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The democratic legitimacy of international law: the role of non-State actors

Steven Wheatley, Director, Centre for International Governance, University of Leeds, UK

The democratic legitimacy of the Westphalian system of international law is provided by the sovereign equality of members (States),¹ the nature of diplomatic conversations, and (in the case of democratic States) by the fact that consent to legal norms,² and ongoing participation in international regimes,³ constitutes an expression of democratic self-determination.⁴ The system of international law enables the peoples of democratic States to commit upholding certain standards of behaviour, and requires them to justify its conduct in the light of those standards. Democratic self-determination is exercised in a constitutional framework, including those norms of public international law that regulate domestic conditions.

The system of global governance no longer makes State consent a requirement for the imposition of legal obligations.⁵ The authority of the Security Council is not for example limited by the will of the members of the United Nations, but by the practice of the institution which gives concrete meaning to the open-textured provisions of the Charter. Likewise, the European Court of Human Rights has not felt constrained by the 'ordinary meaning' to be given to the terms of the ECHR,⁶ or the intention of the States parties 'expressed more than forty years ago'.⁷ These institutions exercise political authority without

direct democratic accountability or control.⁸ They form part of a fragmented system of international governance (without government), in which international organizations, de jure or de facto,⁹ establish legal norms and attach consequences to non-compliance. Given that democracy is the key indicator of legitimacy for the exercise of political authority at the level of domestic government, the question arises as to whether acts of international governance may make any plausible claim to democratic legitimacy? Andrew Moravcsik describes this as 'one of the central questions – perhaps the central question – in contemporary world politics'.¹⁰

The focus here is international governance by international organizations. Other non-State actors, non-governmental organizations, transgovernmental networks, multi-national corporations and public-private partnerships, may exercise a governance function,¹¹ establishing and monitoring compliance with international norms.¹² These 'soft' norms may be transposed into 'hard' laws,¹³ or form one part of the 'bricolage'

¹ See Boutros Boutros-Ghali, *An Agenda for Peace*, Security Council Doc. S/24111, 17 June 1992, at para. 82.

² J.H.H. Weiler, 'The geology of international law – governance, democracy and legitimacy' (2004) 64 *ZaöRV*, 547, 555.

³ Thomas Risse, 'Global Governance and Communicative Action' (2004) 39 *Government and Opposition*, 288, 290.

⁴ The claim is open to criticism given the 'take-it-or-leave-it' approach to much contemporary treaty negotiation and the long chain of democratic control linking the people to their representative, but international law does not *ipso facto* appear to have a democratic legitimacy deficit.

⁵ Cf. Ian Brownlie, *Principles of Public International Law* (6th edn., 2003), at 287. The International Court of Justice has referred to the 'the fundamental principle of State sovereignty, on which the whole of international law rests': *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States) Merits* [1986] ICJ Rep 14, at para. 263.

⁶ See *Golder v United Kingdom*, A18, Separate Opinion of Judge Sir Gerald Fitzmaurice, para. 37.

⁷ *Loizidou v Turkey* (Preliminary Objections), A310, para. 71.

⁸ James Bohman, 'International regimes and democratic governance: political equality and influence in global institutions' (1999) 75 *International Affairs*, 499, 508.

⁹ Jost Delbrück, 'Exercising public authority beyond the State: transnational democracy and/or alternative legitimation strategies?' (2003) 10 *Indiana Journal of Global Legal Studies*, 29, 35.

¹⁰ Andrew Moravcsik, 'Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis' (2004) 39 *Government and Opposition*, 336, 336.

¹¹ Rosenau argues that the term 'governance' may also be applied in world politics to activities 'that may or may not derive from legal and formally prescribed responsibilities': James Rosenau, 'Governance, order, and change in world politics', in James Rosenau and Ernst-Otto Czempiel (eds.) *Governance without government: order and change in world politics* (1992), p. 1, p. 4.

¹² Thomas Risse, 'Global Governance and Communicative Action' (2004) 39 *Government and Opposition*, 288, 309. See for example Klaus Dingwerth, 'The democratic legitimacy of public-private rule making: what can we learn from the World Commission on Dams' (2005) *Global Governance*, 65; and Archon Fung, 'Deliberative democracy and international labor standards' (2003) *Governance*, 51, 56.

