A Proceduralist Theory of Supranational Law

by

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Abstract

This thesis marks an attempt to expand Jürgen Habermas's proceduralist theory of law to the supranational level. It links the legitimacy of law to morality by suggesting that where there is substantial dissonance between the two, questions of legitimacy arise. Recognizing that American hegemony plays a central role in legitimation at the supranational level, this thesis attempts to address the negative effects of hegemony on the legitimacy of law. It strives to establish an understanding of the intricacies of hegemonic strategies of legitimation, and, through an account of the NATO intervention in Kosovo and the HIV/AIDS crisis in Africa, demonstrates that such strategies regularly force a dissonance between law and morality as hegemonic acts of self-preservation. This thesis offers a two-stage approach in an attempt to moderate the dissonance; the first step addresses the function of dissent in weakening the hegemonic order and lays the groundwork for the second step, which focuses on the role of justification in moderating cognitive dissonance. Ultimately, the proceduralist theory of supranational law that is offered is a piece of the broader cosmopolitan project in that it promotes a conception of universal morality, and endeavours to establish a normative approach to the legitimation of law to ensure the morality and legality of future responses to global crises.

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Reasons that are convenient for the legitimation of law must, on pain of cognitive dissonances, harmonize with the moral principles of universal justice and solidarity.
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INTRODUCTION

The temptation to abandon the project of global justice lingers in the mind as one grapples with seemingly larger-than-life terms and objectives. At every juncture, the normative theorist who is committed to such a project must overcome a different obstacle, whether it is related to accusations of moral imperialism, or questions of impracticality. For those theorists who refuse to desert this project, there is as much a sense of obligation as there is guarded optimism that urges them to continue along the chosen trajectory. Oftentimes, however, there are specific incidents or situations that prompt their initial thoughts and drive them to continue to make contributions to the project of global justice.

For the project at hand, the 1999 NATO intervention in Kosovo and the African HIV/AIDS crisis provide the focal points and foundation upon which I develop my position in relation to the problems and potential of supranational law. The first objective of this thesis reflects the conundrum presented in the quote, above. It is to demonstrate that the cognitive dissonance that results from the hegemonic control over the supranational legal framework is detrimental to the legitimacy of supranational law, which, in turn, has negative implications for the legality and morality of responses to global crises. Building on the first, the second objective is to sketch a possible proceduralist theory of supranational law that has as its core a legitimizing mechanism to moderate cognitive dissonance, and therefore, strengthen the legitimacy of supranational law as a response to global crises.

To give added direction and depth to this project, I structure my arguments in relation to the NATO intervention in Kosovo and the HIV/AIDS crisis in Sub-Saharan Africa. I refer to both cases as specific examples of cognitive dissonance in practice, which demonstrate a problematic fluctuation between law and morality and provide insights on the paradoxical relationship between internal coherence and legitimacy. This project is a response, in part, to the current debate in the contemporary literature around the legality and morality of intervention, which can be otherwise conceived of as a conflict between sovereignty and cosmopolitan ideals. Jean L. Cohen's recent article accurately encapsulates the key concerns that characterize this debate, which she explains as follows:

> If we assume that a constitutional, cosmopolitan legal order already exists, which has replaced or should replace international law and its core principles of sovereign equality, territorial integrity, nonintervention, and domestic jurisdiction with cosmopolitan right, and if we construe the evolving doctrine of "humanitarian intervention" as the enforcement of that right, we risk becoming apologists for imperial projects. Under current conditions, this path leads to the political instrumentalization of "law" (cosmopolitan right) and the moralization of politics rather than to a global rule of law. (2004:3)

I conceptualize a proceduralist theory of supranational law with the intent of navigating around the threat of the 'political instrumentalization of cosmopolitan law'; however, I also expand the parameters of this debate by adding another consideration. As important as it is to address the problems associated with actions that stem from the political instrumentalization of cosmopolitan law, I posit that the problems associated with *in*action are just as critical. For this reason, I show that cognitive dissonance produces two key outcomes: illegal action, as represented by the Kosovo example, or immoral inaction, as represented by the example of HIV/AIDS in Africa. In this thesis, I contend that the ability to respond in a legal and moral manner to all types of global crises is hindered because, under conditions of American hegemony, supranational law can only claim weak legitimacy. By linking my treatment of the cosmopolitan debate around morality and legality to a discussion of cognitive dissonance in the context of neo-Gramscian theories of

hegemony, I attribute the weak legitimacy of supranational law to the strategies of hegemonic legitimation that necessitate the fluctuation between law and morality. I argue that processes of legitimation within the supranational public sphere are critical to ensuring the legitimacy of supranational law, and that the emerging normative fault-line with respect to the hegemonic order provides an opportunity for such processes to proliferate. To support these arguments, I provide a two-step approach to the legitimation of supranational law. The first step demonstrates the function of dissent in weakening the hegemonic order and lays the groundwork for the second step, which focuses on the role of justification in moderating cognitive dissonance.

Throughout this project, I refer to the writings of one theorist in particular: Jürgen Habermas. My use of Habermasian theory is important to point out at this stage because it helps to clarify the direction that I take in terms of my conceptual development, and it also illustrates the broad methodological approach that I apply throughout this project. I situate myself in the debate on supranational law by developing many of my arguments in relation to Habermas's writings, using different components of his theories for the purposes of supporting and/or contrasting my arguments. For example, early on in this project, I use his interpretation of cognitive dissonance as the basis for my overall argument, and further along, it becomes clear that his particular conceptualization of the public sphere is critical to my conception of the notion of a supranational public sphere. Finally, Habermas's notion of the democratic principle provides a critical reference point against which I am able to develop my proceduralist theory of supranational law in the final chapter.

Given the complexity not only of the dilemma, but also the proposed response, I take a two-step approach to this thesis. First, I address the roots of cognitive dissonance by uncovering its constitutive elements and functions, and by explaining how cognitive dissonance affects the

legitimacy of supranational law. In doing so, it becomes apparent that cognitive dissonance is related to the notion of internal coherence, which is itself central to the production and the establishment of ideological domination within the context of a hegemonic order. Once the connections between supranational law and hegemony have been explicated, I begin to conceptualize my response. My proposed response to the problem of cognitive dissonance is based on Habermas's proceduralist conception of law that prioritizes processes of legitimation, participation, and the public sphere. Following Habermas's approach, I posit a process of legitimation that centres on the participation of members of the *supranational* public sphere, a concept that is critical to my proceduralist theory of supranational law.

In the first chapter, the objective is to conceptualize the problem of cognitive dissonance, and to develop an understanding of the contemporary debate over international and cosmopolitan legality and morality. To do so, I provide an initial discussion of the terminology of global crisis and global responsibility, focusing on how these two terms help to clarify the nature of the debate. From there, I provide an initial description of the problem of cognitive dissonance, which I illustrate through the case studies where I conceptualize the problem in more pragmatic terms, dealing with the negative implications that result from cognitive dissonance, as evidenced by the NATO intervention in Kosovo and the problem of HIV/AIDS in Sub-Saharan Africa. With a pragmatic understanding of cognitive dissonance, I provide an analysis of different cosmopolitan approaches to the legality/morality debate, which is important as it lends some historical insights and helps to situate my argument within that stream of literature.

In the second chapter, I focus on developing the key concepts in greater detail, in order to elucidate the negative implications that cognitive dissonance has for the legitimacy of supranational law. To perform this task, I refer widely to Robert W. Cox's work to establish an

understanding of hegemony. I then move on to Alan Hunt's essay on ideological domination and internal coherence, which leads me into a discussion of how cognitive dissonance is necessitated by the conditions of hegemony, thereby contributing to the weak legitimacy of supranational law. With this understanding of the internal incoherence of supranational law and its practical implications, I am able to then move on to address the first step in my proceduralist exercise.

In the third chapter, I focus on developing a proceduralist theory of supranational law in greater detail. I build on Habermas's proceduralist theory of law by expanding it to the international level, paying particular attention to the concept of the supranational public sphere as it relates to his notion of the public sphere in the domestic context. Using Habermasian argumentation related to his proceduralist theory, I contend that processes of legitimation are critical to the effective moderation of the fluctuation between law and morality, and explain how such processes may be conceptualized at the global level.

As I move through each chapter, I repeatedly refer to three key points: the problem of cognitive dissonance, the weak legitimacy of supranational law under conditions of hegemony, and the moderation of the fluctuation between law and morality. At each stage, I build on the arguments from before to illustrate the degree to which these three points are interrelated. Towards the end, following the development of my proceduralist account, I re-visit the original case studies to summarize and apply the concepts that I develop in the previous chapters. While my objective is not to provide a solution to the HIV/AIDS predicament in Africa, for example, it is nonetheless beneficial to return to the original case studies to test the theoretical claims that are promoted in this thesis.

CHAPTER 1: COGNITIVE DISSONANCE AND SUPRANATIONAL LAW

To establish the parameters of this project, I explain my normative-theoretical standpoint in the context of the cosmopolitan debate around the legitimacy of supranational law as a response to global crises. The value of this exercise is two-fold: first, it provides an opportunity to address the vital features of the debate itself; and second, it is the foundational step in developing an understanding of the integral role of the supranational public sphere in the legitimation of supranational law, which I develop further in the following chapters. Upon entering into this stream of cosmopolitan discourse, I explicate the fluctuation between morality and law by uncovering the normative fault-line that implicates the nature and effectiveness of globally responsible and legal responses to crises. To uncover the normative fault-line, I examine the relationship between hegemony and the supranational legal framework, which provides insights on the importance of moderating the fluctuation between law and morality.

Beginning with a treatment of relevant terms, I move into a discussion of hegemony, which leads into a discussion of cognitive dissonance as it implicates morality and moralization. Once I have explained the general parameters of this project, I focus on the concepts of cosmopolitan law, international law, and supranational law by situating my position in relation to Immanuel Kant, Jürgen Habermas and Jean L. Cohen. With an understanding of these various theorists' positions and the related terminology, I sketch the scope of the project as I lead into a discussion of the mechanics of cognitive dissonance in more detail in the second chapter.

1.1 TERMINOLOGY

The task of structuring a common understanding of the scope of this project is facilitated through the dissection of potentially contentious terms. I begin by discussing two normatively laden concepts to provide an understanding of the parameters of the debate: these terms are

'global crisis' and 'global responsibility'. The inconsistent way that international law and cosmopolitan law have been deployed in response to global crises reveals a great deal about the nature of the supranational legal framework in general, particularly in terms of the fluctuation between law and morality.[1] The first step in understanding the intricacies of this relationship, however, is to analyze the term 'global crisis'.

There is a palpable anxiousness on an international level that can be directly attributed to at least seven interrelated problems: environmental degradation, economic disparity, health pandemics, natural disasters, terrorism, civil wars, and genocide. While the language of 'global crises' is frequently employed in streams of literature and thought ranging from human rights and development, to political economy and environmental studies [2], there is no readily available definition that illustrates the scope or meaning of the term 'global crisis' in an explicit manner. A single occurrence associated with any one of the aforementioned interrelated problems that results in either a massive amount of casualties all at once, or threatens the lives of many people over an extended time period can be termed a 'global crisis'. For evidence of this, one need only think of the varied nature of recent world events and the corresponding international responses that ensued. As history illustrates, although an event or occurrence is labeled a 'global crisis', it does not necessarily or directly implicate the life of every inhabitant of the Earth; rather, what we often witness is a global response to even seemingly isolated events with relatively isolated consequences, and even then, a global crisis does not always correlate to the loss of life. The

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[1] Although I explain the difference between international law and cosmopolitan law in detail below, it warrants brief consideration before I continue with this chapter. When I use the term 'international law' I am referring to the type of law that is often known as 'classic' or 'traditional' international law: it is that which pertains to the regulation of inter-state relations, such as laws that govern the global economy. Cosmopolitan law, however, applies to individuals across state boundaries. This type of law boasts a distinctively universal character in that it creates a situation where individuals "...are no longer legal subjects merely as citizens of their respective states, but at the same time as members of a cosmopolitan commonwealth" (Habermas 2004a).

[2] For examples, see Brunkhorst 2000, Olivier & Zettelmeyer 2001, Saurin 2001 respectively.

problematic ambiguity of the term 'global crisis' becomes increasingly apparent when we begin to uncover the selective manner in which the term itself is both applied, or not, and the correlating action or inaction that follows from international agents and agencies.

Closely entwined with the notion of responding to a global crisis is the concept of global responsibility. I view global responsibility as being central to the legitimacy of supranational law because it mobilizes assent and dissent through participation, which is central to my proceduralist approach. Where there is a strong sense of global responsibility, there is a corresponding willingness to respond more effectively to global crises; however, it is only with some real degree of legitimacy that supranational law has the pragmatic means to address global crises. The normative force of this argument can be further understood with an explanation of the concept of 'global responsibility' itself. My conception of global responsibility may be viewed in a similar fashion as Ulrich Beck's. He views it as arising from globalization, as evidenced in the following statement: "...with the erosion of territorially-based state power the hour has come for 'global responsibility'" (Beck 2000:86). This quote highlights the idea that power, as previously contained and employed within the nation-state, is now being exercised beyond national borders, with serious consequences.

To further illustrate this phenomenon, Daniele Archibugi states: "...the external threats to the state from the process of globalization and the internal demands for greater autonomy give new force to the old aphorism that the state is too large for small issues, too small for bigger ones. It is here that pressures arise for a new form of world governance..." (2003:4). It is in reference to this "new form of world governance" that I see global responsibility playing a vital role. Rather like Beck, I allude to the dangers inherent in the misappropriation of this type of 'responsibility', specifically as I provide an analysis of international law, cosmopolitan law, and

state sovereignty in the context of the 1999 intervention in Kosovo. The contemporary morality/legality dilemma around sovereignty is explained effectively by Habermas, who states:

> The constitutional state has realized the enormous civilizational achievement of taming political power by legal means on the basis of recognizing the sovereignty of the subjects of international law, whereas the establishment of a cosmopolitan legal order places the independence of the nation-state in question. Does the universalism of the Enlightenment collide here with the obstinancy of political power ineradicably inscribed in the drive for the collective self-assertion of a particular community? That is the realist thorn in the flesh of the politics of human rights. (1999a:267)

This conundrum over legal action and global responsibility has been the subject of many political, social, and legal theories. For example, Costas Douzinas captures the sense of urgency behind the debate over the morality and legality of responses to global crises: "[t]he willingness of Western powers to use force for apparently moral purposes has become a central (and worrying) characteristic of the post-Cold War settlement" (2003:169). I conceptualize the notion of global responsibility as being a driving force behind the processes that contribute to legitimate legal and moral responses to global crises. These notions of global responsibility and crisis are further explained and tested in the context of the accounts of Kosovo and HIV/AIDS in Sub-Saharan Africa, in the following chapter, where supranational law's lack of legitimacy demonstrates the problematic fluctuation between law and morality. The essential concern that underlies this thesis is that the legitimacy of supranational law as a mechanism through which global crises can be addressed in *both* a morally- and legally-responsible manner is compromised by the prevailing hegemonic conditions.

1.2 Hegemony & Law

In the introduction, I refer to "hegemony" and "hegemonic order" to contextualize my central argument. I conceptualize the current hegemonic order as one that is dominated by American political, military, and economic power. This discussion of hegemony provides

insights on the procedural theory that I present in the third chapter in response to the weak legitimacy of supranational law under conditions of hegemony.

Taking a controversial approach, Perry Anderson provides an argument that demonstrates the destructive pervasiveness of the dominant ideology as perpetuated by the hegemonic order. Speaking of the Bush Doctrine and relating it to the post Cold War history of military interventions, he provides this cautionary statement: "[t]he doctrine of pre-emption is a menace to every state that might in future cross the will of the hegemon or its allies...The arrogance of the international community and its rights of intervention across the globe are not a series of arbitrary events or disconnected episodes; they compose a system, which needs to be fought with a coherence not less than its own" (2002:30). It is this sort of recognition of American hegemony that provides the normative impetus for my proceduralist theory of supranational law.

Robert W. Cox's conceptualization of hegemony borrows largely from Antonio Gramsci's perspective, however Cox goes further to underline the importance of an active public sphere in promoting change not only on a domestic level, but internationally as well. To define his notion of hegemony, Cox notes that:

> [i]t means dominance of a particular kind where the dominant state creates an order based ideologically on a broad measure of consent, functioning according to general principles that in fact ensure the continuing supremacy of the leading state or states and leading social classes but at the same time offer some measure or prospect of satisfaction to the less powerful. (1987:7)

This quote is important insofar as Cox recognizes that there must be an element of appeasement that provides the hegemonic order with a degree of consent from the subordinate classes within global society. The recognition and tempered incorporation of the interests of less powerful groups speaks also to the notion of 'incorporative hegemony', as discussed by Trevor Purvis and Alan Hunt. This concept of 'incorporative hegemony' implies a movement away from a strictly class-based approach to hegemony. To this extent, Purvis and Hunt's conceptualization speaks

to the hegemonic project as an exercise in compromise. Like Purvis and Hunt, I contend that the notion of incorporative hegemony is indeed an exercise in compromise, but one that is largely performed for the sake of having to establish an element of consent from the subordinate groups as a strategy of hegemonic legitimization, or as Purvis and Hunt note, as a strategy of establishing a "successful hegemony" (1999:473). I further argue that this notion of 'compromise for consent' applies to the current hegemonic order in the international context, where the US is the hegemonic power, and the 'subordinate group' consists of, for the most part, all other countries.

To gain an appreciation for how the US has been able to achieve its status as world hegemon, however, one would have to recount historical events since World War II to gain an adequate understanding of the types of compromises that have been offered that have helped the US not only establish, but also maintain its strength as the hegemonic power. Key among these is the global economy, where various types of agreements offer capital and/or military protection to the subordinates in exchange for greater economic, military and political power for the US. This view is supported by Stephen Gill, who writes: "...I suggest that the social forces that benefit most from, and that largely consent to the frameworks of accumulation and social reproduction associated with the US-led project of globalization...are protected by coercive panoptic (surveillance) and carceral systems and ultimately by military power" (2003:196).

The degree to which the US is the world's dominant power in economic, political and military terms (Harvey 2003, Johnson 2004) has direct implications for the nature of the supranational legal framework, and thus, for the legitimacy of supranational law. With almost total control over the structures that support the global economy, and with unparalleled military might, the US is able to maintain control over the supranational legal framework, and manipulate

it to benefit its own ends. Linking the above discussion of American hegemony to a discussion of law, Peter Fitzpatrick, on what he terms the "American Empire", writes: "to borrow from a recent account of 'the new world order' widely hailed for its eternal verities, it is 'the weak' who place ultimate reliance on law, including international law, and the 'power' of the United States that can and will ultimately act untrammelled [*sic*] by law, especially when 'multilateralism is impossible and unilateral action unavoidable'"(2003:431). The relevance of this statement is given greater consideration below, particularly as this discussion elucidates the fluctuation between law and morality and its negative effects on the legitimacy of supranational law.

My critique of the weak legitimacy of supranational law is based on the degree to which the current hegemonic order has molded the corresponding supranational legal framework in a manner that suits its own interests. I argue that, as a result of the American hegemony over the legal framework, a normative fault-line has emerged, particularly in the last decade, which compromises the legitimacy of the supranational laws that are produced and enforced within this framework. This normative fault-line is characterized by a sharp divide between the goals and objectives of the hegemon versus the more normative goals and objectives of the 'subordinate groups'. As the normative fault-line expands, it appears that it is becoming increasingly difficult for the hegemonic power to appease the subordinate groups for the purposes of maintaining consent and order. In the next chapter, I discuss how the hegemonic order uses law and the legal structure to establish and attempt to perpetuate hegemonic control as a strategy of ideological domination. This strategy involves the attempt to achieve the 'internal coherence' of law, which I contend necessitates cognitive dissonance by not effectively moderating the fluctuation between law and morality. This ineffectiveness contributes to the widening of the normative fault-line, and is evidence that the legitimacy of supranational law depends on the degree to

which cognitive dissonance is moderated. For these reasons, I contend that the legitimacy of supranational law depends on the moderation of the fluctuation between law and morality. I contend that the normative fault-line that is currently compromising the legitimacy of supranational law will begin to close through processes of justification as the normative authority that was once held by the hegemon shifts to the supranational public sphere. It is the nature of this normative "closure" that I attempt to conceptualize in the third chapter.

