

# The Elements of Legitimacy: The State and the United Nations System<sup>1</sup>

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## The Westphalian State in the Current International Order

The issue of the legitimacy of the United Nations system encompasses a number of related subjects. These include the effectiveness of UN actions, the UN’s capacity to address international crises, and the UN’s ability to provide remedy when mistakes or wrongdoing occur. In essence, we are examining the institutional structure of the UN and asking whether it is up to the job we are asking it to do seventy years after its founding. A clear picture of the future may not be possible, but the scrubbing of what already exists seems unlikely. This does not, however, mean that what exists remains static. Joseph Schwartzberg’s *Transforming the United Nations System: Designs for a Workable World* demonstrates the institutional adaptation the UN has already undertaken and where there is the potential for more to come.<sup>3</sup> The challenge in undertaking such incremental reform is that it takes time to develop when crises abound with ever greater global reach and consequence. Yet there is little immediate alternative to creating pathways to legitimacy outside of the present structure of international institutions and states.

The end of the Cold War in the last decade of the twentieth century ignited a burst of enthusiasm that the post-Second World War United Nations system would finally be allowed to function as designed. This enthusiasm failed to take into account that the intervening decades had unleashed human rights movements and global forces that would place greater demands

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<sup>1</sup> Adapted from Charlotte Ku, *International Law, International Relations and Global Governance* (London: Routledge, 2012).

<sup>2</sup> From 1975-1977, I was on the legislative staff of U.S. Senator Alan Cranston who served as President of the World Federalist Association in 1948.

<sup>3</sup> Joseph E. Schwartzberg, *Transforming the United Nations System: Designs for a Workable World* (Tokyo: United Nations University, 2013).

both on states and the UN system, but without clear direction on how to allocate responsibilities and accountability for legitimate action when addressing those demands. Since the end of the Cold War, we have recognized that existing sources of authority that had historically demonstrated the power and capacity to govern, notably the Westphalian state and the international institutions based on interstate cooperation, were losing legitimacy. They seemed unable to master the humanitarian and other world order problems facing the United Nations fifty years after its founding. UN Secretary-General Kofi Annan put it well on the eve of the millennium when he noted that:

. . . while the post-war multilateral system made it possible for the new globalization to emerge and flourish, globalization, in turn has progressively rendered its designs antiquated. Simply put, our post-war institutions were built for an inter-national world, but we now live in a *global* world.<sup>4</sup>

Technological changes, most notably a rapid increase in connectivity and mobility, have contributed to the state's loss of the competitive advantage over other forms of governance that it held from the seventeenth to the twentieth centuries. States have seen an erosion of their monopoly of authority coupled with growing demands for performance as the basis for recognizing state legitimacy and for fulfilling responsibilities complementary to the duties states have historically imposed on their subjects and citizens. The growing distrust of state authority internally means that national authorities seek alliances with external institutions like the United Nations to provide legitimacy. Their desire, for example, to have the backing of a Security Council resolution under UN Charter Chapter VII, for any use of force demonstrates this quest for international legitimacy. The Westphalian system's inherent right of self-defense is no longer sufficient to overcome domestic divisions or doubt.

We are in the midst of a governance shift much like that of seventeenth century Europe. At the dawn of the Westphalian state system, there were competing models of governance, including multiethnic empires, city leagues, and city states. These, in turn, had replaced the earlier governing models of the Middle Ages: empires, feudal lordships and a theocratic church. The territorial state prevailed in this competition because it "proved to be more adept at

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<sup>4</sup> UN Secretary-General Millennium Report, *We the Peoples*, 11.

preventing free riding, standardizing weights and coinage, and establishing uniform adjudication.”<sup>5</sup> It provided more structured means to direct internal development and to protect against external encroachment because it had a central “locus of authority” which the looser governing models did not. This created a relationship between states and their subjects (and eventually citizens) that reached its apogee in the nineteenth century.

In the twentieth century, we saw pressures exerted on this locus of authority and responses to those pressures that diffused the state’s power. Yet, the state today remains one of the most coherent – and legitimate -- units of governance in the global system. Even as we have seen the shifting of authority from the state to other institutions and units of governance, it is important to note that the state still possesses power and legitimacy that other global actors do not. Still, as Schwartzberg and other scholars of international institutions have noted, competing models of governance in a globalized world are emerging in response to specific needs. New governing institutions, structures, partnerships, and relationships have empowered new actors and asserted new values that form the basis for governance today. They have also created new responsibilities and obligations. However, not all of these arrangements will survive to establish their durability and legitimacy over the long term. A “workable world” requires the development of horizontal performance-based responses to global issues by the more vertical sources of legitimacy that exist today. The need for legitimacy is a primary driver in determining which arrangements will endure.

