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Egalitarian Multilateralism versus Particularism in Multilevel International Law-Making

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EGALITARIAN MULTILATERALISM VERSUS PARTICULARISM IN MULTILEVEL INTERNATIONAL LAW-MAKING

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I. INTRODUCTION

The legal structure of international law has to be certain and determinate, in an effort to make the duties and goals of international actors ascertainable. In other words, any field of law, including international law, is expected to be determinate to its subjects. However, since there is no centralized court and government in the international legal structure, international law must be reasonably flexible to keep in pace with the fluidity and dynamicity characteristics of international law and also instant political will-formation of its actors on the international plane.[1] Given its current structure, international law lacks harmonization of standards in cases of conflict of laws and norms. As a result,

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1. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (2015).

international law lacks a regulatory body to govern conflict of laws and give hierarchy to norms. There is no formula or standard in determining rules of international laws whether it be customary (including instant custom) or statutory international law.[2] In light of this, subjects are likely to strategically impose their own sense of rough justice on the basis of their intuitive grounds that are theoretically backed by the notion of *opinio juris*.[3] Moreover, the function of international courts and tribunals in giving effect to identified values is under a conceptual skepticism. Besides, the natural trend of de-bordering and globalization seems to be an inevitable fact that comes along the outbreak of the stream of global governance institutions.[4] In other words, "[h]uman unity and interdependence of men and nations upon each other have reached such a degree that none of us can remain ignorant or indifferent to what is happening in law in other nations or in international organizations."[5] This state of affairs has led to a unique stream of international law-making and governance that is instantly and dynamically transforming.

International law is intrinsically of a decentralized nonhierarchical temperament.[6] Given this, a special field of legal studies emerged in practice through the study of intellectual correspondence of various actors carried out for practical political ends on the international plane.[7] International laws and norms—whether formal or informal—are, in practice, prone to go in pace with dominant political ends of dominant actors. This indeterminate law-making and norm-identification apparatus sidelines local and regional interests of non-dominant actors if these are not in line with dominant political ideas. Of the adversarial international law-making mechanisms that ensure particularism, representativeness, and non-multilateralism are veto procedure, weighted voting, majority principle, and even unanimity. This has led to volitional defect of international subjects despite international law itself being jurisprudentially composed of intellectual activities of international actors. Given this critique, in many cases, international actors find themselves

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2. *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006).

3. *See* Emily Kadens & Ernest A. Young, *How Customary is Customary International Law?*, 54 WM. & MARY L. REV. 885, 888–89 (2013).

4. *See* Dawn Carey, *The Cosmopolitan Epoch: Configuring a Just World Order*, 6 CULTURE MANDALA BULL. CTR. EAST-WEST CULTURAL ECON. STUD. 1, 1–5 (2003).

5. Earl Warren, *World Peace Through International Legal Consensus*, 40 PHIL. L.J. 510, 511 (1965).

6. *See* MALCOLM N. SHAW, INTERNATIONAL LAW (7th ed. 2014).

7. *See* James Crawford, *Democracy and International Law*, 64 BRITISH Y.B. INT'L L. 113 (1994).

trapped within a web of dominant political ideas and, therefore, do not find room to make their voices heard and interests pursued.

In order to conceptually deal with the above-stated critique, international law scholars have made efforts to categorize international law-making into two distinct features: formal and informal. By doing so, they try to interpret and deal with the illegitimacy critique of international law within the existing structure of international law. In this case, traditional interpretations on international legal theory would be the main source of scrutiny and interpretation. In other words, this division lacks jurisprudential innovation in dealing with illegitimacy of international law, for it attaches itself to either international legal formalism or pluralization of international norm-making process. This response contains no conceptual innovation to standardize and regulate international formal or informal law-making and norm-identification on the basis of international law's jurisprudential specificities. It must be noted that conceptual inquiries on the very existence of ideal democracy for international law-making has been scrutinized by international law scholars but the responses to this inquiry have lacked conceptual innovation in international legal theory.[8] This is why very basic inquiries in this regard remain, to a large extent, unanswered. That being said, of the most critical and basic inquiries in this regard is the following: Are international actors capable of participating in the law-making process?

International law-making and norm-identification streams—including institutions of treaty-making; customary international law; and global governance institutions, such as the United Nations and World Trade Organization—and also the ever-growing influence of informal regulatory mechanisms on regional and transnational planes are all indicative of a unique and newly born atmosphere of legal studies. Scholars need to address this atmosphere of legal studies through a futuristic lens that seeks to detach itself from existing principles of international legal theory and open new horizons for the upcoming international law agenda.

This article deals with the above-stated flaw from a theoretical perspective. Moreover, participatory democracy in international law-making is stressed as a theoretically convincing mechanism for international law-making. Thus, this article will first delve into the current structure of international law-making apparatus to assess whether or not international laws and norms are democratically made. Then, this article will present theoretical

8. *See* Salar Abbasi, *Democracy in International Law-Making: An Unfilled Lacuna*, 14 N.Z. Y.B. INT'L L. 35 (2018).

arguments arguing in favor of using participatory democracy or consensual international law-making in international law-making and norm-identification.

The structure of the article is composed of the following parts: in Part II, different features of particularism—unilateralism and non-deliberative multilateralism—are touched. In Part III, the implications of the ideal of democracy and democratic law-making in the international law-making process is scrutinized. In doing so, the discourse on representative and participatory perspectives of democracy as well as consensus-based international law-making are elaborated. Part IV is the conclusion of the article.