1.3 Cognitive Dissonance

As the following chapters illustrate, the successful moderation of the fluctuation between law and morality necessarily corresponds to the degree of legitimacy that is attributed to supranational law itself. I contend that for supranational law to be legitimately enforced as a response to any given global crisis, the "cognitive dissonance" affecting the legitimacy of law must be controlled and minimized. I borrow this notion of "cognitive dissonance" from Habermas, who understands it as the violence that arises when the claims to universal morality, especially around human rights, conflict with the driving interests of the hegemonic power (Habermas 2004a). The notion of cognitive dissonance corresponds to the concept of the normative fault-line, as I explain in my treatment of hegemony, and as I further elucidate in the next chapter when I discuss internal coherence. I view cognitive dissonance as being a consequence of the problematic, but in some ways unavoidable, fluctuation between law and morality in a broader sense. The term 'fluctuation' refers to the variable proximity of law and morality that is upheld to facilitate the legitimation of law. Of critical import for the purposes of this thesis is the idea that the fluctuation between law and morality is in some instances promoted for the purposes of perpetuating the hegemonic order.

Habermas's treatment of this fluctuation demonstrates the complexity of the relationship between law and morality. While he views morality as a "standard for legitimate law", and argues that the fundamental norms of law and morality are "grounded in the same discourse principle", he is also wary of the unmediated *moralization of politics* (1996:206-7). At this point, I offer two points of clarification that help to establish a deeper understanding of cognitive dissonance: first, I clarify my understanding of morality through an account of Habermas's understanding of morality; and second, I explain my conceptualization of the moralization of *law*, and how it is similar to, and differs from, the concept of the moralization of *politics*.

1.3.1 Morality

I invoke a Habermasian conceptualization of morality, which is to say that I understand morality as having universalistic qualities that are reflected in normative presuppositions, which, once uncovered and analyzed, provide a degree of "self-understanding" (Habermas 1996:xl-xlii). The idea that morality is reflected in normative presuppositions elucidates the central feature of the notion of morality that permeates this thesis. Habermas focuses on the normative presuppositions that underlie legal reason and practice, and communicative reason and practice, to draw-out a universalistic conceptualization of morality. He contends that, even though there is no longer a strong metaphysical rationale to support the "moral ought" in legal reason and practice, for example, morality is no less exhibited in the normative presuppositions that constitute the foundation upon which legal practice and reason are built.

Taken a step further, there is a normative presupposition with respect to legal practice and reason that links law to rights. On the interrelation among law, morality, universality and rights, Habermas states: "[w]hat gives human rights the appearance of being moral rights is neither their content nor even their structure but rather their form of validity, which points

beyond the legal order of the nation state" (1997:137). The validity of human rights reflects an element of universalistic morality that, in turn, is embedded in legal practice and reason, as well as in communicative action and reason. Describing the nature of the normative presuppositions that constitute law, Habermas writes: "[t]he concept of a law or legal statute makes explicit the idea of equal treatment already found in the concept of right: in the form of universal and abstract laws all subjects receive the same rights" (1996:83). Habermas, however, highlights a point of difference between moral and legal norms, stating "...basic rights are equipped with such universal validity claims precisely because they can be justified *exclusively* from the moral point of view. Other legal norms can certainly *also* be justified with the help of moral arguments, but in general further ethical-political and pragmatic considerations play a role in their justification" (1997:138). At the same time, Habermas is wary of prioritizing moral norms over legal norms: "...at the postmetaphysical level of justification, legal and moral rules are *simultaneously* differentiated from traditional ethical life and appear *side by side* as two different but mutually complementary kinds of action norms" (1996:105). The central points of this quote are given further consideration below.

The basis of Habermas's position in Between Facts and Norms stems from a desire to recover validity claims relating to morality from the legal realist assertions around the saliency of practical reason (1996: xl, 5)[3], which he does, in part, by linking the legitimacy of law to the validity of moral claims (1996:33). To explain the elements that constitute the legitimacy of law, Habermas analyzes the connection between law, morality and legitimacy. He suggests that moral claims cannot be separated from law; rather, he asserts that moral claims underpin legal

[3] Although, I should note, he is wary of prioritizing the "normative approach" over the "objectivistic approach" (1996:6). Instead, he asserts that it is best to be "open to different methodological standpoints", which is demonstrated in his notion of communicative action, which attempts to balance practical reason and morality.

norms. Although my methodology and subject matter varies from Habermas's, I also endeavour to balance morality and more pragmatic concerns related to legitimacy and enforcement. My position is that morality, insofar as it constitutes normative presuppositions in a general sense, cannot be separated from law without compromising the legitimacy of the law itself. In other words, using the language from the previous paragraph, to separate law from its normative presuppositions is to separate law from a universalistic conceptualization of rights and morality. I link morality to the legitimacy of law by positing a theory that endorses and promotes participation for the purposes of justification, which I conceptualize within the actuality of the prevailing hegemonic conditions. In this sense, hegemonic powers, because of the inevitability of conflicting interests, force either a convergence or divergence between law and morality, each of which has a negative impact on the legitimacy of law.

1.3.2 Moralization of Law

The notion of 'moralization' relates, in part, to what has been referred to as military humanism (Beck 2000). Habermas is wary of the use of moral claims as a means of justifying political actions that are primarily motivated by interests other than the achievement of a just outcome. It is in this sense that Habermas is wary of the moralization of *politics*. I apply a similar rationale in conceptualizing the moralization of *law*, except that I am more interested in the ramifications associated with the use of moral claims to legitimize illegal actions. In essence, the moralization of law implicates the moralization of politics because, simply put, law is inexorably entwined with politics. However, by focusing on the moralization of law, I seek to provide a deeper understanding of the fluctuation between law and morality and how this relates to ideological domination, as I discuss in the next chapter. To the extent that politics can be coupled with moral claims for the purposes of satisfying specific interests, I contend that the

same can occur with respect to law. At this level, my approach to morality takes on a more Schmittian dimension (Schmitt 1996:54). While previously I stated that to separate law from morality would be akin to separating law from normative presuppositions around rights, here I warn of the moralization of law, which is to warn of what Jean L. Cohen calls the "political instrumentalization" of supranational law (2004:3). The mechanics of this process are explained in greater depth in the discussion of internal coherence in the next chapter. To be clear, however, my account of the moralization of law constitutes only half of the problem of cognitive dissonance. The other, equally important aspect of this project is to address inaction; that is to say, to address the *divergence* between law and morality and the impact of this on the legitimacy of supranational law.

Taking this account and turning it into a more normative prescription, it is clear that, on one hand, law should not be separated from morality, and on the other hand, law should not be moralized for the purposes of achieving specific political ends. The degree of divergence and convergence that occurs with respect to law and morality directly implicates the legitimacy of the law itself, and conversely, the legitimizing processes of supranational law directly implicate the degree of divergence and convergence between law and morality. In this sense, I view cognitive dissonance as taking place when there is either a separation between law and morality (divergence), or similarly when law and morality come together in such a way that the moralization of law occurs (convergence). When this happens, cognitive dissonance can be conceived as a symptom of the weak legitimacy of supranational law, which results in ineffective and/or unjust responses to global crises.

Stemming from the notions of divergence and convergence, cognitive dissonance can be thought of as producing two key outcomes: illegal action and immoral inaction. On one hand,

cognitive dissonance results in 'illegal' responses to global crises when the law invoked does not undergo processes of legitimation that would require the justification of the legal norm, effectively *negating* the counter-claims. On the other hand, cognitive dissonance results in 'immoral' responses to global crises when the moral impetus behind legal action is denied *because of* the apparently 'insuperable' conflict of interest. My objective is to develop a proceduralist theory of supranational law that prioritizes justification as a means of navigating around the problem of cognitive dissonance. I contend that the effective moderation of the fluctuation between law and morality is possible through carefully constituted processes of legitimation built on a principle of justification.

In the paragraphs and chapters that follow, I argue that the act of justification promotes a higher threshold of legitimation than does the hegemonic strategy of legitimation, which is centred on the attainment of internal coherence. The act of justification, however, can be successful in moderating the fluctuation only insofar as it is accompanied by a growing sense of global responsibility, which helps to promote the weakening of American hegemony and the strengthening of the supranational public sphere. These interrelated processes support the two-step approach to the legitimation of supranational law that I offer in the introduction. First, the problematic strategies of hegemonic legitimation alongside the growing sense of global responsibility promote dissent and the possible weakening of the hegemonic order. With the weakening of the normative authority of the hegemon, the influence of the supranational public sphere on the legitimacy of law is strengthened, and it can then undertake discursive processes that are centred on the act of justification. The practice of justification in the discursive process helps to ensure against the strategic convergence and/or divergence between law and morality that is common under the current conditions of American hegemony. For this reason, I contend

that a procedural theory that strives towards the moderation of the law/morality flux is critical to the legitimacy of supranational law. Ultimately, deliberatively legitimized supranational law should minimize the effects of cognitive dissonance, thereby facilitating legal and moral responses to global crises.

1.4 Cosmopolitan Law, International Law, and Supranational Law

With this understanding of cognitive dissonance, hegemony, and what I mean by hegemonic control over the supranational framework, I move on to discuss other key terms of this thesis: cosmopolitan law, international law and supranational law. In this section, I situate my arguments in the context of the cosmopolitan debate around the perceived transition from international law to cosmopolitan law. In doing so, I attempt to provide a deeper understanding of how the hegemonic order affects the legitimacy of supranational law by drawing-out the fluctuation between law and morality and the implications that this has for state sovereignty.

It is important, first, to offer a brief acknowledgement of what seems to be the theoretical standard against which most cosmopolitan perspectives are at least initially conceptualized. While certain descriptive components of his proposal have since been negated or refuted (Bohman & Lutz-Bachmann 1997:4), there are nonetheless important insights contained in Kant's 'cosmopolitan ideal' that continue to bear significance in the contemporary context. Most political and legal theorists who are concerned with questions of international relations and supranational law, writing in the 200 years since Kant's "Perpetual Peace", have situated their own positions by establishing the extent to which their approach reflects or differs from what has come to be known as the 'Kantian Project'. For the purposes of this project, the most prominent theorist to have built his theory in direct relation to many aspects of Kant's writings is Jürgen Habermas. On the relevance of the Kantian Project, Habermas states: "[w]ith his conception of a

cosmopolitan condition, Kant took a decisive step beyond an international law which remained oriented exclusively to states" (Habermas 2004a). An analysis of the Kantian Project, in both its original form and in its conceptual re-workings by Habermas, provides a foundation upon which I introduce the central debates around state sovereignty and the distinction between international law and cosmopolitan law, as a means of establishing the basis of my argument in favour of a proceduralist theory of supranational law.

1.4.1 From International Law to Cosmopolitan Law: Situating State Sovereignty

Writing in the late 18th century, during the revolutionary years in France and the United States, Immanuel Kant constructs his 'cosmopolitan ideal' in his writings on "Perpetual Peace" in particular, and to a lesser degree in "Universal History" (Kant 1991a, 1991b). This ideal stipulates the conditions that are necessary for the establishment of a cosmopolitan order of states in an attempt to balance republican-state sovereignty with the normative objective of 'perpetual peace' among these states (Kant 1991a:94-100). In describing how this peace is to be achieved, Kant writes: "...peace can neither be inaugurated nor secured without a general agreement between the nations; thus a particular kind of league, which we might call a *pacific federation* (*foedus pacificum*) is required" (1991a:104). It is this notion of a federation, characterized by each state's commitment to its republican constitution, that makes peace possible. For Kant, peace is achieved and maintained through an adherence to the principles upheld by the republican constitution, as he illustrates: "...under a constitution where the subject is not a citizen, and which is therefore not republican, it is the simplest thing in the world to go to war" (1991a:100). On the relevance of a republican constitution, Kant states: "[a] *republican constitution* is founded upon three principles: firstly, the principle of *freedom* for all members of a society (of men); secondly, the principle of the *dependence* of everyone upon a single common

legislation (as subjects); and thirdly, the principle of legal *equality* for everyone (as citizens)" (1991a:99). These principles, when mutually reinforced through a pacific federation, contribute to the potential for perpetual peace among nations.

As a strategy of realizing the cosmopolitan ideal, Kant "seeks to achieve peace by instituting a new sort of public law" (Bohman & Lutz-Bachmann 1997:5). This "new sort of public law" speaks to what is widely understood in current literature as 'cosmopolitan law', and is represented by the principles upheld by Kant's notion of the 'republican constitution' in concert with the pacific federation. On Kant's approach to international law and cosmopolitan law, Habermas remarks: "[a]long with the civil law of states and in place of international law, he now introduces an innovation with broad implications: the idea of a cosmopolitan law based on the rights of the world citizen" (1997:113). For Kant, this transition from international law to cosmopolitan law mirrors the transition from "rights in the state of nature" to "state-sanctioned civil law" (Habermas 1997:116). The former set of rights finds validation in the social contract agreement with the state, while the latter rights are substantiated by membership in the federation, which itself can be conceived as a type of social contract (Kant 1991a:104-5). In proposing a federation of states rather than a world republic, however, it becomes clear that Kant endorses a cosmopolitan approach that is careful not to negate, but rather to work within a system where state sovereignty is at least initially respected (Habermas 1997:128, Kant 1991a:114). Habermas notes that, for Kant "...a distinctly 'cosmopolitan' order was to be distinguished from the legal order within states by virtue of the fact that, unlike individual citizens, states do not subject themselves to the public coercive laws of some supreme power; instead, they retain their existence as individual states" (1997:116). In making this distinction,

Habermas highlights the voluntary nature of Kant's pacific federation, and begins to make his case for a legal obligation, not just between states, but among world citizens.

1.4.1A Habermas's Views on the Transition from International Law to Cosmopolitan Law

To illuminate the distinction between international law and cosmopolitan law in the context of the Kantian Project, Habermas, critical of Kant's stance on state sovereignty, writes: "[t]he point of cosmopolitan law is, rather that it goes over the heads of the collective subjects of international law to give legal status to the individual subjects and justifies their unmediated membership in the association of free and equal world citizens" (1997:128). While Habermas deems the transformation of international law, as a law of states, into cosmopolitan law, as law of world citizens, to be the "core innovation of the Kantian Project", he is nonetheless wary of Kant's assertion that a federation of republican states is the only way of interpreting the goal of the constitutionalization of international law[4] (Habermas 2004a). For Habermas, the central point of contention with respect to Kant's position is that the pacific federation is only *voluntary* in nature, as he contends "[t]his explains why Kant never considers the possibility of a community of peoples under the hegemony of a powerful state as a viable alternative [to the classical-modern world of nation states]". (1997:119). Instead, Habermas asserts that "...a federation that creates the conditions of peace in the long run must differ from merely provisional alliances to the extent that its members must feel *obligated* to subordinate their own *raison d'etat* to the jointly declared goal of 'not deciding their differences by war, but by a

[4] The concept of the "constitutionalization" of international law, or "global constitutionalization", in the Kantian and Habermasian sense speaks to a perceived degree of *legal* crystallization of cosmopolitan ideals in practice at the global level. It is helpful to consider this notion of constitutionalization in concert with Kant's notion of the 'pacific federation' insofar as such a federation would function within the parameters of 'constitutionalized' principles of republican cosmopolitanism. For further insights on the concept of constitutionalism, see Habermas 2004a, and Hauke Brunkhorst 2004 and 2002.

process analogous to a court of law'" (1997:117). Instead of a union of states bound by morality, Habermas envisions a legal arrangement that underlies the "union of peoples" (1997:118). To support this position, Habermas contends that there are important similarities between the legal bind that exists within republican constitutional states, and the type of union of peoples that is emerging under forces of globalization (1997:130-1).

To establish this aforementioned 'legal arrangement' of the union of peoples, Habermas links the juridification of the state of nature in the domestic context to the juridification of the state of nature in the global context (1997:117, 130). Just as citizens are granted and guaranteed rights in law under republican constitutions, rights are also granted in law under a cosmopolitan order. Habermas explains the important consequences that result from the juridification of the "world society" as follows: "[e]stablishing a cosmopolitan order means that violations of human rights are no longer condemned and fought from the moral point of view in an unmediated way, but are rather prosecuted as criminal actions within the framework of a state-organized legal order according the institutionalized legal procedures" (1997:140). While I agree with Habermas that-the juridification of the supranational public sphere is important to the establishment of a legal obligation for the purposes of strengthening the union of peoples, I disagree with his view that, *under the conditions of a hegemonic order*, "...a juridification of the state of nature among states would protect us from a moral de-differentiation of law" (Habermas 1997:140). This is not to say that the eventual protection from moral de-differentiation is not possible; on the contrary, it is, in part, what I strive towards in this thesis. However, regardless of prevailing processes of juridification, as long as the supranational legal framework is under the current type of hegemonic control, then the "violations of human rights" are going to continue to be

"condemned and fought from the moral point of view in an unmediated way", as I explain in the following chapter.

1.4.1B Cohen's Views on the Transition from International Law to Cosmopolitan Law

Jean L. Cohen's remarks on the supposed transition from international law to cosmopolitan law effectively captures the quandary that such a transition poses for theorists, especially around the matter of sovereignty. On this, Cohen states that "...the apparent decoupling of law from the territorial state suggests to many that the latter has lost legal as well as political sovereignty" (2004:1), further suggesting that "[t]oday the very category 'international' appears outdated. The question thus becomes: What is to be the new 'nomos' of the earth and how should we understand globalized law?" (2004:1-2). For some cosmopolitan theorists, cosmopolitan law itself, as it is embodied most accurately by human rights as the law that governs world citizens, is put forward as the new global legal standard. Yet, they view the full transition to a desirable state of cosmopolitanism as impeded by the remnants of state sovereignty. Cohen rejects the idea that sovereignty is diminishing and that it *should* be undercut. Rather, she argues for a 'relational sovereignty' that balances state sovereignty and human rights (Cohen 2004:2). In doing so, she explains the limitations of the 'political realist' approach versus the limitations of the 'legal cosmopolitan' and 'moral cosmopolitan' perspectives by sketching theoretical characterizations. In making the distinction between political realists and moral cosmopolitans, Cohen states:

> Like the political realist, the moral cosmopolitan sees sovereignty as a matter of power politics, involving the strategic calculation of national interest and pure *raison d'état*. Unlike the realists, however, the conclusion drawn by human rights fundamentalists is that international law and the discourse of state sovereignty that it is based on must be abandoned in favor of the protection of human rights. (2004:4).

Cohen develops a dualist approach that accommodates both international law and cosmopolitan law.[5] In doing so, she contends that sovereignty must be recognized as a means of guarding against the misappropriation of the right to intervene by the hegemonic power on the basis of humanitarian claims (2004:4). This approach is termed the 'legal cosmopolitan' perspective, which she describes as being different from political realism and moral cosmopolitanism because it is "...potentially linked to a project radically distinct from empire and pure power politics namely, the democratization of international relations and the updating of international law" (2004:3). According to Cohen, this position is based on "...a revised conception of sovereignty and human rights" (2004:3). While Cohen offers reasons in support of sovereignty (2004:14-5), I am less convinced that sovereignty should be upheld as a defense against the moralization of law. Instead, I propose a proceduralist theory of supranational law as a strategy of ensuring the legitimacy of law without limiting the strength of the normative influence of the cosmopolitan ideal to a defense of sovereignty. This strategy involves striking a balance between international law and cosmopolitan law, as Cohen also attempts to do, however, in developing my proceduralist theory of supranational law, I attempt to moderate the fluctuation between law and morality so as to strike this balance and guard against the "political instrumentalization of 'law'" (2004:3). I contend that the probability of reaching a balance between international law and cosmopolitan law depends not on the relative degree of deference that is paid to state sovereignty, but to the manner in which the fluctuation between law and morality is managed and moderated. I view the question of state sovereignty, in the context of the supposed transition from international law to cosmopolitan law, to be a symptom of the

[5] In attempting to conceptualize such a dualist approach Cohen states: "Cosmopolitan right can supplement - but not replace - sovereignty-based international public law" (2004:4). This demonstrates how she is able to have both types of law exist in a complementary fashion.

larger problems associated with hegemonic control over the supranational legal framework: cognitive dissonance and its effects on the legitimacy of supranational law.