### **Emerging Governance Partnerships**

As we consider what the new governing landscape will look like, we know that its elements already exist although we may not yet recognize all of them or understand fully how they interact. The history of the two principal institutions of the twentieth century, the League of Nations and the United Nations, is also the story of the Westphalian state at its high water mark. Once it gained ascendancy, the state set out to replicate itself. States used their collective authority to determine which political entities were entitled to membership in the League and

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<sup>5</sup> Hendrik Spruyt, *The Sovereign State and its Competitors* (Princeton, NJ: Princeton University Press, 1994), 6.

United Nations to do so. Aspiring states regarded membership as a vital step in their acceptance into the international community. This remains true today. Status as a peer is conferred by a group of states through an institution of their own creation, the United Nations General Assembly which provides near-universality in the decision-making process of the state system. But we know from nearly a century of experience with both the League and the United Nations that this universality can come at the price of effectiveness. Decisions can stall as they did in the League of Nations because of the League's unanimity requirements. Some UN General Assembly resolutions are approved over and over again to no avail because their most vociferous supporters lack the capacity to implement their decisions.

Still, states see the value of UN resolutions as an international imprimatur for their actions from their peers. A century of international organization has created a virtually universal consensus on the desirability of a collective decision-making process to legitimate individual state actions. Over the decades, an implicit hierarchy for such collective decision-making has emerged within the United Nations, with the Security Council at the top of the decision-making pyramid. This is the case because Security Council decisions are more closely linked than those of the General Assembly to the capacity and attention required to address international problems. Yet, we know that even a unanimous Security Council resolution is not the panacea that it was once expected to be. The restricted and rotating membership of the Security Council has brought into question the legitimacy of some of its decisions. And problems also arise when the Council delegates implementation of its decisions to powerful states, subjecting the institution to charges of being a pawn to the great powers at the expense of lesser powers or peoples. So while the UN provides legitimacy to its states-members, the organization itself looks for validation of its own legitimacy.

Among the measures it has taken to bolster its decision-making legitimacy is the creation of channels for broader non-state participation through NGO forums and other techniques to harness individual or private sector actors. The practice serves two functions. First, involving private sector actors can increase the capacity of the organization to perform certain tasks better than the public authorities of member states; such actors often have

unique technical information and expertise to implement UN decisions. Second, working with private sector actors, including NGOs, may provide access to vulnerable or affected populations in ways that are not possible for authorities responsible to the government of a member state because of formal legal or technical barriers. Such emerging partnerships, however, may lack accountability and a clear locus of responsibility for actions taken. The UN has made an effort to create legal relationships defining both the scope of responsibility and liability when private sector actors perform services as part of international operations.

### **Towards a New Global Legitimacy**

Despite the questions raised by these emerging partnership arrangements, there are several clear characteristics of the developing global landscape.

1. Governance is more **open and participatory**. This has occurred to such an extent that in the Global Administrative Law project, one important characteristic of that body of law is “publicness.”<sup>6</sup> Reporting and monitoring of actions is routine to check compliance and performance. In other words, all actions, whether taken by individual states, collectively as an international institution, or in concert with private actors is subject to external oversight – formal and informal. Individuals and groups working privately as civil society now use networks and social media to ensure that these reporting and oversight functions are duly discharged.
2. National and international legal institutions increasingly hold public authorities and private actors **responsible** for any damage done and for human rights violations resulting from the conduct of their operations. Remedies, including financial damages, are becoming part of the international legal system, with the development of a separate body of law on the responsibility of international organizations to provide redress.<sup>7</sup>

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<sup>6</sup> Benedict Kingsbury, “The Concept of ‘Law’ in Global Administrative Law,” *European Journal of International Law* 20 (February 2000): 25.

<sup>7</sup> See International Law Association, Final Report, Committee on the Accountability of International Organizations, 2004 available at [www.ila-hq.org](http://www.ila-hq.org). *Accountability and the Use of Force Under International Auspices* (Farnham: Ashgate, 2004): 91-107.

