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ORIGINAL ARTICLE

INTERNATIONAL LEGAL THEORY

The phantom menace: Effects and legitimacy of informal international instruments

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Abstract

The use of informal instruments in international governance has raised concerns about their legal status, including questioning whether they should be approved by domestic parliaments. These concerns are often dismissed by reference to the legal non-bindingness and claimed harmlessness of the instruments. Yet informal instruments have various effects in society as legal and political communications. These effects emphasize the need to address the democratic deficit of informal instruments resulting from their isolation from the parliaments and the undemocratic nature of international decision-making. This article proposes a twofold approach to address this deficit. At the domestic level, better engagement of parliamentarians through deliberative 'feedback loops' established between the parliament and the government should be sought, complemented by parliamentary approval of important informal instruments. At the international level, so-called 'culture of deliberativism', that is, a turn to deliberation by embracing deliberative democratic standards for better representation of public opinions, is proposed to induce democratic sensibility into international decision-making and its products. The legal status and potential bindingness should not be the focus of public debate on informal instruments; their subtle effects and undemocratic origin are the real 'phantom menace' in need of addressing.

Keywords: deliberative democracy; democratic deficit; democratic legitimation; informal international instruments; international decision-making

1. Introduction

1.1 Background

'It does not encourage migration, nor does it aim to stop it. It is not legally binding. It does not dictate. It will not impose. And it fully respects the sovereignty of States.'[1] Such reassuring statements appeared repeatedly in the later part of 2018 when the Global Compact on Safe, Orderly and Regular Migration (GCM) was about to be adopted.[2] The GCM, which had been negotiated in a routine manner, was suddenly facing intense opposition. Particularly

*The author acknowledges support from the Finnish Lawyers' Association. The author is grateful to the Reviewers and Nicola Sharman for helpful comments and suggestions, and Professor Harro van Asselt and Research Professor Antto Vihma for their guidance and feedback during the writing of this article.

[1]Then-President of the United Nations General Assembly, M. Lajčák, '"Historic Moment" for People on the Move, as UN Agrees First-Ever Global Compact on Migration', *UN News*, 13 July 2018, available at news.un.org/en/story/2018/07/1014632.

[2]UN General Assembly, Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195 (2018). See Senior Adviser of the Finnish Ministry of Foreign Affairs, R. Klinge, 'Tällainen on YK:n GCM-sopimus, jonka piilottelusta

anti-immigration groups and media began to claim that this 'UN's Sinister Blueprint for Globalist Migration Hell' was a treaty in disguise and restricting the sovereignty of states,[3] despite its explicit non-legal bindingness.[4] This led many to question whether the GCM should have been submitted for parliamentary approval.[5]

Several states abandoned the GCM, citing its potential effects and restrictions on sovereignty as their motivation.[6] Yet it appeared that the reassurances on the non-bindingness and harmlessness of the GCM had been successful in keeping most states on board. On 10 December 2018, 164 states adopted the GCM. Nine days later in the UN General Assembly (UNGA), 152 states endorsed the GCM, with five states voting against, and 12 abstaining.[7]

The 'non-binding, no worries' argument was a logical answer to the misguided claims about the formal status of informal international instruments. What the argument did not do, however, was answer three questions: what effects may informal instruments produce, do they give reason for concern from the perspective of constitutionalist democracy, and if they do, what can be done to legitimize the instruments? This is where the article embarks on its analysis of the relationship between democracy and non-binding international regulation.

1.2 Purpose and approach

This article analyses the effects and legitimacy of informal international instruments. Informality is defined as dispensing of the traditional formalities of law-making.[8] Understood broadly, informality can cover non-state regulation by private actors and by international organizations.[9] This article, however, focuses specifically on intergovernmental instruments.

The premise of the article is that governance should rest on democratic principles to be legitimate.[10] Above all, people should have ways to influence decisions that affect their lives by participating themselves or by having their interests accommodated in decision-making.[11]

Informal instruments are problematic from this perspective. Whereas in many democracies, treaties maintain some connection with the people through parliamentary approval, informal instruments are generally not approved. As such, while a convoluted 'chain of legitimacy' can be traced from the people through the parliament to the representatives of the state in international

perussuomalaiset syyttävät hallitusta – Suomen on tarkoitus allekirjoittaa joulukuussa', *Iltalehti*, 29 October 2018, available at www.iltalehti.fi/politiikka/a/ef647c46-2541-4a31-a42d-7b2f6fc95919.

[3]J. Delingpole, 'Delingpole: No to Marrakesh! – The UN's Sinister Blueprint for Globalist Migration Hell', *Breitbart*, 9 December 2018, available at www.breitbart.com/europe/2018/12/09/uns-global-compact-on-migration-is-sinister-dangerous-and-wrong; See also J. Rone, 'Far Right Alternative News Media as "Indignation Mobilization Mechanisms": How the Far Right Opposed the Global Compact for Migration', (2022) 25 ICS 1333.

[4]See GCM, *supra* note 2, paras. 7 and 15(b), at 3 and 5, respectively.

[5]E.g., Chancellor of Justice of the Government of Finland, Decisions OKV/1940/1/2018 and OKV/1947/1/2018.

[6]N. R. Micinski, UN Global Compacts: Governing Migrants and Refugees (2021), 120–3.

[7]United Nations, 'General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation among Member States in Protecting Migrants', *UN Press*, 19 December 2018, available at press.un.org/en/2018/ga12113.doc.htm.

[8]The interest is only secondarily on the informality of the processes and actors involved; see J. Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in J. Pauwelyn, R. A. Wessel, and J. Wouters (eds.), *Informal International Lawmaking* (2012), 13 at 15. The focus on instruments also excludes customary international law and its isolation from domestic democratic scrutiny from the analysis.

[9]N. Reiners, *Transnational Lawmaking Coalitions for Human Rights* (2021) and N. Reiners, 'States as Bystanders of Legal Change: Alternative Paths for the Human Rights to Water and Sanitation in International Law', (2024) 37 LJIL 22.

[10]For similar premises, see J. S. Dryzek, 'Transnational Democracy in an Insecure World', (2006) 27 IPSR 101; A. Peters, 'Dual Democracy', in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009), 263; and G. de Búrca, 'Developing Democracy Beyond the State', (2008) 46 CJTL 221.

[11]On participatory approaches, see C. Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (2020). On substantive representation, see, e.g., A. De Mulder, 'Making Sense of Citizens' Sense of Being Represented: A Novel Conceptualisation and Measure of Feeling Represented', (2023) 59 *Journal of Representative Democracy* 633.

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decision-making,[12] the chain is disrupted with informal instruments. Informality escalates de-constitutionalization resulting from globalization,[13] and may increase the power of the executives to govern domestic matters through international arrangements by weakening parliamentary control over the foreign matters of the state.[14]

Adding to the problem, international decision-making is undemocratic. Only some state representatives are democratically elected. International decision-making is generally opaque and difficult to observe by outsiders. Negotiations are often conducted by expert bureaucrats who are accountable to their executive superiors rather than the people.[15] State interests, determined quite freely by the executives, may not always align with those of the citizens. This may have been unproblematic when international decisions mostly concerned international relations, but contemporary international governance increasingly affects non-state actors as well.[16] Thus, the more effects informal instruments have, the more imperative it becomes to address the democratic deficit resulting from the isolation of parliaments and the undemocratic nature of international decision-making.

In its descriptive part, the article departs from previous literature by observing informal instruments as being or as relating to legal and political communications, and by illustrating how they manifest diverse effects in legal and political systems through networks of interpretation, argumentation, and social meaning-making. By employing sociological perspectives, the approach goes beyond the familiar legal descriptions of the effects of informal instruments and can help explain how and why they affect interpretative practices and may develop into binding law or orient policy decisions. Communications in this context may be understood in two ways: firstly, with informal instruments and subsequent communications referring to them as being legal or political communications in themselves or acting as external irritations to legal or political systems that are given meaning in the operations of the social systems,[17] or secondly, as being communicated by knowing subjects, to influence subsequent decision-making and contribute to shared understandings about the world and specific communicative systems.[18] The approaches, often considered competing,[19] are employed where appropriate.

In its normative part, the article argues that the legitimation of informal instruments should primarily be pursued by enhancing the quality of micro-level interactions rather than by seeking major institutional reforms.[20] The approach is twofold. Firstly, at the domestic level, the concept of *feedback loops* is employed to signify better engagement of parliamentarians by establishing a continuing deliberative process between the parliament and the government in the formation and

[12]A. Bummel, 'Representation and Participation of Citizens at the United Nations: The Democratic Legitimacy of the UN and Ways to Improve It', in M. Holm and R. S. Deese (eds.), *How Democracy Survives: Global Challenges in the Anthropocene* (2023), 158 at 162.

