualistic doctrines developed within international law theory cannot end the circularity created by the fact that, on the one hand, States constitute international law, whilst, on the other, international law constitutes States.<sup>41</sup>

When Paulus makes the point that it is “a matter of perspective whether one interprets the use of norms from other systems as an autonomous incorporation or as evidence for the existence of one common system,”<sup>42</sup> he is referring to the core problem of regime pluralism. Each conflict can only be settled within the context of its own entanglement. Even were it possible to clearly state that the international legal regime, with the ICJ at its center, possesses secondary rules of recognition in H.L.A. Hart’s terms and is constitutionalized to the degree that one can identify the emergence of a global political constitution,<sup>43</sup> we must nonetheless recognize that the international law perspective is but one of many. As per Marti Koskeniemi:

Likewise, statements by the Presidents of the ICJ are to be seen as defensive moves in a changing political environment. ‘[S]pecialized courts [. . .] are inclined to favour their own disciplines.’ Judge Guillaume stated in 2000. This is true—but it applies equally to his own Court. If the Presidents argue that other tribunals should request advisory opinions from their Court, then surely this should be read as an effort to ensure position at the top of the institutional hierarchy. But if the conflict has to do with preferences for future development, then it is unsurprising that not one body has expressed interest

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40. Antonio Cassese, *Remarks on Scelle’s Theory of “Role Splitting” (dédoulement fonctionnel) in International Law*, 1 EUR. J. INT’L L. 210, 211 (1990).

41. Fischer-Lescano, *supra* note 19.

42. Paulus, *supra* note 1.

43. Fischer-Lescano, *supra* note 19.

in submitting its jurisdiction to scrutiny by the ICJ [. . .] Today's institutional struggles do not favour the interests of sovereign equality represented by 'generalist' lawyer diplomats.<sup>44</sup>

Within constitutional pluralism—and this point cannot be overstressed—there is no unitary center, no hierarchical higher instance. ICANN and other fora of global law make divergent decisions on cybercrime and the constitutionalization of each regime must establish a mutual interplay between autonomous social and autonomous legal processes.<sup>45</sup> These conditions alone allow for the phenomenon of constitutional duplication, which is characteristic of structural coupling and which precludes the widely held concept that takes as its point of departure the notion that a unitary concept of constitution acts as a melting pot for legal and social orders. The constitution is simply only ever a node or hook between two real-world processes: from the legal viewpoint, reality entails a process of legal norm production that is necessarily enmeshed with the fundamental structures of the social system; from the perspective of the constituted social system, reality entails a process of the creation of the fundamental structures of social order that simultaneously informs law and is, for its part, given normative direction by law.<sup>46</sup> Structural coupling restricts both systems'—legal process and social process—ability to mutually influence one another. The overpowering of one by the other is prevented, mutual irritations are concentrated within narrowly restricted and often institutionalized paths of influence.

#### D. *Democracy Without A Demos versus Cosmopolitical Homogeneity*

Obviously, there are limits to the democratic theory argument that only those norms created by means of interstate consensus should have global validity. Legal validity cannot even be secured for the most fundamental of human rights, such as rights guarding against apartheid, slavery and genocide: not all states are members of the Genocide Convention, not all states—France springs to mind—agreed to art. 53 of the Vienna Convention that lends validity to the notion of *jus cogens*, whilst the most important

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44. Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 562 (2002); see also Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, Speech at the Inauguration Conference of the European Society of International Law at Florence, at 4 (May 14, 2004)(on file with authors).

45. On the structural coupling of law with other social systems, see Gunther Teubner, *Idiosyncratic Production Regimes: Co-evolution of Economic and Legal Institutions in the Varieties of Capitalism*, in *THE EVOLUTION OF CULTURAL ENTITIES: PROCEEDINGS OF THE BRITISH ACADEMY* 161 (Michael Wheeler et al. eds., 2002); LUHMANN, *supra* note 21, at 440.

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

addressee of the ban upon apartheid—the South African Republic of the 1970s and 1980s—remained fierce in its opposition to it. Even when international law is viewed in isolation, democracy and a transnational legal order are still trapped within a circular relationship which international law doctrine attempts to address either:

- by arguing for the return of the post-westphalian system to a coordinatory form of international law;<sup>47</sup>
- by demanding an intensification in the cooperative character of the international law of states;<sup>48</sup>
- by means of a reduction of international legal process to a notion of democratic states as law-makers;<sup>49</sup> or
- through the postulation of a cosmopolitan democracy,<sup>50</sup> or even a global republic.<sup>51</sup>