II. PARTICULARISM IN INTERNATIONAL LAW-MAKING PROCESS

The notion of particularism inherently searches for what is different, unique, or exceptional in order to create something that is incomparable or of special quality.[9] Given this, it is perceivable that particularism can intrinsically be mirrored in a hierarchical system of governance. Hierarchical governance are manifested in national governance systems. In other words, particularism is in tandem with a system in which hierarchical distribution of power is a pillar of its sovereignty. So, particularism makes sense in a hierarchical system of political governance. The structural ingredients of domestic governance systems are *demo* (people), the ruler, and the rule of law. In such a system, laws are produced and enforced by the ruler (i.e. statutory and judicial branches of the governments), and people comply with these laws and rules.

Given the decentralized, non-hierarchical temperament of international law,[10] any mechanism to function a particular feature of particularism is in contrast to the very nature of international law. In detail, the "doctrine of the legal equality of states is an umbrella category for it includes within its scope the recognised rights and obligations which fall upon all states."[11] This is why in the preamble of the Universal Declaration of Human Rights, the equality of member states is recognized as an inherent right.[12] Accordingly, the articulation of this incontrovertible right is provided in the 1970 Declaration on

9. *See* CHARLES M. HAMPDEN-TURNER & FONS TROMPENAARS, BUILDING CROSS-CULTURAL COMPETENCE: HOW TO CREATE WEALTH FROM CONFLICTING VALUES (2000).

10. *See* Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31 (1999).

11. SHAW, *supra* note 6, at 155.

12. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

Principles of International Law.[13] But, in practice, the existence of adversarial international law-making methods such as weighted voting and majority principle—even when it reaches to unanimity—seems disharmonious with the very nature of international law. All in all, by implementing adversarial international law-making methods, the concern of inequality among international actors has led to an unpleasant figure of particularism on the international plane.[14]

In the following sub-parts, different features of fulfilling particularism in international law-making are discussed. Unilateralism (or, in some cases, bilateralism) and non-deliberative multilateralism are tools through which, on the one hand, dominant political ideas are pursued in practice and, on the other hand, interests and voices of non-dominant ones remain sidelined. Therefore, ideals of democracy and democratic international law-making are neglected in such approaches. This flaw drives dominant state-actors to be enmeshed with the dysfunctional ideology of realism, which is premised on the effectiveness and necessity for state-centric particularism.

A. Unilateralism and Bilateralism

It is undeniable that states or elites of states decide, make policies, and act on the basis of their unilateral premises in their everyday conduct on transnational and international planes. In other words, states naturally act and pursue the highest geopolitical interests of their country. But what produces a sharp and critical reaction against unilateralism is the scope, extent, and plane in which it applies. In some circumstances, unilateralism or bilateralism "intrudes upon the interests of third persons to an inappropriate extent, perhaps because [the action] require[s] them to alter their behavior in some way."[15] This feature of unilateralism appears as an abuse of political power or a violation of political rights of other international actors. So, what is

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13. G.A. Res. 2625 (XXV) (Oct. 24, 1970) ("All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature. In particular, sovereign equality includes the following elements: (*a*) States are juridically equal; (*b*) Each State enjoys the rights inherent in full sovereignty; (*c*) Each State has the duty to respect the personality of other States; (*d*) The territorial integrity and political independence of the State are inviolable; (*e*) Each State has the right freely to choose and develop its political, social, economic and cultural systems; (*f*) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.").

14. *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 381 (2005).

15. Philippe Sands, *'Unilateralism', Values, and International Law*, 11 EUR. J. INT'L L. 291, 292 (2000).

contentious is not necessarily unilateralism per se but, rather, the imposition by one community of its values on another community in international and transnational arenas.[16] This is why the International Law Commission Special Rapporteur report on Unilateral Acts of States in 1999 concluded that, "[c]oncerning those [unilateral acts] seeking to produce international legal effects, it was a well-established principle of international law that a State could not impose obligations on other States or subjects of international law without their consent."[17]

International law being indeterminate on the one hand, and its unresponsiveness toward immediately produced political concerns on the other,[18] have extraordinarily lent weight on the primacy of some desired values that are not necessarily of a transnational interest but of a regional or unilateral concern. This has resulted in a hierarchy of values in international law stemming from the hierarchy of state-actors in terms of political power.[19] A prominent unilateral movement is the United States' Unilateral Economic Sanctions.[20] As summarized by investigations by the U.S. International Trade Commission, the United States routinely and unilaterally targets countries or organizations for sanctioning.[21] Of the restrictive measures against selected entities, around twenty percent concern terrorism; other sanctions concern nuclear and other arms proliferation, national security, narcotics, expropriation of U.S. property, human rights, environmental protection, and communism.[22]

These unilateral sanctions designed by the United States are hardly foolproof. The United States imposes these restrictive measures because, depending on the broader diplomatic context in which they are situated, sanctions can impose great economic costs on adversaries and provide the United States with increased diplomatic leverage. Sanctions, whether they be unilaterally or multilaterally imposed, and regardless of unfathomable moral

16. *See id.*

17. *See* U.N. GAOR, 54th Sess., Supp. No. 10 at 130, U.N. Doc. A/54/10 (May 3, 1999).

18. To refer to the necessity of potential interaction of law and political will-formation, see HABERMAS, *supra* note 1.

19. *See* Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, 8 EUR. J. INT'L L. 583, 592 (1997).

20. *See, e.g.*, U.S. INT'L TRADE COMM'N, OVERVIEW AND ANALYSIS OF CURRENT U.S. UNILATERAL ECONOMIC SANCTIONS 2-1 (1998), https://www.usitc.gov/publications/docs/pubs/332/PUB3124.PDF.

21. *See, e.g.*, *id.* at xi–xv.