[13]A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 LJIL 579, at 580; see also A. Jr Golia and G. Teubner, 'Societal Constitutionalism: Background, Theory, Debates', (2021) 15 ICL Journal 357.

[14]J. Friedrich, *International Environmental 'Soft Law': The Functions and Limits of Nonbinding Instruments in International Environmental Governance and Law* (2013), 397–400 and 454; see also C. Tomuschat, 'Bericht von Professor Dr. Christian Tomuschat', in J. A. Frowein (ed.), *Der Verfassungsstaat im Geflecht der internationalen Beziehungen. Gemeinden und Kreise vor den öffentlichen Aufgaben der Gegenwart: Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Basel vom 5. bis 8. Oktober 1977* (1978), 7 at 33–5.

[15]See Bummel, *supra* note 12.

[16]D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', (1999) 93 AJIL 596, at 610–11; T. M. Franck, *The Empowered Self: Law and Society in the Age of Individualism* (2001), 36–7.

[17]N. Luhmann, *Law as a Social System* (2004).

[18]E.g., J. L. Austin, *How to Do Things with Words* (1962); E. Goffman, *Frame Analysis: An Essay on the Organization of Experience* (1974); and J. Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (1984), and J. Habermas, *Theory of Communicative Action, Volume 2: Lifeworld and System – A Critique of Functionalist Reason* (1987).

[19]G. Harste, *The Habermas-Luhmann Debate* (2021).

[20]Similarly, see J. S. Dryzek, *Deliberative Global Politics: Discourse and Democracy in a Divided World* (2006).

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modification of positions before and during international negotiations. This may be supported by the parliamentary approval of important informal international instruments. Secondly, at the international level, the concept of *culture of deliberativism* is conceived, understood as the embrace of deliberative democratic standards for better representation and consideration of public opinions. Together the measures are envisioned as a 'democratic-striving' approach to gradually enhance the democratic quality and legitimacy of international decision-making and its products, including informal instruments.[21]

A position that international decision-making can be integrated on shared values approximates a constitutionalist reading of international law and governance.[22] Pursuing constitutionalization is not the crux of this article, however. The article engages with democratic ideals and the legitimate creation of international rules rather than the issues of proper state conduct, rights-based international order and its future, and hierarchy of norms, which are often the focus of international constitutionalist literature.[23] On one hand, the approach of the article is pragmatic in that it engages with improving existing forms and structures of international decision-making, and on the other hand, critical–normative in the sense that the article analyses these forms and structures critically and offers normative suggestions for their improvement from a democratic perspective.

However, where rules on publicity, transparency, and reporting are called for, the article may contribute to the reformation of the formal bases of international decision-making, and thus to international constitutionalization when understood as a continuing discourse pointed towards future possibilities,[24] rather than as an empirical concept.[25] This could, in time, work towards the recognition of intergovernmental informal instruments as a type of 'standard instruments' with their specific legitimate rule-making procedures.[26] The danger of further retreat to informality must be taken into consideration, however.[27]

The pragmatist approach is presumed on the unlikelihood of cosmopolitan democratization development.[28] A formal state-centred democratic order would need to consist of states that democratically represent their citizens.[29] Recent democracy data does not give reason for optimism in this regard. The number of democratizing countries (18) is clearly being outnumbered by autocratizing countries (42).[30] While a slight majority of countries are democracies,[31] the majority of the world's population lives in autocracies.[32] Formal global democracy may even be undesirable due to a lack of *demos*,[33] and could lead to the lines of delegation derived from the people becoming too extended.[34]

[21]For the 'democratic-striving' concept, see de Búrca, *supra* note 10, at 248.

[22]Cf. E. De Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', (2006) 19 LJIL 611.

[23]E.g., S. C. Breau, 'The Constitutionalization of the International Legal Order', (2008) 21 LJIL 545; see also R. Collins, 'Constitutionalism as Liberal-Juridical Consciousness: Echoes from International Law's Past', (2009) 22 LJIL 251.

[24]C. E. J. Schwöbel, 'Organic Global Constitutionalism', (2010) 23 LJIL 529; See also J. Klabbers reflecting on the thinking of Arendt in J. Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt', (2007) 20 LJIL 1, at 22.

[25]J. Kammerhofer, 'Constitutionalism and the Myth of Practical Reason: Kelsenian Responses to Methodological Problems', (2010) 23 LJIL 723, 739.

[26]M. Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law', (2012) 25 LJIL 335, at 367.

[27]See notes 100 and 163 and discussion thereto, *infra*.

[28]E.g., J. Habermas, *The Divided West* (2006) 115ff; and D. Held, 'Cosmopolitanism: Globalisation Tamed?', (2003) 29 RIS 465.

[29]See Peters, *supra* note 10, at 264.

[30]B. Herre, L. Rodés-Guirao, and E. Ortiz-Ospina, 'Democracy', *Our World in Data*, available at = ourworldindata.org/democracy?insight = the-world-has-recently-become-less-democratic#key-insights.

[31]Ibid.

[32]V-Dem with major processing by Our World in Data, 'People Living in Democracies and Autocracies, World', available at ourworldindata.org/grapher/people-living-in-democracies-autocracies.

[33]See Friedrich, *supra* note 14, at 407–8.

[34]Relatedly, see R. A. Dahl, 'Can International Organizations be Democratic? A Skeptic's View', in I. Shapiro and C. Hacker-Cordón (eds.), *Democracy's Edges* (1999), 19 at 21.

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The issue of (non-)democratization has implication for the emergence of more considerate deliberation as well, and the article thus shares the potential challenges of state engagement and lack of political will.[35] However, the article argues that the required deliberative move is not drastic. This particularly applies to the international regimes that already base their decisions on consensus, which may be utilized to induce democratic sensibility into international decision-making. While it has been argued that deliberation cannot be a 'real substitute' to formal democracy,[36] I consider it to provide one of the more plausible processes of democratization at the international level. We should also be cautious of forcing democracy, as a noble idea can easily turn sour for its implementation is necessarily political.[37]

It has been argued that due to globalization and functional fragmentation of societies the political systems of states cannot fully control other systems anymore, particularly the global economy. This has led to initiatives such as 'societal constitutionalization' to challenge state-centred constitutionalism by instead arguing for self-regulation in different functional areas.[38] However, by analysing what can be done within and in relation to the existing forms of international decision-making, this article focuses on an area that states still have primary control over. In the end, the extent to which improving the existing system is preferable to a more radical transformation or to focusing on alternative settings of global decision-making will be left to the reader to judge.

While the primary contribution of this article lies in a discussion of the effects and legitimacy of informal international instruments from a democratic perspective, the analysis of deliberation is also relevant for other contexts of decision-making. These include hybrid public-private settings and even purely private forms of decision-making. This is based on the presumption that individuals generally have the capability for genuine deliberation and communicative rationality, although they are also potentially restricted by acting as the representatives of institutions and possibly bound by the specific rationalities adhered to in different social systems.[39] Such conceptions of rational deliberation aiming at consensus have been charged for preserving *status quo* and prescribing as equal and consensual processes that are biased and conflictual.[40] The article argues that such concerns are alleviated by the context of international decision-making as a form of elite deliberation, while the prescriptions of deliberative ideals make conflicts a matter of deliberation in themselves.

The rest of the article consists of three sections. Section 2 examines the effects of informal instruments as legal and political communications. Section 3 discusses approaches to legitimize informal instruments. Section 4 concludes by remarking on the previously misguided debate on informal instruments and the debate going forward.

2. Effects of informal international instruments

2.1 Interpretive practice

Courts increasingly use informal instruments in the interpretation of law. What this section argues is that courts are largely forced to utilize non-binding sources due to the complexity of legal questions, increasing international informalization, and the courts' requirement to adjudicate. The point is not to criticize the judiciary, but to illustrate that the dynamics of international regulation and legal interpretive practice emphasize the need to legitimize the underlying international instruments.

[35]See Peters, *supra* note 13, at 608.

[36]See Peters, *supra* note 10, at 270.

[37]See, e.g., A. Orford, *International Authority and the Responsibility to Protect* (2011), 208, arguing that the responsibility to protect has led to undesirable consequences.

[38]See Golia and Teubner, *supra* note 13.

[39]Ibid., at 358.

[40]See note 131 and discussion thereto, *infra*.