1.4.2 Supranational Law & the Fluctuation between Law and Morality

In this thesis, I use the term 'supranational' because it encompasses both international law and cosmopolitan law, and allows me to focus on the framework within which both types of law are constituted and legitimized. Previously, using definitions from Kant, Habermas, and Cohen, I have described cosmopolitan law as the law that governs, or grants rights to, world citizens. An example of this type of law is the Universal Declaration of Human Rights. Similarly, I have described international law as the law that governs relations between states. Examples of this type of law are the regulations that support the global economic system. Whether it is in the form of multilateral agreements, such as the North American Free Trade Act, or in the form of regulations that support the World Trade Organization's (hereinafter, WTO) mandate, laws in the economic realm may be the most important examples of laws that govern relations between states under conditions of economic globalization. But, the rules against intervention and war under the UN Charter are also important here. While I recognize the extent to which these two branches of supranational law serve conceivably different purposes, I maintain that their legitimacy is derived from the same source (the supranational public sphere), and thus, that their legitimacy is threatened by the same force (the hegemonic order). To the extent that this is the case, I conceptualize a proceduralist theory of supranational law in an attempt to address the legitimacy that constitutes both cosmopolitan law and international law.

I consider the legitimacy of supranational law as being dependent on the moderation of the fluctuation between law and morality through processes of legitimation that occur within the supranational public sphere. As I have already claimed, this fluctuation is promoted under

conditions of hegemony as a strategy of achieving hegemonic legitimation through cognitive dissonance and internal coherence. In providing further support for the necessity of a free and pacific federation, the problem of cognitive dissonance is also addressed, in part, by Kant:

> If the concept of international right is to retain any meaning at all, reason must necessarily couple it with a federation of this kind. The concept of international right becomes meaningless if interpreted as a right to go to war. For this would make it a right to determine what is lawful not by means of universally valid external laws, but by means of one-sided maxims backed up by physical force." (1991a:104-5)

It is the last sentence of the above excerpt that brings the central point of this thesis to light. The justification of universally valid, normative action versus action based on "one-sided maxims backed up by physical force" highlights the conundrum that characterizes the present-day cognitive dissonance in relation to supranational law, which, I argue, limits its legitimacy. To the extent that supranational laws are considered to be universally valid, such laws are also legitimate, therefore rendering the action taken as measures of enforcement of said laws to be acceptable to all.

According to Kantian thought on law and morality, law "...acquires its legitimacy from morality, and it is thus intertwined with morality in important ways" (Olson 2003:274). Reflecting what I state above, Hauke Brunkhorst contends: "[f]or Kant, a moral-ethical war, legitimated by one of the parties on its own, can 'never be a universal law' because 'no one can be judge in his own case' (2004:513). Like Habermas, I too am less inclined to support Kant's idea of a federation of republican states as being the most effective means of achieving a balance between law and morality. To this end, I propose a proceduralist approach that centres on the legitimation of supranational law, wherein the fluctuation between law and morality is moderated through strategies of justification.

The decision to act or not to act in response to global crises forces proponents of the cosmopolitan ideal of peace and security into an ethical quandary, where one is forced to

contemplate at what cost one is willing to pursue the ideal. This introspective turn requires one not only to consider when and how responsible action is justified, but also, when and how *in*action is justified. It is in deciphering a response to both of these questions that the degree to which the relative legitimacy of supranational law is subject to the whims of the powers that constitute the hegemonic order becomes apparent.

For the most part, contemporary theorists recognize the danger that underlies the use of humanitarian claims as justification for war. While for some theorists, such as Michael Ignatieff (2003), the prospect of unilateral action is less troubling, for others, such as myself, the crisis of legitimacy that results is highly problematic. However, as I demonstrate in next chapter's discussion on HIV/AIDS in Africa, the misappropriation of the humanitarian cause by hegemonic powers for the purposes of justifying action is only half of the worry; equally as disconcerting is the problem of inaction in the face of global crises.

In this chapter, I link the cosmopolitan debate around international law and cosmopolitan law to a discussion of cognitive dissonance in the context of hegemony, and begin to link the weak legitimacy of supranational law to the inability of the hegemonic order to moderate the fluctuation between law and morality. In calling for the moderation of this fluctuation, I situate myself within the cosmopolitan literature to gain an understanding of the dynamics of the debate around illegal action and immoral inaction. The initial conceptual linkages that I offer in this chapter collectively comprise the foundation for the broader argument that I explain at length in the balance of this thesis. Each argument that I introduce above, I attempt to explain in greater depth in the following chapters, particularly the arguments around hegemony and cognitive dissonance, and the moderation of the fluctuation between law and morality.

In the following chapter, I attempt to provide a deeper understanding of the problem of cognitive dissonance through an account of Kosovo and HIV/AIDS in Africa, in an effort to explain the degree to which this problem is associated with hegemonic control over the supranational legal framework. I explain how and why the ability to respond in a responsible and legitimate manner to all types of global crises is hindered by the fluctuation between law and morality demonstrating that, under conditions of hegemony, supranational law can only claim weak legitimacy.

CHAPTER 2: HEGEMONY AND COGNITIVE DISSONANCE

This thesis provides a theoretical dissection of hegemony and cognitive dissonance to develop a deeper understanding not only of the complex web of linkages between law and power, but also to gain an appreciation for the elements, forces, and processes that constitute legitimate supranational law. With the introduction of 'cognitive dissonance', I link the legitimacy of supranational law to the fluctuation between law and morality, and in this chapter, I conceptualize cognitive dissonance in relation to the prevailing hegemonic order in greater detail.

Invariably, any meaningful analysis of the ties that bind law to power implies an analysis of politics. Law plays a critical role in the establishment of a legitimate political order, which is as salient in the international context as it is in the domestic context. Habermas expresses the interrelation of politics, power and law as follows: "[b]ecause the medium of state power is constituted in forms of law, political orders draw their recognition from the legitimacy claim of law" (2002:197). This quote highlights the importance of establishing an understanding of the role that law plays in constituting power relations, and conversely, of how power relations in the international context constitute law. On international law and power relations, Martti Koskenniemi goes so far as to contend that the distinction between international law and the 'normative principles of international politics' "...have not been...and cannot be simultaneously maintained", ultimately claiming that international law cannot exist independently from power politics (1989:1). While I am less inclined than Koskenniemi to concede the absolute existence of either international law or cosmopolitan law to power politics, as this thesis continues, Koskenniemi's contention does become important to understanding the degree to which cognitive dissonance arises from the interplay of power politics and supranational law. In other

words, I agree with Koskenniemi's view only insofar as it represents the current state of supranational law as it is under the conditions of American hegemony, that supranational law does not exist independently from power politics. However, when the legitimacy of supranational law is ascribed through processes that have as their central objective the perpetuation of a hegemonic order, it becomes evident that the 'normative principles of international politics' are insufficient grounds for the legitimation of supranational law.

Borrowing somewhat from Kant, I posit that the legitimacy of supranational law can be compromised, or conversely reinforced, depending on the corresponding processes of justification. Even a 'legitimate' international law can be rendered illegitimate if its lawfulness (read 'legitimacy'), is ascribed, as Kant says: "by means of one-sided maxims" (1991a:105).[6] From this statement, it is apparent that the legitimacy of supranational law depends on the degree to which the laws themselves cohere with the objectives and norms of a broader normative framework. As such, the potential of supranational law to provide for legal and moral responses to global crises rests on the extent to which the corresponding processes of legitimation control for the problem of cognitive dissonance. However, I am not convinced that the negative effects of cognitive dissonance can be diminished either through a defense of state sovereignty (no matter how dualistic) (Cohen), or as long as a single hegemon controls the supranational legal framework (Habermas).

In certain respects, the Kantian-Habermasian cosmopolitan ideal of peace and security is limited in its treatment of cosmopolitan law, international law and sovereignty. As a result, I

[6] I first refer to this passage in Kant's writing at the end of the first chapter to explain cognitive dissonance, and to begin to uncover the concept of hegemonic legitimation. I view "one-sided maxims" as the grounds upon which a hegemon legitimizes laws and actions, and I provide examples of this in my analysis of Kosovo and HIV/AIDS, below.

broaden the scope of the debate to include hegemony in relation to the legitimacy of supranational law. The most telling insights on the weak legitimacy of supranational law may be gained by observing situations where sovereignty is respected, and not transgressed, by the hegemonic powers. From this, it is clear that I am less concerned with the question of sovereignty than with the effects of hegemony on supranational law. To be clear I do not attempt to make any normative argument for or against the strengthening of state sovereignty per se; rather, I am interested in providing some insight that goes beyond Cohen's dichotomy between 'realists' and 'cosmopolitans' to show that sovereignty is at most a secondary concern to the strengthening of the supranational public sphere for the effective moderation of cognitive dissonance. The first step to demonstrating the interrelation of hegemony, sovereignty, and legitimate supranational law, however, is to develop a stronger appreciation of the role and mechanics of cognitive dissonance.

As I state in the previous chapter, I borrow the notion of cognitive dissonance from Habermas. He invokes it to describe the fluctuation that occurs when a hegemonic power appeals instrumentally to universal morality as a (deceptive) rationale for action (2004a). Habermas suggests that "[a] government that must, by [*sic*] its own decide on issues of self-defense (pre-emptive strikes), humanitarian interventions, or international tribunals, can operate, according to our scenario, as thoughtfully as it may", but he insists that cognitive dissonance is nevertheless "unavoidable" because "it can never be sure whether it actually separates its own national interests from the universalizable interests that could be shared by other nations" (2004a). There is a clear connection between Habermas's views on cognitive dissonance as being the problematic consequence of actions that are justified by a single force, and Kant's assertions around the problems that arise as a result of attaining lawfulness by means of one-

sided maxims. From this analysis, it would appear that both theorists recognize the inconceivability of achieving a cosmopolitan order as long as a single hegemonic state dominates the legal framework. Despite such admissions, however, Habermas, in particular, seems to run afoul of his own cautionary observations regarding the extent to which cognitive dissonance compromises the good intentions of a hegemon, and therefore the legitimacy of supranational law.

Habermas maintains that the US, as hegemon, has in the past been at the forefront of the movement towards a cosmopolitan legal order (Habermas 2004a, 2004b). He credits the US with development of the post-1945 internationalism that gave rise to the establishment of the United Nations, as he states: "[t]he US was the driving force behind the UN, which (no accident) has its headquarters in New York. The US set in motion the first international human rights convention, campaigned for the global monitoring of, as well as the juridical and military prosecution of, human rights violations" (2004b). In his more recent works, Habermas recognizes that the US has strayed from this type of 'internationalism', but he remains optimistic, arguing that the hegemon *can and should* play a leading role in the shift from international law to cosmopolitan law (2004a, 2004b). To this end, Habermas states that the US could inspire a different conception than hegemonic liberalism, which is inspired by the objective of an international order of independent liberal states that operate under a peace-securing super-power (Habermas 2004a). I disagree with Habermas on the role of the US in advancing the establishment of a cosmopolitan legal order. The strong claims he makes related to the negative effects and the limitations of the self-interested hegemon contradict the optimistic lens through which he conceives the role of the US. Heeding Habermas's own warnings, I contend that the

legitimacy of supranational law requires more than a new outlook from the US, rather, that it requires the weakening of the hegemonic order.

To demonstrate the nature of the relationship between legitimacy, hegemony, and supranational law, I explain the mechanics of cognitive dissonance in detail by introducing the concepts of internal coherence and weak legitimacy. The objective of the next section is to establish an understanding of the need to moderate the fluctuation between law and morality, and to explain that, under conditions of hegemony, supranational law suffers from weak legitimacy precisely because it *necessitates* cognitive dissonance.

2.1 Internal Coherence & Weak Legitimacy: The Mechanics of Cognitive Dissonance

At the outset of this thesis, I assert that supranational law can claim only weak legitimacy while under conditions of hegemony; this treatment of internal coherence illustrates why and how this is the case. The following discussion attempts to clarify the interrelation of hegemony, legitimacy, and law and morality, which are the key terms and concepts associated with the central problem of this thesis: cognitive dissonance. Incorporating internal coherence into the analysis helps to establish a stronger appreciation for the nature of hegemony, particularly as it implicates the aforementioned concepts of convergence and divergence.

Internal coherence is a strategy for seeking to ensure the perpetuation of ideological domination by concealing the ideological character of laws and the legal structure by presenting law as having embodied the principle of universal justice (Hunt 1993). On the subject of ideological domination, Alan Hunt writes: "[i]deological domination describes those activities and processes whereby the assent to the existing social order is produced and mobilized...Law is ideological in that it conveys or transmits a complex set of attitudes, values, and theories about

aspects of society" (1993:25). This quote links the legitimacy of law to ideological domination in a paradoxical manner, as I discuss below.

I understand internal coherence to be as much an objective as it is a process. Specifically, I interpret it as the process of legitimation that leads to the formation of compromises upon which a "successful hegemony" is founded (hence the term that I have been using "hegemonic legitimation"). Normatively-based tension between the hegemon and the subordinates can at best be concealed through strategies of internal coherence, as explained by Hunt, who goes on to note that the ideological functions of the state "...cannot operate exclusively as ideological forces, they must find some expression in the actual practice embodied within the legal system" (1993:19). Like Hunt, I argue that the attempt to develop apparently legitimate law is facilitated by the relative amount of control and power any given group possesses in relation to law and its supporting structures. The internal coherence of law, then, is achieved when the ideological forces of the hegemon are embedded in the practices of the legal system in such a way that allow the hegemonic order to be assented to in a substantial manner. Therefore, building on Hunt's main assertions, the success of hegemony rests on two related processes of 'embodiment': the extent to which the ideological forces of the state are "embodied within the legal system", and the extent to which the legal system is seen to embody the principle of universal justice[7]. Taken further, the relative effectiveness of these processes of embodiment corresponds to the success of the hegemon in reaching compromises for the purposes of facilitating assent.

[7] This concept of 'universal justice' is, of course, contentious. In this context, I view it more as a tool for the successful establishment of a hegemonic order insofar as it is broadly representative of the shared moral values of the individuals within the hegemonic state. That is to say, the objective of having law and the legal structure appear to embody the principle of universal justice is a strategy of concealing the ideological functions by maintaining a convergence between law and morality. While I do not feel that it is necessary to enter into a discussion of the meaning of universal justice at this time, I do recognize that it is a highly contestable concept.

Cognitive dissonance is thereby necessitated by the very practice of internal coherence. To maintain the hegemonic order, the ideological forces of the state (as expressed through law) must been seen to cohere with the principle of universal justice; this is what I have termed the 'convergence' between law and morality. The paradox is this: when the law is internally coherent, cognitive dissonance is more pronounced. Internal coherence, then, facilitates the perpetuation of the dominant ideology but compromises the legitimacy of supranational laws. To foster the system of ideological domination, the hegemon forces a dissonance in striving for the internal coherence of law. The very processes of embodiment that facilitate assent consist of subtle strategies that conceal ideological functions while promoting the principle of universal justice. However, these strategies, which are central to the attainment of internal coherence, can only produce the weak legitimacy of law. Due to a combination of subtle tactics of concealment and embodiment, which necessitate cognitive dissonance, law can only claim weak legitimacy. There is invariably a tension between the political, legal and economic objectives of the hegemon, and the moral norms of the subordinates; I conceptualize this paradox as a reinterpretation of what Habermas means when he speaks to the 'inevitability' of cognitive dissonance under conditions of hegemony. It is the legitimacy of laws that are produced and enforced under such conditions that is of concern.

To illustrate the process of internal coherence and its effects on the legitimacy of law, I look to the laws of the global economic structure for some examples of internal coherence that produces cognitive dissonance and weak legitimacy. The regulative structure that supports the global economy is one of the more observable instances of internal coherence in process. To begin with, American hegemonic forces that uphold the capitalist ideology have been successfully embedded in the legal structure of the global economy. The tenet of economic

liberalization is reflected in the modus operandi of the central institutions of the global economy, namely the WTO, World Bank and the International Monetary Fund (hereinafter, IMF). Perhaps somewhat counter-intuitively, however, each of these institutions also appears to maintain a strong position of social justice and a progressive concern with development issues. One need not look much further than the WTO's Doha Development Round, Declaration and the resulting Agenda (WTO 2001), and the IMF's Poverty Reduction and Growth Facility (IMF 1999) for evidence of this. As a result of these types of anti-poverty/equality agendas, policies and regulations that appear to promote a more 'just' outlook have begun to proliferate in the global economic sphere. This meets the second criterion of internal coherence, that laws be seen to embody the principle of universal justice. While it is arguable whether or not the redistributive policies have had any meaningful effects in terms of rectifying the dramatic inequalities that characterize the global economic sphere, it is without question that the nation-states and corporations that support the American hegemonic order have benefited. From this brief analysis, it is increasingly evident that the process of internal coherence is central to promoting the ideological objectives of American hegemony.

In the context of his discussion on ideological domination, Hunt maintains that the means by which ideological domination is established and maintained involve processes that produce assent, stating that "[t]he notion of assent embraces both the idea of legitimacy as active assent and also acceptance as the passive form" (1993:25). According to Hunt's interpretation of Engels, internally coherent law is a central mechanism through which ideological domination is achieved and maintained. Through the processes of compromise, active assent and passive acceptance of law, in particular, ideological domination is realized to the extent that the laws themselves are seen to embody the universal notion of justice. This process, what I call

'hegemonic legitimation', produces what I have previously alluded to as the 'weak legitimacy' of law. Under conditions of internal coherence, with cognitive dissonance resulting from internally coherent law, the law itself can claim weak legitimacy at the most. As long as the processes of ideological domination mobilize assent and mitigate the threat of dissent by means of internal coherence, then the law itself cannot claim full legitimacy. According to this interpretation, internal coherence produces cognitive dissonance, but in doing so, conceals the ideological forces, through compromises, allowing for the perpetuation of the hegemonic order. To demonstrate how this process occurs and the negative impacts that it has on the legitimacy of law, I consider the examples of Kosovo and HIV/AIDS in Africa.

As described above, internal coherence largely plays an ideological role in the context of this treatment of hegemony. In this sense, internal coherence gives rise to the convergence between law and morality for the purposes of achieving ideological ends. However, in the first chapter I conceptualize cognitive dissonance as necessitating either the convergence *or* divergence between law and morality. To reconcile these two arguments, I offer an expanded understanding of internal coherence to include instances where the divergence between law and morality is forced in order to achieve ideological ends or, more accurately, to avoid moral obligations that are indicative of a broader global responsibility. As my account of Kosovo and HIV/AIDS in Africa illustrates below, if there is more for the hegemon to *gain* by becoming involved in a crisis, then the negative effects of cognitive dissonance will be concealed through strategies of internal coherence. I contend that greater risks, in terms of forcing cognitive dissonance, are taken when there are substantial gains to be made through the action. In this sense, a cost/benefit approach to global crises dictates action within the hegemonic order. The

divergence between law and morality can then be conceived of as a potential response to global crises where the cost of action outweighs the economic or political benefit.

When a hegemon controls the supranational legal framework, the task of legitimizing *in*action also requires attaining internal coherence in law, except in a different manner. In situations of divergence, law is separated from morality for the purposes of legitimizing inaction. This often corresponds to an emphasis on 'classic' international laws around state sovereignty. Without a political or economic incentive to force the convergence of law and morality to legitimize action, the hegemon forces divergence to legitimize inaction through an appeal to state sovereignty. By paying deference to state sovereignty, the hegemon circumvents the moral obligation, claiming that to take action would be to violate international law on sovereignty. The internal coherence of law is thus attained by forcing the issue of legality, and not morality in such a manner that invokes the universal principle of justice to legitimize a *legal* claim, rather than a *moral* claim. As a result, internally coherent law again necessitates cognitive dissonance, but this time through different processes for different ends.

I agree with Hunt that under conditions of hegemony, law performs an important ideological function (1993:25). In the same way that ideology serves to sustain relations of domination (Larrain 1994:14), so can law. Like ideology, the more law disconnects itself from existing social values, the more oppressive it may become (Nelken 1984). Because of this separation (or as I have previously referred to it as the 'normative fault-line') laws that are themselves ideological in nature and purpose can claim only weak legitimacy. This statement captures the problematic nature of the aforementioned fluctuation between law and morality. As I demonstrate below, the emerging normative fault-line reflects a tension between the hegemon and the supranational public sphere that can not be effectively managed under conditions of

hegemony. This is because the current hegemonic order cannot legitimately pursue normative ends that inherently conflict with its own dominant ideology, doing so would render the law internally *in*coherent. The end result would expose the ideological forces of law, leading to widespread dissent in response to the hegemonic order.[6]

Under conditions of internal coherence for the purposes of ideological domination, I have already explained that the fluctuation between law and morality is promoted. Processes of embodiment and embeddeness that produce conditions of ideological domination, do not address the problematic nature of cognitive dissonance in a way that would moderate the fluctuation, and therefore cannot allow for the development and enforcement of legitimate law. In conceptualizing my proceduralist approach, I attempt to curb the negative consequences of cognitive dissonance by conceiving processes of justification that moderate the fluctuation between law and morality with the goal of achieving legitimate supranational law.

