The World State: A Forbidding Nightmare of Tyranny? Habermas on the Institutional Implications of Moral Cosmopolitanism

By Ronald Tinnevelt & Thomas Mertens[*]

A. Introduction

"The world truly shares a common fate." These words seem to resonate with Immanuel Kant's famous statement that "a violation of right on *one* place of the earth is felt in *all*."[1] Yet, they are not from his *Toward Perpetual Peace* but from the *UN Millennium Project* report.[2] What makes our world one of "overlapping communities of fate"[3] are first and foremost the "interconnected threats and challenges"[4] we face in our globalizing age. During the last fifty years we witnessed an enormous growth of transboundary problems – climate change, migration, terrorism, infectious diseases, violent conflicts etc.

The Millennium report is very optimistic regarding the institutional structure that is best capable of dealing with these issues and securing the *Millennium Development Goals (MDG)*:

> We have the opportunity in the coming decade to cut world poverty by half. Billions more people could enjoy the fruits of the global economy. Tens of millions of lives can be saved. The practical solutions exist. The political framework is established. And for the first

---

[*] Ronald Tinnevelt and Thomas Mertens are respectively senior lecturer and professor for legal philosophy at the Faculty of Law, Radboud University Nijmegen. Address: R.Tinnevelt@jur.ru.nl; T.Mertens@jur.ru.nl.

[1] IMMANUEL KANT, PRACTICAL PHILOSOPHY 330 (Mary J. Gregor ed., Cambridge: Cambridge University Press 1997) (1795).

[2] U.N.D.P., *Investing in Development – A Practical Plan to Achieve the Millennium Development Goals* (2005: iv).

[3] DAVID HELD, GLOBAL COVENANT: THE SOCIAL DEMOCRATIC ALTERNATIVE TO THE WASHINGTON CONSENSUS, 115 (Cambridge: Polity Press 2004).

[4] Report of the Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 18, U.N. Doc. A/59/2005, (Mar. 21, 2005).

> time, the cost is utterly affordable. (…) All that is
> needed is action.[5]

Unfortunately it is unlikely that all MDG's will be attained by 2015 as scheduled. The underlying causes are not only a lack of political will and action, but also inadequate supranational structures. Creating new partnerships between developed and developing countries and stronger coordinative functions for the UN might not suffice to reduce child mortality by two-thirds and achieve universal primary education. We, therefore, need to seriously reconsider the premise that the necessary framework is indeed in place and examine whether the UN should be given a more coercive and maybe even a state-like structure.

Several normative and policy models have recently been developed to deal with the problem of transboundary problems and global democracy: cosmopolitan democracy, global government networks, directly-deliberative polyarchy, global issues networks, constitutional pluralism, a multipolar world order etc. The main question that drives these proposals is what kind of global institutional scheme fits best the requirements of moral cosmopolitanism – the idea that human beings are the ultimate units of moral concern. What unites these models are two premises.

First, notwithstanding recent 'centralizing' developments within the international realm – such as the realization of the ICC, the judicial functions of the WTO or the quasi-legislative functions of the ILO[6] – the idea of a world state is not accepted as a possible global institutional scheme. Most scholars simply assume that a world state would be an uncontrollable and tyrannical institution and argue for some form of global or network governance. Secondly, although some version of cosmopolitanism is widely defended, it is almost universally seen as a *purely* ethical doctrine that is *conceptually* unrelated to the much stronger claim of political, let alone institutional cosmopolitanism. Taking the equal moral status of individuals seriously does not imply the commitment to some form of world state or global citizenship. In fact, one can be completely *agnostic* about the best politico-juridical organization of international relations.[7]

Jürgen Habermas' proposal for a world domestic polity without a world government forms a welcome exception to this general rule. He forcefully argues that moral cosmopolitanism – as a cosmopolitanism about rights – is indeed conceptually related to 'institutional'

---

[5] U.N.D.P., *supra* note 2, at 1.

[6] *See generally* Hauke Brunkhorst, *How Much Democracy does Global Constitutionalism Need?*, *in* BETWEEN COSMOPOLITAN IDEALS AND STATE SOVEREIGNTY: STUDIES IN GLOBAL JUSTICE (R. Tinnevelt & G. Verschraegen eds., Houndmills, Palgrave. 2006).

[7] *See* Charles Beitz, *Social and Cosmopolitan Liberalism*, 75(3) INT'L AFF. 519 (1999a).

cosmopolitanism, and he therefore develops an institutional alternative to Kant's dichotomy between a federalism of free states and a world republic.

Attractive though it may seem his 'multilevel global system' does not go far enough, or so we defend. Although Habermas holds that subjective rights have objective legal implications, he seems unwilling to accept the final implication of this link between moral and institutional cosmopolitanism. A 'world domestic polity' based on a 'two-track model of democracy' (we will come back to this point) only makes sense within the context of a minimal world state. Such minimal world state can be described both as a 'state' that complements – rather than replaces – national self-determination and is capable of securing human rights. Unlike a 'unified global state' a minimal world state doesn't demand a completely centralized rule. It will be based on the principles of subsidiarity and functional differentiation.