¹³ An example of the role of NGOs in rule-setting is the World Commission on Dams (WCD), which consists of the World Bank, national governments, private industry, and NGOs. Although the

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constructed by domestic and international Courts,¹⁴ but it remains important to distinguish between the policeman and the (well-meaning) gunman. The source of a rule is relevant to its authority and legitimacy; positive laws create a 'pull to compliance', and, in terms of international law, links the relevant norm to a system of responsibility and accountability.¹⁵

How then are we to understand the system of international governance? There is a divergence in the literature between those who hold to a 'contractual' approach, which seek to discern more clearly the intention of the parties as expressed in the text, and those who argue for a 'constitutional' reading of the system of global governance. The public law nature of international governance and its 'direct' or 'indirect' effect on the legal position of citizens suggests a constitutional approach, and related principles of (international) rule of law, checks and balances, etc.

A constitution must also give some collective sense of 'self' and expression of shared political values to guard against the exercise of political authority by self-serving minorities or majorities. According to Martti Koskenniemi there is no 'basic understanding of the common good' in the international political-legal community, 'beyond the languages of diplomacy and positive law whose very fragmentation and indeterminacy provided the starting-point for the search for an (implicit) constitution.'¹⁶ But is this the case? The deformation of the 'Westphalian' system by reference to liberal-cosmopolitan values of human rights, democracy and concern for the social-welfare of 'others' is evident in the emergence of norms of *jus cogens*,¹⁷ which 'give legal form to the most fundamental policies or goals of the international

community',¹⁸ and in the language of international instruments. The '2005 World Summit Outcome' refers to 'common fundamental values', including respect for all human rights,¹⁹ and describes democracy as a 'universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.²⁰ The resolutions affirms the positions of the member States of the United Nations, that human rights, the rule of law and democracy are 'interlinked and mutually reinforcing'.²¹ There can be no democracy without rights, and no rights without democracy.

In order to begin to think about democracy beyond the State, we need to move beyond definitions that define democracy by reference to elections and elite competition. In *Between facts and norms*, Jürgen Habermas outlines an influential model of deliberative democracy. For Habermas a democratic legal order draws its legitimacy from the idea of collective self-determination.²² In ideal conditions, laws result from a process of reasoned deliberation amongst equal citizens, who reach a consensus. The legitimacy of legal norms depends upon 'an appropriate legal institutionalization of those forms of rational discourse and fair bargaining that ground the presumption of the rational acceptability of outcomes'.²³

There may be an argument for applying the model of deliberative democracy to the system of international law: in diplomatic conversations, self-interested arguments will not prevail. The (recognized) members of the political community (States) must offer 'reasonable arguments[,] that fit within a wider context of shared understandings about the rules of international life'.²⁴ The concern in this paper is not with the democratic legitimacy of international law, but international governance: the exercise of political authority by international organizations without the consent of democratic peoples. Citizen participation in the system of global governance is limited. There are no global Parliaments in the fragmented system of global governance. Moreover there is no global public with a shared collective identity and

WCD's work is advisory, it is a powerful source of international "soft law.": Erik Bluemel, 'Overcoming NGO accountability concerns in international governance' (2005) 31 *Brooklyn Journal of International Law*, 139, 163-4.

¹⁴ Cf. Mark Tushnet, 'The possibilities of comparative constitutional law' (1999) 108 *Yale Law Journal*, 1225, 1286.

¹⁵ See International Law Commission, Draft Articles on State Responsibility.

¹⁶ Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) *Modern Law Review*, 1, 16.

¹⁷ Those peremptory norms that are 'clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination': Commentary on art. 26, at para. 5, International Law Commission, Draft Articles on State Responsibility. See also the idea of obligations *erga omnes*, which derive 'from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination': *Case concerning the Barcelona Traction, Light and Power Company, Limited* [1970] ICJ Rep 3, at para. 34.

