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The Power of Rational Discourse and the Legitimacy of  
International Governance

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## Abstract<sup>1</sup>

This paper explores the nature and the dimensions of legitimacy in the international system. In contrast to the philosophically oriented literature on the topic, legitimacy is understood here solely as an empirical phenomenon, a normative force pulling state actors towards voluntary compliance with international regulations. Referring mainly to insights from social theory and legal thinking I conceptualise legitimation of international governance as a rational discursive process. In the absence of other legitimating sources such as foundatory myths, ideas of providence or a *demos*, international governance can rely only on the legitimating force of rational arguments. International governance as governance by agreement draws its legitimation from a consensus on normative principles and its translation into issue-specific rules. I then argue that the factors that determine the legitimacy of international governance can be tentatively divided into three categories: scope of governance, procedural fairness, and substantive justice.

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## 1. Introduction

Parallel to the rapid growth of supranational institutions and economic 'globalisation' over the last few decades, an extensive debate on the legitimacy of governance 'above the nation state' has emerged.<sup>2</sup> The central focus of these debates lies on the problem of democratic legitimation: how can democratic legitimacy be transferred from the single citizen to a remote decision-making body on the international level?<sup>3</sup> The democracy-debate, however, leads to a somewhat paradoxical situation: on the one hand many arrangements of international governance are obviously legitimate in that they are accepted, supported and constantly enlarged. On the other hand, there is the impossibility to grant the normative predicate 'legitimate' to these arrangements. This strand of research on international legitimacy has led to a refined understanding of a philosophical problem but it cannot provide many new insights as to how the process of international legitimation functions in practice. It has no answer to the question: why do states support international governance?

Partly in response to this dilemma, philosophers and legal scholars have struggled to explore other sources for the legitimacy of international governance, mainly the legitimising effect of rational deliberation. International governance is viewed as a deliberative process that (ideally) involves all relevant interests and can thus make up for the obvious lack of direct democratic legitimation. This interesting literature tries to derive normative leverage from the way international governance actually functions and thus takes an ambiguous stance between descriptive and prescriptive perspectives (Joerges and Neyer, 1997). On the purely descriptive side of the spectrum, many 'realist' or 'rational institutionalist' scholars are still prone to ignoring the legitimacy problem completely and to explaining the shape of international governance exclusively in terms of national interests and preferences. International legitimacy as a social fact thus slips into a gap between normative research, which is preoccupied with the philosophical justification of international governance, and empirical research, which tends to dismiss legitimacy as irrelevant.

In this essay I propose a re-conceptualisation of the legitimacy *problematique* by re-framing the issue in the Weberian sense. If we regard legitimacy as an empirical fact rather than as a normative desideratum we can

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<sup>2</sup> In this paper I refer to all structures of governance above the nation state as 'international governance' and correspondingly to 'international domination'. This is a bit unfortunate because 'supranational' brings out better the idea of governance above the nation state. However, I prefer to stay in line with this widely used terminology.

<sup>3</sup> Cf. De Burca, 1996; Jachtenfuchs, Diez and Jung 1996; Horeth, 1998; Kohler-Koch, 1999; Lindseth, 1999; Neyer 1999; Schmitt and Thomassen, 1999.

observe that international governance is widely viewed as legitimate, in the sense that there are normative motivations for voluntary compliance with it. This line of enquiry has been opened up by Thomas Franck (1988, 1995) more than a decade ago but withered in the shade of the democratic legitimation debate. One of the reasons for this might be that Franck and other authors working in this tradition (Hurd, 1999) have quite correctly grasped the dynamics of international legitimation, but –unfortunately– have not underpinned their claims with clear theoretical foundations.<sup>4</sup>

In this paper I therefore want to provide a solid theoretical grounding for an empirically oriented investigation into international legitimacy. I start from Max Weber's assertion that domination in the 20th century is rationally legitimised and I try to hammer out the blueprint of discursive legitimation which is already present in Weber's work, but which is often overlooked. Under the conditions of enlightened modernity, legitimacy of domination usually emerges through a process of rational argumentation. Prescriptions which are viewed as legitimate, successfully link shared basic norms and ideas to practice type rules. Thus, the legitimacy of modern governance ultimately rests on good justifications (Habermas, 1996).

The process of argumentative legitimation can be revised at any time, i.e. existing legitimacy can be argumentatively challenged, and the legitimating discourse can thus be re-opened. International legitimation can be observed at work in what Oran Young has called 'institutional bargaining', the establishment of new international institutions through negotiations (1989, 1994). If international institutions are already set, they usually provide a forum for debate themselves, the most famous being the General Assembly of the UN, which serves as a 'dispenser' of collective legitimation and collective disapproval on a global level (Claude, 1967).