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The legal relevance of informal instruments presents a boundary problem for law. If a thing that is not formally law is legally relevant, then another thing must be legally non-relevant. Courts constantly draw such distinctions, and law can thus be considered a communicational process that determines what is part of the legal system and what is not.[41]

Because law is often not clear, but courts cannot generally decide to not adjudicate,[42] courts must draw from various sources to decide on a valid interpretation of the substance of a vague law. In doing so, courts often make use of informal instruments.[43] When substance is drawn from an informal source, the underlying vague rule acts as a 'legal hook' on which to metaphorically hang the informal source on.[44] Informal instruments are usually described to 'solidify', 'clarify', or 'concretize' the interpretation of the rule in this respect.[45]

Extreme vagueness can give a binding effect to informal instruments. In *Milieudefensie et al.* v. *Royal Dutch Shell*,[46] the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) was used by the District Court of the Hague to give substance to an unwritten standard of due care in Book 6 Article 162 of the Dutch Civil Code. According to Paragraph 1 of Article 162, a person who commits a tortious act against another person that can be attributed to them must repair the damage that the other person has suffered as a result thereof. Paragraph 2 includes in its definition of tortious acts also those acts or omissions which are in violation of what according to unwritten law has to be regarded as proper social conduct, if the behaviour is not justified.

The Court determined that within the context of Royal Dutch Shell's contribution to climate change and its human rights obligations, the unwritten standard included violations of the rights to life and respect for private and family life.[47] The Court then decided to follow the UN Guiding Principles, effectively determining that it is unlawful in the Netherlands for a business to act against the instrument. According to the Court, the UN Guiding Principles is 'an authoritative and internationally endorsed "soft law" instrument', 'in line' with other 'widely accepted soft law instruments' and reflected 'current insights'.[48] The Court also noted that the European Commission had expected EU businesses to adhere to the instrument. Although Royal Dutch Shell had explicitly supported the UN Guiding Principles, the Court deemed this fact irrelevant.[49]

The existence of the unwritten standard was essential since international human rights law cannot be directly invoked against businesses.[50] The relative indeterminacy of the rights to life and private and family life was also a contributing factor. These factors made the UN Guiding Principles effectively binding on Royal Dutch Shell. The lawyers from the side of the *Milieudefensie* called this effect 'reflexive' and 'deciding on the scope of a [Shell's] duty of care to contribute to the prevention of dangerous climate change'.[51]

[41]See Luhmann, *supra* note 17.

[42]Ibid., at 279 and 281–2.

[43]M. Kanetake, 'Soft Law', in A. Nollkaemper et al. (eds.), *International Law in Domestic Courts: A Casebook* (2018), 311; and A. Pellet and D. Müller, 'Article 38', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2019), 819 at 851–64.

[44]A. Aust, *Modern Treaty Law and Practice* (2013), at 52.

[45]T. Määttä, 'Soft Law kansallisen oikeuden oikeuslähteenä – Tutkimus oikeudellisen ratkaisun normipremissin muodostamisen perusteista ympäristöoikeudessa', (2005) XXXVIII *Oikeustiede – Jurisprudentia* 337, at 441; and J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2013), 134.

[46]Klimaatzaak tegen Royal Dutch Shell, Rechtbank Den Haag, 26 May 2021, ECLI:NL:RBDHA:2021:5337.

[47]Ibid., paras. 4.4.9 and 4.4.10; 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, Arts. 2 and 8; and 1966 International Covenant on Civil and Political Rights 1966, 999 UNTS 171, Arts. 6 and 17.

[48]See Klimaatzaak tegen Royal Dutch Shell, *supra* note 46, para. 4.4.11.

[49]Ibid.

[50]Ibid., para. 4.4.9.

[51]R. Cox and M. Reij, 'Defending the Danger Line – A Manual for Climate Litigators: Using the Law as Climate Action Tool to Achieve the Paris Temperature Goal', March 2022, available at en.milieudefensie.nl/news/defending_the_danger_line.pdf, 27.

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There is a trend in climate litigation of increasing legal effect of informal instruments.[52] The link between human rights and climate change has been either noted by courts or by petitions for opinions on the questions posted to them.[53] Thus, while the *Milieudefensie* case reflected peculiarities of the Dutch legal system, there is potential for informal instruments to gain importance elsewhere with regard to vague legal rules.

This potential rests on the requirement to decide. If courts were permitted to determine that they were unable to 'find' the law and thus to adjudicate, they would not be forced to act in a way that can be accused of 'law-creation'.[54] What also matters is whether a structural bias in relevant interpretive institutions provides 'a professional consensus or mainstream answer' to the legal problem at hand.[55]

These factors, that courts try to align their decisions with the past but are also required to adjudicate anew, lead to a Janus-faced condition of conservatism and progress in law. When drawing new distinctions and reacting to changing world, law contributes to determining what kind of future legal communications are considered valid. It is this evolutionary process of the legal system through which international informal instruments become legally relevant and on which arguments of their legal relevance is ultimately based. Dworkin used the metaphor of law as a 'chain novel' written by individual judges to justify this condition.[56] Habermas emphasized the intersubjectivity of the discursive formation of law while also recognizing the fallibility of individual judges.[57]

We can look at informal instruments and speculate how they may contribute to interpretation. For instance, the GCM comprises numerous commitments that are much more descriptive of expected actions and behaviour than prior international law.[58] While the UN Guiding Principles as an instrument created by an international organization requires 'international recognition' before becoming authoritative, including state endorsement,[59] an instrument like the GCM, having been negotiated and adopted by states, can be assumed to be authoritative immediately.

Informal instruments may weaken existing legal standards. The GCM includes a new formulation of the principle of *non-refoulement* that requires higher probability of serious adverse consequences than the standard outlined in the Convention Against Torture.[60] The GCM's sister instrument the Global Compact on Refugees may similarly dilute the principle.[61] The concern over weakening of international obligations is logical, since if informal instruments were without effects, there would be no point for states to go through the trouble of

[52]Ibid., at 26.

[53]E.g., *Verein Klimaseniorinnen Schweiz and Others* v. *Switzerland*, Judgment of 9 April 2024, application no. 53600/20; ECLI:FI:KHO:2023:62 (Supreme Administrative Court of Finland); Request for an Advisory Opinion submitted by Chile and Colombia before the Inter-American Court of Human Rights, 9 January 2023, available at jurisprudencia.corteidh.or.cr/vid/926239275; and Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS, 12 December 2022, available at www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/.

[54]See Luhmann, *supra* note 17, at 281.

[55]M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 607.

[56]R. Dworkin, *Law's Empire* (1986), 228–38.

[57]J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996), 225–9.

[58]E.g., the right to nationality, Universal Declaration of Human Rights, UN Doc. A/RES/217A (III) (1948), Art. 15, at 74; and GCM, *supra* note 2, Objective 4, para. 20, at 10–11. Also, generally the protection of migrants' lives and health in Objective 8 of the GCM, para. 24, at 15–16.

[59]Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/RES/17/4 (16 June 2011), para. 1, at 2.

[60]See Micinski, *supra* note 6, at 115–16. Cf. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Art. 3(1).

[61]B. S. Chimni, 'Global Compact on Refugees: One Step Forward, Two Steps Back', (2018) 30 IJRL 630, at 631.

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reformulating existing legal standards in them. Informal instruments are indeed used to advocate for preferred new norms and interpretations.[62]

Relatedly, the legal hooking technique is also a political argumentative device. Questions such as how to find suitable hooks to make informal instruments binding on states are being asked by activists.[63] This strategy is often prompted by frustration when states do not adopt legally binding obligations, with informal instruments often containing more ambitious norms than states would incorporate in treaties.

The active verb 'hook' echoes purpose and implies a temporal order where an informal source comes first and then a suitable formal vessel is found for its realization. This relates to the question of distinguishing between treaty interpretation and judicial activism. It is certainly possible for judges to make conscious activist interpretations. Yet surely not every judgment in which an informal instrument receives a central role should be assumed to constitute judicial activism. The point is that the influence of informal instruments through judicial decision-making emphasizes the need to legitimize them. Otherwise, informal instruments may be used to mould the likely interpretations of international law as a sort of 'backdoor law' insulated from democratic scrutiny.[64]

2.2 Informal instruments as political communications

The kind of language that is used to assert, declare, or describe issues guides how they are understood and the solutions that are preferred for them. Utterances can be understood not just as transmission of information, but as action with intentional and unintentional effects on people.[65] From this perspective, informal instruments are not just codifications of agreements among states, but communications that shape or are used to shape understandings and preferences among relevant audiences.

