

RETHINKING GLOBAL PARLIAMENT: BEYOND THE INDETERMINACY OF INTERNATIONAL LAW

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I. INTRODUCTION

Liberal democracy within states has been rising into a near-universal norm. Simultaneously, many scholars and movements have realized that the conception of democratic autonomy or self-determination only within the confines of the territorial states is not plausible. The transnational and global realities are increasingly set against the assumptions that accountability of decision-makers takes place only vis-à-vis the citizen-voters, and that consequences of political decisions remain within the boundaries of the territorial states. Thus, David Held's basic argument for extending the reach of the principles of democracy beyond state governance is that "there are disjunctures between the idea of the state as in principle capable of determining its own future, and the world economy, international organizations, regional and global institutions, international law and military alliances which operate to shape and constrain the options of individual nation-states."¹ Moreover, it can be argued that in most contexts of regulation most states have been—and increasingly are—rule-takers rather than rule-makers.² Because democracy has thus far been mostly confined to the shrinking sphere of domestic politics, "globalization" in its present sense has had a corrupting effect on the forms of state-based territorial democracy that evolved in the early and mid-20th century. Without a significant movement towards democratizing globalization and global governance, tendencies to further corruption of democracy and accumulation of power are likely to take over in various contexts. Under these conditions, democracy does not really seem possible without global democracy.³

What is therefore needed is a realistic and feasible strategy of global democratization. Every initiative for global democracy presupposes an account of the meaning of democracy. What does it mean to say that people should rule? What would democratic equality and will-formation mean in a global context? Democracy is all too often equated with the specific institutions of

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1. DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* 99 (1995).

2. See JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

3. See Heikki Patomäki, *Is Democracy Possible without Global Democracy?*, in *BUILDING DEMOCRACY FROM MANILA TO DOHA: THE EVOLUTION OF THE MOVEMENT OF NEW OR RESTORED DEMOCRACIES* 195 (Tapio Kanninen & Katarina Sehm Patomaki eds., 2005), available at http://www.helsinki.fi/process/ti/netcomm/imglib/24189/helsinki_process_publication_series_5_2005.pdf.

Western liberal democratic states. Many proposals and initiatives for global democracy simply assume that global democracy means the replication of the institutions of existing liberal-democratic states at the global level. Thus, since the early cosmopolitan visions of the pre-World War I era by K'Ang Yu-Wei and H.G. Wells, the key in many proposals has lied in establishing a world parliament.⁴ However, most versions of the proposal for a global parliament seem neither realistic in the short run nor viable in the long run. The proposal has been around at least for a hundred years.

In *A Possible World: Democratic Transformations of Global Institutions*, with Teivo Teivainen, I explored and scrutinized different global democracy initiatives in terms of the reasons for them and the validity of the implied claims.⁵ In the spirit of the philosophy of critical realism,⁶ our starting point was that reform proposals are only warranted to the extent that there are good reasons to believe that they would make a justified and reconstructive effect to real geo-historical processes. What are the assumptions about the value of democracy; how are specific global reform proposals justified? Is there actual or potential political support for a proposal? Are there existing legal and political procedures whereby the proposal can be realized or would they have to be created first? What would be the real transformative effects? Is a global democracy initiative based on an institutionally conservative idea of piecemeal social engineering, or does it aim at genuine institutional change? Would the outcome be viable economically, politically, or otherwise? In any given geo-historical context, there are limits to programmatic institutional imagination. But by changing parts, or the nature, of the wider context, new concrete utopias may well become possible. Thus a key question is whether a proposal is conceived as a step in a process or as an end in itself? Usually the former would be preferable in terms of long-term effects.

In *A Possible World*, we concluded that of the possible new institutional arrangements, a world parliament is an interesting but ambiguous possibility.⁷ We argued that it would still need time to evolve into a mature initiative. Moreover, the social conditions for a global parliament do not exist. This is especially true for the kinds of world parliament proposals that aim at giving the world parliament considerable scope and real powers, and would thus seem to imply a movement towards a centralized world state. This is also the long-term goal of the world parliament proposal of Richard Falk and Andrew

4. YU-WEI K'ANG & TA T'UNG SHU, *THE ONE-WORLD BOOK* (2005). K'Ang's book was first published in English in 1958, and in Chinese in 1935 (partly in 1913). W. WARREN WAGAR, *H.G. WELLS AND THE WORLD STATE* (1961); W. WARREN WAGAR, *H.G. WELLS: TRAVERSING TIME* (2004).

5. HEIKKI PATOMÄKI & TEIVO TEIVAINEN, *A POSSIBLE WORLD: DEMOCRATIC TRANSFORMATION OF GLOBAL INSTITUTIONS* (Zed Books, 2004).

6. See *CRITICAL REALISM: ESSENTIAL REALISM* (Margaret Archer et al. Eds., 1998); HEIKKI PATOMÄKI, *AFTER INTERNATIONAL RELATIONS: CRITICAL REALISM AND THE (RE)CONSTRUCTION OF WORLD POLITICS* (2002).

7. PATOMÄKI & TEIVAINEN, *supra* note 5, at 139-49.

Strauss.⁸ Under current conditions, however, the first priority is to establish the conditions for a pluralist and global security community. A pluralist security community does not require unitary or universal governmental bodies, decision-making centers or machineries for enforcement.⁹ The building of a security community is a long and complicated process of institutionalization of mutual acceptance, and trust, procedures and practices of peaceful change. It is always vulnerable to the escalation of conflicts. The more centralizing an attempted large-scale political community is, the more risks there may be. This is so despite the fact that it is also true that democratization is closely connected to the conditions of a security community,¹⁰ and that an effectively functional world parliament would also enable peaceful conflict transformations and changes. On the positive side, we also pointed out that *one aspect* of the assumption about the lack of social conditions for a world parliament could also be tested by means of a global proto-referendum.¹¹

This paper is an attempt to rethink the idea of global parliament from a novel angle. At first, I briefly describe a realist strategy for global democratization, focusing on global political economical reforms that, however innovative otherwise, would leave the main problem of international law quite intact. Secondly, I discuss the conventional ideas about a world parliament as well as recent attempts to find a third possibility, i.e. a role for global parliament that would neither make it a sovereign legislative body nor reduce it to a mere symbol or a place to talk. Thirdly, I propose a novel way of thinking about the scope and powers of global parliament. A world parliament can be seen, first and foremost, as a response to the acute and deep problem of international law: its indeterminacy. Indeed, the critical reason why there would be a need for something like a global parliament has to do with determining what the international (or global) law is. Finally, after having discussed also some of the difficulties of this solution, I conclude by situating my proposal in the context of a long-term vision about a possibly evolving planetary civilization.