22. *See id.* at x.

questions on them, are mostly directed toward the most vulnerable classes[23] of the affected state, including women, children, the infirm, the poor, and others.[24]

Of the most widely known unilaterally driven sanctions is the United States' financial restrictions in calling for a new tack to block Iran's nuclear agenda.[25] These sanctions were imposed in addition to other multilateral sanctions, such as an oil embargo, frozen assets,[26] travel bans,[27] and restrictions on trade[28] and finance.[29] As a result, the various U.N. Security Council resolutions shook Iran to the core and caused a loss of $500 billion to Iran's economy.[30] Add to this the recent unilateral procrastination and demolition by the Trump administration toward the Joint Comprehensive Plan of Action on Iran's nuclear movements[31] that was fleshed out on July 14, 2015 in Vienna.

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23. *See* Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 NATURE 137 (2003).

24. Human Rights Council, 19th Sess., U.N. Doc. A/HRC/19/33, at 9–10 (2012).

25. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-58, IRAN SANCTIONS IMPACT IN FURTHERING U.S. OBJECTIVES IS UNCLEAR AND SHOULD BE REVIEWED (2007) (reviewing U.S. sanctions); Helene Cooper & Steven R. Weisman, *West Tries a New Tack to Block Iran's Nuclear Agenda*, N.Y. TIMES (Jan. 2, 2007), https://www.nytimes.com/2007/01/02/world/middleeast/02sanctions.html.

26. S.C. Res. 1737, ¶ 13 (Dec. 23, 2006).

27. S.C. Res. 1803, ¶¶ 3–5 (Mar. 3, 2008).

28. S.C. Res. 1737, *supra* note 26, ¶¶ 3–4.

29. *See* Mark Landler, *U.S. and Its Allies Expand Sanctions Against Iran*, N.Y. TIMES, Nov. 22, 2011, at A6(L).

30. *See* ALI VAEZ & KARIM SADJADPOUR, IRAN'S NUCLEAR ODYSSEY: COSTS AND RISKS (2013).

31. As a quick historical overview of this agreement, discussed fully in VAEZ & SADJADPOUR, *supra* note 30, it is worthwhile to note that Iran's nuclear program started in the 1950s with the direct support of the United States under the terms of the Atoms for Peace program. After the 1979 revolution of Iran which ended the 2500 years of the Kingdom of Iran and established the Islamic Republic of Iran, international nuclear cooperation with Iran had been ceased while Iran insisted on its nuclear program as a right. In the 1990s, after several international negotiations had been held regarding Iran's nuclear program, Russia supported Iran's nuclear program and provided Iran with Russian experts and technological means. In 2003, the International Atomic Energy Agency ("IAEA") carried out an investigation and eventually found no evidence that Iran's activities are threats to peace. The "EU-3" (Germany, France, and the United Kingdom) talks with Iran as a diplomatic initiative concluded in the Tehran Declaration in October of 2003, allowing all parties to reach their balanced proposals based on transparency, publicity, and peace-keeping. Up until this time, the fear of uranium enrichment of Iran had not been felt. However, Iran's purported refusal to permit the IAEA to inspect Iran's nuclear activities caused growing concerns and doubts on Iran's good will and peace-keeping activities. Consequently, between 2006 and 2007, the United Nations Security Council and the United States National Intelligence Estimate, almost simultaneously, determined that Iran did not comply with the terms of the treaty on Non-Proliferation of Nuclear Weapons. Additionally, in 2011, the IAEA concluded that Iran had been conducting experiments aimed at designing a nuclear bomb. These calamities necessitated a resumption of negotiations regarding Iran's nuclear program with new literature, new rhetoric, and new diplomacy. Very intensive negotiations were held between Iran and the "5+1" countries (the United States, the United Kingdom, Russia, France, and China, plus Germany), and after a prolonged course of negotiations, discussion, and balancing of interests, an agreement was reached and the Joint Comprehensive Plan of Action was fleshed out on July 14, 2015 in Vienna. Based on

This agreement was achieved through intensive negotiations, discussion, and balancing of interests between Iran and 5+1 countries (the United States, the United Kingdom, Russia, France, and China, plus Germany).[32] So, as shown by this example, "[c]onceiving of unfriendly unilateralism as enforcement has deep roots in the legal literature and now drives the black letter doctrine on state responsibility."[33]

It is worthwhile to note that some scholars have considered unilateral international law-making as having a vital function to help enforce and generate laws. These scholars argue in favor of unilateralism in order to avoid inertia of enforcing laws on international plane.[34] Their main argument "maintains that the universalization of international law poses a threat to sovereignty and national interests"[35] and states have to cope with it through unilateralism and bilateralism. An unregulated, universalized international legal order might have serious drawbacks, but the critical question is whether particularism is a proper response to this critique. The other question concerns the extent to which one single state is eligible to take unilateral actions based on its special state of mind and self-interested interpretations. Furthermore, this state-centric uptake is subject to critiques in the age of the over-arching expansion of interpenetration and interdependence of international subjects. This stream of globalization inevitably drives international law to require a transition from anachronistic notions of sovereignty and self-aggrandizement—still epitomized in bilateral power-based pacts—to a more enlightened international society.[36] Accordingly, Bruno Simma argues:

> [I]nternational law has undoubtedly entered a stage at which it does not exhaust itself in correlative rights and obligations running between states, but also incorporates common interests of the international community as a whole, including not only states but all human beings. In so

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this agreement, all parties are committed to mutually balancing their interests and complying with the international rule of law in four phases: (1) reducing enrichment, (2) restraining reprocessing, (3) implementing enhanced monitoring mechanisms provided by Iran, and (4) terminating nuclear-related economic and financial sanctions against Iran.

32. *See* Salar Abbasi, *A Lesson from the Nuclear Agreement with Iran: International Participatory Democracy; a Legitimate End to Middle East Wars*, *in* PAPERS OF THIRD INTERNATIONAL CONFERENCE ON INTERDISCIPLINARY LEGAL STUDIES 2017 67, 70 (2017), http://uniqueca.com/archieves/proceedings/ProceedingsILS2017.pdf.

33. Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT'L L.J. 105, 107 (2014).

34. *See id.* at 105–11.

35. Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 324 (2008).

36. *Id.* at 324–25.

> doing, it begins to display more and more features which do not fit into the 'civilist', bilateralist structure of the traditional law. In other words, it is on its way to being a true *public* international law.[37]

In general, when unilateralism is applied at international level, it is "tainted by its more pejorative use in the political realm."[38] Through unilateralism, a non-dominant, affected, international subject considers itself as having no determinative role in the international law-making process.[39] This approach is conceptually in contradiction with the idea of egalitarian law. The latter definition and understanding of law is put forth by Middle-Eastern philosopher Shahab al-Din Suhrawardi that is touched on later in this article. Based on the idea of egalitarian law, the ontological conceptual inquiry of law is not whether it complies with certain ideology or a set of principles or whether it is posited through the hierarchy of norms. But, rather, the ontological conceptual enquiries of law are whether it is created based upon egalitarianism and whether it is regulated to spread equality among member entities.[40] Considering this perspective, making international laws through particularism plunders the innate perception of non-dominant international actors on whether they are treated equally in modus operandi and the law-making process.[41]

B. Non-Deliberative Multilateralism

The overwhelming emergence of nongovernmental organizations; treaty-making institutions; various regional, non-binding regulatory mechanisms; and social activists on the international plane are indicative of a vivid sentiment of the vast majority of international subjects toward a world order based on global multilateral participation and governance. This new order has been reflected in the plurality of international legal structure. Given this, as discussed earlier, international law has become a special field of legal studies with its unique conceptual characteristics.

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37. Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265, 268 (2009).

38. Maggie Gardner, *Channeling Unilateralism*, 56 HARV. INT'L L.J. 297, 299 (2015).

39. *See* Sands, *supra* note 15, at 292–93.

40. Abbasi, *supra* note 8, at 48–49.

41. *See* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA (Urlich Fastenrath et al. eds., 2011).

From a theoretical perspective, liberal interdependence and integrity of global economic, financial, and trade systems have all led to a revival of the Kantian approach of common morality toward international law.[42] In detail, Immanuel Kant, with his idea of *Perpetual Peace*, "intended to offer a programmatic formula for peace, rather than a philosophical analysis of the nature of international law and relations."[43] His approach was an attempt to pragmatically implement moral orders in international and transnational relations. Given this approach, a cross-cultural agreement in ethics, with corresponding convergence of cultures, toward a universally justified international legal order is reachable.[44] Common morality is the focal tenet of a more socially conscious international legal order that grounds international law's promise of true publicness.

So, bilateral discriminatory arrangements enhance the leverage of the powerful over the weak and increase international conflict and hostility among international subjects.[45] On the other hand, valuing multilateralism with the central aim of opposing particularism can enhance the transparency and effectiveness in addressing global challenges. Therefore, the United Nations recognizes the need to adopt multilateral approaches[46] that are inclusive, transparent, and effective in addressing global challenges and reaffirms the commitment to promote the effectiveness and efficiency of the United Nations system in this area. All in all, true multilateralism in the international law-making process appears as a hurdle toward selective composition of international legal order that is embedded in dysfunctionality of particularism on the transnational plane.

On the other hand, realist scholars have argued that in international legal theory there is no understanding of governance beyond the level of states.[47] Under this approach, some argue that unilateralism, bilateralism, and non-deliberative multilateralism have a vital role in the international law-making process.[48] This standpoint serves as a backbone for increasing the leverage of dominant states over non-dominant international subjects

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42. *See* Patrick Capps, *The Kantian Project in Modern International Legal Theory*, 12 EUR. J. INT'L L. 1003, 1003–25 (2001).

43. Fernando R. Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 57 (1992).

44. *See* Kevin Hart, *Quest for a Global Morality as Kantian Diversion*, 3 J.L. PHIL. CULTURE 243, 243 (2009).

45. Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 INT'L ORG. 681, 681 (1992).

46. G.A. Dec. 65, U.N. Doc. A/65/PV.60, at 38 (Dec. 8, 2010).

47. Richard Higgott & Eva Erman, *Deliberative Global Governance and the Question of Legitimacy: What Can We Learn from the WTO?*, 36 REV. INT'L STUD. 449, 449–50 (2010).

48. *See* Hakimi, *supra* note 33.

provided by discriminatory arrangements of unilateralism and bilateralism.[49] In today's globalized international community, this has, in practice, made room for dominant states to put weaker international subjects under pressure to keep in pace with their self-interested proposals or, at most, non-deliberatively and compulsorily abstain.

As an example, imposing use of force[50] on the basis of unilateral self-interested interpretations[51] is nothing but resorting to unilateralism. It was based on such a dysfunctional particularism that following the 9/11 attacks,[52] the U.S. administration responded to pressure calling for a more offensive posture against so-called rogue regimes by sending troops and launching military attacks against the military and non-military people of Iraq in 2003. The Bush doctrine challenged even the anticipatory self-defense in advocating an extremely broad and legally untenable notion of preventive war.[53] The United Nations as the most important global inter-governmental organization found in practice no alternative other than obeying the United States' proposal to send military troops to Iraq in fulfillment of the pre-emptive right of self-defense. In one of his speeches, Richard Falk gives a clear picture of the United States' unbecoming use of bilateralism or non-deliberative multilateralism by its imposition of war against Iraq in 2003:

> [The United States was] insisting that the United Nations Security Council give it a mandate to wage a non-defensive war against Iraq, validated by the language of preemption but not empirically persuasive on that level. . . . [The United States was] giving an ultimatum to the United Nations . . . [and was] really saying to the Security Council, "[The United Nations must] rubberstamp U.S. geopolitics or

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49. *See* Kahler, *supra* note 45, at 681.