Our starting point is that the most powerful political actors are no longer in a position to control global development of a law. Global regimes reject an external political determination with the consequence that any analytical perspective that restricts itself to a global social contract between States is not in a position to take note of the full range of problems posed by the globalization of law:<sup>52</sup> in other words, if global law is reduced to include only those legal developments that take place in consensual statal proceedings, then a multitude of social phenomena are excluded. An appropriate analysis of the problem thus falls victim to the leading goal of normative unity, and whilst this might possibly facilitate the retention of an ideal unitary international law legitimated by statal consensus, it nonetheless represents a cognitive reductive dissonance. Obviously, we agree with the warning supplied by Paulus that “[t]he move from territoriality to functionality should not be accompanied by a move from democracy to technocracy.”<sup>53</sup> His faith,

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47. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413 (1983); Ernst-Wolfgang Böckenförde, *Die Zukunft politischer Autonomie, in STAAT, NATION, EUROPA: STUDIEN ZUR STAATSLEHRE, VERFASSUNGSTHEORIE UND RECHTSPHILOSOPHIE* 103; 116 (Ernst Wolfgang Böckenförde ed., 1999).

48. See Paulus, *supra* note 1.

49. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995).

50. DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* 278 (1995); OTFRIED HÖFFE, *DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG* 267 (2d ed. 2002); WELTREPUBLIK: *GLOBALISIERUNG UND DEMOKRATIE* (Stefan Gosepath & Jean-Christophe Merle eds., 2002).

51. For a useful summary, see Armin von Bogdandy, *Demokratie, Globalisierung, Zukunft des Völkerrechts—eine Bestandsaufnahme*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 853 (2003).

52. See the critiques in GUSTAV RADBRUCH, *RECHTSPHILOSOPHIE* 185 (Studienausgabe, Ralf Dreier ed., C.F. Müller 1999) (1932).

53. Paulus, *supra* note 1.

however, in the democratic nature of the international law-making process still strikes a false note.<sup>54</sup> The majority of states that are party to the international law-making process are not founded within notions of democratic transmission. Accordingly, normative demands, such as those made by Anne Marie-Slaughter, that democracies should be given a privileged space within the system of the international community also set a false accent because it rests upon strategies of exclusion and marginalization.<sup>55</sup> The suggestion that aristocratic networks or coordinated executives within international organisations such as the UN, WTO, IMF, etc.,<sup>56</sup> might take on the role of supplying global law with legitimacy is similarly misplaced.

Returning to the Cybercrime Convention: the Convention was worked out within the arena of European Council proceedings following the Ministerial Committee's early recommendation that the harmonisation of national provisions was necessary.<sup>57</sup> The US was granted observer status early on in proceedings and a common EU position was already established in 1999.<sup>58</sup> The Legal Committee of the Parliament Assembly gave its opinion on the final draft convention on April 10, 2001. Two weeks later, on April 24, the 15th draft was laid directly before the European Council's Parliamentary Assembly.<sup>59</sup> Despite occasionally very powerful critiques from technical and data protection experts only one amendment was adopted.<sup>60</sup> The draft was

54. See the critiques in the following: B. S. CHIMNI, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004); Sonja Buckel, *Empire oder Rechtspluralismus? Recht im Globalisierungsdiskurs*, 36 KRITISCHE JUSTIZ 177 (2003).

55. Gerry Simpson, *Two Liberalisms*, 12 EUR. J. INT'L L. 537 (2001).

56. Philip Allott, *The Emerging International Aristocracy*, 35 N.Y.U. J. INT'L L. & POL. 309 (2003).

57. Concerning Problems of Criminal Procedure Law Connected with Information Technology, Council of Europe Recommendation No. R(95)13 (Adopted by the Committee of Ministers on September 11, 1995 at meeting 543 of the Ministers' Deputies), available at [http://www.privacy.org/pi/intl\\_orgs/coe/info\\_tech\\_1995.html](http://www.privacy.org/pi/intl_orgs/coe/info_tech_1995.html).

58. 1999/364/JHA: Common Position of 27 May 1999 adopted by the Council on the basis of Article 34 of the Treaty on European Union, on negotiations relating to the Draft Convention on Cyber Crime held in the Council of Europe, 1999 O.J. (L 142) 1–2.

59. Council of Europe Debate on the Freedom of Expression and Information in the Media of Europe, EUR. PARL. ASS. DEB. 2001 Ordinary Sess., 10th Sitting (April 24, 2001), at 380, para. 6.