¹⁸ *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Rwanda)*, judgment 3 Feb. 2006 available at www.icj-cij.org/, Separate Opinion of Judge ad hoc Dugard, at para. 10.

¹⁹ GA Res. 60/1, adopted without a vote 16 September 2005, '2005 World Summit Outcome', para. 4

²⁰ *Ibid.*, para. 135.

²¹ *Ibid.*, para. 119.

²² Jürgen Habermas, *Habermas, Between facts and norms: Contributions to a Discourse Theory of Law and Democracy* (trans. William Rehg, 1996), p. 449.

²³ Jürgen Habermas, 'Between facts and norms: an author's reflections' (1999) 76 *Denver University Law Review*, 937, 940-1.

²⁴ Ian Johnstone, 'US-UN Relations after Iraq: the End of the World (Order) as We Know It?' (2004) 15 *European Journal of International Law* 813, 819.

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common political culture. In Joseph Weiler's phrase there is '[g]overnance without government and without the governed'.²⁵

If the possibilities of global democratic government appear unachievable and/or unwelcome, two alternatives present themselves: either, the fragmented system of international governance must become more democratic, or domestic democratic institutions should be protected from legal norms established beyond the control of democratic people. This latter argument underpins American unilateralism (or more accurately American exceptionalism). Jed Rubenfeld for example distinguishes international constitutionalism, based on the idea of universal rights and principles, from democratic constitutionalism, which regards constitutional law as embodying a particular nation's fundamental, democratically self-given legal and political commitments: 'democracy over time.'²⁶ For Rubenfeld, support for international law is support for 'fundamental constraints on democracy.' This he argues is the purpose of international law, designed as it was 'in the wake of World War II'.²⁷ Where there is a conflict between international constitutionalism and domestic constitutionalism, a democratic government is under a 'democratic duty [to] follow the dictates of its own people.'²⁸

The exceptionist position presents a false choice: either international law, or democratic law. Engagement with international law may produce a more just democratic constitutional order, providing a basis for the reasoned critique of existing norms, and enabling national institutions and publics to engage in critical self-reflection.²⁹ Moreover, the radical democratic position fails to recognize fully the impact of globalization – even for the hegemon.³⁰ Globalization has produced a democratic legitimacy deficit. Issues and actors outside of the direct democratic control of the people will impact on them. Engagement with international law is a pragmatic response to the fact of globalization, enabling

citizens to assert some control over decision-making processes that occur outside of the political unit.

The standard response to a democratic legitimacy deficit in global governance is to propose measures designed to 'inject the voice of individual citizens into the exclusively state-based structures'.³¹ The Cardoso Report on United Nations–Civil Society Relations for example argues that the UN must do more to 'strengthen global governance and tackle democratic deficits'. This work should be guided by principles of 'inclusion – ensuring equitable outcomes, participation – involving people in decisions that affect them, and responsiveness – listening to peoples' concerns and being answerable to them.'³² The democratic deficit of global governance is not narrowed by electoral contestation for office and power, but by the application of the principles of inclusion, participation and accountability.

The distinctive idea of deliberative democracy is that binding rules should be determined through open and fair processes of public reason in which parties offer arguments and evidence to persuade others. The implementation of the principle at the level of international governance requires transparent decision-making, participation by all those who may be affected by the decision, and reasoned decision-making.³³ Legitimacy is further enhanced by deliberations that seek a consensus amongst participants.³⁴ The application of the principles of transparency, inclusion and public will produce better, more informed decisions, which will in turn exert a greater pull to legitimacy.³⁵ They also allow the possibility that the global public(s) will be able to engage with decision-making processes located in international organizations, make a judgment as to whether the decision-maker has sought to act in the global public interest, and engage critically with the substantive rationale for decisions.

²⁵ J.H.H. Weiler, 'The geology of international law – governance, democracy and legitimacy' (2004) 64 *ZaöRV*, 547, 560. Habermas himself has argued that there must be a 'clearly defined "self" for political self-determination and self-direction, to which collectively binding decisions can be ascribed': Jürgen Habermas, 'Toward a cosmopolitan Europe' (2003) 14 *Journal of Democracy*, 86, 88-9.