Our argument is based on two interconnected claims: (a) the competence of Habermas' world organization cannot be limited to maintaining peace and securing human rights, but needs to be expanded to a more extensive form of political co-ordination in the areas of economy, ecology and health, (b) its responsibilities can never be strictly juridical (i.e. non-political) in nature.

To substantiate our main argument we will first show why cosmopolitans, according to Habermas' discourse theory of law and democracy, cannot remain silent about the global institutional implications of their moral ideals. Subsequently, a short outline of Habermas' multilevel global system will be given and his arguments against some form of world state will be rebutted. Finally, arguments are presented as to why Habermas's multilevel global system must be replaced by a minimal world state.[8]

---

[8] Schmalz-Bruns makes a similar claim. Habermas' proposal for a democratization of transnational politics only makes sense if he reverts to certain elements of the idea of a state. *See* Rainer Schmalz-Bruns, *An den Grenzen der Entstaatlichung: Bemerkungen zu Jürgen Habermas' Modell einer "Weltinnenpolitik ohne Weltregierung"*, *in* ANARCHIE DER KOMMUNIKATIVEN FREIHEIT: JÜRGEN HABERMAS UND DIE THEORIE DER INTERNATIONALEN POLITIK 292 (P. Niesen & B. Herborth eds., Frankfurt am Main: Suhrkamp 2007). We would like to emphasize, however, that our argument is primarily based on an internal criticism of Habermas' model of a world domestic polity without a world state. We are not presenting an independent argument for the inevitability and desirability of a minimal world state. For an interesting teleological explanation of why the world state is inevitable – based on the logic of anarchy and the struggle for recognition – *see* Alexander Wendt, *Why a World State is Inevitable*, 9(4) EUR. J. INT'L REL. 491–542 (2003).

B. On Rights

I. Moral Cosmopolitanism and Human Rights

Moral cosmopolitanism is supposed to differ from institutional cosmopolitanism in that the former is 'merely' a normative idea. It requires that we give equal recognition not only to our fellow citizens, but also to people who do not share our nationality, language or history. Human beings – and not ethnic communities, nations or states – are the ultimate units of moral concern.[9] Institutional cosmopolitanism, by contrast, is concerned with institutions and "holds that the world's political units are brought under the authority of supranational agencies of some kind."[10] Adding 'of some kind' is relevant here. It implies that institutional cosmopolitanism allows for a variety of forms and does not necessarily lead to a world state. It could also imply a "network of loosely associated regional bodies."[11]

At first sight, it seems correct to claim that moral premises do not have precise institutional consequences. One should be suspicious of Platonic theories that directly derive an institutional blueprint from moral norms.[12] Many defenders of cosmopolitan justice, therefore, claim that moral cosmopolitanism need not entail *any* claim about the range of political arrangements that are desirable and realistically achievable at the global level. They might support institutional cosmopolitanism for empirical reasons – for instance those dealing with the erosion of state sovereignty and the shift from government to governance – but their moral norms are not necessarily tied to the political ideal of a global institutional order.

Yet, this is only half of the story. Although the philosophical tradition of cosmopolitanism can be traced back to ancient Greece – especially to the Stoic idea of being a member of the world city – its present form is nowadays connected with the idea of human rights. Sometimes both terms are used interchangeably. Beitz, for example, emphasizes that "[t]he doctrine of universal rights is cosmopolitan in its foundations without being cosmopolitan in its institutional requirements." He holds on to the idea that human rights do "not prescribe any particular institution (or set of institutions) for the world as a whole."[13]

---

[9] *See* Thomas Pogge, World Poverty and Human Rights 169 (Cambridge: Polity Press 2002).

[10] Charles Beitz, *Cosmopolitan Liberalism and the States System*, *in* Political restructuring in Europe: ethical perspectives 124 (C. Brown ed., London: Routledge 1994).

[11] Charles Beitz, *International Liberalism and Distributive Justice: A Survey of Recent Thought*, 51(2) World Pol. 287 (1999b).

[12] *See* Pablo De Greiff, *Habermas on Nationalism and Cosmopolitanism*, 15(4) Ratio Juris 434 (2002).

[13] Beitz, *supra* note 10, at 127.

There might be good reasons to follow Beitz in accepting human rights solely as a moral touchstone – "a standard of assessment and criticism for domestic institutions, a standard of aspiration for their reform, and increasingly a standard of evaluation for the policies and practices of international economic and political institutions."[14] But there are equally good – probably even better – reasons to claim that the idea of human rights entails more than a mere moral standpoint. According to Habermas human rights contain both a moral *and* a legal/political claim upon our institutions to protect the autonomy of each and every person. They protect the freedom to choose one's own conception of the good.