50. U.N. Charter art. 2, ¶ 4. ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

51. *See* Natalino Ronzitti, *The Expanding Law of Self-Defence*, 11 J. CONFLICT & SEC. L. 343, 344 (2006).

52. On the morning of Tuesday, Sept. 11, 2001, the terrorist group Al-Qaeda launched a series of four coordinated terroristic attacks on the United States. The attacks consisted of suicide attacks used to target symbolic U.S. landmarks, including, but not limited to, the World Trade Center.

53. *See* Kalliopi Chainoglou, *Reconceptualising Self-Defence in International Law*, 18 KING'S L.J. 61, 68–77 (2007).

> [the United States] will act anyway, and the irrelevance and impotence of the United Nations will be clear for the world to see."[54]

The United Nations had no alternative other than adopting a Hobbesian choice to choose the bad in advance of the worse, which, at that time, was giving a mandate to the United States to send military troops to Iraq in 2003.

Under this structure, terms such as universalism and multilateralism have no place in the practice of international law. In other words, such terms remain as populist terms in international law. They rather appear as a hazardous leeway for dominant international actors to justify their self-interested unjust movements with the aura of such vague and undefined terms in international law. In detail, given the lack of a substantive regulatory mechanism to standardize international formal and informal law-making and norm-identification apparatuses, terms such as universalism and multilateralism will have no practical fruition. Democracy being a non-issue in formal and informal international law-making has given rise to perplexity and non-harmony in international norm-identification. In the forthcoming sub-parts, the practical status of international law in terms of the implications of democracy in international law-making is touched.

III. DEMOCRATIC LAW-MAKING VERSUS PARTICULARISM IN INTERNATIONAL LAW-MAKING PROCESS

Democracy has for a long time been "a non-issue in international law . . . [until] the end of the ideological dichotomy of the Cold War. A new interventionist U.N. Security Council and a large number of newly emerging democracies in Latin America, Africa, and Asia led to a widespread euphoria about democracy."[55] Of the first major international documents addressing this issue was the Vienna Declaration of the World Conference on Human Rights.[56] This declaration recognized that democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.[57] But, turning to the main concern of this article, what

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54. University of California Television (UCTV), *Richard Falk: International Law and the Nature of Security*, YOUTUBE (Aug. 7, 2008), https://www.youtube.com/watch?v=uUQsCFHNXcs.

55. Niels Petersen, *The Principle of Democratic Teleology in International Law*, 34 BROOK. J. INT'L L. 33, 35 (2008).

56. *See id.*

57. World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (June 25, 1993).

about the practical implications of democracy for international law-making and norm-identification? Are international laws and norms democratically fleshed out?

Given the lack of a substantive notion of democracy in international law-making, the modus operandi or the procedural details of international law-making process have been driven mostly under the influence of adversarial democracy or representative democracy. On the other hand, participatory democracy remains less expanded in the international law-making apparatus. Both of these mechanisms have been theorized for domestic legal/political structures where political power is hierarchically distributed. In the following sub-parts, implications of these two perspectives in international law-making are discussed.

A. Representative Perspective of Democracy in International Law-Making

According to western legal thinkers and political philosophers, definitions on democracy rely either on procedural processes or the substantive axiom of participation of all.[58] Under the influence of Western idea of liberal representative democracy, electoral and practically adversarial model of democracy has been pervasively adopted as being representative of the will of the people living in a given territory. The representative perspective of democracy emphasizes use of formal mechanisms of accountability by authorization of representatives for the different groups of entities in international law—indirect participation of actors in the law-making process.[59] Based on this theory, efficient ruling by a sufficiently small number of people on behalf of the larger number is allowed. Under this system, existing political parties resort to different adversarial means to defeat counterparts and become the ruling political power in a knit domestic society. Given this, representative democracy is an instrument of assuring a statist/hegemonic structure of a legal order that had been preceded in thought and practice by a medieval conception that is intrinsically associated with various heterogeneous forms of political control.[60]

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58. *See generally* JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE (2013).

59. *See* Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005).

60. *See* Richard Falk, *The Post-Westphalia Enigma*, *in* GLOBAL GOVERNANCE IN THE 21ST CENTURY: ALTERNATIVE PERSPECTIVES ON WORLD ORDER 147 (Björn Hettne & Bertil Odén eds., 2002).

Manifestations of representative democracy in the international norm-making process are different degrees of adversarial law-making methods, such as veto procedure, weighted voting, majority principle, and unanimity. In this situation, interests and proposals of a dominant state or a small number of dominant actors are voiced and assured. On the other hand, non-dominant actors find no way other than complying with the proposals put forth by dominant ones. Otherwise, non-dominant actors will be subject to unilateral sanctions during the law-making process. This has extremely devastating consequences and is why adversarial democracy has practically served as a kind of oligarchic democracy in international law-making process. The basic reason for this, based on the argument of this article, is that international law has become globalized, intellectualized, and fluid. Conversely, the procedural axioms through which international laws and norms are made are yet non-globalized, dysfunctional, and static.[61]

All in all, representative democracy is inherently associated with the notions of sovereignty, national jurisdiction, and territoriality that are relevant to domestic legal systems where power is hierarchically centralized. In other words, representation in law-making process can potentially be addressed "where the government is represented as an apparatus of public administration, and society as a market-structured network of interactions among private persons."[62] Given this, by applying representative democracy in international law where power is horizontally distributed and decentralized, the world is driven to the point of having a world with government that is "a horrible thought . . . itself."[63] "This is [not] as it should be. The peace of the world is not promoted by a majority riding roughshod over a significant minority."[64]

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61. *See* Lawrence E. Modeme, Democratic Entitlement in International Law? Still Far from the Promised Land (2010) (unpublished working paper) (on file with the Academy for Cultural Diplomacy), http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2010biec/Democratic_Entitlement_In_International_Law_-_Still_far_from_the_Promised_Land.pdf.

62. Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 1 (1994).

63. J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 547, 559 (2004).

64. Louis B. Sohn, *Introduction: United Nations Decision-Making: Confrontation or Consensus*, 15 HARV. INT'L L.J. 438, 444 (1974).

B. Participatory Democracy in International Law-Making

Based on the participatory perspective of democracy, will cannot be represented. In other words, every single entity and person in a knit society has the right to participate, co-operate with other personalities, and make decisions regarding their social and political ends within the society they exist. Based on this inspirational school of thought on democracy, democratic governance means governance of many over many.[65] Proponents of this understanding rely on the very ontological and conceptual meaning of democracy that is based upon the idea that equality and justice are merely achievable through participation of all personalities in decisions-making and law-making processes. This standpoint is best articulated by Jean-Jacques Rousseau when he criticized the representative perspective of democracy:

> [W]ill cannot be represented; will either is or is not, your own; there is no intermediate possibility. Thus deputies of the people are not, and cannot be, its representatives; they are merely its agents, and can make no final decisions. Any law which the people has not ratified in person is null and void; it is not a law . . . .[66]

Applicability and feasibility of participatory democracy in domestic legal and political structures remain under a serious skepticism. In a given domestic political system, there is a hierarchy of political power, a clear hierarchy of values, and an institutional hierarchy. Under such a system, competitive and adversarial methods in grabbing power seats are seen as an infrastructural characteristic of domestic legal, political structures. Given this, it has been widely accepted by governing, as well as governed, entities that the highest expectations of the entire nation could best be met through representative governance. This points to a conceptual shift from an ontological and substantive understanding of democracy—direct participation of all citizens in governance—to representative democracy based upon procedural and electoral axioms. Representative democracy remains the most consistent governance model given the jurisprudential pillars of domestic legal, political structure.

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65. *See* Jan Wouters et al., *Democracy and International Law*, 34 NETH. Y.B. INT'L L. 139 (2003).

66. JEAN-JACQUES ROUSSEAU, JEAN JACQUES ROUSSEAU: POLITICAL WRITINGS 103 (Frederick Watkins ed., trans., The Univ. of Wis. Press, 1986) (1953).

But on the other hand, international law's legal and political system is of a horizontal structure. Given this, the implications of democracy in international law-making and norm-identifications processes should be conceptualized with no reference to traditional discourse on domestic democracy in mind. In other words, participatory democracy is en route to a "new governance model [in international law that] connotes a decentering of legal scholarship, challenging the traditional focus on formal regulation as the dominant locus of change."[67] Moreover, under the auspices of the over-arching influence of globalization, the plural definitions on the notion of governance in international law looms inevitable. Add to this the fluidity or intellectuality character of international law that extends the reach of the principle of democracy beyond the notion of the states.[68] Therefore, a transition from a state-centric global governance to one based upon participatory governance, with the attainment of human dignity for all subjects, has been rendered as a pillar of a just world order.[69]

Therefore, under the participatory view of international law-making, "[t]he *aggiornamento* of international society . . . [will] purposively bring[] international society into line with our best ideas and highest expectations about society in general."[70] This moral need is sufficiently enlightened in Kantian approach of common morality that brings about perpetual peace to the international community based on the fact that morality belongs equally to all people from any religion, nationality, or race. Thus, this understanding detaches itself from any sacred religious text, instead turning on appeals to natural or universally shared beliefs.[71] All in all, participation of all entities in international law-making seems to be more consistent with international legal theory and its jurisprudential specificities. The critical question, and the central focus of international law scholars, is how to harmonize and regulate a dynamic perspective of international law-making[72] that can march dynamically with globalization,[73] intellectuality,[74] and substantial motion of law.

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67. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344 (2004).

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

69. *See* RICHARD FALK, ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS (1995).

70. Allott, *supra* note 10, at 47.

71. *See* Hart, *supra* note 44.

72. *See* Carey, *supra* note 4.

73. *See* Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT'L L. 885 (2004).

74. *See* Crawford, *supra* note 7.

Secularism, which is "tied historically and ideologically to the fate of the sovereign state as the primary organizing unit of world order,"[75] is "difficult to disentangle from kindred ideas of the 'Enlightenment heritage,' 'modernity,' 'rationalism,' and the 'Age of Reason.'"[76] This process of humanizing international law must foremost ground a true democratic legal order. Under the auspices of this ideal, participants to a multilateral negotiation of an international convention ought to be voiced equally, determinatively, and deliberatively in the entire law-making process from its modus operandi to every minute detail of content.

So, the concept of participatory democracy in international law-making has theoretical roots in the idea of egalitarian law put forth by Suhrawardi.[77] Equality, to him, is nothing but an innate perception that emerges in people's minds when they find room to make their voices heard and participate in any course of norm-making.[78] So, according to the intuitionist school of thought, in order to structure a blissful community globally, law (or equality to Suhrawardi) should be created through participation of global actors and entities living more locally in that community—to reach the highest expectation from the law, which is egalitarianism.[79] To Suhrawardi law is a regulatory mechanism that is tasked to spread equality among member entities. Based upon this school of thought, the ontological conceptual inquiry of law is not whether it complies with certain ideology or a set of principles or whether it is posited through the hierarchy of norms. But rather the ontological conceptual enquiry of law is whether it is created based upon egalitarianism and whether it is regulated to spread equality among member entities.