²⁶ Jed Rubenfeld, 'Unilateralism and constitutionalism', 79 *New York University Law Review* (2004) 1971, 1999.

²⁷ *Ibid.*, 2020.

²⁸ Oona Hathaway and Ariel Lavinbuk, 'Rationalism and revisionism in international law' (2006) 116 *Harvard Law Review*, 1404, 1419. This is a review article of Jack Goldsmith and Eric Posner, *The Limits of International Law* (2005).

²⁹ See for example *Lawrence v Texas*, 539 US 558 (2003).

³⁰ Robert Dahl, 'A democratic dilemma: system effectiveness versus citizen participation' (1994) 109 *Political Science Quarterly*, 23, 26

³¹ Eric Stein, 'International integration and democracy: no love at first sight', 95 *American Journal of International Law* (2001) 489, 533.

³² 'Cardoso' Report of the Panel of Eminent Persons on United Nations–Civil Society Relations, 'We the peoples: civil society, the United Nations and global governance', UN Doc. A/58/817, para. 186 (emphasis added).

³³ These are the principles identified by the global administrative law project, in addition to 'review in global governance': Nico Krisch and Benedict Kingsbury, 'Introduction: global governance and global administrative law in the international legal order' (2006) 17 *European Journal of International Law*, 1, 2.

³⁴ Patrizia Nanz and Jens Steffek, 'Global Governance, Participation and the Public Sphere' (2004) 39 *Government and Opposition*, 314, 318.

³⁵ Moravcsik remains sceptical of the ability of increased opportunities of political participation at the level of global governance to generate more informed deliberation and decision-making, leading to greater trust and a deeper sense of common identity and legitimacy: Andrew Moravcsik, 'What can we learn from the collapse of the European Constitutional project?' (2006) 47 *Politische Vierteljahresschrift*, 219, 222.

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Democratic legitimacy at the domestic level requires that government to be responsive to the diverse people of the territory (and not others). To which stakeholders are international organizations accountable for their performance? The cosmopolitan position presents a moral argument that justification is required (with reasons) to any person affected by a particular action. But as Ruth Grant and Robert Keohane observe: if being affected was a sufficient criterion for inclusion then 'anyone who buys gasoline would be entitled to participate in OPEC's deliberations'.³⁶ In democratic States, citizens are entitled to hold 'power-wielders accountable... either as the source of that power (the delegation model) or as the body affected by it (the participation model) or both. On the global level, there is no public that can function in this way... There is no simple analogy that can be made between domestic democratic politics and global politics'.³⁷ What is required is a pragmatic response to the accountability deficit in international governance.

The principle of accountability allows for sanctions to be applied where performance is poor, or power exercised for an improper purpose or objective.³⁸ Moravcsik argues that the political legitimacy of international governance does not rely on its democratic credentials, but its technocratic efficiency. International institutions should not be compared to idealized models of democracy, but with the practices of existing advanced democracies.³⁹ Whilst all functions of government are ultimately controlled by voters or their representatives, there is no requirement that all such functions should be 'immanently under such control'.⁴⁰ Modern democracies he observes 'are not populist but constitutional'.⁴¹ Functions may be delegated to constitutional courts, central banks, expert bureaucracies, etc. for one of three reasons: the greater attention to detail these institutions are able to give the issue in question (in contrast with the general population where most citizens remain "rationally ignorant" or non-participatory); the need impartially to dispense justice for minorities; and the need to provide

majorities with unbiased representation and avoid the capture of government policy by powerful minorities.⁴²

The problem of system effectiveness versus citizen effectiveness is inherent in the practice of democracy.⁴³ The other justifications for delegation assume a model of democratic will-formation that requires laws to enjoy the support of the majority, but subject to the conditions that majority rule does not offend against settled constitutional norms; public reason; or violate the 'rights' of minorities. Citizens expect to have different levels of involvement at different levels of decision-making: a high level of direct involvement in the choice of legislature and government; much less on more 'technical' issues. They expect however that public decision-making bodies will remain accountable to democratic bodies, and crucially they expect to retain the right to move 'regulatory' issues onto the political agenda and thus bring the issue under direct political control (see for example debates around the ethical applications of science: 'bioethics'). In a democracy, there are no 'non-political' issues.