60. Sections of this are documented by the Center for Democracy and Technology. See Comments of the Center for Democracy and Technology on the Council of Europe Draft "Convention on Cybercrime" (Dec. 11, 2000), at <http://www.cdt.org/international/cybercrime/001211cdt.shtml>; Global Internet Liberty Campaign Member Letter on Council of Europe Convention on Cyber-Crime Version 24.2 (Dec. 12, 2000), at <http://www.gilc.org/privacy/coe-letter-1200.html>; Comments of the American Civil Liberties Union, the Electronic Privacy Information Center and Privacy International on Draft 27 of the Proposed CoE Convention on Cybercrime (June 7, 2001), at [www.privacyinternational.org/issues/cybercrime/coe/ngo\\_letter\\_601.htm](http://www.privacyinternational.org/issues/cybercrime/coe/ngo_letter_601.htm). Here is at least one critique of this issue:

In the last few years, after considerable international debate over surveillance, privacy and electronic commerce, the use of encryption has been liberalized, except in a few authoritarian governments such as China and Russia. Article 19.4 is a step backwards by

reviewed for a final time by the European Committee on Crime Problems and approved at the next plenary session. The Convention was finally adopted by the Committee of Ministers on November 8, 2001. Since non-EU members can at best only be given observer status within these closed European circles, it is difficult to claim that these proceedings contributed to the creation of global democratic legitimacy. And the opinion of the Centre for Data Protection of the German State of Schleswig-Holstein was correct in its critique that:

The European Councils draft convention on cybercrime mentioned in the Commission notification was drafted without the transparency and participation of democratically legitimated decision-makers that is necessary in this highly sensitive policy area.<sup>61</sup>

The democratic deficit within the international community and the law-making mechanism of international law is thus currently as great, if not far greater, than the deficit found within global regimes which, for their part, do not represent particular territorial groupings. As a consequence, the challenge is one of ensuring that exclusionary tendencies of regimes will be combated. On the one hand, the universalizing potential of the regime needs to be liberated. On the other, steps must be taken to ensure that such regimes are reflexively connected with their social environments. Such a constitutionalization might facilitate the liberation of the yet to be exhausted democratic potential of these regimes. The constitutional challenge within each regime would be the normative securing of the duality of social autonomy within sub-systems, or the securing of a dynamic between spontaneous and organized realms. The matter would be one of stabilizing and institutionally securing the spontaneous/organized distinction. In the Internet, a distinction between spontaneous public realms (in a manner similar to the fundamental rights sections of political and market constitutions) and highly formalized organizational realms (comparable with state administrative law

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seemingly requiring that countries adopt laws that can force users to provide their encryption keys and the plain text of the encrypted files.

*Id.* at para. C.

61. Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein: *Sichere Informationsgesellschaft, Bekämpfung der Computerkriminalität und Datenschutz, Stellungnahme zur Mitteilung der Kommission KOM(2000) 890, zugleich Kritik des Entwurfs einer "Convention on Cyber-Crime" des Europarats*, (PC-CY (2000) Draft No. 25 Rev.), at <http://www.datenschutzzentrum.de/material/themen/cybercri/cyberkon.htm>, para. 5 (our translation). *See also Report concerning the public hearing of interested parties on the issues addressed in the Communication on 7 March 2001*, organized by the European Commission, available at <http://www.europa.eu.int>.

or company law), would stabilize each realm within its own rationality, and would conceive of its major task the elaboration of mutual controls.<sup>62</sup>

### E. Summary

The unity of public and private regimes would be fostered within global law. The common normative vision is the re-specification of political constitutional law. In each internal realm the duality of the spontaneous public sphere and a highly formalized organizational sphere needs to be secured. This reflects the fact that the major threat to global society is posed by the particularistic and expansive tendencies of highly refined rationality spheres and that the simple substitution of the concept of the *pars pro toto* of politics by a *totum pro parte* is an inadequate response. Rather, a more appropriate strategy would be one of paying adequate attention to *strange loops*: If world politics does not manage to represent world society as a whole, and if it seems to be less and less the political system that puts the decisive consequences on societal reality, but other, non-state actors,<sup>63</sup> then the response to these challenges becomes a matter of constitutionalizing self-contained public and private regimes.

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62. Teubner, *supra* note 46; see also Andrea Ottolia & Dan Wielsch, *Mapping the Information Environment: Legal Aspects of Digitalization and Modularization*, 6 YALE J.L. TECH. 174, 199 (2004), at <http://research.yale.edu/lawmeme/yjolt/files/20032004Issue/Ottolia&Wielsch.pdf>.

63. See Armin Nassehi, *Politik des Staates oder Politik der Gesellschaft? Kollektivität als Problemformel des Politischen*, in THEORIE DER POLITIK: NIKLAS LUHMANN'S POLITISCHE SOZIOLOGIE 38 (Kai-Uwe Hellman et al. eds., Suhrkamp 2002); Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?* 4 EUR. J. INT'L L. 447 (1993).