2.1.1 Cognitive Dissonance & Internal Coherence in Practice

Habermas states: "hegemonic liberalism is not supported by normative reasons...Even if we start from a best case scenario and ascribe the purest motives... to the hegemonic power, the well-intended hegemon will encounter insuperable obstacles" (Habermas 2004a). In making this statement, Habermas correctly points out the futility of relying on the good intentions of a hegemonic power, claiming that, regardless of its motives, the hegemon will not be able to overcome the effects of cognitive dissonance. I contend that the nature of the supranational laws that are developed and enforced, or are blatantly transgressed, under conditions of hegemony

[8] Given that part of the objective of this thesis is to conceptualize a strategy of overcoming the limitations of the hegemonic order, the exposure of the ideological forces of law is a key step in support of a transition from hegemonic strategies of legitimation to supranational processes of legitimation. I expand on this in the last section of this chapter as I conceptualize the opportunity that the emerging normative fault-line represents in terms of the potential for a transition in normative authority and the corresponding legitimizing influences.

have made it such that the unilateral infringement of the sovereignty of a given state is accepted by many as being 'less illegal' or 'more legitimate' than the actions that are taking place within the targeted state. This can be conceived as a divergence between law and morality, as exemplified in the case of the 1999 NATO intervention in Kosovo, where the intervention itself clearly violated international law, but was nonetheless considered by many to be a legitimate action, as discussed in detail below.

On the face of it, the selective violation of international laws that uphold state sovereignty may not be of concern to steadfast proponents of humanitarian intervention, which is to say that some do not immediately see a problem with violating a state's sovereignty when there are humanitarian concerns at stake. In fact, I hold such actions to be, at most, problematic symptoms of the main concern that arises under conditions of hegemony. The crux of the matter comes to the fore when one examines a global crisis that is not caused by civil war, or that does not involve genocide. There are various global crises that do not necessarily involve such state-based, flagrant violations of cosmopolitan norms such as genocide, but that nonetheless have egregious consequences, such as the growing HIV/AIDS pandemic in parts of Africa. The weak legitimacy of supranational law is most obvious in cases such as HIV/AIDS in Africa because it reveals cognitive dissonance on a dramatic, although less widely acknowledged, but equally as problematic level.

The apparent selective and inconsistent deference to state sovereignty by the hegemonic power towards the states implicated in such crises is most clearly a consequence of the attempt at attaining the internal coherence of supranational law. As previously discussed, under conditions of hegemony the processes of embodiment associated with internal coherence force an ideological quality onto law and the supporting legal structures for the purposes of facilitating

assent. However, crises such at HIV/AIDS in Africa place the hegemon in a situation where its more 'selfish' goals related to self-preservation conflict with the strong moral quality of the crisis itself, which I explain in more detail below. At this point, however, I attempt to illustrate that it is not necessarily the practice of selective sovereignty that is the main worry, but it is the varying degree of legitimacy of supranational laws themselves that poses the greatest concern. From this statement, it is clear that I am less concerned with questions of sovereignty per se, than I am with questions of legitimacy. I assert that legally and morally acceptable responses to global crises correspond to the variable degree of legitimacy of supranational law. As I explain above, and demonstrate in the section below, under conditions of hegemony, supranational laws can claim only weak legitimacy, which has a direct impact on the nature of the attention that global crises receive.

2.1.1A Kosovo

The first instance of analysis of supranational law responding to a global crisis that I will consider is the example of Kosovo. While the events that were unraveling in Kosovo during the mid- to late 1990's eventually resulted in a NATO intervention, the term 'global crisis' itself was rarely, if ever, employed. The terms used to describe the situation and garner international support were: 'humanitarian crisis', 'Kosovo crisis', 'Bosnian crisis', 'Yugoslav crisis', among others (Caplan 1998). Although the events in Kosovo were not immediately recognized to be global in scope, after almost eight years of conflict between Serbians and Albanians (Caplan 1998:745), there was eventually a supranational response in 1999. An increase in violent attacks on Albanians towards the end of the 1990s prompted international actors, namely NATO, to put an end to what Caplan calls the "pattern of neglect" that characterized their position on the Serbian/Albanian conflict in the 1990s (1998: 747). On the subject of Kosovo and law, Martti

Koskenniemi writes: "...the obsession to extend the law to such crises, while understandable in historical perspective, enlists political energies to support causes dictated by the hegemonic powers and is unresponsive to the violence and injustice that sustain the global everyday" (2002:160). This quote captures the precise dilemma that I attempt to address: why law extends to some crises, such as Kosovo, and not for others, such as HIV/AIDS in Africa, and how the legitimacy of law is implicated.

It is important to gain from this discussion an understanding of the degree to which hegemonic interests influence supranational law, and how this affects the legitimacy of the law itself. On the intervention in Kosovo, Habermas writes:

> From the perspective of the parameters of classical international law, such an action would have constituted meddling in the internal affairs of a sovereign state, and thus a violation against the prohibition on intervention. According to the premises of the politics of human rights, the intervention is said to be an armed peacekeeping mission, (even without UN mandate implicitly) authorized by the community of nation-states. According to this western interpretation, the war in Kosovo could signify a leap from the classical international law of states to a cosmopolitan law of a global civil society. (1999:264)

This passage accurately captures the nature of the debate pertaining to the conflict in Kosovo. On one hand, the intervention contravened principles of state sovereignty that are enshrined in what Habermas refers to as 'classical international law'. On the other hand, as Habermas suggests, this transgression of international law was considered to be acceptable by many because the intervention was thought necessary to protect human rights, or in other words, because principles that are represented by cosmopolitan law were being contravened. This reflects the dilemma of humanitarian intervention, as mentioned above, and links it to an apparent transition from the prioritization of international laws around sovereignty, to a system where 'cosmopolitan laws' are given greater consideration. Such a transition suggests a notable

shift in the process of legitimation of law and corresponding action: from state-centred, to a more supranational approach to legal and moral responsibility.

Also addressing this dilemma, Douzinas contemplates the problems that arise when apparently illegal actions (in the sense of classical international law) are taken in the name of humanitarianism: "...these criticisms have acquired great urgency in the wake of the war over Kosovo, the first military campaign in history conducted in the name of humanism and human rights....The war gave us the opportunity to assess the claim that human rights have become the new just cause for military action" (2003:167). In the following paragraphs, I assess this claim in the context of cognitive dissonance. Ultimately, I contend that Kosovo represents a problematic convergence between law and morality.

In the example of Kosovo, it is evident that global powers came together to act in the form of a US led NATO initiative; however, the impetus that drove these global powers towards this action is far less discernable. I posit that cosmopolitan laws are invoked as a call to action only when there are a specific set of factors that are in place, and even then the cosmopolitan laws themselves are limited in their scope and legitimacy. David Chandler writes that the 1999 bombing by NATO was welcomed "...as a 'humanitarian' crusade, explicitly setting individual rights above the territorial rights of nation-states" (2003:27). In this instance, there was an early claim, stemming from the knowledge of previous atrocities in during the Bosnian conflict, that the humanitarian situation in this region of the world may have benefited from international intervention. In his writings on Kosovo, however, Richard Caplan suggests that the main driving force behind intervention in Kosovo was the "...shared assumptions about the requirements for regional stability, which have informed international diplomacy from the earliest stages of the crisis in Kosovo. Among these assumptions has been the importance of inhibiting territorial

fragmentation and of keeping Belgrade positively engaged" (1998:746). Despite the claim to be acting on behalf of humanitarianism, Caplan's analysis of what he calls the frequent "sidelining" of Kosovo in the 1990s demonstrates that the saliency of certain factors can be heightened as a strategy of lending greater internal coherence to selected supranational laws. Specifically, such supranational laws that ultimately support the attainment of political or economic objectives are more likely to be upheld and enforced, through strategies of internal coherence, than are laws that offer fewer political or economic benefits (1998:749). Taking a slightly different approach and understanding of the consequences of this type of intervention, Chandler states that "[u]nder the cover of 'international justice', a much more direct reflection of the hierarchy of global power is now being set in place, as new Western agencies are given a jurisdiction above international law" (2003:35). When Chandler uses the term "Western agencies", he is referring specifically to The Hague War Crimes Tribunal for the former Yugoslavia. He is attempting to illustrate that the interests of 'Western' actors (states, and agencies such as the UN and NATO) are being upheld 'under the cover of international justice' through the farcical impartiality of hearings that took place at this Tribunal (2003:34). But this "hierarchy of global power" is indicative of the problematic conditions associated with the hegemonic order and the corresponding supranational legal framework, which compromises the legitimacy of supranational law overall. The hierarchy may be conceptualized in a manner that reflects the structure of a hegemonic order on a broad level. On one hand, at the top of the hierarchy with the most control over the supranational legal framework, is the United States; on the other hand, comprising the lower tiers of the hierarchy, are the 'subordinate' countries with relatively little control over the framework.[9]

[9] The US's place at the top of this hierarchy is the result of a combination of its military strength and its control over a substantial portion of the world's finances. In support of this correlation between legal and economic power, I

Through strategies of internal coherence, in this case by forcing the convergence between law and morality, the hegemon legitimizes its actions through moral claims. It is worth underlining at this stage that the internal reasoning within the NATO community was not necessarily grounded in moral concerns; rather, as I argue here, I suggest that there were other motivating factors that prompted the NATO intervention. However, in order to garner support for its intervention, moral claims were offered by NATO and its supporting parties as the central selling point. According to this position, NATO did not run roughshod over legality in the name of morality per se. It would be more accurate to view the trumping of legality by morality as the NATO's public relations approach, which was a strategy of gathering support for their position. The actual motivating factors behind the intervention, those reasons that prompted NATO and the supporting governments to act, were not necessary or even primarily moral concerns.

To this effect, Brunkhorst notes that "...the trend to replacing the formal constraints of international law whenever they contradict not only US power-political or economic interests but also moral-ethical goals has been clearly discernible since the Kosovo War at the latest" (2004:512). This quote is useful in that it addresses the implications that result from having hegemonic control over the supranational legal framework, namely the moralization of law. While Kosovo can be considered an example of a developing cosmopolitan law prevailing over international law, as Habermas in particular suggests, I refer to the case of Kosovo as an example of internal coherence and cognitive dissonance in practice. For the purpose of this analysis, Kosovo is an example of the convergence of law and morality for the purposes of political ends, in other words, the actions taken in Kosovo represent the moralization of law. I contend that as

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refer to Lauren B. Edelman, who points out that "[l]aw is integrally related to power -- and hence to economic action" (2004:188).

long as the hegemon retains power over the supranational legal framework, the legitimacy of law will be perpetually compromised through strategies of internal coherence that necessitate cognitive dissonance.

2.1.1B HIV/AIDS in Africa

From my account of Kosovo above, it is clear that although the international actors felt sufficiently justified in upholding human rights claims by military force, other factors also had to be in place before these actions were taken. Turning now to the HIV/AIDS health crisis in Africa, where a large scale humanitarian crisis has been unfolding for decades, one must wonder why there has been relatively little action to alleviate the crisis in this area. I focus on Sub-Saharan Africa because most of the nations that comprise this geographical region are less able to gain control of this pandemic without substantial external intervention (Bastos 1999:52, World Health Organization 2004)[7]. In this analysis of HIV/AIDS in Africa, I attempt to illustrate both the need and the opportunity for legitimate supranational laws to address a crisis situation in a decisive legal and moral manner. Not to discount important work that various non-state actors and non-governmental organizations have undertaken, my critique is directed largely at the same dominant actors who intervened on the claim of humanitarianism in other instances, namely Kosovo.

In an attempt to guard against an over-simplified account of HIV/AIDS in Africa, I should point out that there have been a series of legal measures that attempt to control the spread of HIV/AIDS. However, this legal action has largely been originating from within the domestic

[10] The World Health Organization (hereinafter "WHO") reported: "Rates of infection are still on the rise in many countries in sub-Saharan Africa. In 2003 alone, an estimated 3 million people in the region became newly infected." (WHO 2004:3). It is precisely this type of new information on HIV/AIDS in that region of Africa that continues to be a major concern, which is why I have decided to include it in this project as an example of the both the limitations and the potential of supranational law as a response to global crises.

legal spheres. Laws making prostitution and homosexuality illegal are among the examples of steps that have been taken in countries such as Uganda, where, like for many countries in the region, HIV/AIDS is a health concern that is compounded by longstanding economic, social and political division (Barnett & Blaikie 1992:44). While the relative effectiveness of legal approaches adopted within the domestic domain of countries such as Uganda provide interesting insights on the overall effectiveness of legislation as a response to HIV/AIDS in Africa, I take the analysis in a different direction, and attempt to develop an understanding of why supranational laws have not been invoked in the response to the HIV/AIDS pandemic.

There are a variety of conclusions one can draw as to why there is a lack of effective and legitimate laws in place to deal with this type of global crisis. The most relevant account for the purposes of this project is that which is provided by Peter A. Mameli. His argument suggests that a major limitation of law in responding to these types of crises is that, while there is a known situation developing in one area, the "legal" response to this situation is perpetually contested and debated by the most powerful nation-states. To this end, Mameli states "...despite all of the energy devoted to HIV/AIDS issues in [gaining legal saliency in international affairs], it is arguable that these issues have not yet reached the same level of legitimacy in the international community as have other human rights concerns. The way HIV/AIDS discrimination has been handled in international human rights law suggest [*sic*] this notion" (2000:216). Mameli correctly asserts that the nature of the crises itself largely dictates the response from international actors. The human rights angle in the context of the HIV/AIDS crisis in Africa is arguably less obvious, particularly when compared with the example of Kosovo. Although both examples involve the loss of life, the HIV/AIDS pandemic in Africa differs because there is no clear target at which international actors can direct their response. In the case of HIV/AIDS, there is no

single 'aggressor', and the causes and effects of the crisis are complex. Some of the reasons for not taking more of a formal legal approach to containing the pandemic include: the fear of further stigmatizing those living with the disease by drafting specific legislation, and a desire to avoid disrupting efforts that are already in place under the hospices of the UN (Mameli 2000:215).

As a result, there has been an unwillingness within the international community to accept an understanding of the HIV/AIDS crisis when it is couched in human rights language as Mameli speaks to the "...uneasiness within governments with the fact that HIV/AIDS-issue advocates were successfully weaving these and other issues into a human rights-based tapestry" (2000:214)[8]. While Mameli points out that there has been some marginal improvement in making the linkages between HIV/AIDS, law, and human rights, he also contends that

> "...there is a nagging feeling that what needs to be examined once again is the creation of a specific and binding international agreement that outlines the rights of people with, and from, HIV/AIDS. With ongoing efforts to codify HIV/AIDS concerns silently in existing human rights conventions, it may be that the time is ripening for a more public act" (2000:217).

Based on Mameli's insights, the hegemon's lack of a response to the HIV/AIDS crises in Africa can be seen as a consequence of the divergence between law and morality. According to this view, cognitive dissonance does not lead to the moralization of law as it does in the Kosovo example, but instead leads to an equally problematic outcome: immoral inaction. To avoid a moral obligation with respect to the HIV/AIDS crisis, the divergence between law and morality has been perpetuated within the supranational legal framework. Internal coherence on this matter has been achieved by upholding international laws on sovereignty (Mameli 2000:210)

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[11] Mameli provides a list of "HIV/AIDS-related human rights topics" as stated in the UN Commission on Human Rights 1996, which include: non-discrimination and equality before the law; human rights of women; human rights of children; the right to privacy; the right to enjoy the benefits of scientific progress and its applications; the right to liberty of movement; the right to liberty and security of person; the right to education; the freedom of expression and information; and freedom from cruel, inhuman, or degrading treatment or punishment (Mameli 2000:215-6).

while refusing to recognize the legitimacy of human rights claims (Mameli 2000:214). By developing processes that moderate the fluctuation between law and morality more effectively, I contend that law would be more effectively deployed in such situations as the HIV/AIDS pandemic in Africa, which could mean the more expedient and just alleviation of suffering. Inaction in this context demonstrates the degree of cognitive dissonance that results when a particular type of global crisis provides few political or economic incentives for action.

What begins to emerge is a problematic fluctuation between law and morality that is highly dependent on the nature of the crisis itself. For example, Kosovo and HIV/AIDS in Africa represent two types of crises that correspond to two types of cognitive dissonance. The former involves a convergence between law and morality for the purpose of legitimizing formally illegal action based on rhetorical claims of human rights, and the latter involves a divergence between law and morality and a corresponding appeal to state sovereignty for the purposes of legitimizing inaction. At present, the hegemonic nature of the supranational legal framework prioritizes political and economic opportunism to the detriment of entire populations of people who are either suffering from HIV/AIDS, or who are at risk. I contend that it is critical to minimize the cognitive dissonance that currently plagues supranational laws around issues of social justice in particular. To this end, my proceduralist theory of supranational law attempts to moderate the fluctuation between law and morality that is the cause of cognitive dissonance through a prioritization of participation centred on the act of justification, as I explain in the next chapter.

In the cosmopolitan literature, varying analyses of the cognitive dissonance conundrum, as explained above, largely reflect the normative concerns that were most prominently and effectively expressed by Kant, which explains the numerous reconfigurations of the Kantian

Project in recent years. Through an analysis of Kosovo and HIV/AIDS in Africa, I strive to establish an understanding of how the relative divergence or convergence of law and morality at times of global crises prompts cognitive dissonance. This implicates the legitimacy of supranational law in a negative manner insofar as the laws themselves are rendered illegitimate as tools employed primarily in support of the perpetuation of ideological domination.

2.2 The Emerging Normative Fault-line: Global Responsibility and Dissent

I have already mentioned two significant obstacles that must be addressed if the legitimacy of supranational law is to be achieved: cognitive dissonance and hegemonic control over the supranational legal framework. This portion of the thesis is dedicated to clarifying the first step of my two-step approach to legitimation. As a strategy of moderating the fluctuation between law and morality, I propose a proceduralist theory of supranational law. In conceptualizing my proceduralist account, I attempt to address the problem of cognitive dissonance through processes of legitimation that are centred on principles of participation and a supranational public sphere. Prior to an account of my proceduralist approach, however, I must lay the conceptual groundwork by explaining the role of dissent as it relates to the weakening of the hegemonic order. It is in the weakening of the normative authority of American hegemony that the supranational public sphere is strengthened, moderating the fluctuation between law and morality, making the legitimation of supranational law possible.

In the above discussions on cognitive dissonance and global crises, I have considered why such a shift in legitimizing strategies is necessary, at this point I undertake to explain the conditions that make this change possible, and the processes that may bring this vision to fruition. Having established this foundation with respect to the key terms associated with the literature on cosmopolitanism and hegemony, I shift the focus of this discussion from a general

account, to a more detailed treatment of hegemony as it relates to law in the first instance, and then supranational law in the second instance. In doing so, I revisit Hunt's writings on law and hegemony and end with a discussion of the arguments that Habermas provides in his writings on Iraq.