8. Richard Falk & Andrew Strauss, *Bridging the Globalization Gap: Toward Global Parliament*, 80 FOREIGN AFFS. 212 (2001). Recognizing that a centralized worldwide legislative body is not a realistic goal in the early 2000s, the solution of Falk and Strauss is to make the global parliament only a symbolic place to talk in the short run. Their optimism about the viability of this solution is based on the assumption that “[o]ver time, as the assembly became the practical place for clashing interests to resolve differences, formal powers would likely follow.” *Id.* at 218.

9. See KARL W. DEUTSCH ET AL., *POLITICAL COMMUNITY AND THE NORTH ATLANTIC AREA: INTERNATIONAL ORGANIZATION IN THE LIGHT OF HISTORICAL EXPERIENCE* 3-11 (1957); Arend Lijphart, *Karl W. Deutsch and the New Paradigm in International Relations*, in *FROM NATIONAL DEVELOPMENT TO GLOBAL COMMUNITY: ESSAYS IN HONOR OF KARL W. DEUTSCH* 233 (Richard L. Merritt & Bruce M. Russett eds., 1981).

10. See Heikki Patomäki, *Problems of Democratizing Global Governance: Time, Space and the Emancipatory Process*, 9 EUR. J. INT’L REL. 347, 365–68 (2003).

11. PATOMÄKI & TEIVAINEN, *supra* note 5, at 146-48.

II. FROM POLITICAL ECONOMY BACK TO INTERNATIONAL LAW

In *A Possible World*, we developed a strategy for global democratization that focuses on global political economy reforms.¹² First we concluded that it is virtually impossible to democratize the UN system or, in particular, the Bretton Woods institutions.¹³ The international courts are best seen as elements in the wider background context. Although important from the point of view of establishing the rule of law globally, the democratizing effects of creating or strengthening international courts are dependent on a number of other reforms. The establishment of a debt arbitration mechanism and global taxes—and the currency transactions tax [hereinafter CTT] in particular—emerge as the most prominent possibilities as also emphasized by the early 21st century actors who seek global democratic transformations. Because many crucial mechanisms of power in the global political economy are based on financial dependency, the creation of a debt arbitration mechanism and the CTT would make a major difference. We also argued that although the advocates of greenhouse gas taxes [hereinafter GGT] have thus far been more concerned with other issues than global democratization, it might be more difficult to build the momentum for making the GGT a key element in a strategy of global democratization (although global warming is a serious problem and the revenues of this tax could also be used for the purpose of global common goods).¹⁴ Nonetheless, the CTT would decisively relieve the dominance of global finance over states, and thereby enhance the rule of law and democratic politics. Simultaneously, the CTT would create new sources for financing development and other priorities.

The CTT is an ambitious but contested reform proposal. In addition to the US and some other Western states, a number of offshore financial centers and tax havens are also disposed to block reforms such as the CTT.¹⁵ The only way forward may thus be to proceed without some countries. Indeed, what was common to the successful global initiatives of the 1990's is that they were based on the possibility that a grouping of countries can proceed, at first, without the consent of the others.¹⁶ For instance, this has been true in the cases of the International Criminal Court and the Ottawa mine ban convention. Also, this seems the only realistic way of materializing the currency transactions tax and greenhouse gas taxes in the early 2000's. According to the *Draft Treaty on Global Currency Transaction Tax*, it is possible for any grouping of countries to proceed quickly without the consent of every

12. PATOMÄKI & TEIVAINEN, *supra* note 5, at 7-8.

13. *Id.* at 17-69.

14. *Id.* at 180.

15. *Id.* at 170.

16. *Id.* at 170, 174.

state, including such financial centers as London/UK or New York/US.¹⁷ The CTT would be the first multilaterally agreed global tax controlled by a democratic body. Most of the legal framework defining the tax base in the *Draft Treaty* is based on the EC 6th Value Added Tax Directive, which has thus far provided the model for Central and Eastern European states, Russia, China, and many other states.¹⁸ The CTT is set at a sufficiently high level to curb the power of transnational financial flows; thus, in this regard it is closer to James Tobin's original proposal than some later versions of the tax.¹⁹

Occasionally, it has seemed that the possibility of a debt arbitration mechanism has also been taken seriously by the US and the Bretton Woods institutions.²⁰ Yet, it is quite evident that they would like to retain the power to control, effective to varying degrees, the economic policies of a large number of Southern and Eastern states.²¹ Some kind of compromise might be possible, particularly in the longer run, given the inadequacy of Heavily Indebted Poor Countries ("HIPC") I and II initiatives and the pressures to recognize the de facto insolvency of a large number of states struggling with the debt problem. It is not inconceivable that this component in a strategy for global democratization might thus be nearly universal, comprising all major states and perhaps also giving the civic actors and movements a right to speak. Most likely, however, the only way to realize a rule-of-law based and democratically organized debt arbitration mechanism is to use the same step-by-step procedure as in the case of the CTT.