In the last section of this paper I suggest a tentative typology that identifies three main dimensions of international legitimacy. In the legitimation discourse a consensus must be established regarding the scope and means of international governance, the fairness of its procedures, and the justice of its outcomes. I argue that legitimacy disputes in international relations can be meaningfully sorted and analysed according to this typology. Thinking in differentiated categories has an advantage over treating legitimacy as a package in that it not only allows for a typology, but enables us to spot the sensitive points in international governance where the respective dimensions tend to

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<sup>4</sup> In fact, Franck runs into conceptual difficulties when he introduces state interests to explain compliance pull of rules, rather than sticking to rule-inherent factors (cf. Berman, 1991). Hurd's essay quite correctly grasps the function of legitimacy in international affairs but gives little indication how legitimacy and legitimation might work in practice.

clash. International society, like any other, is founded on partly complementary, partly irreconcilable values that by necessity will collide in some situations.

Discursively established legitimacy is therefore potentially unstable and undergoes challenges and revisions. Actors can challenge the legitimacy of international governance with respect to one or several of these three dimensions and can thus re-initiate the process of discursive legitimation which might lead to a completely new institutional arrangement, a revision of existing procedures, or might, if the majority of parties concerned do not favour any changes, end in a consolidation of the existing governance structures. The recurring moments of acute legitimation crisis open up the opportunity to gain a closer look at the legitimacy base of international governance and thus onto the shared values on which the international society is built.

## **2. What is Legitimacy?**

Scientific enquiry into the nature and the dimensions of legitimacy is one of the oldest tasks of both normative and empirically oriented political science. Traditionally, political philosophers have reflected on the conditions under which the domination of human beings over others could be called legitimate. Legitimacy in this sense is a normative quality that is attributed by philosophers to certain social arrangements. In this tradition we might grant the adjective 'legitimate' to structures of governance which have been established in accordance with certain rules and principles (which are today mostly democratic principles). This is the normative idea of legitimacy. With the rise of empirical social science in the early 20<sup>th</sup> century a remarkable turn occurred in the thinking about legitimacy. Max Weber detached legitimacy from its philosophical background and conceptualised it as a social fact: legitimacy is the phenomenon that people are willing to accept domination on normative grounds, no matter on which specific beliefs this acceptance is grounded. Legitimacy in Weber's sense is the phenomenon that a social order enjoys "the prestige of being considered binding" (Weber 1978, 31).

Contrary to the normative variant, legitimacy as an empirical fact reports an attitude held by individuals or groups towards domination.<sup>5</sup> In the course of this re-conceptualisation the analytical role of norms has shifted significantly. Instead of being the philosopher's yardstick, they have become a sort of "independent variable" in a causal relationship, a motivation for social action that can be explained by the scientist. As a social scientist in the Weberian tradition should abstain from any value-judgement concerning the observations

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<sup>5</sup> For this distinction see Weber's polemical remarks on Rudolf Stammler, in Weber, 1978: 325-333. An excellent introduction into the two versions of legitimacy is provided by Beetham, 1991: 3-41.

she has made in her empirical work, the study of legitimacy has lost its normative status. The tension between the two notions of legitimacy becomes presumably clearest in connection with fascist rule. Can fascist domination be called 'legitimate' if it is accepted and supported by the majority of the population? Whereas in the philosophical sense there is wide room for debate (and the answer is likely to be negative), in the strict Weberian sense the answer must be positive. Political scientists always seem to have felt very uneasy when legitimacy is opened up to a high degree of arbitrariness and random. Can a *political* scientist accept any kind of domination, even if the majority of the *demos* support it?

In recent times we have seen ambitious attempts to reconcile these two analytical strands, such as David Beetham's essay in which he argues that in fact democratically legitimised polities are more stable than authoritarian regimes, because their mode of legitimation is not only normatively privilegible but also empirically more effective (1991). Although the issue is intriguing I cannot engage in these debates here. Given the confusion around the concept of 'legitimacy' and the often rather unclear use of the term in scientific and non-scientific literature, it nevertheless seems necessary to take a clear stance what legitimacy is supposed to mean here.