2.2.1 Hegemony, Legitimacy & Supranational Law

In his treatment of internal coherence, Hunt discusses the relationship between ideological domination and law, specifically in the context of hegemony. Hunt writes: "[t]he vital characteristic of 'hegemony' is that it is an active process; it is concerned not merely with the *fact* of consent, but focuses on the creation and the mobilization of that consent" (1993:20). The mechanics of this process were explained in the above discussion of legitimacy and internal coherence: that consent is mobilized through processes of internal coherence that necessitate cognitive dissonance and facilitate compromises. What is important for the purposes of the current discussion is to comprehend the degree to which hegemony requires, creates, and mobilizes consent, and to develop an understanding of how law plays into these processes. On the power of law, Hunt contends that "[i]t is this ability to integrate two critical functions, on the one hand to give practical effect to the interests of the dominant class, and, at the same time, to provide a justification or legitimation for these interests in terms of some higher and apparently universal interest of all classes that demonstrates the real power and influence of law in capitalist society" (1993:32). This quote highlights the function that law plays in both legitimizing and perpetuating the hegemonic order itself. In other words, by assenting to laws, the subjects of these laws are, either passively or actively, consenting to the hegemonic order. Up until this point, both Hunt and Cox underline the importance of the act of consent in relation to the establishment and perpetuation of the hegemonic order, and Cox, in particular, contends that

where the subordinate class is no longer successfully being 'appeased', then there is the potential for change in the manner in which supranational law is legitimized. I prefer Hunt's more subtle understanding of hegemony, however, which he views as an active process that depends on the creation of consent through the two related strategies of embodiment. The reflexive nature of legitimation in relation to hegemony in this instance, and in relation to law as discussed in the context of internal coherence, is critical as it allows for both assent and dissent to take place, thereby minimizing the deterministic quality that would otherwise negatively affect this theory.

With this understanding of the role of assent in relation to hegemony, it is possible now to contemplate the problem of cognitive dissonance as it relates to the fluctuation between law and morality. It is apparent that ideological domination, like legitimation, is a process that requires assent; however, unlike my more normative interpretation of legitimation, ideological domination differs in that it is less able to accommodate widespread morally-based dissent. In the previous chapter, I express my agreement with Purvis and Hunt, who argue that hegemony requires compromises in order to retain a degree of assent that is necessary to establish a "successful hegemony" (1999:473). As long as such compromises are not seen to be benefiting the hegemon, then assent is more likely to be maintained. However, I posit that there are points in the life-cycle of a hegemonic order that certain compromises can no longer be maintained. In particular, the compromises that directly implicate moral value and norms are especially tenuous under conditions of ideological domination. Stated otherwise, I contend that assent is maintained as long as the moral norms held by the 'assentees' are not transgressed or violated by the system of compromise. Where the moral norms are violated, assent is lost and morally-based dissent is more likely to occur. For the most part, through strategies of compromise, the hegemon can maintain its dominance. As I demonstrate above, it is internal coherence that makes these

compromises possible, but it is also in pursuing internal coherence that the weak legitimacy of law results. In the following paragraphs, I expand the scope of analysis to the supranational level in an effort to conceptualize the relationship between supranational hegemonic power and supranational law. In doing so, I illustrate the shift that is taking place in the international/supranational public sphere, and the effects of this in terms of the overall weakening of the hegemonic order.

2.2.2 Dissent & Change

My proceduralist theory of supranational law, unlike the notion of internal coherence, strives to achieve strong legitimacy in law. To begin with, my notion of legitimacy is notably more normatively-focused than Hunt's treatment of law, and is more akin to Habermas's interpretation and application of legitimacy. Revealing the emancipatory drive of both our proceduralist theories, like Habermas, I contend that it is important that law be legitimate to ensure its effective and justified enforcement. However, for us both, the principles of active justification and inclusive participation are themselves the critical components that produce the potential for the attainment of legitimate law. According to Habermas, law is legitimate only if it is justified through processes of active participation in deliberative discourses within the public sphere (Habermas 2004a). Since processes associated with ideological domination are less focused on the *justification* of a law, than they are on the internal coherence of the law, the legitimacy of the law itself is compromised. That is to say, by stifling dissent and necessitating cognitive dissonance, law under most conditions of ideological domination can claim only weak legitimacy. This follows Habermas's perspective, which is expressed as follows: "[a] unilateral anticipation of what would be rationally acceptable to all sides can only be tested by submitting the presumptively unbiased proposal to a discursive procedure of opinion- and will-formation

within a legally institutionalized process" (2004a). Relatedly, the differences between weak and strong legitimacy are critical to the effectiveness of law, and can be readily uncovered through an analysis of how the fluctuation between law and morality is moderated: either through strategies of internal coherence (leading to weak legitimacy), or by means of deliberation centred on the act of justification (leading to stronger legitimacy).

There are two interrelated points that I wish to offer with respect to my interpretation of this opportunity for change. First, I view this potential for change as emanating from the supranational public sphere. This is an important point insofar as it demonstrates the fundamental characteristics of my proposed proceduralist theory. I do not view this change as a highly orchestrated call to action, but rather as a process of reinforcing and strengthening movements that are already in place, as I explain in detail in the next chapter. The second point that I wish to make is that my conceptualization of the processes of legitimation does allow for dissent. It has become apparent that hegemony requires some form of either passive or active assent in order for it to be accepted as legitimate. As I contend above, I consider the need for dissent as important as the need for assent in the legitimation of law and its corresponding framework. Under conditions of hegemony, when assent is replaced by dissent, there is the potential for a change in processes within the supranational legal framework that lead to the legitimacy of law: this is what I refer to as the opportunity for the normative renewal of supranational law.

In conceptualizing this opportunity, I borrow from Habermas's writings on the US invasion of Iraq. This article describes the normative fault-line that I view as providing the necessary conditions in which the change from hegemonic legitimation to proceduralist legitimation can occur. On the subject of the 'hegemonic fracture', Habermas writes:

> For half a century the United States could count as the pacemaker for progress on this cosmopolitan path. With the war in Iraq, it has not only abandoned this role; it has also given up its role as guarantor of international rights. And its violation of international law sets a disastrous precedent for the superpowers of the future. Let us have no illusions: the normative authority of the United States of America lies in ruins. (2003:703)

This passage demonstrates that the weakening, or as Habermas contends the 'ruining', of the US's normative authority corresponds to the weak legitimacy of supranational laws that have been supporting the hegemonic structure since World War II. This effectively illustrates the nature of the opportunity that is being offered by this emerging normative fault-line. As the US loses the 'normative authority' that is required to maintain the internal coherence of supranational law, the ideological functions of law under conditions of hegemony are exposed. As such, the hegemon's control over the legitimizing processes associated with the supranational legal framework is similarly jeopardized. This marks an opportunity to strengthen the legitimizing function of the supranational public sphere, thereby promoting processes of legitimacy that allow for the moderation of the fluctuation between law and morality. However, as I contend throughout this thesis, in order to achieve strong legitimacy of laws, these processes must be structured around a principle of justification that encourages both assent and dissent.

As discussed in the account of the weakening of normative authority, it seems that the stress of cognitive dissonance is becoming too much to bear for the current hegemon. This is particularly telling in the events in recent years where, either through action or inaction, responses to global crises have been highly contentious on both moral and legal levels. I argue that processes of legitimation within the supranational public sphere can lend stronger legitimacy to law if the "inner contradictions" that offend the "conception of right" of existing supranational laws continue to be drawn-out (Hunt 1993:18). In other words, as the legitimacy of the responses to various global crises is called into question, the weak legitimacy of supranational laws is being exposed. The opportunity for change, then, *lies in the combination* of the

exposition of law's weak legitimacy and the increased consideration attributed to global responsibility. With this, there is now an opportunity to strengthen the legitimizing functions of the supranational public sphere with the objective of moving beyond the merely weak legitimacy of supranational law.

Taken in the context of the current discussion of hegemony, the case of Kosovo, as discussed in this chapter, is evidence of competing normative objectives within the hegemonic legal framework, as discussed by Habermas:

> ...a remarkable difference had become visible between the continental European and the Anglo-American powers over strategies for justifying military action. The Europeans had drawn the lesson from the disaster at Srebrenica...thus saw it as a means for making progress toward fully institutionalized civil rights. England and America, conversely, satisfied themselves with the normative goal of promulgating their own liberal order internationally, through violence if necessary. (2003:703)

Kosovo represents an instance of convergence between law and morality as a strategy of legitimizing political ends (Koskenniemi 2004). The case of HIV/AIDS in Sub-Saharan Africa, on the other hand, represents an instance of a divergence between law and morality, which leads to the negation of a global responsibility. In recent years, however, there has been a fracture in the normative authority of the hegemonic order, which has helped to expose the weak legitimacy of the supranational laws that supported this order. Coupled with a growing sense of global responsibility, the result has been a widening gap between the objectives of the hegemon, its subordinates, and the supranational public sphere.

The dissent that these interrelated processes instigates provides an opportunity for the movement away from a strictly hegemonic basis of legitimation towards a more inclusive and normatively coherent process of legitimation so that, in the future, all types of global crises, particularly those such as the HIV/AIDS situation in Africa, may benefit from actions that are supported by legitimate supranational laws. In the context of this thesis, dissent is as much

reactive (in response to moral/legal transgressions by the hegemon) as it is proactive (in response to growing global responsibility). From this standpoint, dissent is not simply a by-product of the exposure of power relations. It is the response to the (continued) violation of some deeply-held moral/legal norms, as much as it is the consequence of globalization and increased interdependencies across borders. As I state above, assent is maintained as long as the moral norms held by the 'assentees' are not violated by the system of compromise that is invoked as part of the strategy of hegemonic legitimation. Dissent, then, should be viewed as the consequence of the illegal actions and immoral inactions of the hegemon, such actions/inactions that conflict with the sense of global responsibility held by the members of the supranational public sphere. For these reasons, dissent is critical to the legitimation of supranational law because it is in moving away from the pattern of compromise and towards global responsibility that the act of justification can foster legitimacy. This movement away from hegemonic legitimation and the strengthening of the supranational public sphere constitutes the first step in the moderation of cognitive dissonance and the legitimation of supranational law, and lays the groundwork for my proceduralist theory of supranational law. In the final chapter, I build on this understanding of cognitive dissonance in relation to hegemony and begin to conceptualize processes of legitimation that can accommodate dissent while moderating the fluctuation between law and morality for the purposes of developing legitimate supranational law.

CHAPTER 3: A PROCEDURALIST THEORY OF SUPRANATIONAL LAW

Having provided an analysis of some of the limitations of supranational law in relation to hegemony in the previous two chapters, I shift the focus now to elaborate on what I have termed a 'proceduralist theory of supranational law'. A proceduralist theory is one that offers a conceptualization of the characteristics of a given process, keeping in mind the factors that influence the process and the objectives or effects of the process overall. A normative proceduralist theory is oriented towards the attainment of a particular goal or objective, as such, the associated processes are assessed based on their potential to ensure the attainment of this normative objective. Following this line of thought, a normative proceduralist theory of law is oriented towards the attainment of legitimacy in law. The underlying Habermasian premise that guides this type of theory is that laws are not automatically granted legitimacy by virtue of being law. Rather, it is in the process of law-making, and correspondingly in the justification of law that legitimacy is attained (Habermas 1996).

I embark on this conceptual project because it is not enough to claim that supranational laws lack legitimacy under conditions of hegemony. What must be offered alongside such a critique is at least a forward-looking sketch of how the fluctuation between law and morality can be moderated for the purposes of lending greater legitimacy to law. With an understanding of the opportunity that is provided by the exposition of the ideological character of law and an increased sense of global responsibility, it is apparent that a change from hegemonic legitimation to proceduralist legitimation is possible. In this chapter, I endeavour to explain how my proceduralist approach involves strategies that help to moderate the effects of cognitive dissonance, thereby lending greater legitimacy to supranational law. This proceduralist approach provides the ideal framework within which I can incorporate the key concepts that I have

previously discussed: global responsibility, legitimacy and cognitive dissonance. Ultimately, I contend that through the effective moderation of the fluctuations that cause cognitive dissonance, supranational law will benefit from greater legitimacy, and will then be able to be a suitable framework through which the broader international community could satisfy its global responsibilities.

The first step in support of the above argument is to link my discussion on cognitive dissonance to the current context. With this general treatment of Habermas's approach, I begin detailing my proceduralist theory of supranational law by explaining why such a theory is necessary in the first place. To do this, I borrow largely from Habermas's more recent writings to support the reasoning behind a proceduralist theory of supranational law. I conclude this discussion on my proceduralist theory of supranational law by clarifying the processes that are necessary for moderating the fluctuation between law and morality that causes cognitive dissonance and negatively affects the legitimacy of supranational law.

3.1 Habermas's Proceduralist Conception of Law

In order to elucidate the conceptual linkages between the previous discussion on cognitive dissonance and hegemony and the current discussion of proceduralism, I offer an analysis of the constitutive components of Habermas's proceduralist approach. Beginning with a discussion of discourse ethics, I move on to provide an account of Habermas's principle of democracy to clarify the processes of legitimation that underpin my proceduralist approach.

3.1.1 Discourse Ethics

In developing his approach, Habermas looks to the post-metaphysical conundrum as a starting point from which he studies law and morality. For example, in The Inclusion of the Other, Habermas finds support for his concept of discourse ethics by explaining how, since the

decline of a dominant religious worldview, most theories have failed to provide a normative outlook that relates principles of justice to notions of duty (Habermas 1998:7). In an effort to explain how and why, without a strong religious foundation, laws and norms can be legitimized and subsequently obeyed, Habermas sheds light on the force of moral principles as that which can bind concepts of justice to notions of obligation, stating: "[r]easons that are convenient for the legitimation of law must, on pain of cognitive dissonances, harmonize with the moral principles of universal justice and solidarity" (1996:99). This is the quote that opens this thesis, and acts as the guiding force for Habermas's discourse theory of law and morality, as well as for my proceduralist theory of supranational law. It captures the idea that law must correspond to a broader moral framework in order to claim strong legitimacy, effectively highlighting the fluctuation between law and morality as a critical dynamic that, if not moderated through processes of justification, leads to the type of cognitive dissonance that causes the weak legitimacy of law that I describe in the two preceding chapters.

Habermas conceptualizes discourse ethics as a moral theory. The key to Habermas's concept of discourse ethics is the discourse principle: "[o]nly those norms may claim to be valid that could meet with the consent of all affected in their role as participants in a practical discourse" (1989:197). In describing the resulting 'moral principle', he states: "[t]he moral principle first results when one specifies the general discourse principle for those norms that can be justified if and *only* if equal consideration is given to the interests of all those who are possibly involved" (1996:108). Also speaking to the moral principle, Habermas goes on to state that it pertains to any norm that is both sufficiently and necessarily justified through moral arguments (1996:111). What is critical to take from the description of these principles is the linkages between morality, validity and legitimacy: "[t]he predicate 'valid' pertains to action

norms and all the general normative propositions that express the meaning of such norms; it expresses normative validity in a nonspecific sense that is still indifferent to the distinction between morality and legitimacy" (1996:107). From this, one may ascertain that in conceptualizing discourse ethics, Habermas proposes an abstract moral theory that is necessarily inclusive with a goal of producing universally accepted norms. In terms of the ultimate objective of discourse ethics, there is a clear universalistic impetus guiding the process, as demonstrated in the following statement: "[f]or a norm to be valid, the consequences and side effects of its general observance for the satisfaction of each person's particular interests must be acceptable to all" (1989:197). In addition, this quote is indicative of the processes of justification that disputed norms must undergo before they can be accepted by all participants.

Based on these statements, it is clear that Habermas emphasizes the importance of the deliberative processes of justification and participation therein. With respect to the more precise nature of participation as it is constituted in discourse ethics, Habermas writes: the goal of "'uncoerced joint acceptance' specifies the respect in which the reasons presented in discourse cast off their agent-relative meaning and take on an epistemic meaning from the standpoint of symmetrical consideration"(1998:43). From this quote, it is apparent that Habermas's conceptualization of participation in discourse ethics performs a number of functions alongside and in support of justification. Linking the procedural requirements of participation to the substantive outcome, Habermas states: "[i]t must turn out that a practice of justification conducted in this manner selects norms that are capable of commanding universal agreement" (1998:43). For Habermas, participation is critical to the justification, and therefore the validity and legitimacy, of norms. As previously asserted, norms can claim validity only if they can first "...meet with the consent of all affected in their role as participants in a practical discourse"

(1989:197). According to this approach, participation in the discursive process has two key implications related to justification. First, the more members that are involved in the process as participants, the greater the chances that norms will be in dispute and will require justification. Second, participation in the process of justifying the norms in dispute helps to ensure the validity of the norms themselves. Stated otherwise, the practice of justification is instigated by participants in the discursive process when the validity of a norm is in dispute. Where there is such a dispute among participants, the norm must be justified to all members of the discourse before it is seen to be valid. As such, it is apparent that broad-based participation in the discursive process is critical in that it necessitates and is necessitated by the practice of justification.

The moral principle that informs Habermas's discourse ethics provides the moral-abstract foundation upon which he builds his proceduralist theory of law by linking the moral principle to the democratic principle. In general terms, discourse ethics provides the conceptual underpinnings of the discourse principle, and can be conceived of primarily as an attempt at developing a theory of universal morality in the contemporary context. From discourse ethics, Habermas moves on to consider the linkages between law and morality, focusing on how legal obligations arise from moral obligations, and analyzing how legitimacy is implicated in this dynamic.

3.1.2 The Principle of Democracy

Habermas defines his interpretation of law as follows: "[b]y law I understand modern enacted law, which claims to be legitimate in terms of its possible justification as well as binding in its interpretation and enforcement...Law is two things at once: a system of knowledge and a system of action" (1996:79). This duality with respect to the role of law reflects the tension

between facticity and validity. In reference to law, the tension between facticity and validity speaks to the tension between the factual aspects around law-making and enforcement and its claim to legitimacy through social integration (Habermas 1996:27). This tension is reflected in Habermas's explanation of Kant's approach to legal validity:

> [l]aw is connected from the start with the authorization to coerce; this coercion is justified, however, only for 'the prevention of a hindrance to freedom,' hence only for the purposes of countering encroachments on the freedom of each. The validity claim of law is expressed in this internal 'conjunction of the universal reciprocal coercion with the freedom of everyone'" (1996:28-9).

Based on this account of Kantian legal validity, Habermas emphasizes the "dual perspective on law", which views "legal norms as both enforceable laws and laws of freedom" (1996:31). In a foreshadowing of his proceduralist theory of law, Habermas goes on to provide further insights on the tension that is created by Kant's dualist perspective. As he states:

> [a] legal order must not only guarantee that the rights of each person are in fact recognized by all other persons; the reciprocal recognition of the rights of each by all must in addition be based on laws that are legitimate insofar as they grant equal liberties to each, so that each's freedom of choice can coexist with the freedom of all. (1996:31-2)

In this quote, Habermas speaks to the facticity of law in that it is expected to perform specific functions so as to create and maintain a legal order. He then suggests that the facticity of law is relevant only to the extent the law itself is valid and therefore enforceable, as evidenced in his comment that laws "...are legitimate insofar as they grant equal liberties to each" (1996:31). With this statement, the link between my interpretation of cognitive dissonance and Habermas's conceptualization of the tension between facticity and validity comes to be realized with greater clarity, as I explain below.

We both locate a tension associated with the 'dual perspective on law', and I follow Habermas's assertions that this tension inevitably involves questions of legitimacy. It is not enough to create a law that guarantees rights to every individual; the underlying legitimacy of the

law depends on the 'reciprocal recognition of the rights of each by all'. Whether law is perceived to be limiting or rights-granting, both functions mutually reinforce the legitimacy of law. The legitimacy of law consequently depends on its ability to perform both functions, and Habermas's notion of the 'expectation of legitimacy' reflects this sentiment. In this sense Habermas's proceduralist conception of law can be conceived of as an attempt to reconcile the duality of law itself by conceptualizing processes of legitimation that prioritize participation and justification. This statement is evidenced in the strategy that he adopts as a means of demonstrating the functions of law on one hand, and the important legitimizing function of the public sphere on the other.

To conceptualize his discourse theory of law, Habermas makes a distinction between the principle of morality and the principle of democracy. In describing the principle of morality, Habermas uses the term 'action norms', which he defines as "...temporally, socially, and substantively generalized behavioral expectations" (1996:107). Conversely, in his treatment of the principle of democracy, Habermas uses the term 'legal norms'. Relating the two principles, Habermas states: "[t]he principle of democracy results from a corresponding specification for those action norms that appear in legal form. Such norms can be justified by calling on pragmatic, ethical-political, and moral reasons –here justification is not restricted to moral reasons alone" (1996:108). From these two accounts, it is evident that the key distinction between 'action norms' and 'legal norms' is that the former can be sufficiently justified through moral reasoning, whereas the latter can be justified on grounds other than those provided by moral reasons. In connecting the two norms, Habermas suggests that legal norms are 'intentionally produced' action norms, which supports his claim that action norms that support the principle of morality are more spontaneously occurring.