Financial reforms have emerged as a priority in the strategy for global democratization.²² By tackling important aspects of the power of finance and by creating democratic forums and new public sources of finance, the world political context can change and become more favorable to further transformations. Most importantly, by relieving the effects of debt and short-term finance on the policies of states, the debt arbitration mechanism and CTT would make a number of states also more autonomous in the World Trade Organization ("WTO") negotiations. Also, for instance, UN reforms will become more likely once new sources of funding the UN system have been institutionalized. Partial reforms will in this way create new opportunities for further transformations.

Of the existing multilateral arrangements, the WTO seems most susceptible to democratic changes. The one country/one vote principle on

17. Heikki Patomäki & Denys Lieven, *Draft Treaty of Global Currency Transactions Tax* (Jan. 2002) (NIGD discussion paper), available at <http://www.nigd.org/ctt>.

18. PATOMÄKI & TEIVAINEN, *supra* note 5, at 170.

19. *Id.*

20. *Id.* at 159-60.

21. *Id.* at 159.

22. This resonates with the dominance of global finance in the post-Bretton Woods era and particularly the world political situation after the 1997-1998 Asian financial crisis (that spread also to other parts of the world). However, for an analysis how the particular momentum for reforms of global governance generated by the Asian crisis was over by 2004, see Heikki Patomäki, *Global Tax Initiatives: The Movement for the Currency Transaction Tax*, UNRISD CIVIL SOCIETY AND SOCIAL MOVEMENTS PROGRAMME PAPER NO. 27 (Jan. 2007).

which it is theoretically based makes changes possible, however difficult they may appear at the moment.²³ The WTO has been central to the global project of locking-in free market economic policies.²⁴ According to Stephen Gill, the dominant juridical and political dimension of governance in the present-day global political economy is what he calls “the new constitutionalism of disciplinary neo-liberalism.”²⁵ This project has been to a large extent focused on expanding the scope and powers of the WTO. According to the rules of the WTO, almost anything can now be related to trade and thus can be, in principle, covered by the process of WTO lawmaking.²⁶ Ultimately, trade is absolutely and perfectly “free” only in an idealized global model of neo-classical free market capitalism. In practice, the WTO is in fact biased towards serving the particular commercial interests of the powerful, which is also a partial explanation of why multilateral trade negotiations have been so difficult and fragile since 1999, when the third ministerial conference in Seattle ended in failure.²⁷

The reform potential of WTO reforms lies nonetheless in its multilateralism and in the potential of the one vote/one country principle.²⁸ In our analysis, democratic reforms of the WTO should focus, primarily, on reducing and redefining its scope and powers and, secondly, on democratizing its preparatory process, decision-making procedures and dispute settlement mechanisms.²⁹ For the poorest countries, a mere General Agreement on Tariffs and Trade (“GATT”) type trade regime would be quite enough. For other member-states, there should be opt-out mechanisms and room for different economic and developmental policies. Regulation of trade in services should be clearly disconnected from the project of liberalization and privatization of services. Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) should be revised to be more conducive to diffusion of

23. PATOMÄKI & TEIVAINEN, *supra* note 5, at 71.

24. *Id.* at 73-74.

25. Stephen Gill, *The Constitution of Global Capitalism*, Paper Presented at the International Studies Association Annual Convention: The Capitalist World, Past and Present 2 (2000), available at <http://www.theglobalsite.ac.uk/press/010gill.pdf>. For Gill, the notion of “constitution” is in this context a metaphor that indicates how difficult it is to change international treaties, but for an argument that the idea of constitution, literally conceived, should not be applied to the WTO, see Jeffrey L. Dunoff, *Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 EUR. J. INT’L L. 647 (2006).

26. PATOMÄKI & TEIVAINEN, *supra* note 5, at 73.

27. *Id.* at 79.

28. The activation of the principle one country/one vote—to be enabled by financial reforms that would first increase the autonomy of many Southern states—would mean that democratic WTO reforms are not as easy to block as the current “consensual” practices and procedures would seem to indicate. If any country or a small group of countries attempted to block a reform, it is possible to resort to a vote, even if this would be a new phenomenon in the WTO. With a sufficient number of states supporting reform, the only option would be to opt out from the WTO. The administration of George W. Bush might consider this, but most governments would be very reluctant to go that far.

29. PATOMÄKI & TEIVAINEN, *supra* note 5, at 90.

technologies and free communication, and also moved out of the WTO, possibly to the UN system and/or to the reconstructed World Intellectual Property Organization (“WIPO”). Trade-Related Investment Measures (“TRIMS”) should be replaced with a new investment regime holding foreign direct investors and transnational corporations accountable to democratically elected and accountable global authorities, rather than the other way around, as now is the case.

Both the financial and the WTO reforms will be uncertain and contingent on the process of building political and social support. The precondition for this strategy is thus the empowering of new political forces. There must be a strong transnational movement for global transformations. The World Social Forum (“WSF”) process stands out as a new major space created by and for global civil society. The WSF process has been mostly independent of any state.³⁰ In a relatively short time, it has contributed to the global capacity of civil society to generate new projects and alliances.³¹ The further empowerment of the democratic elements of the global civil society, especially via the WSF process, would seem to be a pivotal component in a strategy for global democratization. In principle it is also possible that the WSF itself may develop into an actor, although in 2006 this looks quite unlikely.

A few words on the legal principles are apt here. Firstly, the Treaty on Global CTT has the potential to act as an “icebreaker” in international law (to use the expression of Denys), by setting an easily repeatable example of post-sovereign legal principles that enable global re-regulation and taxation.³² The debt arbitration mechanism would not be as pathbreaking, but would nonetheless contribute by strengthening the rule of law in global financial governance. Both of these reforms would leave, however, the overall structure of international law intact in many important regards. Although introducing new principles and strengthening the rule of law, they would still do fairly little to overcome the general problem of indeterminacy of international law. As will be soon argued, this is a key puzzle of the modern international condition that global democratic transformations should overcome.