In this essay I exclusively use a notion of legitimacy that describes an empirical fact: the phenomenon that a social order enjoys "the prestige of being considered binding" (Weber 1978: 31), and that therefore the ruled-over voluntarily accept the domination relationship. To be even more precise: with the term legitimacy I describe the fact that people voluntarily accept domination *on the grounds that they believe in its normative rightfulness*.<sup>6</sup> This definition rules out possible misconceptions of legitimacy stating that domination will be viewed as legitimate if it is materially advantageous to the ruled over. This might indeed be an important factor determining *acceptance* of domination but it is not related to legitimacy in the Weberian sense.

As I will describe in more detail below, Weber intended legitimacy to describe normative motivations that elicit acceptance *without* providing material incentives, and that help to sustain this acceptance even in cases when material burdens are demanded. To be clear, I do not suggest that legitimacy is the only factor eliciting *de facto* acceptance of domination. I acknowledge that the two other classic sources 'fear' and 'interest' play a significant role in most cases of

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<sup>6</sup> Note that 'normative rightfulness' cannot be equated with the legality of a rule. A rule might be codified as law but at the same time be perceived as illegitimate. Similarly, the fact that a norm has been established through the prescribed legislative process does not automatically guarantee that it will be viewed as legitimate, although this will be more likely (Habermas, 1996: 29ff). See also section 5 below where different dimensions of legitimacy are identified.



rule following (Kratochwil, 1984; Hurd, 1999). To keep the analytical distinction we should resort to the term 'legitimacy' if, and only if, we want to mark a specifically normative motivation for rule-acceptance.

So far my remarks have remained on safe terrain in that such a notion of legitimacy is quite common in the social sciences. However, at least among international relation scholars it might still elicit raised eyebrows to claim legitimacy for domination on the international level. The two doubts one might have about this assertion arise from the realist view on international politics stating that:

- there is no international domination to be legitimate in the first place, because in the international system there is anarchy;
- there is no international legitimacy because international domination, if it occurs, does not need legitimation.

Both of these objections are tackled in the following sections where I will outline an approach to international legitimation. One last caveat is in order here: the analysis of international legitimacy I describe in this essay on quite a abstract level relates to international relations in general without taking into account the special conditions in the European Union (Marks et.al., 1996; Jachtenfuchs and Kohler-Koch, 1996). For normative as well as empirical investigation, legitimation patterns in the EU are much more complicated, due to the unique characteristics of European multi-level governance. Although I hold that the general characteristics of rational-discursive legitimation apply to supranational governance in the EU as well, it is not feasible in this essay to tackle all the special features of the emerging European polity.

### **3. International Domination**

#### *3.1 The Weberian Notion of Domination: Fragmented and Issue-specific*

The argument I want to develop over the following pages starts from the assumption that any kind of domination on whatever level of social aggregation needs legitimacy in order to be enduring. This can supposed to be true for domination on the international level as well (Franck, 1990; Hurd, 1999). The notion of domination I have in mind here is based on Max Weber's definition of the term: "“Domination” (*Herrschaft*) is the probability that a command with a given specific content will be obeyed by a given group of persons” (Weber, 1978: 53). By introducing the 'given group of persons' he apparently does not imagine domination as a single, universal structure in the polity - the government dominating and citizens obeying.

Secondly, domination for Weber does not imply that *any* possible command will be obeyed by the addressees. Weber's concept of domination rather refers to many different social relationships, including for instance, the relation between employer and employee (Weber, 1978: 213). This example is useful to bring out the Weberian idea of domination that I want to put forward in this essay: an employer can generally count on obedience on the part of the employee, but only for a few and clearly defined types of commands. The domination of the employer over the employee is clearly restricted to the world of work. An employer cannot issue commands concerning the employee's private life with a reasonable expectation of compliance.

Thus domination in the Weberian sense must not be viewed as universal and all-encompassing, but rather as sectorized and fragmented. Consequently, every individual or group is embedded in different, overlapping domination relationships, concerning different aspects of their lives. Moreover, the Weberian notion of domination does not require that domination can be enforced through coercion mechanisms of the police-type. An employer confronted with a recalcitrant worker cannot simply call the police to make the employee do as he is told. He has to resort to other means, ranging from persuasion over material incentives to material sanctions. In extreme cases the only alternative is to terminate the voluntary domination relationship by firing the employee. Although other kinds of social domination cannot be terminated as easily as a working contract, all sorts of domination are limited with respect to time and geographical space and are open to change as far as the range of domination and the means of securing obedience are concerned.