Further describing the relationship between action and legal norms, and subsequently defining the key functions of the principle of democracy, Habermas contends that legal norms "...have an artificial character; they constitute an intentionally produced layer of action norms that are reflexive in the sense of being applicable to themselves. Hence the principle of democracy must not only establish a procedure of legitimate lawmaking, it must also *steer the production of the legal medium itself*" (1996:111). The artificial character of legal norms, then, is the result of the intentionality behind their existence. In light of this ascription, legal norms may be justified through means *other than or in addition to* moral reasoning. This passage also encapsulates the nature of the 'dual perspective on law' that I mention above. Given the intentionality of legal norms, both the product of the intent (law) and the corresponding processes (law-making), according to the principle of democracy, must be legitimate. To ensure the legitimacy not only of the law, but also of the law-making processes, Habermas links the discourse principle to the democratic principle, as follows: "[t]he democratic principle states that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted" (1996:110). The dual stipulations that this democratic principle upholds regarding process and legitimacy is echoed by his addressee/author approach, as explained below.

In terms of the connection between discourse theory and law, Habermas writes: "[d]iscourse theory explains the legitimacy of law by means of procedures and communicative presuppositions that, once they are legally institutionalized, ground the supposition that the processes of making and applying law lead to rational outcomes" (1996:414). This quote demonstrates the important link between proceduralism and legitimacy. In developing discourse ethics, Habermas connects the discursive process to the legitimacy and justification of moral

norms. To conceptualize his proceduralist theory of law, Habermas builds on this premise by linking the legitimacy of law to the legally institutionalized processes of lawmaking and enforcement, suggesting that the processes themselves grant legitimacy to law. The role of the discourse principle in his proceduralist theory of law is further explained through an account of the addressee/author relationship in the context of lawmaking and equality.

Again, I borrow from Habermas in order to clarify the interrelationship of these variables: "[l]egitimate law closes the circle between the private autonomy of its addressees, who are treated equally, and the public autonomy of enfranchised citizens, who, as equally entitled authors of the legal order, must ultimately decide on the criteria of equal treatment" (1996:415). This quote provides additional insight on the processes associated with the legitimation of law, specifically as it illustrates how the members of the public sphere are simultaneously law's addressees as they are law's authors. By conceptualizing citizens as both authors and addressees of law, the citizens themselves establish the criteria of equal treatment against which they are also measured. The author/addressee approach then helps to rectify the duality of law as it secures both the private and public autonomy of citizens. The cyclical manner in which laws are legitimized, contested, and applied, addresses the duality of law and is reflected in Habermas's notion of the 'reciprocal recognition of rights'. In the proceduralist context, this concept of reciprocal recognition translates into the author/addressee dichotomy.

In a passage that explicates not only the mechanics of the deliberative process, but also its functions, Habermas explains his proceduralist conception of law as follows:

> [a]ccording to this conception, the democratic process must secure private and public autonomy at the same time: the individual rights that are meant to guarantee to women the autonomy to pursue their lives in the private sphere cannot even be adequately formulated unless the affected persons themselves first articulate and justify in the public debate those aspects that are relevant to equal or unequal treatment in typical cases. The private autonomy of equally entitled citizens can be secured only insofar as citizens actively exercise their civic autonomy. (1998:264)

From this excerpt, it is apparent that Habermas calls upon democratic processes of deliberation to engage the public sphere in a debate around rights and equality as part of the overarching strategy of simultaneously securing private and public autonomy. He contends that the legitimacy of law requires the active involvement of citizens because it is through the active involvement in public debate that rights and law are justified and secured.

Habermas conceptualizes his proceduralist approach, in large part, as a means of reconciling the tension between facticity and validity, represented in this context as the tension between private and public autonomy. In developing his proceduralist theory, he is careful to accommodate the duality of law, explained above as being grounded in the view that legal norms are both "enforceable laws and laws of freedom" (1996:31). By asserting a theory that prioritizes the practice of justification and participation in the discursive process, Habermas constructs an approach wherein the participants themselves are responsible for the legitimacy of the laws to which they are also subjects. In this equation, laws are (justly) enforceable only to the extent to which they are legitimate; if laws of freedom are to be upheld, then the participants must ensure their legitimacy through the practices of 'reciprocal recognition' and citizen-engagement. It is through a similar approach that I endeavour to moderate the law and morality flux. In conceptualizing a procedural approach of supranational law that is based on Habermas's principles of discourse and democracy, I attempt to develop a theory that ensures the legitimacy of supranational law by prioritizing participation and justification to minimize the effects of cognitive dissonance.

As the above discussion illustrates, Habermas's proceduralist conception of law implicates two interrelated points that are important to highlight: the prioritization of participation, and the right to justification. I briefly address each concept below to make

linkages between Habermas's proceduralist approach and my own proceduralist theory of supranational law, which I explain in greater detail towards the end of this chapter.

3.1.3 Constituting Legitimacy through Participation & Justification

It is important to be clear that this approach to legitimacy differs from the perspectives offered by Hunt, Cox, and Gramsci, which I discussed in the previous chapter. The main distinction is that I, like Habermas, conceptualize processes of legitimation as a strategy of achieving specific normative ends, whereas the treatment of legitimacy in the context of theories of hegemony is mostly descriptive in that it is meant to illustrate the means by which hegemonic order is established and perpetuated. This latter notion of legitimacy (what I have previously referred to as hegemonic legitimacy or weak legitimacy), however, helps to demonstrate the pervasiveness of cognitive dissonance, and provides insights on the strategies that are employed as a means of exploiting the fluctuation between law and morality. By incorporating the notion of internal coherence into the treatment of hegemony and legitimacy in the previous chapter, it becomes clear that the legitimacy that is claimed under conditions of hegemony is weak because of the fluctuation between law and morality. The more normative understanding of legitimacy that Habermas and I invoke is meant to moderate the fluctuation between law and morality through the conceptualization of processes of legitimation that not only allow for the contestation of norms, but that require dissent to initiate acts of justification. Such acts of participation and justification allow for the moderation of the negative effects of cognitive dissonance to the benefit of the overall legitimacy supranational laws. The intricacies of these processes and principles are given further consideration below.

Intrinsically related to the aforementioned process of legitimation, Habermas's dedication to participation in the process of rational discourse is also broadly illustrative of an underlying

commitment to the right to justification. The need for justification within the broader proceduralist theory of law brings to mind a more active approach to legitimacy. To expand on this, the act of justification necessarily involves the consideration of arguments where claims and counter-claims are offered that generally support or contest the law. It is through the processes of public deliberation that a law is seen to be justified or not; from this, one can postulate that a law cannot be legitimate if it is not justified in the public sphere. For Habermas, the deliberative process itself is conceived of as an act of justification that contributes to the legitimacy of law overall. In accordance with his aforementioned postulation of the principles of law and morality, Habermas is concerned with the issuance of consent and validation in an effort to ensure that all norms, which are ultimately accepted by the populace, have been justified through the discursive process. With respect to the function of justification, Thomas McCarthy notes that Habermas's proceduralist approach "bases the justification of norms on the reasoned agreement of those subject to them" (1994:47). This comment from McCarthy is illustrative of Habermas's position on justification that was alluded to in the previous discussion on the processes of legitimation of law in the context of the addressee/author relationship. Habermas addresses justification as an act that is performed by the members of the public sphere as an expression of their role as the authors of the same laws to which they are also addressees (1996:123, 2001a:767).

When considering the role of participation in his proceduralist theory of law, one must necessarily make reference to the discourse principle that is the central tenet of the concept. On this subject, Habermas writes:

> [a]ccording to the discourse principle, just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses. Hence the desired political rights must guarantee participation in all deliberative and decisional processes relevant to legislation and must do so in a way that provides each person with equal chances to exercise the communicative freedom to take a position on criticizable validity claims (1996:127)

Habermas refers to the act of participation as "the practice of deliberation and justification" (1998:43), which helps to emphasize the connection that is being made in this section between justification as action, and participation as the catalyst or vehicle of the justificatory act itself.

Overall, Habermas's proceduralist conception of law implicates processes of legitimation that prioritize participation and justification. Habermas recognizes the underlying tensions that are reflected in the dual roles of law: that it simultaneously secures private and public autonomy, or stated otherwise, that it both grants and limits freedoms and rights. Law's dual roles correspond to a dualist approach to legitimation, specifically Habermas's notion of the author/addressee dichotomy. As a strategy of ensuring the legitimacy of law, Habermas mediates the facticity/validity tension that underlies the duality of law by stipulating that, in accordance with the democratic principle, law is legitimate if it has been justified through processes of participation in deliberative discourses within the public sphere (Habermas 2004a). To further illustrate the important role of public participation in the legitimation of law, I reiterate Habermas's statement, that "[t]he private autonomy of equally entitled citizens can be secured only insofar as citizens actively exercise their civic autonomy" (1998:264).

Although Habermas asserts that the justification of legal norms is "not restricted to moral reasons alone" (1996:108)[12], I nonetheless contend that the legitimacy of law fundamentally depends on the strategies of legitimation that are invoked, and the manner in which the tension between law and morality is mediated in the process. In the first and second chapters, I described a negative correlation between the legitimacy of supranational law and cognitive

[12] This a reference to a distinction that I make above pertaining to the difference between legal and moral or action norms. Habermas contends that action norms can be satisfactorily justified by moral reasons alone; however, he asserts that legal norms can be justified by "...calling on pragmatic, ethical-political, and moral reasons" (1996:108).

dissonance: strong cognitive dissonance corresponds to weak legitimacy. It is integral to the dynamic understanding of cognitive dissonance that the justification of legal norms need not be pursued strictly in moral terms, or as Habermas asserts "by moral reasons alone" (1996:108). To limit processes of justification in this manner would be akin to forcing the perpetual convergence between law and morality. That is to say, to have laws be justified solely by means of moral reasoning would be the same as suggesting that any law that diverges from moral reasoning to be invalid. This would be as restrictive as it would be irrational. Like Habermas, I contend that laws should be justified by means of a broader spectrum of reasoning, namely political, ethical and pragmatic reasons (1996:108). However, as I have argued in the first chapter, to separate law from its normative presuppositions is to separate law from a universalistic conceptualization of morality; in this sense, law and morality are inherently bound at a fundamental level. A forced divergence between law and morality is particularly problematic when taken in the context of cosmopolitan law, the principles of which are inexorably woven into the fabric of universal morality. While Habermas invokes the terminology of facticity/validity and private/public, I nonetheless view his proceduralist approach as an attempt to moderate this fluctuation between law and morality, or stated in Kantian-Habermasian terms, the role of law as an enforceable instrument of legal order, and the role of law as the guarantor of freedom and rights.

In the following section, I explore how the moderation of law and morality occurs through processes of legitimation that prioritize participation and justification in the supranational context. The above discussion of Habermas's proceduralist approach brings two key questions to the fore. First, given the central role of participation and the public sphere in the legitimation of law in the domestic context, how might this translate to the supranational

context? Second, if law and morality in the supranational context, as in the domestic context, are regulated through processes of legitimation that invoke the act of justification, what implications does this have with respect to the hegemonic control of the supranational legal framework? In offering my responses to these questions, I conceptualize how the fluctuation between law and morality is moderated for the purposes of legitimizing supranational law.

3.2 A Proceduralist Theory of Supranational Law

Overall, both Habermas's and my own proceduralist conceptions are attempts to reconcile the need for law to "harmonize with the moral principles of universal justice and solidarity" (Habermas 1996:99), without invoking the moralization of law. Throughout this project, I have referred to Habermas's writings first in relation to the limitations and application of supranational law, and second, with respect to his proceduralist conception of law. Having provided a number of examples of Habermas's position on the limitations of supranational law, especially in the context of Kosovo and Iraq, it is interesting that Habermas himself does not expand his proceduralist conception to account for supranational law. On one hand, he has a proceduralist theory of law, and on the other hand he provides a defence of cosmopolitan law, and yet nowhere does he attempt to reconcile the two objectives into a single movement, although his latest writings seem to be hinting at it. For example, in the context of his proceduralist conception of law, Habermas states: "...the law can fulfil the function of stabilizing behavioral expectations only if it preserves an internal connection with the socially integrating force of communicative action" (1996:84). When applied to the context of supranational law, this statement takes on a new dimension insofar as it broadly reflects my arguments around cognitive dissonance as outlined in the previous chapter, yet it also implicates Habermas's own

thoughts on supranational law in an interesting fashion, as I demonstrate further in the following example. On the subject of cosmopolitan law, Habermas writes:

> The institutionalization of cosmopolitan law does not require the establishment of a world government based on a monopoly of the means of legitimate violence held by a global state.... This kind of global arrangement depends on bargaining processes in the looser framework of transnational regimes, of standing conferences, settled procedures, regular summits, etc. But the institutionalization of this most important part of world politics can only work if governments on the national level are perceived, from within their national arenas, as cooperative members of a world community rather than independent actors. (1999b:451-2)

This statement reflects a type of proceduralist approach to supranational law that loosely mirrors his domestic approach: a reliance on deliberation in a public sphere and an overarching commitment to legitimacy as stemming from the degree to which the claim to validity is justified within the public sphere itself.

In terms of the project at hand, my objective is to conceptualize a proceduralist theory that attempts to address the issue of cognitive dissonance in supranational law by reconciling Habermas's normative proceduralist approach with his insights on cosmopolitan law. At both conceptual stages of this project I have borrowed from Habermas to support my objectives around the effectiveness of supranational law. At this stage of the project, I carry the insights gained from Habermas in both contexts to develop my proceduralist theory of supranational law in greater detail.

I use the language of cognitive dissonance to describe the condition of weak legitimacy under conditions of the hegemonic order because it allows me to conceptualize legitimacy and hegemony in a manner that more effectively captures the nature of the fluctuation between law and morality that prevails in the supranational legal sphere. My conceptualization of cognitive dissonance and my proceduralist theory of supranational law reflect the basic understanding of the proceduralist project as established by Habermas, but moves beyond the domestic context in attempting to develop processes of legitimation on a supranational scale.

According to earlier arguments, cognitive dissonance must be minimized through processes of legitimation that moderate the fluctuation between law and morality, thereby lending greater legitimacy to supranational law. My proceduralist approach, like Habermas's, attributes a substantial number of legitimizing functions to the public sphere. The critical point of distinction, however, is that Habermas conceives of his public sphere primarily within the domestic context, whereas I implicate the concept of a *supranational* public sphere. In recognition of the contentious nature of such a conceptualization, I explain the qualities and characteristics of my understanding of a supranational public sphere in the following paragraphs, beginning with a sketch of Habermas's conception of the public sphere.

3.2.1 The Public Sphere

Habermas provides a number of definitions to explain the role and function of the public sphere as dictated by the context in which his discussion occurs. In an early definition of the public sphere, he illustrates its most fundamental function: "By 'the public sphere' we mean first of all a realm of our social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens. A portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body" (1974:49). I consider this to be his most basic conceptualization of the public sphere, but it is still relevant as a means of illustrating the basic function and characteristics he associates with this concept. In the decades following his initial writings, Habermas adds further complexity to this concept, as demonstrated in Between Facts and Norms, where he states: "[t]he public sphere can best be described as a network for communicating information and points of view; ...the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified *public* opinions" (1996:360). Beyond the role that the public

sphere plays in constituting the laws, the public sphere also plays a key role in the application of these laws, having to develop the standards against which claims to validity are measured, ultimately deciding "on the criteria of equal treatment" (Habermas 1996:415). Participation is a critical component of the discursive process insofar as it links individual actors to universalistic principles of communicative action and related processes.

In his weak/strong binary structuring of deliberative politics, the strong public sphere is where "decision-oriented deliberations" take place, and he adds to this account, explaining that this deliberative process is "regulated by *democratic procedures*" (Habermas 1996:307). Habermas provides further insight on the function of this strong public sphere, as follows: "[d]emocratic procedures in such 'arranged' publics structure opinion- and will-formation processes with a view to the cooperative solution of practical questions, including the negotiation of fair compromises. The operative meaning of these regulations consists less in discovering and identifying problems than in dealing with them" (1996:307). As a "the network of noninstitutionalized public communication" (1996:358", the 'weak' public sphere's central objective is to produce, through discursive processes, the public opinions of it participants. Once discursively formed, the opinion of the members of the 'weak' public sphere is expected to influence the decision-making processes that take place within the 'strong' public sphere. Like his proceduralist conception of law overall, his 'strong' public sphere is characteristically democratic in its regulated approach to the deliberative process, and has at its centre the decision-making function, which itself is constituted as a relevant feature insofar as it is focused on the task of problem-solving. On the other hand, Habermas notes that the weak public sphere is a "procedurally unregulated public sphere", adding that it is the "vehicle of 'public opinion'" (1996:307). Other terms that he uses to describe the structure of the weak public sphere are

"anarchic" and "spontaneous", and to describe its function, he notes that "[d]emocratically constituted opinion- and will-formation depends on the supply of an unsubverted political public sphere" (1996:307-8). From this account, it is clear that he views the weak public sphere as playing a vital role in overall public deliberation to the extent that it supports and influences the decision-making process itself. It is in the context of the weak public sphere where contestable norms are initially identified as requiring justification; in other words, it is in the weak public sphere where the first acts of dissent and contestation are expressed, which initiates processes of justification of the norm or law in dispute. From this it is apparent that the functions of will- and opinion-formation are central processes that Habermas ascribes to the public sphere.

3.2.2 The Supranational Public Sphere

The concept of the supranational public sphere is a critical component of my proceduralist theory of supranational law. Central to the process of public deliberation, the public sphere is the locale of will- and opinion-formation for the purposes of developing intersubjectively held norms. In my conceptualization of the *supranational* public sphere, the fundamental nature and function of the public sphere remains in tact, the only difference being that I expand its scope, or what I henceforth refer to as its 'jurisdiction'. The rationalization for this jurisdictional expansion is as follows: if the public sphere is seen to legitimize law in the domestic context, then a supranational public sphere is necessary for the legitimation of supranational law. This is a logical extension of Habermas's proceduralist conception of law, which applies primarily to the domestic context.

I use the term 'supranational' to distinguish my concept of a public sphere from Habermas's, and because it best reflects the function and nature of the public sphere itself. On one hand, my concept of the public sphere must recognize the role of nation-states in influencing

the decision-making process, be it through the will and opinion of the individual participants, or as participating entities in their own right. On the other hand, I use the term to show that, although nation-states play a role in this public sphere, the scope of the sphere itself reaches across the boundaries of such states. This is in keeping with my use of the term 'supranational law', which, as I explain in the first chapter, is meant to encompass two types of law: international and cosmopolitan. The concept of a supranational public sphere is meant to do the same: recognize the role that nation-states play, while representing a function that reaches across borders. In this sense, the communicative networks that characterize my conceptualization of the supranational public sphere function among and within different levels. I agree with Habermas's conception of 'international negotiating systems' insofar as they should be "...the dynamic picture of interferences and interactions *between* political processes that persist at national, international, and global levels" (2001b:110). To this end, the supranational public sphere includes national public spheres as part of the communicative network to the extent that states themselves are participating entities at the supranational level.

Like its domestic counterpart, the supranational public sphere consists of a network of communication and acts as a "vehicle of public opinion" (Habermas 1996:307). From my account of the supranational public sphere thus far, one would be correct to infer that it most accurately reflects what Habermas terms a "weak" public sphere. However, it is too simplistic merely to take Habermas's weak public sphere and apply it to the global context; doing so fails to capture the particular conditions and circumstance of communication at the supranational level. For a more accurate understanding of supranational publics, I refer to Brunkhorst, who provides interesting insights on the notion of a weak public sphere in the supranational context. Brunkhorst notes: "...a weak public is a public sphere enabled by the existence of basic rights

[...]. Such rights are a necessary but not sufficient condition for the emergence of such a public. Sufficient conditions are: the existence of mass media, political culture, political associations, etc." (2002:677-8). I agree with Brunkhorst's description of the weak supranational public sphere, specifically with his assertion that basic rights, in combination with multitude of networks for communicating, together comprise this type of public. According to Brunkhorst, basic rights are necessary within a public for it to be considered "well-ordered", and that the public can be more or less 'well-ordered' depending on the degree to which these rights are formalized in law with, or without binding force (2002:677). While I am less concerned with the degree to which the public sphere is 'well-ordered', I look to this concept of basic rights as representing an overarching normative framework that binds the members of the supranational public sphere, lending it a degree of moral weight. Building on this position, Brunkhorst contends that "...a weak public has moral influence but not legally regulated access to political or administrative power..." and that "...the communicative power of a weak public can have profound political impact and can lead to political reforms and even revolutions..." (2002:276). He conceives of the supranational public sphere as having some access to administrative power, which is to say that it influences decision-making processes.