Pursuing one's conception of the good life, however, not only implies the protection of everybody's *private* autonomy (by granting civil rights and creating the status of the legal person). If citizens are to accept the legal restraints that are created by such rights and the legal means to ensure them, they must also understand themselves as the authors of these laws. Citizens must be capable of participating in a "practice of *politically autonomous* lawmaking."[15] Private autonomy is, therefore, protected only if civil rights are formulated and politically implemented in a public discussion between citizens. They must be able to participate freely in the political process of lawmaking, and thus have the right to equal political participation.[16]

According to this reading, cosmopolitanism is not only internally related to (human) rights, but also to democracy. If the central features of moral cosmopolitanism – inclusiveness, individualism and equality – are best expressed in terms of human rights and if these rights are both civil and political, agnosticism with regard to institutions will not do. Obviously, this is depending on one's interpretation of human rights. But if moral cosmopolitanism includes a *political* theory of rights, the link with institutional cosmopolitanism is inevitable. This is what Habermas holds. The doctrine of human rights, according to him, is best understood as a political theory of rights.

II. A Political Theory of Rights

In *Between Facts and Norms*, as is well-known, Habermas elaborates on the 'objective legal implications' of subjective rights. Following Kant's theory of right his discourse theory of law and democracy starts from the internal connection between the ideas of right and

---

[14] Charles Beitz, *Human Rights as a Common Concern*, 95(2) AM. POL. SCI. REV. 269 (2001).

[15] JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER. STUDIES IN POLITICAL THEORY 121 (C. Cronin & P. De Greiff eds., Cambridge
(Mass.): MIT Press 1998).

[16] *See* POGGE, *supra* note 9, at 184.

state. The organizing, sanctioning and executive powers of the constitutional state are "not just functionally necessary supplements to the system of rights but *implications* already contained in [these] rights." Political power, according to Habermas, is both "*presupposed* by law" and "constituted in the form of basic rights."[17] But unlike Kant, Habermas denies that law derives its full normative sense from a priori moral premises. Legitimacy can only be reached "through a procedure of lawmaking."[18]   And this procedure needs to be democratic.

The easiest way to understand this is to look at the Janus face with which modern law presents itself to its addressees.[19]   According to Habermas modern law is marked by a constitutive tension between facticity and validity. On the one hand, law has a socially integrative function and aims at stabilizing behavioral expectations. But on the other hand law can only perform this function if it satisfies certain normative criteria. Law thus needs to be efficient and legitimate. The normative claim might not always be compatible with its social claim, but both necessarily depend on each other. Legal norms are, after all, more than just factual constraints on a person's scope for action.

This internal connection between facts and norms manifests itself mainly in the ambivalent mode of legal validity. Legal norms are neither just the outcome of policy-decisions nor the result of sheer legality. They are also bound up with an expectation of legitimacy. If we expect citizens to abide by norms on a secure and long-term basis, they need good reasons why these norms are valid. We cannot simply impose laws on citizens in an arbitrary or paternalistic way. Positive law needs to be rationally acceptable.

The validity of legal norms thus depends on two interconnected claims. On the one hand states need to guarantee average compliance. If necessary this compliance must be enforced by sanctions. On the other hand they must fulfill the "institutional preconditions for the legitimate genesis of the norm itself."[20] Legal norms must be the outcome of a legitimate and democratic process of lawmaking. Taken together these claims illustrate the internal relation as well as the tension between the facticity of law enforcement and the legitimacy of the lawmaking process.

One of the main consequences of this relation is that political power needs to be organized and exercised within forms of legitimate law – within the framework of a constitutional state. The relation between law and democracy is, therefore, not just an historical

---

[17] Jürgen Habermas, Between Facts and Norms. Contributions to a Discourse Theory of law and democracy 134 (Cambridge: Polity Press 1996).

[18] *Id.* at 135.

[19] *See* Habermas, *supra* note 17, 448-449.

[20] *Id.* at 448.

contingent one. They are conceptually or internally related. The practice of self-legislation does not exist in a vacuum, but needs to assume an institutionally differentiated form within the framework of the constitutional state.[21] From this the source of legitimacy of legal norms can easily be explained. In a post-metaphysical and pluralistic era, the only source of legitimacy is a legally institutionalized democratic procedure for the production of law.