As it is perceivable, deliberative participation in the law-making process is of a consensual weight for it provides a practically tangible equality of international actors in the law-making process. Therefore, in order to chase the roots of the ideal of participatory democracy, one has to touch upon the term "consent" in international norm-making. In other words, "consent" is the inseparable tenet of the participatory democracy. Given this, participatory democracy has been manifested in the practice of international law as the consensus-based international law-making method. The next sub-part is devoted to the theory

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75. RICHARD FALK, RELIGION AND HUMANE GLOBAL GOVERNANCE 35 (2001).

76. *Id.*

77. *See* YAHYA AL-DIN SUHRAWARDI, HIKMAT AL-ISHRAQ [THE PHILOSOPHY OF ILLUMINATION] (John Walbridge & Hossein Ziai trans., 1999) (1186).

78. *See generally id.*

79. *See* Abbasi, *supra* note 8.

of consent and its practical implications that are mirrored in consensus-based law-making method in international law.

C. Consensus-Based International Law-Making

Laws, including international law, can be likened to the science of language that is an endowment bestowed upon mankind. This endowment is illuminated in practice by making different meaningful sounds through a well-organized man-made process on the basis of association, analogy, and correspondence. Law, in its very essence, is an innate endowment bestowed on mankind and comes into practice through man-made institutions and constitutions on the basis of motives and purposes of the consent which constituted them. Considering law, including international law, as a natural bestowment that can only be progressed through participatory consent or custom, traces back to the writings of Francisco Suárez, a Spanish theologian[80] who "equated the law of nations with custom"[81]—consensus-based uptake. After centuries of hot debate among scholars on the nature of custom and consent theory in international law, custom, at its very core, remains a matter of social participation and, thus, its legitimacy is naturally and inevitably contingent upon the participatory perspective of democracy.[82] Accordingly, Heikki Patomaki argues that democratization is a basic for further reconsiderations on the international legal system: "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."[83]

In social sciences, "consensus is used to mean either a statement of agreement or a particular process used in decision making."[84] In establishing legal norms and laws, consensus is of a contractual weight and means a generic agreement of all participants on a debated issue. In fact, consensus calls for an attempt, mostly by negotiation, to achieve an agreement of all

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80. *See* FRANCISCO SUÁREZ, DE LEGIBUS, AC DEO LEGISLATORE [A TREATISE ON LAWS AND GOD THE LAWGIVER] (1612), *reprinted in* 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ 3 (Gwladys L. Williams et al. trans., 1944).

81. Kadens & Young, *supra* note 3, at 887.

82. *See* Alec Stone, *What Is a Supranational Constitution?: An Essay in International Relations Theory*, 56 REV. POL. 441 (1994).

83. Heikki Patomäki, *Rethinking Global Parliament: Beyond the Indeterminacy of International Law*, 13 WIDENER L. REV. 375, 382 (2007).

84. Martha E. Gentry, *Consensus as a Form of Decision Making*, 9 J. SOC. & SOC. WELFARE 233, 233 (1982).

participants on the basis of multilateralism.[85] Therefore, once an agreement is reached through consensus, the common action and support of all members are arguably assured.

On the other hand, it has been argued that it is based on the theory of consent that member states, relying on the theory of self-limitation, independently choose to be bound by international norms only if they consensually agree to be bound.[86] In other words, states are believed to be obliged only by what they have consented to.[87] However, given the tremendous growth in international institutions and the network of rules and regulations, and in the light of the fluidity of custom[88] as the most important source of international law, a trend away from the self-limitation theory to totality of international law has inevitably emerged.[89] Given this, undeniably, "states are constantly being treated as bound by rules and principles which they cannot be seen as having consented to."[90]

In general, "one cannot ignore the role of consent in international law. To recognise its limitations is not to neglect its significance."[91] Valuing consent, in this research, does not call for revival of positivistic state-centric approaches toward international law but, rather, stresses the importance of deliberative consensus-based international law-making processes. This is not in contrast to the totality of international law. Also it is of a crucial importance in coping with the inequality of actors in international norm-making process. In other words, consent is the focal tenet of the participatory perspective of democracy that is, as outlined above, an incontrovertible pillar of an egalitarian humane governance in the international legal system—a post-modern approach[92] to international law.

The above-stated fact is also embedded in David Held's account of cosmopolitan democracy through a framework-setting institution.[93] Based upon this idea, it is necessary to lay out an institutional design that provides a room for participatory

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85. *See* GEOFF R. BERRIDGE, DIPLOMACY: THEORY AND PRACTICE (2015).

86. SHAW, *supra* note 6, at 7.

87. Thomas Larsson, Customary International Law: Developments Towards a Non-Consensual Source of International Law? 30 (2014) (unpublished thesis, Uppsala University) (on file with author).

88. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, AM. J. INT'L L. 757, 784 (2001).

89. *See* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW (Antonio Cassese ed., 2012).

90. *See* Larsson, *supra* note 87, at 30.

91. SHAW, *supra* note 6, at 8.

92. *See* Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66 (1991).

93. *See* HELD, *supra* note 68.

democracy to grasp the deliberative consent of the participants. Under the transformationalist literature of the cosmopolitan democracy, the modern state approach finds itself "trapped within an extensive web of global interdependence . . . [necessitating the state's] recourse to international cooperation."[94] This condition of affairs necessitates a balancing between autonomy of the state in decision-making and pursuit of the good of the peoples living in the entire region. In other words, the autonomy of states is constrained by recognizing the mutual dependence and democratic autonomy of other nations. Given this, it has been purported that, through implementation of cosmopolitan democratic law, states will be driven to adopt the democratic governance model and be part of the confederation of democratic states. In other words, through cosmopolitan democratic law, the principles of individual democratic states could come to coincide with those of the idea of cosmopolitan democratic law. "As a consequence, the rights and responsibilities of people *qua* national citizens and *qua* subjects of cosmopolitan law could coincide, and democratic citizenship could take on, in principle, a truly universal status."[95]

The consensus-based decision-making method became popular in 1970s "as a result of [the] growing number of independent states taking an active part in international politics."[96] This has gradually penetrated the idea of the sovereign equality of states in co-operation in the international norm-making process.[97] In other words, "[t]he consensus system assures that decision-making at a multilateral negotiation of a convention will not be dominated by the numerical [or any kind of] superiority of any group of nations."[98] Therefore, the consensus-based decision-making method in international law provides an equal opportunity for substantively unequal actors to act deliberatively and determinatively in the law-making process. This method reduces weak or developing participants' risk of becoming permanent minorities.[99]

The important trait that is embedded within the very meaning of consensus is that consensus is reached only in the absence of any objection. The significant aftermath of this trait is that participants cannot get an acceptance for their proposals unless they accept proposals put forth by other participants. In other

94. *Id.* at 25.