III. GLOBAL PARLIAMENT: IN A SEARCH FOR A THIRD WAY

Global democratization does not necessarily mean the establishment of a centralized, elected legislative body, whether symbolic or real. In the proposals for a world parliament, however, usually only two possibilities are considered:

30. PATOMÄKI & TEIVAINEN, *supra* note 5 at 116-26. On the role of the World Social Forum vis-à-vis states, see Teivo Teivainen, *The World Social Forum, in* ENCYCLOPEDIA OF GLOBALIZATION, 1302-04 (Roland Robertson & Jan Aart Scholte eds., 2007).

31. PATOMÄKI & TEIVAINEN, *supra* note 5, at 121-22.

32. Denys Lieven, *The Currency Transaction Tax as an Icebreaker in International Tax Law*, FINNISH Y.B. INT'L L. (forthcoming 2007). The article was given as a speech at the University of Helsinki on November 18, 2004.

1. global parliament either as a mere place to talk or to make symbolic decisions (this includes various proposals for a global e-parliament such as those of Tenbergen), or Johansen in this volume.³³
2. global parliament as a sovereign legislative body.

Falk and Strauss present 1 as the first step and 2 as the long-term aim of the process of building a global parliament.³⁴ David Held has, however, taken a step towards a slightly different direction. In his model for cosmopolitan democracy, a world parliament would be only a “framework-setting institution.”³⁵ Yet, the global assembly could also “become an authoritative international center for the examination of those pressing global problems which are at the heart of the very possibility of the implementation of cosmopolitan democratic law.”³⁶ Issues would include health and disease, food supply and distribution, the debt problem and the instability of global financial markets. Held’s proposal remains somewhat vague in terms of its institutional design, however. It is not obvious what the role of a parliament in these functional areas of governance should be.

Building on this idea, however, I have argued that in the longer run—after the first phases of global democratization—it might be possible to think about coordinating, say, global economic policies of states and various functional organizations, without creating an over-arching territorial layer above all these other spaces and layers of global governance.³⁷ Yet, the coordinating body could be a globally elected representative assembly, with limited and relational (i.e. non-sovereign) powers. The constituencies of this body may be defined in terms of identity and/or functional areas rather than territorial location—or a combination of these. A part of the seats could be allocated by means of lottery among those non-governmental organizations interested in taking part in the functioning of this body. Institutionalized opt-out mechanisms could ensure that not everybody would have to follow (all) the rules and principles of this assembly all the time. Once we have relieved our institutional imagination from the standard categories of modern Europe, many kinds of new possibilities might suddenly appear plausible and worth exploring.

33. Rasmus Tenbergen, *Towards a World Parliament: A Summary of the Debate and a Proposal for an Electronic World Parliament on the Internet Organized by Civil Society*, The First Virtual Congress on World Citizenship and Democratic Global Governance, <http://www.ifld.de/essay/worldparliament.pdf>; see also in this volume Robert C. Johansen, *The E-Parliament: Global Governance to Serve the Human Interest*, 13 WIDENER L. REV. 319 (2007) (discussing the e-Parliament project to link national parliamentarians by way of the Internet).

34. Falk & Strauss, *supra* note 8, at 217-20. See also their response to Joseph Nye in Richard Falk & Andrew Strauss, *Parliamentary Debate: Letter to the Editor*, 80 FOREIGN AFFS. 181-82 (2001).

35. HELD, *supra* note 1, at 273-83.

36. *Id.* at 274.

37. PATOMÄKI & TEIVAINEN, *supra* note 5, at 361-63.

It is also important to ask what would emerge, in the longer run, from a series of global democracy reforms confined to particular functional areas of governance. Modern social worlds are functionally differentiated. Many of the existing international organizations are functional rather than territorial, in part following the idea that functional cooperation—with possible “spill-over effects”—is the most realistic path towards gradually overcoming the territorial authority of sovereign states.³⁸ Different functional organizations have different memberships, consisting mostly of states and non-governmental organizations. In other words, their membership may be overlapping, but it is not identical, inclusive or exclusive, territorially or otherwise. Also new organizations can be founded. Whether old or new, any of these organizations can be (re)constructed on various democratic rules and principles. Logically, what would emerge is a non-centralized, non-territorial and non-exclusive system of complex global governance with manifold treaties, rules of law, and sets of regulations. To an extent, this is the situation already. The problem is that these laws and regulations may be not only overlapping but also mutually (or in themselves) contradictory and thus indeterminate in various ways. Thus, there seems to be a problem of identification, coordination and prioritization of relevant rules and principles that is as important as the problem of coordination of economic policies, and is not reducible to it.

IV. THE INDETERMINACY OF INTERNATIONAL LAW

Upon reconsideration, I have now come to the conclusion that the establishment of a world parliament should be, after all, an essential part of the strategy for global democratization. Moreover, there are reasons to believe that a global parliament should be high on the immediate agenda of transformative global politics. The main reason for this rethinking has to do with the indeterminacy of international (or global) law. To start from a concrete and easy-to-grasp aspect of the problem, the principles of deciding which treaties—many constitutive of functional systems of governance—should prevail in any given context are typically contested. A well-known example is whether the norms of human rights should prevail over the rules and principles of the WTO.³⁹ However, the problem can also be generalized: how can we identify valid international legal norms and apply them in concrete cases? For instance, was the legal justification for the U.S. and British invasion into Iraq plausible? Or to give another kind of example, is basic education a universal human right, and if yes, with what implications to whom?

38. See DAVID MITRANY, *A WORKING PEACE SYSTEM* (1966); see also ERNST B. HAAS, *BEYOND THE NATION STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* (1964).

39. See, e.g., Ernst-Ulrich Petersmann, *The ‘Human Rights Approach’ Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?*, 7 J. INT’L ECON. L. 605 (2004); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT’L L. 483 (2006).