Yet if the democratic process bears the entire burden of legitimating legal norms, the "paradoxical emergence of legitimacy out of legality" needs to be explained.[22] Does the legitimacy of legal norms fully depend on their genesis? Is this not a crude form of legal positivism, albeit it of a minimally 'democratic' sort? Of course Habermas doesn't claim that every formal decision that the legislator makes is legitimate. He merely claims that legal norms are only legitimate if they meet with the rational assent of all citizens in a democratic process of opinion- and will-formation that itself has been legally constituted on the basis of the rule of law.[23] Or put differently, the idea of self-legislation by citizens should take shape in a discursive process of legislation that is based on the substance of human rights. Human rights should legally institutionalize the communicative presuppositions of such a process of deliberative politics.[24]

If this is true, moral cosmopolitanism does entail a political theory of rights. It not only excludes a system of absolutist states but also *positively requires* a system of democratic states. Now the question is: will it also require some form of global (democratic) authority? According to Habermas' analysis of the challenges we face in our post-national constellation it does. The state-centric system is by now based on the unlikely presupposition that socio-economic and political problems are territorially concentrated and can be solved by domestic institutions alone.[25] Modern processes of production and consumption, however, create externalities that cannot be handled by sovereign states individually. Moreover, a state-centric system cannot deal adequately with the asymmetry between political decision-makers and those affected that arises as a consequence of globalization. We, therefore, need some kind of global authority or procedure to settle conflicts in an equitable and authoritative way.

Such a reply, however, is based on an *empirically laden* assessment of the political and socio-economic consequences of globalization and does not conceptually follow from the

---

[21] *See Id.* at 39.

[22] *Id.* at 83.

[23] *See Id.* at 10.

[24] *Id.* at 458.

[25] *See* POGGE, *supra* note 9, at 181-184.

premises of moral cosmopolitanism. It depends on a *de facto* 'unbundling' of state sovereignty. A complementary line of argument – one that is also present in Habermas' work – would start from the objective legal implications of cosmopolitanism and from the distinction between a 'willingness to guarantee peace' and 'actually securing it'.[26] Kant, for instance, argued that in the absence of a formally instituted state of peace, states are still a permanent threat to each other. Even if hostilities between states are suspended, there is still "a constant threat of an outbreak of hostilities."[27] That is why each nation "can and ought to require the others to enter with it into a constitution similar to a civil constitution, in which each can be assured of its right."[28]

C. On Politics

I. World Domestic Politics

According to this reading, it is wrong to assume that moral cosmopolitanism is "formally consistent with a state-based conception of world order."[29] From the premises of moral cosmopolitanism it follows that a global political arrangement is necessary. But to what extent is Habermas capable of retaining the link between law and democracy on the global level? Let's take a closer look at his proposal for a multilevel system of global governance.

Habermas starts with the assumption that globalization and multiculturalism have put an end to the historical unity between nation, territorial state and national economy. With the rise of international law, governance networks, the new global economic order, and migration flows the traditional powers of the state have become unbundled. State authority has been diffused: upwards to international institutions and transnational corporations, sideways to global financial markets and global social movements, and downwards to various subnational bodies.[30]

These transformations of our global system have an important effect on our understanding of sovereignty. Sovereignty can no longer be seen as inalienable and indivisible. But if sovereignty can be horizontally and vertically dispersed the question arises as to what type

---

[26] Here we follow Höffe's distinction between "Friedensbereitschaft" and "Friedenssicherung." *See* OTFRIED HÖFFE, DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG 291 (München: Beck 1999).

[27] KANT, *supra* note 1, at 322.

[28] *Id.* at 326.

[29] Charles Beitz, *International Relations, Philosophy of*, *in* 4 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 831 (E. Craig ed., London: Routledge 1998).

[30] *See* Anthony Payne, *Globalization and Modes of Regionalist Governance*, *in* DEBATING GOVERNANCE. AUTHORITY, STEERING AND DEMOCRACY 203 (J. Pierre ed., Oxford: Oxford University Press 2000).

of global institutional scheme best suits the new political constellation? The best way to understand Habermas' answer is to compare his idea of a *multilevel global system* to Kant's proposal for perpetual peace and his dualism between a federalism of free states and world republic.[31]

Habermas rejects Kant's federalism because it leaves the sovereignty of states untouched. Cosmopolitan law must be binding on all governments and backed by a threat of sanctions. Only in this way can the external relations between states be transformed "into a domestic relationship between the members of a common organization based on a constitution."[32] According to Habermas, moreover, it is inconsistent to describe "the cosmopolitan community as a federation of states" instead of as a community of world citizens. If the legal order is founded on basic rights it is inconsistent to give a priority to states. The meaning of cosmopolitan law is precisely "that it bypasses the collective subjects of international law and directly establishes the legal status of the individual subjects" as "free and equal world citizens."[33]

But Habermas also rejects – for reasons that we will discuss below – Kant's undesired alternative of a world republic. Instead he suggests a third option, a *world domestic politics without a world government.* Such a system consists of democratic states at the national level, networks of continental regimes at the international level, and a world organization with a very limited competence – maintaining peace and securing human rights – at the global level.

What relevant function does the principle of popular sovereignty still have within such a multilevel system of governance? Can democratic politics achieve a binding force beyond the boundaries of nation-states?[34] According to Habermas' *desubstantialized* and *proceduralized* conception of popular sovereignty it can because democratic opinion- and will-formation does not presuppose the existence of a particular cultural nation – as liberal nationalists would claim – but leaves the scope of the democratic community undefined.