Central in this regard is how informal instruments frame issues. Frames are 'schemata of interpretation' that 'allow a user to locate, perceive, identify, and label' a situation.[66] Frames can diagnose issues as problematic and in need of alteration (diagnostic framing) and propose specific solutions to them (prognostic framing).[67] They 'define the terms of debate in strategic ways'.[68] Producing dominant understandings and solutions can affect how an issue is governed, and conversely, how an issue is governed can solidify the predominance of specific expectations. Accordingly, political actors try to mobilize and shape the understandings of others around a specific point of view,[69] not least since international institutions tend to adhere to agreed framings.[70] Such description and redescription of aspects of the world can determine who has the power to decide on issues.[71]

[62]M. A. Pollack and G. C. Shaffer, 'The Interaction of Formal and Informal International Lawmaking', in J. Pauwelyn, R. A. Wessel, and J. Wouters (eds.), *Informal International Lawmaking* (2012), 241 at 269.

[63]E.g., Lawyers Responding to Climate Change, 'Legal Status of Paris Rulebook', 30 October 2017, available at legalresponse.org/legaladvice/legal-status-of-paris-rulebook/; and Sheila McKehnie Foundation, 'Powering Campaign People – Using the Law for Campaigning & Social Change: A 101 Guide', (2019), available at smk.org.uk/wp-content/uploads/2020/08/SMK_101_Law_Guide_Interactive_Web.pdf, at 5.

[64]G. Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (1987), 12; and T. Meyer, 'Alternatives to Treaty-Making – Informal Agreements', in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (2020), 59 at 72–3.

[65]See Austin, *supra* note 18.

[66]See Goffman, *supra* note 18, at 10–11 and 21.

[67]D. Snow and R. D. Benford, 'Ideology, Frame Resonance and Participant Mobilization', in B. Klandermans, H. Kriesi, and S. G. Tarrow (eds.), *From Structure to Action: Comparing Social Movement Research Across Cultures* (1988), 197 at 199.

[68]L. Winslow, 'Frame Analysis', in M. Allen (ed.), *The SAGE Encyclopedia of Communication Research Methods* (2018), 2.

[69]S. Kaplan, 'Framing Contests: Strategy Making Under Uncertainty', (2008) 19 OS 729, at 730.

[70]C. Odeyemi, 'UNFCCC's Posture on Displacement Riskification: Conceptual Suggestions', (2021) 10 *Progress in Disaster Science*, at 6.

[71]M. Koskenniemi, *The Politics of International Law* (2011), 337–8.

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Informality itself can be understood as a structural framing. By choosing informal arrangements, states frame issues as something to be managed rather than legislated. This goes even beyond the managerialism which envisages international law as a purposive instrument,[72] as it abandons the normative expectations and safeguards that come with binding law, being more about the materialization of power through administrative practices than its restriction by the rule of law. Relatedly, with the adoption of the Global Compact on Refugees, the most comprehensive and detailed international instrument on refugees is now legally non-binding, which is at odds with traditional emphasis on inviolable human rights and legality. Whether existing standards and processes change over time in this regard should be followed with interest.[73]

Informal instruments can also shape language. Experts use specific vocabularies to communicate with each other. When certain terms and concepts are used consistently, their use can become habitual and expected by a professional group. Legal competence itself is about learning a specific language and thinking in a specific way.[74]

An illustrative example are the terms 'regular' and 'irregular' in migration governance. At least since the early 2010s there has been an active campaign to promote their use in place of the legal/illegal migration terminology to prevent migrants from being associated with illegality.[75] The regularization terminology was institutionalized with the adoption of the GCM in 2018. The instrument makes no reference to legal or illegal migration, while regularization of migration is a central tenet in it.[76] States now largely abstain from referring to migration as legal/illegal at least in formal GCM related meetings.[77]

The terminology has not changed because of the GCM alone. However, it can be inferred that 'the correct way' of talking about migration in formal interactions has been settled for now. It remains to be seen if the changing language affects actual perceptions on migration. Pushing for new language is not always as successful, as shown by the presence of the term 'natural disasters' in the GCM in spite of a continuing effort to end its use by disaster risk reduction experts.[78]

Informal instruments may also facilitate overcoming domestic political stalemates and act as blueprints of domestic political reform.[79] As such, informal instruments may allow governments to create beneficial operational environments for themselves through international actions while simultaneously circumventing the parliament in the process.

Informal instruments as political communications can also affect domestic legal systems. As discussed in the previous section, legal systems react to changes in their environments. However, political communications must be translated to legal communications to make sense of them in the legal system.[80] Arguing in a court that not adhering to an informal instrument would threaten the achievement of non-binding global political targets would not go off well but stating that the instrument confirms certain acts as illegal would be immediately understood as a valid legal argument. Also, 'frames in the legal sphere operate in a similar fashion to the public opinion realm. An established frame influences ensuing discussions, decision making, and policy outputs of other elites who must communicate using established terminology.'[81] In this regard, informal

[72]M. Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) 1 EJLS 8.

[73]See Chimni, *supra* note 61.

[74]M. Koskenniemi, 'Mistä oikeustieteessä on kysymys?', (2022) 7–8 *Lakimies* 1016.

[75]See Micinski, *supra* note 6, at 114.

[76]E.g., GCM, *supra* note 2, Objectives 2 and 5, at 8–9 and 11–12, respectively.

[77]States did not generally use the legal/illegal terminology at the International Migration Review Forum 2022; cf. the 19 May plenary statement by Hungary; see United Nations Network on Migration website, available at migrationnetwork.un.org/international-migration-review-forum-2022.

[78]See GCM, *supra* note 2, paras. 18(h)–(l), at 9; *#NoNaturalDisasters* campaign website, available at www.nonaturaldisasters.com/; and United Nations Office for Disaster Risk Reduction, *#NoNaturalDisasters* website, available at www.undrr.org/our-impact/campaigns/no-natural-disasters.

[79]A. L. Newman and E. Posner, *Voluntary Disruptions: International Soft Law, Finance and Power* (2018), 72–92.

[80]H. Baxter, 'Niklas Luhmann's Theory of Autopoietic Legal Systems', (2013) 9 ARLS 167, at 169 and 181.

[81]J. Wedeking, 'Supreme Court Litigants and Strategic Framing', 54 AJPS (2010) 617, at 618.

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instruments as both political and legal communications can contribute to the formation of professional legal consensuses.[82]

The effects relate to what political scientists call 'soft power'. New ideas are constantly introduced, lobbied, and discussed in international institutions. These 'intellectual tides' or 'webs of dialogue' can shape understandings and decisions on all levels.[83] International professionals may adopt and transfer the ideas to different international and national forums and thus institutionalize their use, which can contribute to norm diffusion.[84] Elite discourse and framings may also affect public conceptions through different media.[85]

The meanings communicated via informal instruments matter. States can spend years arguing whether the world should 'transition away', 'phase down', or 'phase out' fossil fuels in a legally non-binding decision,[86] with each having different implications on the intensity and timing of expected actions. In this respect, the remark by COP28 President Al Jaber that '[w]e are what we do, not what we say' is only partly true.[87] The Sixth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) also noted the power of language by remarking that the 'success of climate-related migration as an adaptive response is shaped by how migrants are perceived and how policy discussions are framed'.[88]

The varying communicative machineries are essential to understanding the potential effects of informal instruments. These effects, then, emphasize the need to consider how to make informal instruments more legitimate from the perspective of the people affected by them. Accordingly, the next section discusses approaches that may enhance the democratic legitimacy of the instruments by addressing the two primary problems of the isolation of parliaments and the undemocratic nature of international decision-making.

3. Democratic legitimation of informal international instruments

3.1 Parliamentary approval of informal international instruments

Many democracies subject treaties to parliamentary approval to protect the authority of the legislator from constraining international obligations.[89] To secure approval by the parliament, the government may need to consult the parliament and try to achieve negotiation targets that the parliament sees as desirable.[90] Parliaments may benefit from their budgetary power in this regard.[91]

[82]See note 55 and discussion thereto, *supra*.

[83]D. Green, *How Change Happens* (2016), 142; and J. Braithwaite and P. Drahos, *Global Business Regulation* (2000), 553–7.

[84]L. Parks and E. Morgera, 'The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit-Sharing', (2015) 24 RECIEL 353, at 362–5.

[85]D. Chong and J. N. Druckman, 'A Theory of Framing and Opinion Formation in Competitive Elite Environments', (2007) 57 JC 99.

[86]E.g., 'COP28 Ends with Call to "Transition Away" from Fossil Fuels; UN's Guterres Says Phaseout is Inevitable', *UN News*, 13 December 2023, available at news.un.org/en/story/2023/12/1144742.

[87]See 'COP28 President Delivers Remarks at Closing Plenary', *COP28*, 13 December 2023, available at www.cop28.com/en/news/2023/12/COP28-President-Delivers-Remarks-at-Closing-Plenary.