International organizations are not accountable to democratic institutions, or democratic publics. There is a democratic legitimacy deficit in international governance that cannot be cured by increased transparency and participation, or by more reasoned decision-making processes. International governance institutions can become more accountable through engagement with global public opinions and accountable to those affected by their actions, but they cannot become more democratic. Where then does that leave the question of democratic legitimacy? The question cannot be ignored: democratic legitimacy – not technical efficiency – remains the key indicator of legitimacy for the exercise of political authority. The only way in which the system of international governance can make a claim to democratic legitimacy is in terms of output legitimacy: international governance must promote democratic self-determination within sovereign States. That is not to suggest that international organizations should reinterpret their mandate to make democracy promotion their primary objective: they remain the creatures of their constitutive instruments. The Security Council does not for example have a constitutional mandate to promote democracy or authorise military intervention to enforce democratic regime change. On the other hand where it authorizes the administration of territories on behalf of the international community; intervenes in civil wars; and deals with the consequences of military intervention in failed and rogue States, it is appropriate for the Security

³⁶ Ruth Grant and Robert Keohane, 'Accountability and abuses of power in world politics' (2005) 99 *American Political Science Review*, 29, 33.

³⁷ *Ibid.*, 34.

³⁸ Accountability measures in global governance range from legal actions, through formal measures of political accountability (loss of office), to reputational sanctions: *Ibid.*, 36.

³⁹ Andrew Moravcsik, 'Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis' (2004) 39 *Government and Opposition*, 336, 337.

⁴⁰ Andrew Moravcsik, 'Conservative idealism and international institutions' (2000) 1 *Chicago Journal of International Law*, 291, 312.

⁴¹ Andrew Moravcsik, 'What can we learn from the collapse of the European Constitutional project?' (2006) 47 *Politische Vierteljahresschrift*, 219, 238.

⁴² Andrew Moravcsik, 'In defence of the "democratic deficit": reassessing legitimacy in the European Union' (2002) 40 *Journal of Common Market Legal Studies*, 603, 614.

⁴³ Robert Dahl, 'A democratic dilemma: system effectiveness versus citizen participation' (1994) 109 *Political Science Quarterly*, 23, 29.

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Council seeks to promote democracy – and this is the practice of the Council.⁴⁴

What then is the relationship between the fragmented institutions of the system of international governance and the peoples of democratic States? International organizations may exercise 'sovereign' authority where it is delegated or transferred to them by the States parties to their constitutive instrument.⁴⁵ There should however be a presumption against them exercising political authority in the absence of direct authorization. This is expressed in the principle of subsidiarity, which requires that the exercise of political authority should be undertaken as close to the people as possible consistent with the principle of achieving effective outcomes. Where sovereign authority is exercised without direct

authorization, legal norms should accommodate where possible the principle of democratic deference.⁴⁶ The purpose of international governance must be to promote domestic constitutional discourses to ensure an act of democratic self-determination consistent with the values recognized in international legal instruments. Where national authorities engage in an open and fair processes of public reason in which all relevant parties have been able to participate with a view to reaching a consensus, there should be a presumption that the domestic law is democratically legitimate and consistent with international standards. The future of international governance is domestic, democratic, and deliberative.

⁴⁴ See Steven Wheatley, 'The Security Council, democratic legitimacy and regime change in Iraq', 17 *European Journal of International Law* (2006) 531, 541 and 548.

⁴⁵ Dan Sarooshi, *International organizations and their exercise of sovereign powers* (2005).

⁴⁶ The European Court of Human Rights has for example upheld the United Kingdom's position on assisted reproduction, which was the 'culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in [this area]' (*Evans v the United Kingdom*, App. No. 6339/05, judgment 7 March 2006, para. 63), but rejected its position on the rights of prisoners to vote where there had been no substantive debate on the issue in Parliament (*Hirst v United Kingdom* (No. 2), App. No. 74025/01, judgment 6 October 2005 [GC], para. 79).