It is this latter conceptualization of the weak/strong publics offered by Brunkhorst that most accurately reflects the type of supranational public sphere that plays such a central role in my proceduralist theory of supranational law. I conceive of the supranational public sphere as allowing for the free formation of opinion and will. Like Habermas's conceptualization of the weak public sphere in the domestic context, the supranational public sphere is similarly unrestricted. However, also I recognize the degree of formalization that is beginning to permeate the supranational public sphere. Increasingly, albeit at a very slow pace, the communicative

networks that constitute the supranational public sphere are becoming regulated. In light of this slow shift, Brunkhorst optimistically labels the supranational public sphere as a "strong public in the making" (2002:689). He notes that despite lacking an overarching administrative power for decision-making purposes, the language of this public may translate into a language that can be effectively interpreted by an emerging strong public. To describe this sphere in transition, Brunkhorst states:

> [i]f NGOs and other global public agencies speak the language of human rights, they speak a language which is *still* morally grounded, but *already* legally binding. This language, as a *moral* language, can enable the mobilisation of public interest and communicative pressure, and it is, as a legal language, a language the political class and its administrative body of legal advisors, diplomats, etc. can understand and take into account for decision making. As long as no sufficient legal procedures of democratic representation bind discussions - and this might never be the case on the global level - the language of human rights will replace global democracy - and human rights have to be 'called into being' by 'lawmaking in the streets', a task which can be performed even by a weak but growing and extending public. (2002:689-90)

This description encapsulates the power of the supranational public sphere for forming opinion and influencing decision-making, and illustrates the degree to which existing supranational networks of communication, such as NGOs and even international governmental organizations like the UN, cohere around the language of morality and, increasingly, legality. Furthermore, Brunkhorst identifies this threat of moral co-optation, known in previous chapters of this thesis as the moralization of law, to be the main driving force behind the movement towards a 'strong supranational public' (2002:690). While I do not enter into a discussion over the likelihood of such a transition from a weak to a strong supranational public sphere, I do agree with Brunkhorst's view as it pertains to the threat of moralization as a central motivating factor behind the strengthening of the supranational public sphere.

When I argue in favour of strengthening the supranational public sphere, I am speaking in terms of strengthening its position of influence in processes of legitimation in the supranational

sphere, relative to the position of influence currently held by the US as hegemon. This reflects my broader argument in favour of the movement away from hegemonic legitimation towards supranational legitimation. The strengthening of the supranational public sphere occurs alongside the weakening of American hegemony. Correspondingly, the same processes that promote the weakening of the hegemonic order, such as a growing sense of global responsibility and the negative effects of cognitive dissonance, also promote the strengthening of the supranational public sphere. While I argue for a strengthening of the supranational public sphere, I am not making an argument for the formalization of processes within the sphere itself; in other words, I am not arguing in favour of a 'strong' public sphere *at this time*. Instead, in the following paragraphs I attempt to show that the building of a weak supranational public sphere is a necessary first step towards achieving a higher degree of legitimacy with respect to supranational law.

I conceptualize the supranational public sphere as one that is 'weak' in the Habermasian sense of the 'weak' public sphere. One of the critical features of the public sphere, in both its 'weak' and 'strong' forms, is that it is *unsubverted*. To reiterate the importance of this feature, I refer to Habermas, who argues that "[d]emocratically constituted opinion- and will-formation depends on the supply of an unsubverted political public sphere" (1996:307-8). The key process in the strong public sphere is that which contributes to democratic will-formation, while in the context of the weak public sphere, the central objective is opinion-formation, both processes taking place within public spheres that are considered to be 'unsubverted'. In the supranational context, it is equally important that the public sphere be unsubverted. As suggested by my two-step approach to the legitimation of supranational law, the processes of justification must be either preceded by, or must occur in tandem with, the weakening of American hegemony. This

is critical insofar as the weakening of the hegemonic order has a direct impact on the degree to which the supranational public sphere can claim to be unsubverted. Free-flowing and spontaneous communicative networks must be established as such to ensure that the will- and opinion that is formed through these discursive processes is 'untainted', specifically by the contaminants associated with power politics. As such, the unsubverted nature of the supranational public sphere is critical to the legitimizing process overall, specifically in relation to participation, justification, and dissent.

3.2.2A Participation

As a strategy of demonstrating my reasoning in support of participation in general, I must begin by explaining the connection between my conceptualization of participation and related notions of deliberative democracy. James Bohman explains with respect to deliberation: "[t]he call for more deliberation is...a demand for more rational political order in which decision making at least involves the public use of reason. According to this position, the legitimacy of decisions must be determined by the critical judgment of free and equal citizens" (1996:2). In a Habermasian context, the similar argument reads as follows: "...a law may claim legitimacy only if all those possibly affected could consent to it after participating in rational discourses" (Habermas 2002:200). Habermas's prioritization of participation as contributing to the legitimacy of a law is central to my proceduralist theory of supranational law in general. To expound on the connection between participation and legitimized laws, I highlight the relationship between participation and the duties and obligations of participants in the supranational public sphere.

Reflecting Habermas's insights on the necessity of addressees also being authors of law, theorists like Iris Marion Young argue in favour of public deliberation in the form of citizen-

participation from the perspective that citizens deserve the opportunity to participate in decision-making processes: "peoples and communities obliged to observe standards must have the opportunity to participate" (Young 1999:271). Young's argument supports the principle of inclusiveness in the decision-making process itself, whereby participation is a right for the citizens of a community. In this sense, everybody affected by the law should have an opportunity to participate in the discursive process that ultimately ascribes legitimacy to that law. The element of inclusiveness, like the notion of the 'unsubverted public sphere' in general, is important to the legitimacy of law overall. The inclusiveness feature of the supranational public sphere helps to ensure that any individual who may be affected by the law is not excluded from the discursive process. This reflects Habermas's 'general discourse principle', which holds that a norm is "justified if and *only* if equal consideration is given to the interests of all those who are possibly involved" (1996:108). In terms of my broader proceduralist theory of supranational law, I prioritize participation because I view the act of engaged participation as an essential strategy of moderating the fluctuation between law and morality insofar as it invokes the act of justification.

3.2.2B Justification

In the supranational public sphere, participation is the mechanism through which dissent is expressed and processes of justification are initiated. As my earlier comments indicate, I agree with Habermas's proceduralist approach with respect to justification in the sense that it emphasizes the need for participation. Recalling a previous quote, Habermas states that law claims to be legitimate in terms of its possible justification (1996:79). From this, I postulate that it is through the processes of public deliberation that a law is seen to be justified or not; taken one step further, a supranational law cannot be legitimate if it is not justified in the supranational

public sphere. In further support of my position with respect to the importance of justification, I refer to Rainer Forst, who states "[p]receding all demands for concrete human rights, there is one basic right being claimed: the right to justification" (1999:36). The right to justification mobilizes the members of the supranational public sphere towards participation in deliberative processes as authors/addressees who seek justification of legal norms. Under conditions of hegemony, the right to justification has been compromised to the extent that it is less conceived of as a right than as a privilege. Under such conditions, members of the supranational public sphere are less authors of the law than they are addressees. I view this as a problematic situation to the extent that it compromises the legitimacy of supranational law in general, but that it also limits and distorts the influence of the supranational public sphere.

I consider the processes by which decisions are justified to be a critical component of any deliberative theory. Without an underlying commitment to the right to justification, the structure and purpose of a proceduralist theory of supranational law would be irrelevant; taking this further, without an underlying commitment to participation, the right to justification would itself be meaningless. In order to guard against the moralization of law and related strategies associated with cognitive dissonance, the supranational public sphere must uphold an unsubverted process of legitimation that is centred on justification. Limiting the right to justification is critical to the perpetuation of ideological domination, and as I explain in the first and second chapters, it is also damaging to the legitimacy of supranational law. In other words, without an effective right to justification, supranational law is susceptible to moralized political and economic objectives.

While I agree with the language of a *right* to justification, it is the *act* itself that is most important in terms of the actual moderation of the fluctuation between law and morality. To this

end, the act of justification necessarily involves the balancing of claims and counter-claims, which requires participants to engage in discursive processes that are centred on the reciprocal recognition of rights insofar as participants are both the authors and addressee of law. As such, the act of justification itself is central to the moderation of the fluctuation between law and morality by allowing for questions of law and morality to be addressed through unsubverted deliberative processes. To support this position, I refer to Habermas, who states that law is legitimate

> only if it has come about in a legitimate way, namely, according to the procedures of democratic opinion- and will-formation that justify the presumption that outcomes are rationally acceptable. The entitlement to political participation is bound up with the expectation of a public use of reason: as democratic colegislators, citizens may not ignore the informal demand...to orient themselves toward the common good (2001a:779).

Like Habermas, I view the addressee/author relationship as being critically important to the legitimation of law; I interpret the addressee/author relationship as being crucial because it requires participation that invokes the act of justification, an act that necessitates the moderation of law and morality through discursive processes.

My proceduralist approach has at its core the idea that the fluctuation between law and morality can be moderated through discursive processes to the benefit of the legitimacy of supranational law. These processes help to moderate law and morality through the practice of the contestation and acceptance of validity claims, or in other words, through the act of justification. Taken further, supranational law gains legitimacy from the act of justification itself. By prioritizing participation in the supranational public sphere, the act of justification necessitates strategies of legitimation that are based on the discursive processes that give rise to the moderation of the fluctuation between law and morality. From my discussion of justification, it becomes evident that the process of moderating the fluctuation is tied into the process of justification itself. The distinguishing feature that separates strategies of hegemonic legitimation

from supranational legitimation is the means by which the members of the public sphere are implicated in the processes of legitimation overall.

For hegemonic legitimation, members of the public sphere are involved insofar as their assent is necessary for the perpetuation of the hegemonic order. Under conditions of hegemony, members of the public sphere are not implicated in processes of justification, but rather they are involved in strategies of compromise. In this equation, compromise is not the result of discursive processes centred on the act of justification. Instead, compromises are reached through ideological processes directed towards the attainment of the internal coherence of law, such processes that necessitate cognitive dissonance and promote the fluctuation between law and morality for strategic ends. From this account it is evident that, under conditions of hegemony, the public sphere is highly 'subverted'.

Conversely, the proceduralist theory of supranational law that I put forth in this thesis implicates the members of the public sphere in a different manner, to achieve different objectives. The act of justification, centred on the Habermasian understanding of the discourse principle, plays a key role in mitigating the negative effects of cognitive dissonance. Instead of promoting the fluctuation between law and morality and forcing cognitive dissonance, the act of justification helps to ensure the legitimacy of law by upholding a process that takes the opinion and will of those affected by the law into consideration. In the supranational context, acting in accordance with discursively justified legal and/or moral claims may require that the sovereignty of nation-states be transgressed. However, an unsubverted discursive process of legitimation that prioritizes justification and inclusiveness ensures that the legal claims made in the name of such actions harmonize with the moral norms held by the supranational public sphere.

At the supranational level, this harmony between law and morality is achievable through the two-step process of legitimation that has been the subject of discussion through this thesis. The dissent that is necessitated in the first phase of legitimation lays the groundwork for the strengthening of the supranational public sphere, which allows for the unsubverted practice of justification to take place in the second phase of legitimation. While the first step of my approach *promotes* the moderation of cognitive dissonance by means of dissent, it is through the discursive process, as outlined in my proceduralist theory of supranational law in the second step, that the harmonization of law and morality actually occurs. Insofar as the fluctuation is moderated by means of the discursive process that underpins my proceduralist theory, the underlying tension between law and morality itself is not *eliminated.* The negative effects of cognitive dissonance that are caused by the fluctuation can be moderated through proceduralist strategies of legitimation and justification such as I propose herein; however, the tension between law and morality is a dynamic that can only ever be manipulated (either to promote dissonance, as is the case with hegemonic legitimation, or to promote harmony, as is the objective with proceduralist legitimation), and never negated.

3.2.2C Dissent

As I asserted in the previous chapter, and again above, dissent is the central feature of the first step of legitimation. At present, however, I am underlining the degree to which the unsubverted nature of the supranational public sphere is critical to the legitimacy of the discursive processes, and as such, is central to the legitimacy of law. In the context of the current discussion, I attempt to demonstrate that dissent continues to play a critical, although slightly different, role in the second stage of legitimation as it does in the first. To begin with, my proceduralist approach holds that dissent must be accommodated by the discursive processes

of the supranational sphere in order to ensure the legitimacy of both the process and product. As such, the unsubverted quality that I ascribe to the supranational public sphere is central to the accommodation of dissent, and therefore, is key to promoting the legitimacy of law. If dissent cannot be accommodated by the process, as is the case with hegemonic legitimation as I explain in the previous chapter, then the legitimacy of law suffers.

I support this position according to the following rationale: dissent, partly as an expression of the desire for the justification of a law, is central to instigating processes of deliberation. In the conceptualization of my proceduralist theory, which constitutes the second stage of legitimation, what begins to emerge is an important relationship between dissent and justification. If dissent is stifled or not taken into consideration while in the process of legitimation, then the laws that result from the process are unjustified. This is one of the key distinguishing features between hegemonic legitimation and proceduralist legitimation. While the former is structured so as to encourage assent, the latter is conceptualized in a manner that not only accommodates dissent, but holds dissent to be integral to the broader process. It is in the process of justification that laws are justified, and to the extent to which dissent is accommodated as an expression of the desire for justification that law is ascribed its legitimacy.

In the first stage of legitimation, I conceive of dissent as occurring as a result of the illegality and immorality of the (in)actions of the hegemon, and as the pathway to a strengthened supranational public sphere. In the first stage, dissent is an expression of a growing sense of global responsibility and is an indication of the negative consequences of hegemonic legitimation. In the second stage, dissent is still an expression of global responsibility, but it also becomes a measuring stick against which the unsubverted nature of the supranational public sphere is gauged.

I contend that it is the problem of cognitive dissonance in general that motivates participation and initiates dissent in the supranational public sphere. As I state in the first chapter, my interpretation of cognitive dissonance incorporates the concept of the moralization of law, but also includes the problem of 'immoral inactivity' that results from a divergence between law and morality. In recognition of the cognitive dissonance that compromises the legitimacy of supranational laws under a system of hegemony, the supranational public sphere is now in a position to replace the hegemon as the holder of "normative authority". What Brunkhorst views as a slow transition from a weak to a strong public, I am more inclined to view as part of the aforementioned movement from hegemonic legitimation to supranational legitimation. As I contend in the previous chapter, this shift is not highly contrived, but rather stems from forces and movements that are already taking place at the supranational level. In this sense, I am referring specifically to the movements that are underway in the supranational public sphere in reaction to the threat of cognitive dissonance, the same movements that Brunkhorst views as contributing to the transition from a weak to a strong public.

3.3 Habermas on Legitimacy and Accountability in the Supranational Sphere

At this stage, I return to Habermas's writings, specifically to his attempt to reconcile the democratic principle with his views on posnationalism. I do this as a means of introducing and dealing with the question of accountability in the supranational context, and to compare my position on legitimacy to Habermas's. First, to clarify his position, this section begins with an outline of Habermas's position on membership, non-membership, and legitimacy.

In a chapter in which he contemplates the 'future of democracy', Habermas looks to the issue of membership as a means of identifying the weaknesses inherent in the establishment of a 'world organization' by "advocates of a 'cosmopolitan democracy'" (Habermas 2001b:107). In

doing so, he provides interesting insights on the nature of democratic legitimation in relation to cosmopolitan law and international law, and the limitations of a 'democratic world state'. On the problems that arise when considering the transition from national to supranational legislative functions, Habermas states: "...legitimation gaps also open up as competencies and jurisdictions are shifted from the national to the supranational level" (2001b:71). To explain the reason behind this gap, he refers to Amnesty International and Greenpeace, stating that "...these new forms of international cooperation lack the degree of legitimation even remotely approaching the requirements for procedures institutionalized via nation-states" (2001b:71). In this context, Habermas contends that a 'cosmopolitan democracy' is conceivable for the purposes of closing this legitimation gap, although a world state and community are not part of his notion of cosmopolitan democracy. As he states:

> the 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. A cosmopolitan community of world citizens can thus offer no adequate basis for a global domestic policy. The institutionalization of procedures for creating, generalizing, and coordinating global interests cannot take place within the organizational structure of a world state. (2001b:108-9)

Habermas conceptualizes a variation in the corresponding strength of legitimizing processes between the nation-state and what he terms the 'world state'. To this end, he contends: "...on the international level this 'thick' communicative embeddedness is missing. And a 'naked' compromise formation that simply reflects back the essential features of classical power politics is an inadequate beginning for a world domestic policy" (2001b:109). In this context, Habermas offers a critique of the current state of decision-making processes at the supranational level. His mention of a 'naked compromise formation' speaks to the lack of a more systematized approach to decision-making, and suggests that power politics reigns over the current process, to

the detriment of the supposed transition from international to cosmopolitan law. He writes, that in addition to the lack of organization,

> [t]he world organization also lacks a basis of legitimacy on structural grounds. It is distinguished from state-organized communities by the principle of complete inclusion - it may exclude nobody, because it cannot permit any social boundaries between inside and outside. Any political community that wants to understand itself as a democracy must at least distinguish between members and non-members. (2001b:107).

From this, it is apparent that Habermas begins to question the principle of total inclusion because it lacks the inside/outside distinction, to the extent that he ends up questioning the legitimacy of the world organization's (here, the United Nations) democratic structure. By stating that democracy requires members and non-members, Habermas negates the likelihood of an "us/them" distinction arising at the world level, which, for him in this instance, consequently means that no organization of world citizens could function legitimately as a democratic structure. He further states that this is because the "...ethical-political self-understanding of citizens of a particular democratic life is missing in the inclusive community of world citizens" (2001a:107). I interpret this quotation as suggesting that without the excluded other, citizens are unable to be self-referential, and lack an element of 'self-understanding', which Habermas views as necessary for democratic legitimacy. Stated more explicitly, Habermas contends that democratic legitimacy requires difference, and that the world organization would lack this legitimacy because there are no non-members, and therefore, no difference. In light of his views on membership and non-membership, Habermas, inadvertently or not, forces a reconsideration of the role of the public sphere as a legitimate system of "noninstitutionalized public communication" that is able to succeed at its former function as a sphere of democratic will- and opinion-formation. Habermas's prioritization of communicative rationality and participation are meant to facilitate inclusiveness in the deliberative processes; however, his more recent

movement away from the 'ideal speech situation' and his focus on membership/non-membership characterizes the consequential weakening of his position on participation in the public sphere. Ultimately, his comments regarding the participation and membership of individuals at the supranational level have the effect of weakening his later views on the potential of even a 'less strict' discursive process.

Instead of a global community and proposals for a world state, Habermas proposes that already existing supranational processes of legitimation be pursued and further developed: "[r]ather than a state, it has to find a less demanding basis of legitimacy in the organizational forms of an international negotiation system, which already exist today in other political arenas" (2001b:109). Habermas suggests that the processes of legitimation that are in place within nation-states are too demanding for the supranational context; instead, he supports that idea that supranational processes of legitimation build on existing negotiating networks. He argues that the European Union is the only institution at the supranational level that has the potential to facilitate the type of legitimation that takes place in the context of the nation-state (Habermas 2001b:98-100).[13] Building on this position, Habermas contends that the nation-state benefits from an active civic solidarity rooted in collective identities, as he suggests that this "...ethical-political self-understanding of citizens of a particular democratic life is missing in the inclusive community of world citizens" (2001b:107-8). Ultimately, Habermas argues that without a collective identity, the citizens of a world state lack the ability to generate any "normative

[13] Much of Habermas's hope for the European Union rested in the ratification of what he terms as a 'European Charter'. Discussing the transfer of nation-states' rights, he states that "...the European Union must be repositioned from its previous basis of international treaties, to a 'Charter' in the form of a basic law", further noting that this move would "...aim toward a common practice of opinion- and will-formation, nourished by the roots of a European civil society, and expanded into a Europe-wide political arena" (2001b:100). Interestingly, the Spring 2005 referendum on the ratification of the European Constitution, with the Netherlands and France voting against ratification, has shown that not all Europeans accept the idea of transferring nation-states' rights to the European Union.

cohesion" that is necessary to go beyond a 'naked compromising function' (2001b:108). Below, I offer some points of contention that pertain to Habermas's position in Postnational Constellation, and that consist of my response to this type of Habermasian critique of my conceptualization of a supranational public sphere.