### *3.2 International Domination and the Domestic Analogy*

The most encompassing kind of domination we face today is that exercised by the state over the citizen, and it is usually this notion of state-citizen domination we tend to transplant by analogy to the supranational level when we think about international domination. The only authority that can be imagined within the boundaries of this analogy is a world government that terminates international anarchy.<sup>7</sup> Unfortunately, this domestic analogy which is so often used (and abused) in IR fixes our attention exclusively on political domination in the state/citizen context and shadows other possibilities of more issue-specific

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<sup>7</sup> As the self-understanding of IR as an academic discipline rests to a good deal on the idea that there is international anarchy (in contrast to the hierarchical mode of organisation inside the state), the anarchy argument is put forward even by some constructivists who see it as sort of a quasi-natural organizing principle of the state system. Anarchy as a quasi-natural feature of the international system is propelled not only by realists but also by some "constructivist" authors such as Alexander Wendt (1992, 1999) who try to establish a theory which is systemic and "social-constructivist" at the same time.

domination. Although it is quite obvious that there is no world government able to enforce every single norm and rule, the anarchy metaphor is misleading when it comes to the present state of the international system. International governance today is at such an advanced stage and has produced such a variety and density of regulations that we can justifiably speak of domination structures. These domination structures are multiple, issue-specific and by no means all-encompassing. In many fields international functional regulation to a great extent determines already state behaviour in the respective issue area. Since disputes catch our attention much more than the cases in which international domination functions smoothly, we at times might underestimate its power.

The domestic analogy is misleading because it focuses exclusively on the (im)possible creation of a world-state in analogy to an omnipotent nation state, which could in its domestic affairs ultimately push through any rule by resorting to force. Although it is undoubtedly true that international enforcement strategies are weak compared to national enforcement mechanism equipped with a functioning police force, it would nevertheless be mistaken to conclude from this fact that there is no domination at all in the international system. To conclude from the non-existence of a world-state that there must be international anarchy hampers the perception of supranational domination structures, which do *de facto* exist. Coercion must not be equated with domination; it is simply one aspect of it. In this respect recent legal literature is highly instructive as it highlights the manifold possibilities of domination without police-like enforcement, particularly at the supranational level (Chayes and Chayes, 1995).

Following Weber, international domination could now be defined as follows: “International domination is the probability that specific regulations made on the international level will determine respective state actions”. This notion of domination is at odds with the domestic analogy because it does not suggest (or require) a generalised ability to push through any rule, but envisages rather a field - or issue-specific domination and allows for a broad variety of non-coercive means to attain rule compliance. The obvious lack of coercive capacities makes international domination much more dependent on voluntary compliance than governance taking place inside the state. From a functional point of view this is rather an argument for than against its legitimacy. However, if we keep in mind Weber’s notion of fragmented and multiple domination structures it is much easier to see that domination is indeed manifest on the supranational level.

All the similarities with private contracting notwithstanding, international domination is in many respects clearly different from domination structures inside the above-mentioned firm. The principal difference is quite obviously that states are makers and receivers of the rules at the same time. In this sense

international domination structures resemble those of a co-operative rather than those of a private firm, since decisions can only be taken by the members themselves, and those members of the co-operative in turn are subject to the decisions made. Problems of self-governance in a co-operative resemble the structural problems international governance faces – with the difference that states cannot opt out of their co-operative, i.e. the international system. Consequently, international domination with a high demand for voluntary compliance seems to be highly dependent on the sustained support of the governance structures by individual members, too a much higher degree than domination inside the state or even inside a firm of the capitalist kind.

#### **4. Approaching International Legitimacy**

##### *4.1 Weber's Work on Rational Legitimacy*

In the preceding sections I have already hinted at the function legitimacy performs in social life. Technically speaking, legitimacy facilitates domination by enhancing the probability of non-enforced rule compliance. Max Weber has put it this way:

“But custom, personal advantage, purely affectual or ideal motives of solidarity, do not form a sufficiently reliable basis for a given domination. In addition there is normally a further element, the belief in *legitimacy*. Experience shows that in no instance does domination voluntarily limit itself to the appeal to material or affectual or ideal motives as a basis for its continuance. In addition every such system attempts to establish and to cultivate the belief in its legitimacy.” (1978: 213)

This is true for any kind of social domination and it is particularly true for international relations. Given the strong voluntary element in rule creation and rule following in the international system, international domination is even more dependent on legitimacy beliefs on the part of the ruled over as any other. Before I can go into more detail about the specific characteristics of international legitimacy I must inquire more deeply into the *specific type of legitimation* that generally prevails in modern societies: rational legitimacy. The following paragraphs will tackle the question of how legitimacy of domination can be established, maintained and challenged under conditions of rational legitimation.