Habermas's intersubjective interpretation thus abandons the *conceptual framework of the subject* that is being used by liberals and republicans alike. Popular sovereignty in democratic states is neither embodied in the 'heads' of the politically active members of society (republicanism), nor in the legislative, executive, and judicial institutions of a constitutional democracy (liberalism). Sovereignty is subjectless and anonymous. It resists

---

[31] For a more extensive comparison between Kant and Habermas, *see* Thomas Mertens, *Cosmopolitanism and citizenship: Kant against Habermas*, 4(3) EUR. J. PHIL. 328-347 (1996).

[32] HABERMAS, *supra* note 15, at 179.

[33] *Id.* at 180-181.

[34] *See Id.* at 127.

any concrete embodiment and resides in anonymous communication processes and not in a substantially defined national community.[35] Given such a procedural and desubstantialized conception it is not only easy to understand why democracy beyond borders is possible, but also why human rights and democracy are internally related. Political opinion- and will-formation can only constitute the basis of legitimate lawmaking if they are legally institutionalized by a system of rights.[36]

This conception of popular sovereignty, however, is at odds with a normative theory of international relations that is based on the idea of a global polity *without* a state. This is not only because such a theory abandons the Kantian idea of an internal connection between right and state, but also – as we will show below – because it contradicts Habermas's two-track model of democracy. Democratic politics, according to Habermas – is to proceed along two tracks of opinion- and will-formation – an informal and a constitutional one.[37] Public opinions are developed within the procedurally unregulated political *public sphere* – an intermediary structure between the private sectors of the lifeworld and the formal political system. It consists among others of interest groups, labor unions, professional agencies, and universities. The procedurally regulated and constitutionally organized *political system* is the vehicle for political decisions and their application.

II. "There is no Social Contract"

Given that cosmopolitan law only makes sense if it is binding on all and backed by sanctions, it is striking that Habermas doesn't take seriously the advantages of a minimal world state. What is wrong with a world state? Legal and political philosophers that defend a world state will obviously not win a popularity contest. A world state seems food for thought for novelists like Huxley or Wells, but not a topic that deserves serious philosophical reflection. Most simply agree that a world state would be a "forbidding nightmare of tyranny."[38] Yet even generally shared convictions need to be based on arguments. In Habermas's work we can find three types of argument: a no-social contract argument, an exclusion argument, and a superfluous argument. A critical analysis will show that they are not convincing.

---

[35] *See Id.* at 251. *See also* ERIK ODDVAR ERIKSEN & JARLE WEIGARD, UNDERSTANDING HABERMAS: COMMUNICATING ACTION AND DELIBERATIVE DEMOCRACY 252 (London : Continuum 2003).

[36] *See* HABERMAS, *supra* note 17, at 104.

[37] *See* HABERMAS, *supra* note 15, at 373.

[38] Hannah Arendt, *Karl Jaspers: Citizen of the World*, *in* THE PHILOSOPHY OF KARL JASPERS 539 (P. Schilpp ed., New York: Tudor 1957).

The *no-social argument* is certainly not new. It has already been formulated by Hobbes, Kant and others. Its main point is that no structural analogy exists between the state of nature between individuals and that between states. The constitutionalization of international law, according to Habermas, should not be understood "as a logical continuation of the evolution of the constitutional state leading from the national to a global state." Both processes have different starting points. There already exists a constitution – such as the Charter of the UN – at the global level and the actors (states) are members of an international body. Absent from the state of nature between states, therefore, is not "a constitution that founds an association of free and equal consociates under law", but a supranational organization with "executive and sanctioning powers."[39]

This argument, however, is untenable. From the fact that the national and international order differ in many ways, one cannot directly infer that no form of world state is needed. A disanalogy between national and international constitutionalism, for instance, does not dispel the claim that a stronger hierarchy and unity between the different constitutional sites and courts of justice is needed to end the present fragmentation of our international constitutional order. On a conceptual level, moreover, it is perfectly possible to develop a theory of global democracy that acknowledges this disanalogy but still embraces a minimal world state.

Höffe's idea of a multilevel or federal world republic is a case in point. A careful reader will have great difficulty finding important differences between Höffe's multilevel world republic and Habermas' multilevel system of governance. Yet, according to Habermas, there are. Because the legitimation of law and policy decisions in a multilevel world republic is exclusively focused on the consent of individual actors (world citizens), there is no room for meaningful political decision-making at the level of collective actors (states). States are "relegated to mere parts of an overarching hierarchical super-state."[40]   A multilevel world republic, in addition, would require a monopoly on the use of force.

But this reading clearly misrepresents Höffe's general point. He explicitly argues for a two-track model of legitimation (as is typical for a federal state), stresses the moral significance of collective self-governance at the state level and emphasizes that states retain the possibility to use force under strict conditions.[41]   A multilevel world republic only supplements traditional states. States will still be primarily responsible for the most fundamental types of rights protection.[42]   A minimal world state conceptualized along these lines shows little difference with Habermas' conceptual proposal.