[88]G. Cissé et al., 'Health, Wellbeing, and the Changing Structure of Communities', in H.-O. Pörtner et al. (eds.), *Climate Change 2022: Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (2022), 1041 at 1117.

[89]HE 1/1998 vp, at 148–9, available at www.eduskunta.fi/fi/vaski/hallituksenesitys/documents/he_1+1998.pdf; Section 94.1 of the Constitution of Finland; Art. 59(2) of the Basic Law for the Federal Republic of Germany; and Rijkswet van 7 juli 1994, houdende regeling betreffende de goedkeuring en bekendmaking van verdragen en de bekendmaking van besluiten van volkenrechtelijke organisaties (Rijkswet goedkeuring en bekendmaking verdragen), Stb. 1994, 542, particularly Arts. 2 and 7, in the context of Art. 93 of the Constitution of the Kingdom of the Netherlands.

[90]R. D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', (1988) 42 IO 427.

[91]See Tomuschat, *supra* note 14, at 34.

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The parliament loses this control with informal instruments as they do not require parliamentary approval. Extending parliamentary approval to informal instruments could thus strengthen parliamentary control over the foreign matters of the state and allow public debate on the instruments.

Parliaments do scrutinize informal instruments at times. For example, the parliaments of Estonia and Germany debated and voted on the GCM.[92] However, regularizing parliamentary scrutiny is complicated by the diversity of informal instruments. Some informal instruments are bilateral, others regional or multilateral. Some are self-standing, while others initiate processes. Some stipulate clear commitments, while others contain guidelines. Hence, there would be no point or time to approve all informal instruments. A standard would be needed to determine which instruments merit approval.

There are such standards for treaties. For example, in Finland approval is not required if an international obligation is deemed insignificant enough.[93] Since all international obligations are, formally speaking, equally binding, the qualification of the constraining potential is also tied to the subject area of the obligation.[94] However, legal instruments are generally approved because legal bindingness usually means that the obligation is relevant to the functions of the legislator.

With informal instruments a similar standard would have to be simply grounded in their significance. This introduces complex questions. What kind of effects may the instrument have? At what level and in what systems would those effects emerge? What effects are significant enough, and what does 'significance' entail? Does the instrument affect the state or are its effects rather felt in the private sphere? These are conceptually and empirically complex questions and necessarily require the evaluation of abstract concepts such as normativity and political as well as moral constrain.[95]

A simplifying standard could focus on whether the instrument contains committing language while simultaneously taking its subject matter into consideration. D'Aspremont has proposed a theory of ascertaining international law based on linguistic indicators, as states sometimes use certain language when they want to create binding law. For example, the UN Security Council 'decides' when it intends for a decision to be binding.[96]

To compare, the GCM 'expresses [states'] collective commitment to improving cooperation on international migration',[97] and includes 23 detailed objectives, each starting with the words 'we commit'. All 56 Actions of the similarly non-binding Pact for the Future include the phrase '[w]e decide', whereas the annexed Global Digital Compact and Declaration on Future Generations use committing language.[98] This highlights the potential need for linguistic harmonization, as one may ask, how is the language of deciding in the non-binding Pact for the Future different from that used by the Security Council for binding law?

The use of informal instruments can be a deliberate choice by states to insulate international governance from domestic scrutiny and to avoid restrictions of formal law-making.[99] And here lies a paradox of the standardization of informal instruments: if parliaments would start approving

[92]Riigikogu, 'The Riigikogu Passed the Statement on the UN Global Compact for Migration', 26 November 2018, available at www.riigikogu.ee/en/press-releases/plenary-assembly/riigikogu-passed-statement-un-global-compact-migration/; and Deutcher Bundestag, '68. Sitzung des Deutschen Bundestages am Donnerstag', 29 November 2018, available at www.bundestag.de/dokumente/protokolle/amtlicheprotokolle/ap19068-581434, under 'Zusatzpunkt 3'.

[93]Section 94.1 of the Finnish Constitution.

[94]See HE 1/1998 vp, *supra* note 89.

[95]Relatedly, see D. B. Hollis and J. J. Newcomer, '"Political" Commitments and the Constitution', (2009) 49 VIJL 507, at 577.

[96]See d'Aspremont, *supra* note 45, at 185–94; See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, [1971] ICJ Rep. 16, at 53, para. 114.

[97]See GCM, *supra* note 2, para. 8, at 2.

[98]UN General Assembly, The Pact for the Future, A/RES/79/1 (2024).

[99]A. Peters, 'The Global Compact for Migration: To Sign or Not to Sign?', *EJIL: Talk!*, 21 November 2018, available at www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/, under 'Legitimacy'.

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informal instruments with specific linguistic indicators in them, states could simply start to avoid that language. Standardization is essentially formalization and could thus lead to a further retreat to informality.[100] Instead, states could use even more informal arrangements, perhaps turning towards the use of bureaucratic 'managerial technologies' rather than juridico-political instruments.[101]

The benefits of parliamentary approval are limited, however. Continuing international rule-making can extend far beyond what could have been predicted when the parliament approved the underlying treaty.[102] Parliaments are largely given take-it-or-leave-it deals after the instruments have been already negotiated, with little influence on their substance. As such, parliamentary approval should be treated as a complementary solution to enhance the role of the parliaments after the adoption of the instruments. Accordingly, the next section considers how to better engage the parliaments before and during international negotiations.

3.2 Deliberative feedback loops and parliamentary engagement

In parliamentary systems, parliamentarians are the representatives of the people. In this role, the parliamentarians can transfer the will of the people into international decision-making by bringing 'complicated and technical questions . . . into their proper perspective in relation to their underlying political implications'.[103] Fulfilling this potential requires that the parliamentarians can provide input and feedback (legislator–executive interface), and that the parliamentarians listen to and accommodate opinions by the people (legislator–citizen interface).

Parliamentary input is typically possible when the government informs the parliament about international negotiations. This is at times done with informal instruments. For example, in June 2018 the Government of Finland informed the Parliament of Finland about the GCM and the Global Compact on Refugees as a matter of their consideration by EU organs.[104]

Informing and requesting statements from parliaments should be done at an adequate time. For example, at the time of informing the Parliament of Finland about the Compacts on 5 June 2018, the last GCM revision before the final draft was already being finalized in the fifth round of intergovernmental negotiations at which point most of the eventual contents of the GCM were already in place.[105] Interestingly, the parliament did not issue a statement on the GCM, which shows that input opportunities are not necessarily utilized.

A more ambitious process could be pursued to allow more effective input from the parliaments when they wish to engage. This could take the form of a deliberative feedback loop process between the government and the parliament,[106] where national positions would be formed and fine-tuned based on changing negotiation circumstances. This could take place through inclusive parliamentary settings representative of the parliamentary assembly, such as committees with members from different parties. The aim would be to pursue consensus and for the government to

[100]See d'Aspremont, *supra* note 45, at 136; see also Tomuschat, *supra* note 14, at 34.

[101]I. Roele, *Articulating Security: The United Nations and Its Infra-Law* (2021).

[102]See Friedrich, *supra* note 14, at 399. See also N. Craik, 'Deliberation and Legitimacy in Transnational Governance: The Case of Environmental Impact Assessments', (2007) 38 VUWLR 381, at 383–4; and Peters, *supra* note 10, at 293–4.

[103]Stated by H. Macmillan; see Parliamentary Assembly of the Council of Europe, Social, Health and Family Affairs Committee, Reply to the Fifth Report of the International Labour Organisation, Motion for a Resolution, Doc. 446 (15 October 1955), available at = = assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid = 768&lang = en.

[104]Parliament of Finland, 'Asian käsittelytiedot E 43/2018 vp', available at www.eduskunta.fi/FI/vaski/KasittelytiedotValtiopaivaasia/Sivut/E_43+2018.aspx.

[105]UN Refugees and Migrants, 'Intergovernmental negotiations – Fifth Round', available at refugeesmigrants.un.org/intergovernmental-negotiations-fifth-round.

[106]For related uses of the concept, see J. Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research', (2006) 16 CT 411, at 421; and N. Götz, *Deliberative Diplomacy: The Nordic Approach to Global Governance and Societal Representation at the United Nations* (2011), 428.

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provide arguments for its positions. Importantly, national positions should not necessarily have to be formally approved by the parliament, since such a requirement would tip the balance of power in countries where the government is constitutionally mandated to lead the foreign policy of the state.

The feedback loop process would strengthen the connection of international governance with domestic democracy and enhance its democratic legitimacy particularly in the countries where the approach is implemented. Widespread parliamentary engagement could also enhance the legitimacy of international regimes in general by diversifying the opinions fed into international decision-making.