As is well known, Max Weber has developed three ideal types of legitimate domination or authority (*Herrschaft*): traditional, charismatic and rational. The first two types, however, are used by Weber mainly to contrast with rational legitimacy, which he sees as the prevalent type in modern societies. Charismatic as well as traditional authority is not based on equality among members of society but on distinctiveness. The “chief” and the normal members of society have a completely different status, and it is precisely the distinctive

qualities of a chief that make traditional and (even more) charismatic rule following possible. The chief's commands are to be obeyed because she is viewed as of divine providence or endowed with extraordinary force and virtue, etc.

Such forms of legitimacy presuppose an *extreme asymmetry* in rights and status in the respective society, and by virtue of eliciting obedience preserve the asymmetry of the existing order. Traditional chiefs and charismatic leaders are themselves not subject to the same rules as the other members of society, the commands they issue as binding normally do not bind them themselves. Moreover, nobody expects them to feel bound by many of the rules recognised as valid by normal members of society. This way traditional and charismatic legitimacy not only secures rule following but also reproduces the asymmetric status structure of those societies.

Under ideal conditions of rationally legitimated domination, the personalised dimension of rule following is completely suspended. Obedience is not owed to individual persons but to the rules as such that are usually fixed as law. Rational-legal rule is the rule of abstract laws, which generally do not make any differences between their subjects; at the very least all exemptions and exceptions from the rule require careful justifications. These justifications must be argumentatively derived from abstract deliberations with regard to the function of the person and its beneficial contribution to society, but not the person as such. For example, many modern societies recognize exemptions from generally valid laws for certain groups of persons, e.g. for lawyers, priests and doctors, but only insofar as those persons' professional function is concerned. In most democracies, elected politicians enjoy far-reaching exemptions in the sense that they are protected by immunity against prosecution. Nevertheless, even this immunity can in many countries be renounced, if parliamentary majorities agree. As soon as all these persons leave office, parliament etc., their special status expires.

In the same way as most exemptions before the law are only temporary and are precisely circumscribed, the competencies of persons in office are clearly defined and delineated. Officials are strictly bound by the text of the law and their administrative prescriptions, and the room left for their own interpretation is (ideally) very narrow. All the rules they follow are set through a prescribed process and written down in a codified form, so that there can be little insecurity as to what counts as a valid rule. Of course it may be the case that the applicability of an abstract rule to a certain real-world case is doubtful, but even these contingencies are normally resolved through a clearly prescribed administrative or judicial process. In addition, the application of administrative rules is executed regardless of the individual person making claims, and like

adjudication, administration should be imagined as blind, not regarding the individual characteristics of the person but strictly following abstract rules and prescriptions.

To sum up: rational principles together with the rational organisation of decision-making procedures in rational institutions form the preconditions for rational legitimation. The impersonalised bureaucracy Weber describes is perceived as legitimate because it works according to impersonal principles, applied in an impersonal way. It is precisely this interplay of the rational principles of organisation together with the rational grounding of decisions which allows for attaining maximum rationality of rule-setting and rule-application. In his writings on rational legal rule, Weber elaborates quite extensively on the organisational characteristics of modern bureaucracy and the status of the civil servant. The aspect I want to examine in this essay, however, is not the bureaucratic organisation as such but the rational process of justification according to which it works. We should also keep in mind that Weber's account of rational legitimation *among formal equals* can be applied to domination inside the state but also to international society.

#### 4.2 The Importance of 'Giving Reasons'

The core principle of rationality in rule-making and - application is the non-arbitrariness of the outcome. Non-arbitrariness does not mean that the outcome is determined from the beginning, but rather, on the contrary, that the process of decision-making is open first and is then narrowed down by different procedural moves until (ideally, n.b.) no more than one outcome is possible. The result can be called rational if the rational rules of the procedure have been adhered to and if alternative outcomes have been ruled out *for good reasons*. Given that the rules of procedure are fixed (and if rational they are fixed by definition) it seems that the good reasons should be of crucial importance to the understanding of rational legitimation. In the course of his deliberations about the functioning of bureaucratic administration, Weber already highlights the crucial importance of "giving reasons" for the modern ways of legitimate decision-making:

"The only decisive point for us is that in principle a system of *rationaly debatable "reasons"* stand behind every act of bureaucratic administration, namely, either subsumption under norms, or a weighing of ends and means." (Weber, 1978: 979; my emphasis)

An act of rational rule-making not only must be based on reasons; what is more, these reasons must also be "rationally debatable". Prior to the specific reasons one could employ in order to justify a rule is the mechanism of *rational justification*. The idea of a rational debate obviously implies that the speaker and the hearer can meaningfully communicate the reasons on which the decision is

based. This mechanism also seems to be specifically modern in that it plays a minor role for the functioning of traditional or charismatic domination. Neither traditional nor charismatic rules require extensive communicative justification. A person who is emotionally fascinated by the charisma of a leader can hardly give sustained reasons for the effect the person exerts on him or her. The traditional authority of custom, which is rather felt than argued, remains unreflected, and it draws its force precisely from the fact that it remains “unquestioned” or even “unquestionable”.