---

[39] Jürgen Habermas, The Divided West 132 (Malden (Mass.): Polity 2006).

[40] Habermas, *supra* note 37, at 135.

[41] *See* Höffe, *supra* note 26, at 299.

[42] *See Id.* at 317.

III. "There is a Need for Exclusion"

The exclusion argument is more difficult to refute than the no-social contract argument because it refers to a widely shared understanding of (democratic) politics: 'no politics without some form of exclusion'. This argument can be found among a variety of political theories – liberalism, communitarianism, agonism, deliberative democracy, post-structuralism – and takes many different forms. What unites them is the assumption that political self-determination and political identity imply a distinction between members and non-members, or as Schmitt argues between friends and enemies. With regard to the world state Habermas describes the exclusion argument as follows:

> [T]he political culture of a world society lacks the common ethical-political dimension that would be necessary for a corresponding global community – and its identity formation.[43]

On the global level no well-defined 'self' for political self-governance exists nor can it ever be developed. Political self-determination presupposes a social and territorial delimitation.[44]

Interestingly, Habermas' use of the exclusion argument is ambiguous. The argument can either be understood as an *empirical* or as a *conceptual* claim. Empirically speaking, it is indeed somewhat unrealistic to expect a very strong sense of solidarity and identity to arise on the global level. This, however, doesn't mean that the exclusion argument as such is valid. While it seems unlikely that some form of strong global political community will develop in the near future, it is not inconceivable that a politically constituted global community will come into being in the long run. The conceptual claim does pose a more serious problem. To understand why, we need to look at Habermas' analysis of the preconditions of social integration within democratic societies.

The *ethical-political* self-understanding of a democratic community forms the basis of the 'national' (political) culture of a country. According to Habermas, such a culture should consist of a distinctive and particularistic interpretation of the universal principles that are inherent to democratic constitutionalism – human rights and popular sovereignty.[45] This implies, however, that democratic self-determination is intrinsically tied to bounded political communities and that democratic societies are – in daily political practice –

---

[43] HABERMAS, *supra* note 15, at 108-109.

[44] *See* JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 63 (Cambridge (Mass.): MIT Press 2001a).

[45] *See* HABERMAS, *supra* note 15, at 118.

subject to a tension between universality and particularity. Whereas human rights address persons as members of an *all-inclusive* moral community, democratic self-determination addresses persons as members of a *particular* ethical community and this implies some form of exclusion:

> Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. The self-referential concept of collective self-determination demarcates a logical space for democratically united citizens who are members of a particular community.[46]

Benhabib describes this conflict as the 'paradox of democratic legitimacy' and concludes from it that democracies require borders.[47] This paradox is supposed to explain the conceptual impossibility of a world state.

Although one could reply that a multilevel world state need not annul the importance of *membership* in bounded communities, this misses the point of the exclusion argument.[48] On the global level no bounded political community can develop. The problem with this argument, however, is that the 'paradox of democratic legitimacy' does not live up to its promise. On a superficial reading the paradox merely implies that democratic politics is necessarily tied to a *concrete embodiment* and *particular interpretation* of the idea of human rights. But why should such a specific interpretation be excluded on the global level? The differences in formulation content of the *Universal Declaration of Human Rights,* the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rig*hts, for example*,* clearly show that a concrete historical understanding of human rights will play a role at all political levels – even at the global level. A critical distance between the idea of human rights and its concrete embodiment within constitutions, treatises, and declarations, moreover, is crucial for what human rights are.

On a more thorough reading the 'paradox of legitimacy' stresses that collective identity indispensably implies a distinction between *insiders* and *outsiders.* At first sight this argument sounds very convincing. If self-legislation implies self-constitution – as

---

[46] HABERMAS, *supra* note 43, at 107.

[47] SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 45 (Cambridge: Cambridge University Press 2004).

[48] That the liberal nationalist's argument for bounded political communities is not incompatible with a multilevel ethical and political view, is argued in Ronald Tinnevelt & Helder De Schutter, *Global Justice as Justice for a World of largely independent nations? From Dualism to a Multi-level Ethical Position*, 11(4) CRITICAL REV. INT'L SOC. & POL. PHIL. 519-538 (2008).

Habermas and Benhabib claim – then sovereignty leads to exclusion. But why should this exclusion be thought of in *spatial* terms?   Why does collective identity formation presuppose an *external* other?   Difference and otherness can also be constructed "imaginatively and temporally."[49]   A global political identity, for example, could develop "on the basis of difference from the values of a past historical identity from which one wishes to mark one's distance."[50]   Habermas seems to accept this possibility. Cosmopolitan consciousness, according to him, "could in any case take on a more concrete form by a delimitation of the temporal dimension (…)."[51]   If this is true, there is no reason why a global political community is conceptually impossible.