As David Kennedy and Martti Koskenniemi, among others, have argued, the structure of international law is indeterminate at a deep level.⁴⁰ The standard assumption behind many administrative, legal, diplomatic, and military practices is that external sovereignty remains analogical to exclusive private property, and the sovereign state is, metaphorically, a possessive individual. The contradictory system of meanings, stemming from the definition of sovereign states as possessive individuals, is perhaps most plainly visible in international law. As possessive individuals, sovereign states owe apparently nothing to international society, the same way possessive individuals owe apparently nothing to society.⁴¹ Yet, the rights and duties of sovereignty and consequent relations between sovereign states are regulated in international law, which can be conceived in various ways (as natural law, world communitarianism, justice, progress or any other universal principle). Moreover, states do not anymore exhaust the subjects or objects of law, which may be seen to support the case for supranationalism. Yet, critical studies of modern legal practices show that if you start from the premise of possessive individualism, you end up arguing from a supranational basis; and if you start with supranationalism, you end up recognizing the implications of possessive individualism, i.e. actual state practices.⁴² Given the basic premises and institutionalized practices, these options are mutually implicating, yet contradictory.

I do not agree with those critical legal scholars that maintain that modern western societies are not characterized by the rule of law in any meaningful sense.⁴³ It is nonetheless true that law is always—to an extent—indeterminate at some level, i.e. that there are always at least some degrees of freedom for interpretation of both law and the relevant social realities. This kind of limited indeterminacy does not always pose any serious problems to the (legitimacy of the) rule of law when legislators, judges and citizens share understandings and values and more or less follow the same legitimate institutional procedures, at least to a sufficient degree. There are at least three sets of constraints⁴⁴ for possible legal interpretations:

40. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Cambridge University Press 2005) (1989); David Kennedy, *Theses About International Law Discourse*, 23 GERMAN Y.B. INT'L L. 353 (1980).

41. Cf. C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 263 (Oxford University Press 1964) (1962).

42. *Id.*

43. For well-known criticism, see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); for a recent review of debates, see Mark Tushnet, *Critical Legal Theory (without Modifiers) in the United States*, 13 J. POL. PHIL. 99 (2005).

44. Some critical legal theorists, including Koskenniemi, would claim that law itself is never binding and that there can never be any “legal constraints” in any meaningful sense. The predictability of law-applications depends merely on the institutional and structural bias of its appliers, basically due to their ethico-political and professional orientation and position. For a systematic elaboration of these aspects of the indeterminacy thesis, see KOSKENNIEMI, *supra* note 41, at 590–617. While it is true that all social rules, including explicit legal rules, are in some ways

vague and ambiguous and dependent on at least partially reciprocal expectations of social actors, arguments against the *possibility* of rule of law are mistaken for reasons that I can only briefly mention here. See PATOMÄKI, *supra* note 6, at 106-07. The generic critical argument against the rule of law stems usually from an all-purpose Derridean post-structuralist theory of language that reduces everything—and not only law—to a set of binary oppositions, the positions of which are ultimately empty. For a sympathetic criticism of Derrida and his vacillating position on reality and realism, see CHRISTOPHER NORRIS, *AGAINST RELATIVISM: PHILOSOPHY OF SCIENCE, DECONSTRUCTION AND CRITICAL THEORY* (1997). However, various rules, from syntax, grammar and tacit rules of many practices to explicit legal rules, are real and they can be and are followed; rules that are widely followed must be a key part of any social contexts for society to be possible. For instance, without the concept of widespread rule-following in social practices, it would not be possible to make sense of the sufficient sameness of meaning in any context, including critical legal scholarship itself. Cf. JÜRGEN HABERMAS, *2 THE THEORY OF COMMUNICATIVE ACTION* 18-19 (1989). The ongoing process of reconstructing meanings is social and, in some moments, also political, but this does not make meanings or rules indeterminate or arbitrary in any significant sense; relatively well-functioning communication is a real possibility actualized by actors sufficiently frequent to make the coordination of actions and many forms of cooperation possible, even in the context of international law. Cf. KOSKENNIEMI, *supra* note 40, at 600. Moreover, in typical post-structuralist theories and analyses, there is a tendency to set the idea of categorically objective rules against the geo-historical conditions of ethico-political judgments and to draw overtly dramatic conclusions from the ordinary human condition of diversity and controversies. Heikki Patomäki, *Global Justice: A Democratic Perspective*, 3 *GLOBALIZATIONS* 99 (2006) (analyzing the origins and nature of law and justice). Yet plausible judgments about truth, morality and legal validity are achievable also in the absence of Kantian transcendental grounds or actual consensus. Further, in critical legal scholarship there is also a tendency to use the appearance of whatever disagreements and disputes as evidence for the fundamental indeterminacy of law, although controversies are part of the very idea of justice and law as rhetorical / dialectical practice. Cf. CH. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* (John Petrie trans. 1963); NICHOLAS RESCHER, *DIALECTICS: A CONTROVERSY-ORIENTED APPROACH TO THE THEORY OF KNOWLEDGE* (1977). Yet, it is a key idea of just legal institutions that plausible judgments and decisions can be made following public and fair debates about factual interpretations and relevant legal rules and principles. In many legal institutions, it is also possible and legitimate to resort to a majority vote to reach a verdict. Finally, it is also worth mentioning that attempts at deconstructing the idea of rule of law tend, in effect, to turn law-appliers—lawyers and judges—into lawmakers (or at least reinforce their *de facto* role in this regard). Although legal theory is often less concerned with the implementation of policies that assume a legal form, the same applies, *mutatis mutandis*, to the role of civil servants and bureaucracy. By making the (possibly self-fulfilling) assumption that the interpretative and argumentative powers of legal professionals or civil servants are decisive in determining what the law is, the radical version of the indeterminacy thesis has potentially anti-democratic implications. It ignores the role of citizens and their democratic representatives in lawmaking. From the point of theories of democracy, we should not thus accept at the face value the idea that the real ethico-political difficulty concerns finding “the possibilities for translating [the legal professionals] work into politically contestable terms—or promoting the experience of responsible human freedom among the experts who govern our world,” as Kennedy summarizes the main point of critical legal studies. David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 *SYDNEY L. REV.* 5, 5 (2005); see also KOSKENNIEMI, *supra* note 40, at 572, 615 (for a similar statement that the critical project “seeks to liberate the [legal] profession from its false necessities.”); *id.* at 615 (and “[i]nternational law is what international lawyers make of it.”); but see *id.* at 601 “[N]othing in this book suggests that there should be a turn towards a ‘more political’ jurisprudence.”).