However, the approach requires a functional process and relationship between the parliament and the government. Preserving trust among international negotiators may necessitate withholding information from outsiders, including parliamentarians.[107] Compromises between states may necessitate that representatives are not equipped with strictly predetermined positions, and representatives could feel pressured to hold onto positions that have been agreed through domestic deliberations. A feedback process can be cumbersome and require time that is often limited in international negotiations. Particularly in the EU countries, the fact that the EU and its members try to negotiate collectively may limit the extent to which a member state can form individual positions through domestic deliberations. If the executive has the mandate to lead foreign affairs, the feedback process requires either utilizing constitutionally available channels for parliamentary participation or modifying the constitution to enhance the participatory rights of the parliament.

Effective engagement may require educating interested parliamentarians who have no prior experience of foreign politics and international law. The enigmatic legal and political nature of informal instruments presents a distinct educational need. Education could help prevent significant informal instruments from being processed simply based on the question of their legal bindingness, if at all.

To further support parliamentary input, parliamentarians could become more directly engaged with the foreign matters of the state. In this respect, the parliamentarians could act as 'well-informed critics' of the state's foreign policy, which could also contribute to more effective deliberations at the domestic level.

When parliamentarians participate in international decision-making, they typically act as observers. While there are historical examples of parliamentarians acting as full delegation members with the purpose of enhancing societal representation and legitimation,[108] acting as observers may better support the role of parliamentarians as well-informed critics since a negotiating role could lead to the parliamentarians also practicing secrecy to avoid domestic scrutiny and accountability.[109] In fact, parliamentarians may be content with having expert bureaucrats at the reins of the negotiations,[110] with the latter in turn being defensive about expanding parliamentary diplomacy in an area they see as their own.[111] The main downside of an observing role is that the executives may exploit information imbalances if the parliamentarians cannot observe closed meetings.[112]

The parliamentarians must be responsive to deliberative principles for the feedback loops to fulfil their purpose. They must also be receptive to citizens' interests and opinions as a precondition of a credible democracy.[113] We can assess this as the extent to which substantive representation occurs.

[107]In the EU context, see P. Dann, 'The Political Institutions', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (2010), 237 at 268.

[108]See Götz, *supra* note 106, at 423, 425–6, and 433.

[109]Ibid., at 430.

[110]Ibid., at 428.

[111]Ibid., at 426.

[112]M. Onderco, 'Parliamentarians in Government Delegations: An Old Question Still Not Answered', (2018) 53 CC 411, at 423.

[113]See Habermas, *supra* note 106.

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Parliamentarians are not required to invariably reflect the wishes and interests of their voters at least if we consider political compromising a necessity. Parliamentarians, however, generally try to represent the interests of their voters to a sufficient degree to secure re-election. Hence, parliamentarians can be generally expected to be receptive to citizens' opinions.

However, not all people vote or are able to vote, and thus parliamentarians may prioritize the interests of the most active citizens. As such, parliamentarians or candidates should not only deliberate with their immediate voters to figure out their preferences, but also deliberate with political oppositions and by themselves on what the implications of specific policies would be to the wider populace. This is, of course, an ideal picture of individual parliamentarians and collective parliamentary representation, but the legitimacy of the parliament does rest on the notion that it represents the whole citizenship to a sufficient degree.

In parliamentary democracies the ministers serving in the government are often elected members of the parliament themselves. They are thus also accountable to voters, although there is a sense that when representing the ministerial and state institutions, they are expected to act on behalf of the abstract interest of the state which may not align with those of their voters. To the extent ministers or other officials are not elected members of the parliament, they are mainly accountable to the government institution and the parliament, not the citizens. Here, too, deliberative feedback loops may enhance the connection between citizens and foreign matters of the state by enabling deliberations between government representatives and members of the parliament.

Domestic political struggles are an obstacle to feedback loops and foreign engagement of parliamentarians, particularly those from opposing parties, as the party (or parties) in power may not be willing to engage with their political competitors. As such, the establishment and maintaining of the dynamics may require revisiting constitutional provisions on parliamentary rights of participation. However, parliamentary politicians generally understand the ideological and political value of parliamentarianism, and those in power realize that they will likely be in the opposition at some point in time themselves, which may help obtain enough political support for expanding the role of the parliament.

Enhancing the legislator–citizen and legislator–executive interfaces carry the potential to strengthen the links between international decision-making and citizens. It is another question, however, if the mediated public opinions are expressed and considered in international decision-making. As the final decisions are often reached in the late hours of the last day of international negotiations, behind closed doors, and between a limited number of state representatives, it is evident that these are the situations when it truly matters whose voice is made heard.

3.3 Deliberation in international decision-making

Insofar as the international order continues to be dominated by state executives, substantive representation of public opinions by decision-makers emerges as the modus of improving the democratic quality of the decision-making processes. The question is then how these opinions are expressed and considered so that they can influence international decisions, with implications for both legally binding and non-binding international instruments.

Following the logic of focusing on micro-level interactions, deliberative democratic literature has departed from the traditional democratic understanding that voting is the cornerstone of a well-organized and functioning democracy.[114] Instead, deliberative democracy focuses on the exchange of 'good arguments' aiming at a rationally motivated consensus.[115]

[114]E.g., I. Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (2011), 4; A. Floridia, 'The Origins of the Deliberative Turn', in A. Bächtiger et al. (eds.), *The Oxford Handbook of Deliberative Democracy* (2018), 35; N. Curato et al., 'Deliberative Democracy in the Age of Serial Crisis', (2022) 43 IPSR 55; and S. Niemeyer et al., 'How Deliberation Happens: Enabling Deliberative Reason', (2023) 118 APSR 345.

[115]J. Cohen, 'Deliberation and Democratic Legitimacy', in A. Hamlin and P. Pettit (eds.), *The Good Polity: Normative Analysis of the State* (1989), 17 at 23.

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In this view, reasonable and legitimate decisions are the result of successful communication. According to Habermas, humans maintain themselves through communicative action, that is, socially co-ordinated action aimed at reaching understandings. Rational discourse satisfies the conditions of rationality of propositional truth, normative rightness, and subjective truthfulness,[116] and is thus more multifaceted than instrumental rationality. Interaction can be linked with democratic legitimacy since 'democratic will-formation draws its legitimating force ... from the communicative pre-suppositions that allow the better arguments to come into play in various forms of deliberation and from the procedures that secure fair bargaining processes'.[117]

Hence, the quality of international decision-making can be analyzed by reference to different conditions of democratic deliberation, for example:

Table 1. Conditions of deliberation[118]

Information	Access to reasonably accurate information on the matter at hand
Substantive balance	Arguments are answered by arguments by those who hold other perspectives
Diversity	Representation of major public opinions in decision-making
Conscientiousness	Sincere weighing of the merits of different arguments
Equal consideration	Arguments are equally considered regardless of who expresses them

As the conditions suggest, ideal deliberation is free of coercion; only the force of a better argument may be exercised.[119] Since the better argument should prevail, all participants must not have an equal effect on the outcome of the deliberation. Deliberation should be oriented towards common good and be sincere. Yet self-interest may be acceptable as long as it is constrained by fairness, while insincerity in, for example, pragmatic compliments and greetings can facilitate further deliberation.[120]

While deliberation should ideally be open and public, a closed meeting may facilitate genuine deliberation on controversial questions and make the participants more willing to retreat from positions when faced with a better argument. Whereas transparency better ensures that the participants propose and hold on to positions preferred by their constituents, it can also introduce inflexibility and aggressive bargaining and even lead to breakdown of negotiations by preventing compromises.[121] Deliberation should be inclusive, but too many participants quickly leads to speech-making instead of genuine deliberation.[122] Where consensus cannot be reached, deliberation may be followed by bargaining,[123] or a vote if allowed by the procedural rules of the relevant institution.[124]

The exclusivity of intergovernmental decision-making means that it cannot be deliberatively democratic in the ideal sense. Deliberative democracy works best in a limited setting where the people who are affected by the decisions can directly participate. Instead, international decision-making can at best be a form of *elite deliberation*, not committed to mass participation but to 'indirect filtration' of public opinions.[125]

[116]See Habermas (1984), *supra* note 18, at 75 and 397.

[117]J. Habermas, 'Three Normative Models of Democracy', (1994) 1 *Constellations* 1, at 4.

[118]J. S. Fishkin, *When the People Speak* (2009), 34.

[119]J. Habermas, *Legitimation Crisis* (1975), 107–8.

[120]A. Bächtiger et al., 'Deliberative Democracy: An Introduction', in A. Bächtiger et al. (eds.), *The Oxford Handbook of Deliberative Democracy* (2018), 1 at 4 and 8.

[121]D. Stasavage, 'Open-Door or Closed-Door? Transparency in Domestic and International Bargaining', (2004) 58 IO 667, at 678 and 695.