IV. "It is Superfluous!"

The 'superfluous argument', finally, rests on the idea of functional differentiation. As long as the competences of the world organization can be limited to securing peace and protecting human rights (primarily *legal* competences according to Habermas), there is no need for some form of world government.[52]   This argument, however, rests upon two shaky assumptions. On the one hand that national, transnational and supranational issues can be clearly distinguished and strict criteria can be given for determining the scope of democratic communities.[53]   On the other hand, that the competences of the world organization can be kept to a minimum and that there is a surveyable amount of global players.   If these assumptions turn out to be untenable – as we think is the case – a tendency towards a more centralized political rule is inevitable and Habermas's multilevel global system must be replaced by a more competent minimal world state.

Let's start with the first set of assumptions. These are the least difficult to cast doubt on. The consent of the governed, according to most contemporary political philosophers, forms the basis for the binding force of political power. But how to determine *who* the governed are or *whose* consent is needed to make legitimate decisions? How to settle the scope of democratic communities? Within the traditional framework of closed and self-contained national communities, this question could be relatively easily answered. But as a consequence of globalization, the assumption upon which past theories of democracy have been based – a symmetrical relation between political decision-makers and the

---

[49] Arash Abizadeh, *Does collective identity presuppose an other? On the alleged incoherence of global solidarity*, 99(1) AM. POL. SCI. REV. 58 (2005).

[50] *Id.* at 58.

[51] HABERMAS, *supra* note 43, at 184.

[52] *See Id.* at 106-107.

[53] *C.f.* CAROL GOULD, GLOBALIZING DEMOCRACY AND HUMAN RIGHTS 174-180 (Cambridge: Cambridge University Press 2004).

recipients of political decisions[54] – has turned out to be naïve. Those who shape global public policies are not or not always accountable to those affected by them.

Given the untenability of this assumption, it is no longer evident what the relevant constituency is for border crossing issues like migration flows, transnational economic investments or global warming. Who are 'the people' that have a right to participate in decision making? What, in other words, are the right *criteria* for determining the proper scope of democratic communities on the transnational and supranational level? Habermas's 'all-affected' principle gives an interesting and – at first sight – plausible answer to this boundary problem. Anyone who is affected by a decision has a right to participate. But how do we determine who is affected and what kind of democratic participation 'being affected' implies? The main defect of Habermas's normative theory of international relations is that he doesn't answer this question.

But suppose Habermas would be able to give a satisfying answer, which institutions would then be responsible for making these decisions? Habermas would probably reply – although he does not specifically address this issue – that we need international deliberative bodies to resolve disputes about the scope of democratic communities. But this answer is only convincing to the extent that such transnational deliberative bodies are actually capable of making a clear distinction between national, transnational and supranational issues. If disputes regarding the scope of democratic communities remain or if political issues cannot be fixed to one specific level of political decision-making, higher level deliberative bodies are needed. The all-affected principle, in other words, leads to a more centralized global institutional structure.

The remaining set of assumptions is closely tied to Habermas' claim that democratic politics can only be attained at the global level on the basis of a weak and indirect form of legitimation; one that strongly leans on only one track of his two-track model. The problem with this claim, however, is that the deliberative model of democracy that Habermas so strongly advocates on the national and international level is replaced by a liberal model at the global level.

The fact that Habermas conceives of a minimally competent world organization as a sufficient guarantee of world domestic politics, implies that he returns to the *liberal* priority of rights to democracy on the global level.[55] If the competences of the world organization are primarily legal ones (as Habermas claims), there is no need for a political status for world citizens or a republican type of constitutionalism.   Liberal

---

[54] *See* HELD, *supra* note 3.

[55] *See* Robert Fine & Will Smith, *Habermas's Theory of Cosmopolitanism*, *in* 10(4) CONSTELLATIONS: AN INTERNATIONAL JOURNAL OF CRITICAL AND DEMOCRATIC THEORY 478 (2003).

constitutionalism, after all, does not create a political authority but domesticates power "through the division and channeling of *existing* power relations."[56]

This liberal orientation can also be found in Habermas's view of democratic legitimacy. Because the world organization should only secure peace and ensure human rights, the requirements of democratic legitimacy can be less strict than what we expect from domestic politics. Legitimacy follows primarily from the "organizational forms of an international negotiation system, which already exists today in other political arenas."[57] Such an international negotiation system should not reflect the power politics between competing continental regimes, but retain some of the communicative embedding which is characteristic of a common political culture. So instead of a strong kind of legitimation Habermas defends a weak one that is based on a multilevel and multidimensional system of organization and procedures.[58]

Why does Habermas settle for such a less demanding basis of legitimacy? Not only because it is difficult to create a strong kind of solidarity at the global level, but also because not all the communicative and institutional preconditions for the full legitimate genesis of legal norms are available at the global level. Without a global democratic community no demanding form of legitimacy is needed. But, as we have seen, no good reasons exist why such a society would be impossible in the future.