Both national judicial and legislative processes have been seized with this issue as we have seen in Canada and The Netherlands.<sup>8</sup> Private parties, NGOs, and individuals have used national legal processes to hold international actors accountable.<sup>9</sup>

3. Effectiveness in performance is judged not only by how well actions address a problem, but also by how publicly **accountable** national, international, and private actors are to a civil society constituency. Providing the national and international institutional channels for civil society to raise any concerns is an adaptation that institutions have been making for the past three decades. There is no legitimacy without both effectiveness and accountability.

Operationally, the role of states and international organizations is now to manage, coordinate, and facilitate coalitions of myriad actors that can best address a problem or issue. All these actors seek legitimacy on three levels:

**Performance legitimacy**, where actions are evaluated for their effectiveness. This effectiveness is more than just solving a problem; how the problem is addressed is a relevant factor to assess. The means now matter as much as the end.

**Process legitimacy** assesses where the decision to act was made; which institutions and individuals were involved in that decision; and on whose terms it was reached.

**Cognitive legitimacy** requires that larger social or community values, and not short term advantages for the actors concerned, shape their decisions. This form of legitimacy needs to be reassessed as conditions change.<sup>10</sup>

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<sup>8</sup> See Commission on Inquiry into the Deployment of Canadian Forces to Somalia, "Dishonored Legacy: The Lessons of the Somalia Affair," Minister of Public Works and Government Service, Ottawa, 1997 available at <http://www.dnd.ca/Somalia.vol10/vos27e.htm>. See Netherlands Institute on War Documentation, "Report on Srebrenica: A Safe Area" available at <http://www.srebrenica.nl/en/menulinks.htm>.

<sup>9</sup> See Srebrenica Appeal Decision, "The Hague Court of Appeal (5 July 2011), LJN: BR0132, available at <http://www.rechtspraak.nl.ljn.asp?ljn=BR0132>.

<sup>10</sup> Mark C. Suchman, "Managing Legitimacy: Strategic and Institutional Approaches," *Academy of Management Review* 20 (1995): 582.

Using these qualitative elements as benchmarks may be more fruitful to determining the legitimacy of a decision and its implementation than focusing on the formal authority of an individual actor or institution. Whether by strategic interaction, *ad hoc* accommodation, public-private partnership or happenstance, the post-Westphalian system has empowered a variety of elements to perform some function in global governance. We therefore now need to understand these new elements, their capacities, potential and shortfalls. Most importantly, we need to understand their connection and relationship to each other and their long-term system-wide effects in global governance and the role they play on the legitimacy continuum. Accumulating information on and understanding what is done and by whom will help to define global legitimacy.

The ability to differentiate between the forms, functions, and dynamics of legitimacy makes possible a better understanding of the conduct and behavior of global actors that either claim or seek legitimacy. Changes in legitimacy are less a wholesale rejection of an established order than they are an adjustment needed in light of changed conditions and needs. There is nothing particularly novel in all this. What makes identifying these emerging elements of a global environment challenging is the pace of change and the growing number of international actors simultaneously competing and cooperating with the Westphalian state.

## **Conclusion**

The conceptual challenge is therefore less one of judging the legitimacy of individual actors than it is to understand the elements that comprise legitimacy today. We know, for example, that openness, participation, responsibility, and accountability are characteristics of legitimate actions. Existing legal and political channels already provide access to the decision-making of the United Nations and national institutions in many states, but more such channels will be needed in the future. Global governance will also require looking and thinking more expansively about public and private authorities, whether they are operating within a domestic or international sphere. We know already that actions of national legislatures and courts have global effects and that international decisions have profound local effects. Since the state remains one of the most developed governing units available for the foreseeable future, the

clearest pathway to process and cognitive legitimacy may well remain that of national channels. This does not, however, mean a return to the state-centric environment of the past in which the Westphalian state answered to no authority beyond its own borders.

States are held to international and global standards that make them accountable for their actions. They are also held accountable and responsible for the actions of those individuals, NGOs, and other actors operating under their jurisdiction, whether exercised unilaterally or through an international mandate. National authorities can become more responsible and accountable agents of global governance by pursuing performance, process, and cognitive legitimacy. And their actions in this regard will impart legitimacy to existing international institutions and shape the emerging global order.