[122]J. Parkinson, 'Legitimacy Problems in Deliberative Democracy', (2003) 51 PS 180, at 181.

[123]J. Mansbridge et al., 'The Place of Self-Interest and the Role of Power in Deliberative Democracy', (2010) 18 JPP 64, at 68.

[124]See Cohen, *supra* note 115.

[125]See Fishkin, *supra* note 117, at 70–5.

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The prevalence of consensus decision-making in international regimes implies that state representatives are already versed in deliberation to some degree. To illustrate, in the UN Framework Convention on Climate Change (UNFCCC) decisions by the Conference of the Parties are based on consensus. The perspectives of states most affected by climate change are pitted against states that are arguably most responsible for it. The states have access to the most up-to-date information on climate change through the regular reports of the scientific Intergovernmental Panel on Climate Change,[126] as well as civil society actors who actively participate in climate negotiations as observers.

These factors should facilitate genuine deliberation on diverse perspectives and positions backed by scientific evidence and subjective experiences. However, intergovernmental consensuses should be treated with healthy scepticism. For example, small island developing states disproportionally affected by climate change were not in the room when the final decisions of COP28 in Dubai were gavelled in late 2023.[127] This did not prevent the negotiated result from being called the 'UAE consensus'.[128] The consensus related complications within the UNFCCC are largely the result of its inability to adopt a formal definition for consensus,[129] which opens the door to coercion and exclusion by powerful states against smaller states or marginalized groups.[130]

When consensus is used to make reaching decisions difficult or as a concealed veto mechanism, it can be criticized for favouring the *status quo*.[131] In this regard, majority voting may better facilitate social change in contentious issues, which, however, is also the reason why it is rarely applied by states. Majority voting may, however, democratically delegitimize decisions and lead to political struggle for the required majorities.[132] Here, genuine deliberation should not be confused with pseudo-consensuses which merely mask political coercion or power.[133] Even more so, majority voting itself should be preceded by genuine deliberation with the purpose of making the vote unnecessary.

Inclusivity is a major challenge for international decision-making. The number of people who have opinions about or are affected by global issues is enormous. It is impossible to accommodate them all.[134] Thus, the requirement of inclusivity in international decision-making cannot pertain to people but to curated ideas. Deciding what public opinions to deliberate must be a matter of deliberation itself. The deliberated views cannot merely comprise majority or mainstream opinions because that would exclude affected but marginal groups and diverging public opinions.

But how to facilitate genuine deliberation? The main issue is getting the formal decision-makers, state representatives, on board. The willingness of at least some executives to champion better deliberation could be utilized to pursue a 'culture of deliberativism' in international decision-making, meaning the embrace and pursuance of ideal deliberation with concomitant

[126]Intergovernmental Panel on Climate Change, 'Reports', available at www.ipcc.ch/reports/.

[127]A. Rasmussen, 'COP28 Closing Plenary: AOSIS Statement on GST Decision', *Alliance of Small Island States*, 13 December 2023, available at www.aosis.org/cop28-closing-plenary-aosis-statement-on-gst-decision.

[128]E.g., 'COP28 President Delivers Remarks at Closing Plenary', *COP28UAE*, 13 December 2023, available www.cop28.com/en/news/2023/12/COP28-President-Delivers-Remarks-at-Closing-Plenary; and the UNFCCC COP28 page, available at unfccc.int/cop28/outcomes.

[129]D. French and L. Rajamani, 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere', (2013) 25 JEL 437, at 449–50; and A. Vihma, 'Climate of Consensus: Managing Decision Making in the UN Climate Change Negotiations', (2015) 24 RECIEL 58, at 62–4.

[130]R. B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', (2004) 108 AJIL 211.

[131]C. O'Hara, 'Consensus Decision-Making and Democratic Discourse in the General Agreement on Tariffs and Trade 1947 and World Trade Organisation', (2021) 9 LRIL 37, at 56–60.

[132]See Vihma, *supra* note 129.

[133]S. B. Banerjee, 'Decolonizing Deliberative Democracy: Perspectives from Below', (2022) 181 JBE 283.

[134]R. O. Keohane, 'Global Governance and Democratic Accountability', in D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization* (2003), 130 at 141. See also N. Sharman, 'Objectives of Public Participation in International Environmental Decision-Making', (2023) 72 ICLQ 333, at 339.

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social attitude. A cultural change should be emphasized, since introducing formal rules of deliberation runs the risk of overburdening the participants, being perceived as the forcing of 'Western ideals', or resulting in bureaucratization which could detract the participants from genuine deliberation.

External pressure on states to address the problems of international decision-making could result in a compliance deficit which then could lead to institutional changes. The power of political pressure was exemplified by the number of states withdrawing from the GCM process in 2018.[135] The pressure would mainly emerge from civil society actors which can circumvent the convoluted chains of communication from the people to state representatives in domestic political systems.[136] Civil society actors can also monitor international decision-making and distribute information to the public for increased transparency.[137] Such opportunities may be enabled by the opening up of international organizations to dialogue with civil society organizations.[138] For example, international organizations have increasingly established so called Dialogue Forums to engage with civil society actors, however, they have been criticized as being mere talking-shops rather than forums of genuine deliberation.[139]

In this regard, intergovernmental deliberations should be understood as coupled with other deliberations in and around international institutions.[140] Parliamentarians can also contribute to the deliberative culture as critics of their state's foreign policy. The Parliamentary Assembly of the Council of Europe, the most institutionalized and influential parliamentary forum associated with international organizations,[141] acts as an exemplary of the potential of parliamentary engagement. While not a formal body, the Inter-Parliamentary Union organizes meetings at the annual climate negotiations with the purpose of influencing the executives and engaging domestic parliaments.[142]

Here a global 'public sphere' can be conceptualized. For the form and structures of the international system, the global public sphere in question would comprise in non-governmental discursive opinion-formation that is peripheral to formal governmental decision-making,[143] in other words, a network for communicating opinions to the decision-makers.[144]

The presence of civil society actors does not ensure that this public sphere is necessarily inclusive. Just as the historical bourgeois model of public sphere originally analysed by Habermas was exclusionary with regard to gender and class,[145] so may the representativeness of global civil society be limited. Only some civil society actors have the capacity and resources to engage with international institutions which may lead to cultural and geographical imbalances and the reproduction of existing biases.[146] Their representatives are rarely elected to their positions, and

[135]See Micinski, *supra* note 6.

[136]J. S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (2000), 131.

[137]See the example of the International Institute for Sustainable Development, Summary Report, 14–18 March 2015: WCDRR-3 (2015), available at enb.iisd.org/events/wcdrr-3/summary-report-14-18-march-2015.

[138]A. Peters, 'International Organizations: Effectiveness and Accountability', (2016) *MPIL Research Paper No. 2016-01*, at 13–15.

[139]M. Coni-Zimmer, N. Deitelhoff, and Diane Schumann, 'The Path of Least Resistance: Why International Institutions Maintain Dialogue Forums', (2023) 99 IA 941.

[140]Relatedly, see K. Bäckstrand, 'Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development', (2006) 12 EJIR 467.

[141]J. Lipps, 'Intertwined Parliamentary Arenas: Why Parliamentarians Attend International Parliamentary Institutions', (2020) 27 EJIR 501.

[142]Inter-Parliamentary Union, 'Climate Change', available at www.ipu.org/impact/climate-change.

[143]N. Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', (1990) 25/26 ST 56, at 75.

[144]J. Habermas, 'The Public Sphere', in C. Mukerji and M. Schudson (eds.), *Rethinking Popular Culture: Contemporary Perspectives in Cultural Studies* (1991), 398.

[145]See Fraser, *supra* note 143, at 59–60.

[146]C.-A. Sénit, F. Biermann, and A. Kalfagianni, 'The Representativeness of Global Deliberation: A Critical Assessment of Civil Society Consultations for Sustainable Development', (2017) 8 GP 62; and Friedrich, *supra* note 14, at 425–6. See also Dahl, *supra* note 34, at 27.

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while they usually claim to represent the public, civil society actors may not themselves be open to genuinely consider valid but differing opinions.[147]

The claimed public sphere must then be critically assessed so that sufficient substantive representation of the people can actually be satisfied and not merely declared. Fraser argues that there are many public spheres, and accordingly, effective opinion formation may require nourishing parallel deliberative settings at domestic and local levels to allow different social groups to produce their specific discourses and to organize for effective input at the international level.[148] So-called deliberative Citizens' Assemblies could be used to model public opinion formation and mediation to support international decision-making.[149]

The legitimating function of deliberation could act as an incentive for states to conduct themselves in a certain manner in international institutions. States regularly use international law to legitimize their actions and present the justificatory discourses in institutions that confer the most legitimacy to them.[150] International organizations also utilize democratic narratives to legitimize their operations.[151] The legitimacy of instruments produced through deliberation could thus exert influence on subsequent state behaviour.[152] Deliberation may create a virtuous cycle where the institution's enhanced legitimacy acts as a pull factor for more decision-making to be conducted there.