Instead of solving a problem, Habermas's indirect and weak form of legitimacy at the international level creates a new one. On the higher political levels of his multi-level global system, Habermas relies on mainly one track of his two-track model of deliberative politics.[59] The informal public sphere gradually replaces the formal political system. The result is a strong imbalance between rights and democracy. On the one hand, human rights need to be entrenched in transnational and supranational democratic and law enforcement bodies that can actually bind governments and organizations.[60] Such organizations must be able to make collectively binding decisions. The highest level at which this can be accomplished is that of the world organization. On the other hand, however, Habermas denies that it is possible to fully realize democratic self-legislation at the global level. So although his discourse theory holds that principles of (human) rights and popular sovereignty can only be reconciled with and solved by creating a cosmopolitan

---

[56] HABERMAS, *supra* note 37, at 138.

[57] HABERMAS, *supra* note 43, at 109.

[58] *See Id.* at 109 and Jürgen Habermas, *Solidarität jenseits des Nationalstaats: Notizen zu einer Diskussion*, *in* TRANSNATIONALE SOLIDARITÄT: CHANCEN UND GRENZEN 235 (J. Beckert et al eds., Frankfurt am Main: Campus 2004).

[59] *See* Fine & Smith, *supra* note 55, at 477-478.

[60] *See* Eriksen & Weigard, *supra* note 35, at 239.

legal order, it is precisely at the global level that Habermas abandons his co-originality thesis. This co-originality thesis can only be upheld by creating a more *centralized* democratic world organization.

Habermas' confidence in a weak form of constitutionalization and democratic legitimacy**,** however, has the remarkable implication that a more *competent* world organization is needed. Remember that the primary level of democratic legitimacy, according to Habermas, is not that of a world state or of "a democratized and empowered UN," but the level of regional bodies and intermediate institutions (governmental and non-governmental) that lie between the UN and the nation-state.[61] Like most proponents of global governance Habermas relies strongly on the willingness of international organizations and regional bodies to cooperate. Yet, such a weak kind of legitimation can only function properly if a supranational body exists that guarantees precisely those legal, political and institutional preconditions under which these organizations (like the EU, ASEAN, Amnesty International and Human Rights Watch) can interact and flourish. Regional bodies and NGOs after all, are – especially given the absence of a world state – always likely to be or to become the expression of a hegemonic project. In analogy with the traditional functions of parliament and administration a world organization should, therefore, have a strong coordinative and enabling function. It should *prevent* the social and political powers of international actors to dominate transnational political decision-making, *institutionalize* the conditions for global civil society to flourish as an arena of deliberation, and *anchor* morality. Democratic legitimacy cannot solely rely on an indirect legitimation by states, regional associations and an informal public sphere, but also needs a formal political system.[62] This conclusion is reinforced once we realize that Habermas's confidence in the functioning of transnational negotiation systems depends to a large extend on the fact that there will be a surveyable amount of global players.[63] If there are not, the need for more competent and state-like coordinating supranational organization becomes even stronger.

At some points in his work Habermas seems to acknowledge this difficulty. Although he repeatedly claims that a world organization can only be effective if its functions are restricted to security and human rights, he occasionally mentions other functions, such as environmental policies, education, and health.[64] It is indeed improbable that a transnational network of regional regimes can secure these public goods by itself. The only way to guarantee strict observance of the Kyoto Protocol, for example, is to turn it into one

---

[61] *Id.* at 240.

[62] *C.f.* Eriksen & Weigard, *supra* note 35, at 247ff.

[63] *See* HABERMAS, *supra* note 15, at 337.

[64] *See* HABERMAS, *supra* note 55, at 234; *see also* HABERMAS, *supra* note 42, at 107 *and* JÜRGEN HABERMAS, ZWISCHEN NATURALISMUS UND RELIGION: PHILOSOPHISCHE AUFSÄTZE 350 (Frankfurt am Main: Suhrkamp 2005).

of the objectives of the world organization. The same applies to the threat of infectious diseases and other transboundary problems. Given this broad range of public goods it is unlikely that a world public can be united by a *negative consensus* regarding flagrant human rights violations.[65] A thicker communicative embedding is inevitable.

D. Concluding remarks

Our argument centers in essence on a simple observation. Habermas's discourse theory of law and democracy is built on a close connection between rights, state and democracy – between human rights and democratic state-like structures. On the global level, however, he is unwilling to uphold this connection. One the one hand, the internal relation between right and state gives way to a world organization with only limited functions and without a monopoly on the use of force. On the other, the internal relation between law and democracy is replaced by the liberal priority of the idea of right. His proposed system of multilevel governance is, therefore, incoherent**.** The only sensible solution to this problem is to opt for a multilevel world republic. Given the fact that Habermas' arguments to the contrary are untenable, moreover, there is no reason to exclude this option.

---

[65] *See* HABERMAS, *supra* note 37, at 109.