What distinguishes modern rational legitimation is the fact that reasons can and must be given for it to succeed, and that these reasons must be open to confirmation or disconfirmation in a justificatory discourse. Johannes Weiss has persuasively argued that the development of the ability to rationally ask questions and to rationally give reasons is the core feature of Weber’s account of modernity. In his view, the possibility of rational communication is the overarching frame that unites the numerous notions of rationality that occur in Weber’s writings.<sup>8</sup>

As Weiss correctly points out, the communicability of reasons is an indispensable precondition for many other processes of social rationalisation (such as legalisation, bureaucratisation, ethical universalism and consequentialism).<sup>9</sup> Communicative potential is the mechanism which enables individuals to exchange their views and to communicatively agree on strategies of action. This is a formal characteristic in the sense that it does not predict which course of action individuals will choose, be it oriented towards material or ideal goals. Rational communication is a tool that is universally applicable

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<sup>8</sup> Rogers Brubaker, for example, counts 16 different notions of rationality (1984: 2).

<sup>9</sup> “Betrachtet man jedoch genauer, was die Praktizierung von Rationalität in allen diesen Vorgängen (der einzelnen Aspekte gesellschaftlicher Rationalisierung, J.S.) bedeutet, so wird der Sprachgebrauch des Soziologen Weber womöglich verständlich und plausibel. Immer nämlich besteht die Rationalisierung darin, dass das, worauf sie sich richtet, höhere Grade von inter-subjektiver Fasslichkeit und (bloss mentaler oder auch praktischer) Reproduzierbarkeit annimmt. Dies lässt sich auch so ausdrücken, dass die –nach Material und Vollzugsweise im übrigen sehr verschiedenen- Rationalisierungsprozesse darin übereinkommen, die Sozialität bzw. (zumindest) Soziabilität ihrer jeweiligen Gegenstände zu steigern. Dieser “vergesellschaftende” Sinn aller Rationalisierungsprozesse bedeutet durchaus nicht, dass diese sich auf ein gemeinsames Ziel im Sinne einer vollkommenen, harmonische Sozietät zubewegten. Vergesellschaftung heisst in diesem Zusammenhang vielmehr nur, die Möglichkeiten der Kommunikation über die betreffenden Objekte in extensiver und / oder in intensiver Hinsicht zu entwickeln. Vergesellschaftung in der Form der Rationalisierung unterscheidet sich von anderen Formen darin, dass die Verbesserung der Kommunikations- und Interaktionsmöglichkeiten über eine explizite Bestimmung, eine - tendenziell - argumentative (“diskursive”) Begründung und eine - tendenziell - konsequente Anwendung derjenigen “Prinzipien” und “Regeln” verläuft, welche das menschliche Handeln (im weiten Weberschen Sinne) ordnen und leiten.” (Weiss, 1981: 48).

and may be called second-order rationality. Although Weber did not elaborate systematically on the topic of communicability there are some strong hints in “Economy and Society” which allow for the assertion that he indeed had such an overarching notion of rationality in mind. This seems to be in line with his general diagnosis: after the disenchantment of society there are no *metaphysical* resources left which could justify domination. In modernity, classic legitimating sources like holiness, providence or divine authority are exhausted, what remains is rational argumentative justification.

### 4.3 Legitimation Through Rational Discourse

This account of modern legitimation through rational discourse which can already be seen in the writings of Max Weber was picked up and developed much further by Jürgen Habermas.<sup>10</sup> “Max Weber’s concept of legitimate authority directs our attention to the connection between belief in the legitimacy of orders [*Ordnungen*] and their potential for justification, on the one hand, and to their factual validity on the other.” (Habermas, 1988: 95) For both Weber and Habermas, legitimacy is the conceptual place where facts and norms merge, where we see the *de facto* validity (*Geltung*) of a social order springing from shared conviction about the normative validity of values (*Gültigkeit*). Habermas has contributed invaluable to our thinking on rational legitimacy because he elaborated further and in great detail on the process of discursive legitimation that was only mentioned in passing by Weber, and which in his time could not find a systematic place in social theory (Habermas, 1979).