All things deliberative seem objective and equalizing. However, deliberative approaches have also been criticized. One prevalent criticism has concerned the mode of deliberation expected for realizing communicative rationality and the high burden it places on the participants. The participants should be knowledgeable and capable of expressing themselves in a proper manner and listening attentively, without prejudices. However, in reality people are often swayed by rhetoric and style, and as Young notes, those who do not perform as well in these areas are at threat of being dismissed if this dimension of argumentation is not given adequate attention.[153]

Habermas's purpose in conceptualizing communicative action and rationality was to redeem modernity and the rational ideals of the enlightenment from the critics of subject-centred reason.[154] A related criticism has been to charge communicative rationality as an immanently European or occidental idea.[155] Merawi emphasizes that modernity and its rationalities should not be observed in a historical vacuum, as doing so would threaten to express as universalist an inherently European hegemonic conception of the world and disregard the role that reason has played in injustices.[156]

The elite deliberation form of international decision-making should alleviate such concerns to some degree. The differences in personal capacities and capabilities are smaller within the participants of the international political system than in the wider society. Regarding this

[147]M. Beijerman, 'Conceptual Confusions in Debating the Role of NGOs for the Democratic Legitimacy of International Law', (2018) 9 *Transnational Legal Theory* 147, at 158–61; see also K. Anderson and D. Rieff, '"Global Civil Society": A Sceptical View', in H. Anheier, M. Glasius, and M. Kaldor (eds.), (2004) 5 *Global Civil Society* 26, at 30.

[148]See Fraser, *supra* note 143, at 60 and 67–8.

[149]L. Muradova, 'Climate Change Communication and Public Engagement in Interpersonal Deliberative Settings: Evidence from the Irish Citizens' Assembly', (2020) 20 CP 1322.

[150]I. Johnstone, 'Security Council Deliberations: The Power of the Better Argument', (2003) 14 EJIL 437, at 477–8; and I. Hurd, 'The International Rule of Law: Law and the Limit of Politics', (2014) 28 EIA 39.

[151]K. Dingwerth, H. Schmidtke, and T. Weise, 'The Rise of Democratic Legitimation: Why International Organizations Speak the Language of Democracy', (2020) 26 EJIR 714.

[152]T. M. Franck, *The Power of Legitimacy among Nations* (1990).

[153]I. M. Young, *Inclusion and Democracy* (2000), 70.

[154]J. Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (1987).

[155]E. Dussel, 'Eurocentrism and Modernity (Introduction to the Frankfurt Lectures)', (1993) 20 *The Postmodernism Debate in Latin America* 65; and F. Merawi, 'Habermas, Modernity and Postmodernism; A Philosophical Inquiry', (2012) 1 *Science, Technology and Arts Research Journal* 75.

[156]F. Merawi, 'Habermas and the Other Side of Modernity', (2012) 8 *Ethiopian Journal of the Social Sciences and Humanities* 31, at 56.

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subjective dimension, claiming that genuine deliberation is immanently biased towards Western participants would reduce the agency of non-Western participants and result in their unjustified 'othering' by claiming that they are not able to equally engage in rational discourse. Rather, the potential political biases relate primarily to the established structures of international decision-making, and in this regard pursuing genuine deliberation should relax structural biases rather than exacerbate them. Deliberation as an ideal is a process which calls for genuine participation of those who are needed to create a 'common universe of discourse'.[157]

A challenge is that the deliberative conception assumes that it is possible for participants to come together and deliberate as if they were equals. Yet gaping social and economic differences exist in the world. Fraser argues that this calls for thematizing the inequalities in deliberations, which aligns with Habermas's later conceptions of communicative ethics.[158] Conflict precedes unity in understanding, in communication and in democracy. We observe such thematization at times in international deliberations. For example, small island developing states are often given a special role of expressing concerns about climate change. The problem is that these expressions should not be treated as a mere theatre that validates whatever decisions are made. The problem with rational deliberation is not about its European origin or claimed universality, but its political implementation.[159]

It should be reiterated that the validity dimensions of normative rightness and subjective truthfulness should facilitate unbiased determination of reasonable outcomes as far as the participants are conscious of them. At the same time these dimensions must count towards the 'totality' of reason that is backed by scientific knowledge (theoretical truth). In finding global solutions to global problems, it is hard to imagine a more objective frame of reference.

Some practical obstacles stand in the way of the deliberative turn. External scrutiny depends on information shared by the executives and the contents of the resulting instruments. Without transparency we cannot be sure if some views were genuinely considered but were deemed less persuasive than others. Thus, at least some publicity is imperative.[160] Requiring detailed reporting on how different positions were taken into consideration would force states to produce reasoned arguments for their positions. This could also strengthen the accountability of the decision-making process,[161] and thus enhance its perceived legitimacy.

States may perceive non-participation as preferable to a process in which they cannot utilize political leverages. However, pragmatic approaches to deliberation allow bargaining and compromising when consensus cannot be reached through genuine deliberation. Also, rational deliberation may alleviate concerns by states since an unreasonable demand without merit will not succeed and states can simply make reasoned arguments in favour of alternatives.

The emerging deliberative practices may require procedural rules to maintain them,[162] as cultural transformation is vulnerable to power fluctuations such as changes of governments and international as well as domestic political struggles. It is also dependent on the qualities and preferences of the people participating in the decision-making processes at a specific time. Rules, however, may be interpreted as an attempt to formalize informal instruments, with the lack of formal restrictions often being specifically the reason for states to adopt informal instruments.[163] Also, as mentioned earlier, too many and strict rules may detract participants from genuine deliberation.

The suggested approach should be understood as a democracy-striving process where genuine deliberation is constantly realized to the fullest extent possible. In time, this discursive process may

[157]M. B. Ramose, *African Philosophy through Ubuntu* (2005), 33.

[158]See Fraser, *supra* note 143, at 64.

[159]M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', (2005) 16 EJIL 113, at 115 and 119.

[160]See Bächtiger et al., *supra* note 120, at 8.

[161]M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007) 13 ELJ 447, at 450.

[162]See Habermas, *supra* note 116, at 8. See also Goldmann, *supra* note 26.

[163]See Tomuschat, *supra* note 14.

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work towards a more systemic democratization development in international decision-making. In the short term, it acts as a continuing reminder of the diversity of public opinions and affected individuals. If realized, the process will not justify declaring international decision-making democratic, but it is the best available course of action within the existing structures of the state-centred and executive-led order.

4. Conclusions

The debate on the legal status of the GCM in 2018 focused on the wrong problem. It moved attention away from the real 'phantom menace' of informal international instruments, that is, their subtle legal and political effects and democratic deficit which remain outside public attention if debate focuses simply on the questions of legal bindingness and parliamentary approval.

In this context, the backlash surrounding the GCM may have reflected anxieties towards globalization and elite governance in general.[164] Such anxieties, however justified, are not helped by democratically unchecked international governance with effects on private lives. When such governance proliferates in number and kind,[165] the need to address the democratic deficit of informal instruments is apparent also from the perspective of addressing domestic political turmoil.

This article has argued for a twofold approach to enhance the democratic legitimacy of informal instruments. At the domestic level, parliaments should not only approve significant informal instruments but be more engaged in the formation and observation of national positions before and during international negotiations. At the international level, a turn to deliberation is envisioned with the purpose of enhancing substantive representation and genuine consideration of public opinions in international decision-making.

Debate should continue on if improving the existing system is preferable or if a more radical restructuring is in place, although the latter is necessarily confronted with the question of state will. On the other hand, more debate is called for on the continuing complexity of the globalized world and more fragmentation-sensitive approaches on transnational governance in and through functionally differentiated social systems,[166] including whether such development is sociologically inevitable.[167] In the end, informal international instruments are only one form of new modes of global governance and the problem of the distancing of political power from the populace.

[164]J. Klabbers, 'Soft Authority in Global Governance', in M. Eliantonio, E. Korkea-aho, and U. Mörth (eds.), *Research Handbook on Soft Law* (2023), 162 at 173.

[165]J. Pauwelyn, R. A. Wessel, and J. Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', (2014) 25 EJIL 733.

[166]E.g., Golia and Teubner, *supra* note 13.

[167]See Koskenniemi, *supra* note 72, at 11.

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