1. first set of constraints: legal materials – legal positivism appears quite often sufficient for legal judgments and professional legal practices.
2. second set of constraints: discursive and practical backgrounds of an ethico-political community—even legal positivism tacitly presupposes many shared understandings and values, and this common sense may also amount to a hegemonic ideology.
3. third set of constraints: the real—both actual and possible—social situations and episodes that are being referred to and interpreted in legal disputes.

While the law does impose many significant constraints on the adjudicators in the form of substantive rules, such as statutes and case law, this may not be enough to bind them to come to a particular decision in a given particular case (not even when they agree on the depiction of the relevant social situation). The three sets of constraints are thus in many contexts backed by a wider institutional framework that defines procedures for making plausible and legitimate decisions also in controversial or ambiguous cases.⁴⁵ However, in the absence of both sufficiently shared backgrounds and institutional procedures that could settle disputes over interpreting social situations and episodes and determining what the relevant law is, either hegemonic consent or mere cynical power politics must prevail. Moral and legal opinions are often expressed in the name of “international community,”⁴⁶ but who can really speak legitimately in its name? The wealthy and powerful can always find an interpretation—however implausible for many or most legal scholars, practitioners and concerned citizens—that supports their case and they have means to propagate it as the opinion of the “international community.” Thus, there seems to be an urgent need for a procedure and body that could legitimately settle conflicts between understandings and values and create a framework within which law can be legitimately determined.

The main point of critical legal studies is that “law is politics,” at least in some sense. Jürgen Habermas has specified this point in a re-constructive way: legal systems are not closed systems of formal rules but substantial, and thus, in various ways open towards processes of political will-formation.⁴⁷ There is an internal relation between the rule of law and democracy. The point is to organize the openness of law in a legitimate, i.e. democratic manner. Citizens

45. See, e.g., Loran A. King, *Deliberation, Legitimacy and Multilateral Democracy*, in GOVERNANCE: AN INTERNATIONAL JOURNAL OF POLICY, ADMINISTRATION AND INSTITUTIONS 16, 38-42 (2003).

46. The term “international community” arose in the discursive practices of the UN era and in the context of making claims about shared values and principles either of the whole world or at least the supposedly main actors of the international system.

47. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 454-57 (4th prtg. 2001).

must be enabled to judge whether the law they enact (even if only indirectly) and must follow (even if only as members of particular states) is legitimate. In international law, where the role and powers of the existing courts are limited and the diversity of background assumptions is wide, there is a need for a legitimate body that could interpret and determine what the law is.⁴⁸ Direct worldwide elections could give democratic legitimization to this body. However, the new body should not be conceived as a directly elected world's Supreme Court, because its authority stems explicitly from the processes of citizens' political will-formation rather than (merely) from the "highest" possible legal expertise. Moreover, this body may also have powers other than legal adjudication over rules and principles and their application.

The new body would be a global parliament, although not in any traditional sense. A world parliament is a global assembly where representatives are selected on the basis of one person, one vote. However, a global assembly does not have to replicate the institutional designs of the already existing parliaments.

V. GLOBAL PARLIAMENT: BEYOND THE CATEGORIES OF MODERN LIBERAL-DEMOCRATIC STATES

In my proposal, the idea of a world parliament is different from the conventional notions of global parliament, usually seen either in terms of sovereign legislation or mere place-to-talk and forum of symbolic representation. A world parliament should not be seen as part of a centralized world state, as it would have no powers or machinery for direct enforcement. Enforcement of law would follow the rules of existing treaties, customary law, etc. Yet, a world parliament in this sense enables a democratic and legitimate public opinion—especially *opinio juris*—of the world community, replacing the current notion of "international community" that tends to mask the arbitrary power of a few.⁴⁹ For the first time, humanity would have a representative body that could speak on behalf, and in the name, of the whole planet (rather than merely in the name of "united nations," as the UN General Assembly does).

The new proposal raises many questions, however. For instance, what are the mechanisms that may limit the decisions of the new body to determining what the already existing law is, instead of simply creating new law out of non-legal ethico-political reasons? Something, or somebody, should ensure that the first set of interpretative constraints—legal materials—remains essential to the formation of democratic and legitimate public opinion in the world parliament. One possibility is a world parliament of two chambers, with the second chamber given limited veto powers, following certain well-specified

48. Cf. PATOMÄKI & TEIVAINEN, *supra* note 5, at ch. 4.

49. It has never been specified legally or otherwise who can speak in the name of "international community" and thus represent the "shared values" of the whole world. In the absence of clearly defined democratic procedures, it is a matter of arbitrary power to make normative claims on behalf of the "international community."

procedures. Whereas the first chamber would be a directly elected body of citizens' representatives, the small second chamber could consist of legal experts who would determine whether the decisions of the first chamber are reasonably based on the existing body of law (with the understanding that law is, to an extent, politics and open to different interpretations). The second chamber may be nominated by (i) states, (ii) existing international courts and (iii) law schools of various universities representing different parts of the world. Its task would be to maintain the idea that law is a particular style of reasoning with the already existing rules:

one particularly important feature that legal norms share with moral norms, and which distinguishes both of them from policies: it is the *principled character of application*. Not only can one not make legal rules as one goes along, even if such decisions were to command substantial majoritarian support, but "legality" requires the evenhanded application of rules in "like" situations in the future.⁵⁰