I agree with Habermas that a world state could not produce the same strong legitimating functions as a nation-state, and to be clear, I do not conceive of my proceduralist approach as necessitating a world state. However, I do accuse Habermas of dismissing the important potential of the weak public sphere in influencing decision-making. Although he asserts that the same 'thick' processes of legitimation are not possible at the global level as at the national level , I nonetheless believe that what I have previously conceptualized as the *weak* processes of a supranational public sphere play a critical role in influencing decision-making, and therefore in legitimizing supranational law. I realize the extent to which he also may be seen to be making an argument for a type of supranational public sphere; however he appears to be discrediting the legitimizing processes at the same time that he is arguing in favour of one. Specifically, Habermas runs the risk of self-contradiction by suggesting that the legitimacy of supranational law is any less dependent on processes of legitimation that occur as a result of the participation of individuals in the public sphere in the supranational context as it does in the domestic context. I can concede that the degree of legitimation may not produce the exact same results in both contexts, or even that the processes of legitimation themselves do not occur in precisely the same manner; however, to so readily negate the importance of the supranational public sphere in legitimizing supranational law is to irretrievably dismiss the democratic and discourse principles that underlies his proceduralist conception of law.

Habermas's comments on the lack of legitimation at the level of international institutions highlights a concomitant issue related to legitimacy at the supranational level: accountability. While he does not explicitly state it, Habermas's notion of the "legitimation gap" speaks to the relative difference between levels of accountability in the supranational sphere versus the national sphere. When there is a breakdown in the legitimizing and/or law-making and law enforcement mechanisms in the context of the nation-state, questions of accountability can be directed towards specific targets with often predictable consequences. However, in the supranational sphere, particularly under conditions of American hegemony, there is relatively little accountability. Governments, governmental organizations, NGOs and multinational enterprises enjoy an almost consequence-free environment, for whom questions of accountability are not much more than an afterthought.

I have conceptualized a proceduralist theory of supranational law that attempts to address this problem of accountability. Admittedly, under conditions of American hegemony, international institutions, including the UN, are rarely held accountable for their actions. This lack of accountability, however, is another factor that triggers dissent in response to the hegemonic order. At the supranational level, accountability is compromised to the extent that the ideology that underlies American hegemony is also embedded in the supranational legal institutions and practices. In this sense, the laws and law-making processes that support this hegemonic order are accountable only to themselves insofar as they perpetuate the conditions necessary for assent. Under the conditions set out in my proceduralist approach, however, a strengthened supranational public sphere means that the institutions that create and implement the discursively legitimized law are more accountable to the public than when under conditions of hegemonic legitimation. Still in full realization that the nation-state has mechanisms that

allow for a stronger form of accountability, as explained above by Habermas, I do nonetheless view my proceduralist approach as potentially strengthening accountability at the supranational level.

The processes of legitimation that take place in the supranational public sphere are expressions of global responsibility through the contestation of the actions and legal norms of the hegemonic order. In the previous discussion of Habermas's proceduralist approach, it has already been asserted that contestation (in the form of a norm dispute) initiates processes of justification (Habermas 1998:264). Above, I attempt to demonstrate that the processes associated with the act of justification are the central means through which the fluctuation between law and morality is moderated. I endeavour to link global responsibility, justification, and dissent to illustrate that cognitive dissonance can be moderated through processes of legitimation associated with the will-formation, and emerging opinion-formation, strategies of the supranational public sphere. These linkages are given further consideration below.

3.4 My Proceduralist Theory of Supranational Law In Practice

The overarching task of this thesis has been to demonstrate the mechanics of the weak legitimacy of supranational law and to develop a proceduralist approach to the legitimation of supranational law with the intention of addressing global crises in a morally- and legally-responsible manner. At this stage, I endeavour to summarize the claims I have made thus far by demonstrating that my proceduralist approach does provide for the legitimacy of supranational law in such a manner that could better ensure moral and just responses to global crises. To do this, I return to my discussion of global responsibility and relate it to the examples of Kosovo and HIV/AIDS in Africa in the context of my proceduralist approach.

At the outset, I tout global responsibility as being central to the legitimacy of supranational law because it mobilizes assent and dissent through participation. I argue that a strong sense of global responsibility corresponds to a willingness to respond more effectively to global crises. Furthermore, I conceptualize global responsibility as being a driving force behind the processes that contribute to legitimate legal and moral responses to global crises. In this sense, the notion of global responsibility may represent a universal moral orientation but what is equally crucial is that claims to global responsibility must be vetted in the communicative networks in the supranational public sphere in the legitimation and contestation of law. What begins to emerge are two key points of consideration relevant to my proceduralist approach: global responsibility as a motivator, and the justification of claims made under the banner of global responsibility.

In the previous chapter, I asserted that dissent is as much reactive as it is proactive, suggesting that the relationship between global responsibility and dissent is critical to motivating proactive participation. For an understanding of the reasoning that necessitates this underlying moral motivator in discursive processes, I borrow again from Habermas, who states that "[t]he entitlement to political participation is bound up with the expectation of a public use of reason: as democratic colegislators, citizens may not ignore the informal demand...to orient themselves toward the common good" (2001a:779). Without the conveniences of motivating strategies that one finds in the domestic context to orient participants of the discursive process "toward the common good", in the supranational context, the moral impetus stems from the sense of a common global responsibility. This reflects the statements that Brunkhorst offers on the subject of morality as the common binding force in the communicative networks of the supranational

public sphere, specifically his comment that moral language "...can enable the mobilisation of public interest and communicative pressure" (2002:689).

In this sense, then, the expression of global responsibility in the supranational public sphere is the central mechanism for the generation of opinion-formation. In order to influence the legitimacy of law in a positive capacity at the supranational level, the communicative networks of the weak public sphere must be strengthened through a common desire to act in a globally responsible manner. The concretizing of the normative foundation of the supranational public sphere, which occurs alongside the weakening hegemonic order, creates the conditions wherein the deliberative processes are directed towards a common objective. As Habermas points out, it is critical to the effectiveness of the deliberative process, and to the legitimation of law overall, that citizens "orient themselves toward the common good" (2001a:779). Therefore, a strengthened normative foundation facilitates the establishment of an effective communicative network in the supranational context, which is critical to the will-formation function of the public sphere, and to its ability to influence the legitimacy of supranational law.

I conceptualize a *weak* public sphere because, unlike Habermas, I do not believe that the type of change that is required to legitimize supranational law can be achieved under the conditions of the current hegemonic order. Because the strength of the supranational public sphere requires the weakening of American hegemony, and because the prevailing communicative networks and their corresponding institutions are effectively satellites of American hegemonic power, I argue that the change must occur at a more fundamental level. So as to move beyond the confines of hegemony, I view the growth and strength of the supranational public sphere as emanating from less formalized origins, and more from a deeper sense of shared responsibility. For this reason, I maintain that the formation of a weak public

sphere at the supranational level is an important step in achieving a positive influence on the legitimacy of supranational law.

Habermas's suggestion that this type of influence can be achieved by including NGOs more regularly in the deliberative processes of the supranational negotiating system is appealing (2001b:111), but is neglectful of the intermediate steps that must be taken that lead to strengthening of the supranational public sphere in the first instance. On this subject, Habermas states:

> ...the institutionalized participation of non-governmental organizations in the deliberations of international negotiating systems would strengthen the legitimacy of the procedure insofar as mid-level transnational decision-making process could then be rendered transparent for national public spheres, and thus be reconnected with decision-making procedures at the grassroots level.

This excerpt highlights a key point of contention between Habermas's approach to legitimacy, and my proceduralist theory of supranational law. To suggest that supranational institutions, once rendered deliberative, can influence the legitimacy of the procedure to such an extent is too simplistic. Many NGOs suffer gravely from democratic deficiencies themselves, as such, while the process of deliberation may appear to be more inclusive, it is not the case that this type of inclusiveness is particularly conducive to effective will- *or* opinion-formation. The institutionalization of the issue-oriented agendas of NGOs into the negotiating systems would do little more than complicate and retard an already over-loaded process. What would still be lacking is a broader normative foundation that would guide the direction of the negotiation systems towards a common good. For this reason, I propose that the change occur from the ground-up, and not in the problematic top-down approach that Habermas envisions. I contend that a fundamental change in the approach to inclusiveness and participation at all levels, coupled with the weakening of the hegemon, will contribute to the establishment of a normative

foundation for effective will-formation. Only then can NGOs participate meaningfully in the deliberative process.

In making this argument, not only does Habermas fail to recognize the pervasiveness of the hegemon's sphere of influence over many NGOs and related transnational institutions, he also skips important intermediary steps that are critical to the strengthening of the supranational public sphere. Instead, he offers a temporary, but ultimately ineffective solution to the problem of legitimacy with respect to supranational law, one that seeks procedural legitimacy through the quickest means possible, at the expense of his own broader objectives.

The influence of the supranational public sphere is as difficult to pinpoint as it is to gauge. For the purposes of my proceduralist theory of supranational law, I prioritize the influence of the supranational public sphere as being central to the overall legitimizing process. In order for it to grow as a positive influence on the legitimacy of law, the supranational public sphere must strengthen its will-formation function through the continued concretizing of the normative foundation. I maintain that the strong will and direction of the supranational public sphere cannot help but influence the decision-making processes of the transnational and national governmental organizations. Habermas's suggestion related to the inclusion of NGOs in the deliberative process does not pay sufficient deference to the multiplicity of problems associated with legitimacy and hegemony. As I claim throughout this thesis, once the prevailing hegemonic ideology has been replaced by the normative authority of the supranational public sphere, only then can there be a meaningful change in the legitimacy of supranational law.

This shift is gradual, and is dependent on a multitude of motivating factors. It is central to the legitimizing processes associated with supranational law that the notion of global responsibility motivates participants of the discursive process by mobilizing public interest. By

developing processes of legitimation that are normatively-centred around the notion of a common global responsibility, but which simultaneously function to check claims of responsibility that may be instrumentalized, I contend that law would be more effectively deployed in such situations as the war in Kosovo and the HIV/AIDS pandemic in Africa, which could mean the more expedient and just alleviation of suffering. Insofar as the act of justification moderates the fluctuation between law and morality, and therefore lends greater legitimacy to supranational law, the notion of global responsibility motivates participation in the supranational public sphere in the first instance. As the normative authority of the hegemon declines, the sense of global responsibility stands to be reinforced in the supranational public sphere in a manner that corresponds with the transition from hegemonic legitimation to supranational legitimation. In this sense, I am not suggesting that conceptions of responsibility alone will mobilize individuals toward dissent and participation. It is the combination of a growing sense of global responsibility and a feeling of injustice that initiates dissent and sustains participation in the discursive processes.

It is critically important that claims to be acting in the common good be open to questioning, dissent and justification in the supranational public sphere. This ensures that claims made under the banner of global responsibility are justified through the discursive process itself, thereby mitigating the problem of cognitive dissonance. As I demonstrated in the previous chapters, the decision to act or not to act in response to global crises inevitably raises questions of legality and morality. The circumstances that lead to cognitive dissonance under conditions of hegemony show that it is the nature of the global crisis itself (and the costs and benefits attached to responding) that indicates whether or not a response will ensue. However, it is becoming increasingly apparent that the hegemonic order cannot manage the tension between its self-

interests and morally-grounded supranational interests. To this end, measures of internal coherence that force cognitive dissonance are largely insufficient strategies of addressing global crises because such strategies promote the problematic fluctuation between law and morality, with deleterious consequences.

In the context of Kosovo, instead of blurring the moral obligation by acting out of self-interest as was the case under hegemony, a stronger supranational public sphere could have moderated the fluctuation between law and morality by acknowledging its global responsibility through processes of justification, and by influencing action in accordance with the discursively justified legal norms. As I state above, the act of justification helps to ensure the legitimacy of law by taking the opinion and will of those affected by the law into consideration. An unsubverted discursive process of legitimation as described above ensures that the actions taken in accordance with legal norms harmonize with the moral norms held by the supranational public sphere.

My proceduralist approach is conceptually structured so as to ensure that the law-making process reflects the will- and opinion of the supranational public sphere. Discursively legitimized international and cosmopolitan law would help to ensure the legality and morality of actions taken in response to global crises. The reasoning that supports this position is as follows: when the normative objectives, or the shared moral values, of the supranational public sphere are reflected in discursively legitimized law, then law *in action* should rarely conflict with the moral framework within which the legitimation process occurs. At this stage, it benefits my argument to break the proceduralist elements of this approach down even further so as to demonstrate the inner mechanics of legitimation and justification. The discursive process of legitimation moderates the fluctuation between law and morality through the practice of justification by using

the collective morality of the supranational sphere as the sounding-board against which the legitimacy of law is ascribed or denied. At one level, if the legal norm is not found to conflict with the moral norms that are held by the supranational public, then the law can be seen as legitimate. Taken a step further, the means by which this harmony between law and morality is established is by means of justification.

With respect to the HIV/AIDS pandemic in Africa, a stronger supranational public sphere that is motivated by a sense of global responsibility could be able to mobilize 'communicative pressure' on the decision-making organizations in a manner that would recognize the moral obligation, and influence action accordingly. As such, immoral inaction that results from strategies that invoke the divergence of law and morality would be less likely to occur.

Throughout this thesis I have used the term 'supranational' and not 'global' as the identifier in my conceptualization of the public sphere because movements themselves are not all necessarily *global* in their scope and source. In fact, most of the relevant movements take place in the domestic context and are directed at the domestic government, but their central impetus and objective is supranational in nature. For example, the network of movements against the US invasion in Iraq (Habermas 2003), and there are notable social movements across the world that are speaking-out against the ballistic missile defence plans of the US (Richter 2004). These are examples of how less institutionalized networks and movements within the supranational public sphere are able to influence public opinion and decision-making with varying degrees of success. This multifaceted mobilization has been occurring largely in response to the actions of the hegemonic order. The more these movements dissent, demand justification, and cohere around issues relating to the problematic convergence and/or divergence between law and morality, the more the normative authority of the hegemon is questioned. As the normative fault-line

continues to widen, these supranational movements have an opportunity to strengthen their influence on decision-making bodies by seizing the normative authority that once belonged to the hegemon.

On a general level, Brunkhorst's assertion that it is a concern over morality, or more specifically, the convergence between law and morality, that drives communication in the supranational public sphere is most relevant for the purposes of this project. This provides a foundation to the argument that I make around the shift in processes of legitimation from hegemony to the supranational public sphere. Participation in these processes by the members of the supranational public sphere provides opportunities for assent and dissent, which leads to the formation of public opinion and will. As I explain above and in previous chapters, the emerging normative fault-line represents the growing inability of the hegemonic order to sustain its system of ideological domination through the internal coherence of supranational law.

Brunkhorst, Habermas, Beck, and Anderson, all warn of the misappropriation of moral claims by the hegemon that leads to illegal action, and I add to this debate a similar concern related to the problematic divergence between law and morality that results in immoral inaction. The nature of cognitive dissonance demonstrates the degree to which questions of morality are central to the legitimation of supranational law. I contend that the supranational public sphere can now move to at least counter-act, if not replace, the current hegemonic control over the supranational legal framework, which has proven to have detrimental effects on the legitimacy of law in response to global crises. As the hegemon loses its normative authority, and therefore its ability to achieve internal coherence in law for the purposes of perpetuating ideological domination, the supranational public sphere stands to gain normative authority through processes of legitimation that are centred on public justification.

Under conditions where the supranational public sphere plays a substantive role in the legitimation of supranational laws, the fluctuation between law and morality can be expected to be moderated through discursive processes that are mobilized by an underlying sense of global responsibility. In acting in accordance with this global responsibility, the supranational public sphere does not risk promulgating cognitive dissonance because the act of justification itself circumvents the type of one-sided strategies of legitimation that prevail under conditions of hegemony. For these reasons, I contend that the strengthening of the legitimizing influence of the supranational public sphere is the only way of ensuring that supranational laws "...harmonize with the principles of universal justice and solidarity" (Habermas 1996:99), therefore ensuring the legality and morality of responses to global crises.

CONCLUSION

The first objective of this thesis has been to demonstrate that the cognitive dissonance that results from the hegemonic control over the supranational legal framework compromises the legitimacy of supranational law, which has negative implications for the legality and morality of responses to global crises. In response to the quandary set out by the first objective, the second objective has been to develop a possible proceduralist theory of supranational law that invokes processes of justification that could strengthen the legitimacy of supranational law as a response to global crises.

To lay the foundation for my argument, I have situated my position in relation to two prominent theorists: Habermas and Cohen. By contending that the negative effects of cognitive dissonance cannot be diminished as long as a single hegemon controls the supranational legal framework (Habermas), nor through a defense of state sovereignty (Cohen), my approach attempts to reach beyond the scope of the common parameters of the cosmopolitan debate. Instead, my arguments are directed at the circumstances of hegemony that lead to the weak legitimacy of law.

In conceptualizing the negative effects of hegemony, I have contended that the internal coherence of law is necessary for the perpetuation of the hegemonic order, but in striving for internal coherence, the hegemon forces either the convergence or divergence between law and morality. To develop a deeper understanding of cognitive dissonance, I have provided an analysis of illegal action, as represented by the Kosovo example, and of immoral inaction, as represented by the example of HIV/AIDS in Africa, which demonstrates the convergence and divergence of law and morality, respectively. From this discussion, I concluded that the hegemon cannot pursue objectives that inherently conflict with its own interests, and that the

hegemonic processes of legitimation cannot accommodate widespread dissent. Furthermore, I have found that the hegemon's reliance on strategies of internal coherence has most recently fostered the emergence of a normative fault-line, which provides an opportunity for the transition from hegemonic processes of legitimation to supranational processes of legitimation that are centred in the public sphere.

As a response to this opportunity and to address the weak legitimacy of law, I conceptualized a proceduralist theory of supranational law with the intent of circumventing the conditions that lead to the convergence or divergence between law and morality. Like Habermas's conception, my proceduralist approach attributes most of its key legitimizing functions to the public sphere. I have contended that the act of justification instigates the discursive processes within the supranational public sphere that provide for the moderation of the relationship between law and morality, which has a legitimizing influence on supranational law. Furthermore, I linked Habermas's notion of the 'common good' to global responsibility as a strategy of mobilizing participation that would generate outcomes that are conducive to will-formation. Ultimately, the contestation of hegemonic legal norms sets in progress processes of justification as expressions of global responsibility, and the act of justification moderates the fluctuation between law and morality, which lends greater legitimacy to the supranational laws by moderating cognitive dissonance.

Insofar as my proceduralist approach is an attempt to moderate the fluctuation between law and morality, I recognize that this fluctuation can never be defeated. It represents a dilemma that has occupied the minds of thinkers for millennia, and will likely continue to do so in the future. My thesis follows a line of thought that has emerged in recent years as a result of the anxieties caused by two related phenomena: globalization and hegemony. Globalization has

changed not only the nature of global crises, but also the nature of the responses to global crises, which implicates fundamental questions of law and morality. Insert the factor of American hegemony into this equation, and the law and morality dilemma becomes increasingly complex. With the apparent decline of hegemonic control, however, the probability for the normative renewal of the supranational legal framework grows, a matter of circumstance that has been met with guarded optimism by myself and theorists like Habermas. As hegemonies rise and fall, and as the sovereignty of nation-states clash with the legitimation of cosmopolitan legal norms, the questions that loom most prominently on the horizon of international and supranational political and legal theory pertain to the structure of the "postnational" political and legal arena. In this thesis, I begin to conceptualize the nature of my desired supranational constellation (borrowing from Habermas's notion of the *postnational* constellation, 2001b) in a manner that attempts to balance legal legitimacy with moral accountability. By blending abstract proceduralist theory with practical examples of global crises that invoke cognitive dissonance, I endeavour to demonstrate the essential role that a supranational public sphere could play in the legitimacy of supranational law, while also recognizing the limitations of its legitimizing function.

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