95. *Id.* at 232–33.

96. Suren Movsisyan, *Decision Making by Consensus in International Organizations as a Form of Negotiation*, 21ST CENTURY 77, 77 (2008).

97. *See* Kahler, *supra* note 45, at 681.

98. Barry Buzan, *Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea*, 75 AM. J. INT'L L. 324, 327 (1981).

99. *See* MILES KAHLER, LEADERSHIP SELECTION IN THE MAJOR MULTILATERALS (2001).

words, there has to be an egalitarian multilateral will to reach an agreement by accepting and cooperating each participant's standpoint. This is why, by taking into the role of consensus in making laws, views of the minority are voiced determinatively and, therefore, decisions are developed cooperatively and deliberatively. In other words, through this humane process, "the need to negotiate to achieve a consensus in multilateral conferences [on the international plane] enable[s] small and developing states to participate in discussions and even veto any proposal" that potentially violate their rights.[100]

Consensus-based decision-making method has occasionally been adopted by some international organizations such as the North Atlantic Treaty Organization, the Third United Nations Conference on the Law of the Sea, the General Agreement on Tariffs and Trade Uruguay Round, the Madrid Meeting of the Conference on Security and Cooperation in Europe, and some specialized agencies of the United Nations. Just to mention the effectiveness of consensus in multilateral conventions, one must consider all eight rounds of the General Agreement on Tariffs and Trade, briefly discussed by Suren Movsisyan:

> Starting from November 1981, when preparation for Uruguay Round was officially launched, large discussions taken place over two controversial subjects, "whether trade in services and other new subjects should be included in a negotiating programme," . . . and on agricultural products, that were discussed and postponed during the previous, Tokyo Round in 1979. Only in 1986 did the Preparatory Committee meet to discuss all proposals and objections for new multilateral trade negotiations and agreed on the venue, in Punta del Este, Uruguay, in September 1986, without any progress in main issues mentioned above. Several formal and informal groups were created to discuss and recommend new proposals but failed to reach a consensus as well. However, the consensus was reached during Uruguay Round Negotiations when 61 members decided to separate those two controversial issues. . . . Compromise was achieved in agricultural issues as well during the last day of a meeting. The Uruguay Round shows that consensus even over controversial issues may be achieved only by negotiations; that the latter is a core of any consensus in multilateral meetings.[101]

100. Movsisyan, *supra* note 96, at 85.
101. *Id.* at 80.

Prior to concluding this article, it is worthwhile to mention a conceptual misunderstanding in the main discourse of this article. Some writers considered consensus as an ultimate and the most desirable feature of adversarial decision-making methods in international law by considering unanimity and consensus as having the same meaning. For instance, Professor D'Amato divided consensus into four possible kinds: "complete unanimity, near-unanimity with a few abstentions, near-unanimity with one or more active dissents, and majority opinion with substantial minority disagreement."[102] But, based on what is argued in this article, consensus-based law-making is essentially different from adversarial decision-making methods such as weighted voting or even unanimity. Consensus is, therefore, a deliberative agreement through direct participation whereby members party to a multilateral convention take part in fleshing out agreements and thus, it contains their full consent both in content of the agreement and modus operandi in international law-making process. It must be noted that this is exactly where negotiation strategies play a crucial role in today's pluralistic international sphere. It has also been argued that "consensus decision can be achieved only by negotiation."[103] Indeed, negotiation strategies are the centerpiece of any consensus in international law-making.

IV. CONCLUSION

In this article, the protection of minorities and non-dominant international actors in the international law-making process is discussed. Under the over-arching influence of globalization, traditional state-centric interpretations on international law appear to be dysfunctional. In other words, institutions of treaty-making, global governance institutions, such as the World Trade Organization and the United Nations, customary international law, and non-binding regulatory mechanisms cannot be harmonized and governed through static state-centric approaches toward international law.

This article contributes to this movement by highlighting the ideal of democracy and democratic norm-identification in international law-making. Specifically, in the context of the horizontality, fluidity, and de-centrality of international law, the participatory perspective of democracy appears as a workable notion of democracy for the international law-making apparatus.

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102. Anthony D'Amato, *On Consensus*, 8 CAN. Y.B. INT'L L. 104, 106 (1970).
103. Movsisyan, *supra* note 96, at 78.

In addition, the current representative democracy in international law-making that intrinsically brings with it particularism, divisiveness, and inequality is criticized.

This article gives a clue for further studies in regard to conceptualization of a substantive ideal of democracy for international law-making. The theoretical roots of this new understanding of democracy for international law-making do not necessarily lie in the literature provided by Western legal thinkers. For instance, many legal thinkers in the Middle East have elaborated on the very meaning of law in the global context. In this article, the idea of egalitarian law in the global context is discussed. This notion could be read through the remarks made by a Middle Eastern thinker Suhrawardi. At the end, this article is put forth to open a new horizon for international law researchers to delve into the discourse on the necessity of conceptualizing the ideal of democracy for international law-making.