The decisions of the world parliament would, however, become an important source of law in the future. This new idea of a world parliament specifies a significant task for a global parliament without committing the standard errors of—potentially risky—world federalism. The powers of lawmaking would still reside in sovereign states. Gradually, however, other actors could increasingly assume worldwide regulative powers, particularly in various systems of functional governance. For instance, national parliamentarians and civil society organizations would play a decision-making role in the Currency Transaction Tax Organization [hereinafter CTTO]. Over time, the new global framework, constituted by new legal principles of both functional governance and the world parliament itself, could even evolve into a world organization, replacing the already anachronistic UN system.⁵¹

However, apart from the—currently somewhat distant-looking—possibility of a new universal world organization, world parliament may also be established, at first, by a grouping of like-minded countries, like the International Criminal Court was in the 1990's.⁵² Thus, it may be possible to achieve relatively rapid progress with a group of like-minded states, even though the ultimate aim must be a truly global parliament. A parliament is a place to talk for representatives of the citizens, occasionally also for other world citizens (*parlar* = to talk, *mentum* = a place). Although it would not be a sovereign legislative body, a global parliament in this design also has real powers. When there is no consensus on what the existing international or

50. FRIEDRICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 208 (1989).

51. For an argument that the era of the UN is drawing close, see Heikki Patomäki, *Kosovo and the End of the United Nations*, in MAPPING EUROPEAN SECURITY AFTER KOSOVO 82 (P. Van Ham & S. Medvedev eds., 2002).

52. I share this idea with Falk and Strauss, *supra* note 8, at 219.

global law is, the basic principle is majority decision-making. The second chamber could check whether the decision is within the scope of legal reasonability, given the existing legal materials. Moreover, in the future, all multilateral treaties should perhaps be ratified by the world parliament, as a condition of validity of the new law.

There are further hard questions, however. An important difficulty is to define the procedure of taking cases to the world parliament. Some kind of principle of subsidiary is probably needed: whenever law can be reasonably determined elsewhere, the world parliament should not be involved. On the other hand, the world parliament should also have the right to initiate a process of scrutinizing legal rules, principles, priorities and applications. Another potential problem is excessive politicization that may generate undesirable volatility, controversy and strife that may, under certain conditions, regress to the logic of violence. If legal interpretations are changing too often, uncertainty and negative emotions may take over. The second chamber could play a decisive role in calming down the effects of this mechanism, but there are further complementary possibilities. One possibility is to develop rules and principles to limit how often a case can be opened. The terms of office of the world parliament could also be made relatively long, from six to eight years.

As the world parliament would be the first body entitled to speak legitimately on behalf, and in the name of the whole planet, its powers should not necessarily be confined to the sphere of legal disputes only. To the contrary, there is, for instance, an acute need to coordinate worldwide economic policies and activities of different functional organizations. The world parliament could adopt policies for global common good. All this could be done without creating an over-arching territorial layer above all these other spaces and layers of governance. Global taxes—such as the CTT—could provide a source of revenue, and thus, coordination of activities and interpretation of rules and principles would be based on available resources. Alternatively, the world parliament could also have its own sources of funding. The list of possible sources of income is long.⁵³ Apart from the CTT, the proposed international or global taxes include:

- Pollution taxes (a global carbon tax on sales of fossile fules)
- Arms sales tax (a levy on international sales of designated weapons)
- Travel tax (a flat tax on all passenger flights)
- A fractional tax on the day's telecommunications
- Proceeds from mining the seabed (taxation of the proceeds of the Seabed Authority, established under 1982 UN Convention for the Law of the Sea)

And the proposed other possible sources of revenue include:

53. *See* SOUTH CENTRE, FOR A STRONG AND DEMOCRATIC UNITED NATIONS: A SOUTH PERSPECTIVE ON UN REFORM 88-91 (Zed Books 1997) (1966).

- The establishment of a world lottery
- A percentage of proceeds earned through national lotteries
- A credit card under the control of the world parliament
- A dedication to a special fund of the proceeds from one day's sale of stamps by the world's post offices every year

This is a general proposal for a world parliament, not yet fully developed in concrete detail. A key problem in my view is whether this kind of a parliament could be sufficiently exciting and powerful to stimulate political imagination? The European Parliament, for instance, is not a good example of a democratic body.⁵⁴ It has been created from above by elites, not through citizen pressures. The low, and in many places still falling, electoral participation of the Eurocitizens indicates that we are not talking about a body that the people find particularly relevant for their lives.

Another intricacy is to decide how to allocate voting districts of the world parliament. Strictly proportional representation is unlikely to work in a world where various boundaries and particular collective identities remain powerful forces, so compromises may be necessary. An important possibility is that the constituencies of this body may be defined also in terms of identity rather than merely in terms of territorial location. There are also technical possibilities of voting without any given territorial voting districts (alternatively, the voters can choose whether they want to belong to a territorial district or not).

VI. CONCLUSIONS

From the legal point of view, the world parliament is, first and foremost, a solution to the problem of indeterminacy of international law and to its unnecessary, unwanted and unneeded ethico-political consequences. A world parliament in this sense would establish, legitimately, the rule of law in world politics and global governance, in a manner that is consistent with what is known in legal theory about politics of law, about interpreting law, and about making legal judgments.⁵⁵ Parallel with other developments in international

54. See PATOMÄKI & TEIVAINEN, *supra* note 5, at 142–43.

55. *But see id.* at ch. 4 (offering different interpretations of the indeterminacy thesis and its significance). Moreover, many legal practices continue to be based on legal positivism. Positivism can also be seen as an ethical code that says that legal material should have the first priority in determining what the law is. This kind of normative code is important for democratic governance to work in complex societies, based on elaborate division of labour. It is nonetheless true—as critical legal scholars maintain—that as a metaphysical position legal positivism tends to suppress critical reflectivism on possible and plausible interpretations and their presuppositions. My point is simply that although as a general account of law positivism may mask certain unnecessary, unwanted and unneeded practices of power, as an ethico-political

legal principles, this would transcend many of the contradictions of the modern international problematic. A world parliament, thus designed, would constitute a world system based on law. Further, this law can be legitimately contested by following well-defined democratic and legal procedures.

From the point of view of earlier institutional designs for a global parliament, my proposal has potential for overcoming the conventional dilemma: (i) either you propose a sovereign legislative body and thereby make your proposal both unrealistic and potentially dangerous (from the point of view of the conditions of global security community); (ii) or you propose a mere symbolic body, as the first step, that would have no real transformative effects and would thus probably also fail to catch the imagination of world citizens. The new design will have both real transformative effects and simultaneously avoid the standard problems of world federalism. Moreover, the world parliament could also be given powers other than those related to legal interpretation and adjudication. It could have real powers also in coordinating and setting a framework for various areas of functional governance that are often also overlapping. Hence, the world parliament should also have independent sources of funding to facilitate its activities and the implementation of its decisions. This kind of world parliament is likely to become a focal point in worldwide political activities of citizens, movements and parties. In my assessment, the new proposal is thus more feasible and viable than the previous alternatives, even though political support for this proposal must remain, at this stage, mostly just potential.

An important question is, however, whether this new proposal is best understood as a step in a process or as an end in itself? From a teleological point of view, it would be easy to see this proposal as a step in a process of building a one world and a world state.⁵⁶ For instance, in K'Ang Yu-Wei's three-stages scheme for building a strictly egalitarian world federation ruled by a global parliament, my proposal might be seen as falling somewhere between stages one and two. In the first stage, "The Age of Disorder at the Time the First Foundations of One World Are Laid," territorial states remain sovereign and law-making powers reside with them, yet, "the laws made by international conferences, being public law, are superior to the laws of the individual states."⁵⁷ Functional cooperation has evolved in various issue areas, but some states may still decide to be out of any particular arrangements. There are, however, global legal processes. "All cases of international litigation are sent to the international conferences for litigation."⁵⁸ In stage two, "The Age of Increasing Peace-and-Equality, When One World Is Gradually Coming into Being," the states are gradually subsumed under the authority of global bodies. "The laws made by the public parliament certify the laws made by the

orientation it—or perhaps rather something analogous in normative terms—is vital for democratic practices to work.

56. For a recent argument for this kind of teleological logic, see Alexander Wendt, *Why a World State is Inevitable*, 9 EUR. J. INT'L REL. 491 (2003).

57. K'ANG, *supra* note 4, at 107.

58. *Id.* at 122.

individual states.”⁵⁹ Parts of the world such as high seas—amounting to areas of the planet that Ambassador Arvid Pardo of Malta half a century later, in his 1967 speech at the UN, called “the common heritage of mankind”⁶⁰—would be at this point directly governed by global public bodies. Furthermore, “there is the public government and the public parliament to deliberate on cases of undecided and divergent laws of the individual states, including cases in which the laws are defective or erroneous.”⁶¹ K’Ang’s stage three, “The Age of Complete Peace-and-Equality When One World has been Achieved,” is basically a description of a world state, run by a global parliament, from which all differences and borders have been absolutely eliminated.⁶²

K’Ang’s list describing various aspects and components of these stages is long and complicated. The point is that with a stretch of imagination, and with some fresh legal theoretical ideas, it might be possible to envisage my proposal for a world parliament as a stage—perhaps somewhere between K’Ang’s stages one and two—in a similar pre-given, universal teleological scheme of building a unified world and world government. This is not my intention. World history is and must remain open.⁶³ It is thus much better to proceed in a more experimental and evolutionary way. The problem with teleological visions is not only that they may be wrong, but also that they may themselves constitute part of the problem and thus contribute to disastrous outcomes. By experimenting with both old and new possibilities, and by proceeding in a gradual manner, there is time to see what is really working, and thus viable, and what is not. Moreover, in a new context, others may come with new and better ideas. This kind of a gradual process may thus lead to an outcome that

59. *Id.* at 107, 122.

60. Pardo’s concept was embodied in the now ratified Law of the Sea Treaty. In the Preamble of the 1982 UN Convention on the Law of the Sea, it is stated:

Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared *inter alia* that the area of the sea-bed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 397, 398.

61. K’ANG, *supra* note 4, at 109.

62. *Id.* at 105-22.

63. Critical realist ontology explains why there are multiple possible futures. The actual is only a part of the real world, which also consists of non-actualized possibilities and unexercised powers of the already existing structures and mechanisms that are transfactually efficacious in open systems. Moreover, since new social and other structures may evolve or emerge, and old ones become absent, human geo-historical future is likely to involve possibilities that are, in principle, impossible to envisage now. For further discussion, see Heikki Patomäki, *Realist Ontology for Future Studies*, 5 J. CRITICAL REALISM 1 (2006).

goes beyond what we—whoever the “we” may be—can now foresee or even imagine. At least we should cultivate this possibility as an opportunity to create something new, something that may be truly important for the long-term development of humanity.

It is likely, however, that the next ethico-political problem will be that of creating democratic procedures for changing existing laws and enacting new laws. As Gill suspects, the dominant juridical forms of global governance tend to be what he calls “the new constitutionalism of disciplinary neo-liberalism.”⁶⁴ Apart from financial and other mechanisms, the neo-constitutional form is based also on the real difficulty of changing international law. Often, it is possible to create more political and democratic procedures within existing or new functional systems of global (or regional) governance. The world parliament itself would politicize and also change many of the prevailing interpretations of international or global law. This may not be enough, however. It is likely that there will be a need, and quest, for more generic procedures for changing the rules and principles of our planet.

64. Gill, *supra* note 25, at 2.