“From these reflections [on the nature of norms, J.S.] it follows that we cannot explain the validity claims of norms without recourse to rationally motivated agreement or at least to the conviction that consensus on a recommended norm could be brought about *with reasons*. In that case the model of contracting parties who need know only what an imperative means is quite inadequate. The appropriate model is rather the communication community [*Kommunikationsgemeinschaft*] of those affected, who as participants in a practical discourse test the validity claims of norms and, to the extent that they accept them with reasons, arrive at the conviction that in the given circumstances the proposed norms are ‘right’. The validity claim of norms is grounded not in the irrational volitional acts of the contracting parties, but in the rationally motivated recognition of norms, which may be questioned at any time.” (Habermas, 1988: 105)

Analogous to the normative force (validity) of single norms the legitimacy of more complex governance systems can be traced back to the two components

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<sup>10</sup> Note that this assessment is at odds with Habermas’ own interpretation of Weber. In the ‘Theory of Communicative Action’ (1984), Habermas develops his approach against Weber who is portrayed as the proponent of strategic rather than communicative action. Such a reading of Weber is definitely too stark and polemical as it deliberately overlooks the initial stages of communicative rationality already inherent in Weber’s works.



which Habermas outlines here: that they come into being through agreement, and that this agreement is based on rational communication. Thus, in principle, rational legitimacy emerges through conscious, reflected adherence. People accept the validity of a social order by an act of outspoken or silent adherence to the values on which it is founded and to the validity of the arguments, which link practice type rules to these value principles. This is not to say that every single rule needs the explicit acclamation of all people concerned by it in order to attain legitimacy. The point is that every single rule could be justified in principle, even if an explicit justification might not be required for a long time. The respective argumentative resources are nevertheless always present, even if they are not made explicit at a certain point in time.

Under conditions of rational legitimation, purely habit-driven adherence to rules that even in principle could not be supported by argumentation is likely to break down on the very next occasion when the rule is called into question. This becomes clear when we think about the confrontation of rationally grounded and non-grounded arguments in a conversation: “we should do x because I say so” is obviously on very shaky ground if confronted with a more elaborate argument of the type “x should be done because we can attain y this way”. We know very well from everyday life that if you cannot give rationally accessible reasons for your point it means that you drop out of the discussion.

The only option left to win a point then is the tactical resort to threats or positive incentives – which might work indeed in the short run (provided you are strong or rich enough) but cannot replace an argumentation accepted as valid by others in the long term. But why exactly is ‘because I say so’ such a weak argument? The decisive criterion is that it is not presented in a universal, but in a personalised form. The speaker of course insinuates to her listeners to agree with her proposal but the reasons others could have to do so are special characteristics of the speaker: status, credibility, authority, or just power. Thus ‘because I say so’ can be accepted or refused, but it cannot be challenged by counter-arguments. It leads immediately to a communication impasse because it cannot be connected to a reason-giving discourse. As this example has shown, rational legitimation requires a specific type of rational discourse which only acknowledges certain arguments that give reasons in an impersonal, universal fashion and are open to counter-arguments at the same time.

Such a discourse also presupposes that speakers take certain attitudes towards each other. Connected to his pragmatics of language, Jürgen Habermas has explored a set of important preconditions for argumentation, which he calls idealisations.<sup>11</sup> These idealisations are often counterfactual constructs, in the

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<sup>11</sup> See for an accessible statement on this Habermas, 1996: chapter 1.

sense that we always assume the existence of these preconditions when we enter a conversation, no matter if they are actually present or not. Legitimacy can only emerge when these conditions are met to a reasonable degree in the communication situation, as it requires that the participants adhere to the reasons and the reasoning behind the rule, not just to the rule as such.

The counterfactual nature of these idealisations and the taken-for-grantedness of its elements mean that they can be pinpointed only in cases where these conditions are absent. Instead of explaining the main points on an abstract level, I will develop the core conditions from a piece of international negotiation literature. My illustration here are Western perceptions of Soviet / Russian negotiating behaviour.<sup>12</sup> Apparently, the ‘Soviet style’ completely contradicted what Westerners thought to be ‘normal’ communicative behaviour in international negotiations. In a recent article, Hiroshi Kimura (1999) has enumerated the main problems Western negotiators encountered when dealing with the Soviet/Russian style of negotiating:

- 1) the concept of negotiation as a means of social coordination was entirely alien to Tsarist and Soviet negotiators. The reason for this, Kimura suggests, seems to be that Russian culture never had much esteem for the idea of equality. Thus, debate among equals was not seen as an appropriate method of decision-making. Since social relations were viewed as hierarchically structured, commanding and pushing through one’s objectives by any means were supposed to be appropriate behaviour in social conflict. International negotiations, by analogy, were seen as a continuation of war by other means;
- 2) Russian negotiators regularly exasperated their Western counterparts by remaining virtually immune to reasoned argument. They turned a deaf ear to all attempts of persuasion. In addition, Russian negotiators very rarely exposed themselves to critical argument – by simply not putting forward any proposals or initiatives themselves. This apparently clashed with a Western presupposition that negotiation involves openness and responsiveness to arguments presented by the other side;
- 3) According to Kimura, Russian enthusiasm for secrecy has always been a notable pattern in their negotiating behaviour. Russian negotiators are not only extremely proclive towards the public but also towards their partners on the table. Any supply of information about own positions

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<sup>12</sup> I am aware of the fact that for Habermas a negotiation situation would not count as case of real arguing, since participants are supposed to have strategic orientations (Habermas 1984, Vol.I). However, it has been shown that Habermas’ categorical distinction between communicative and strategic orientations of action is in its radicality untenable, see Alexander, 1988; Dorschel, 1990 and Greve, 1999.

and preferences is seen as a potential disadvantage rather than a way of furthering agreement;

4) Western observers have been regularly astonished how quickly Russian negotiators changed their positions and that they apparently could not be bothered with consistency. It was notorious Russian style to make 180 degree turns overnight without giving any explanation why this change happened. Obviously, offers made and positions taken were rather a test of the partner's strength and determination than a proposal for agreement.

Against the background of this description it becomes clear what current Western, modern culture presupposes when it comes to the exchange of arguments on the path to rational decisions or agreements. The core rules are:

1) acknowledge the others as equals! The Russian despite for co-operative decision making sprang from rather underdeveloped ideas about individuals as equals;

2) provide information about facts! It is supposed that a rational agreement can be reached only on the basis of agreed facts;

3) be open to persuasion! If there are different arguments on the table it can be discursively clarified which one is better.

4) be sincere and consistent! Offers made should be honest in the sense that one should feel bound by them, especially when the other side accepts them.

This list covers the main dimensions of what Habermas has called the ideal speech situation, which has in this case been almost systematically violated by Russian negotiators.<sup>13</sup> To be sure, nobody expects professional negotiators to be continuously sincere, honest and responsive to new arguments. The counterfactual concept of an ideal speech, or rather, 'negotiation' situation nevertheless shines through here in that massive deviations from a 'good style' are pointed out. As occasional 'tricks' such deviations are tolerated and even expected among Western negotiators and surely 'the art of bargaining' is to a great extent about handling them carefully. Russians negotiators, however, took these tricks as their general guidelines.

Of course a sort of 'agreement' can be reached even under the most adverse bargaining conditions: with a revolver pointing at my chest I am quite likely to agree to give my wallet to the mugger. The rational legitimacy base of

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<sup>13</sup> Another important counterfactual precondition to communication is that ideally only the better argument should count and the distribution of power should not determine the outcome of the argumentative process. This precondition seems to be somewhat suspended in international affairs: actors do obviously not expect this in international negotiations.

an agreement reached under such conditions is rather poor, i.e. the force pulling towards voluntary compliance with it is at a minimum. Compliance in this case will have to rely on carefully crafted reciprocal concession-making (Axelrod, 1984; Axelrod and Keohane, 1985; Oye, 1985).

#### *4.4 The Importance of the Forum: Rule-setting, Rule-revision, and Participation*

From the reflections on Weber and Habermas in the previous section it is consequent that modern, discursive legitimation needs a certain forum in order to function. The publicity of the forum is again a potentially counterfactual assumption: even in negotiations behind closed doors legitimacy-creating arguments are the ones that could be repeated in public. So it is not the publicity as such which creates legitimacy but the structure of an argument that could be presented in public. This is not to say that every inter-state deliberation needs to be public in the sense that the press be present: as temporary secrecy is indispensable in many bargaining circumstances, the status of 'publicity' shifts from a real to a counterfactual condition - the structure of rational political argument requires that politically relevant arguments can be formulated only in a universalised way, *as if* they were uttered in public debate.<sup>14</sup>

Logrolling, bargaining packages and similar deals might in fact facilitate agreement in social conflict but they cannot enhance the legitimacy of an agreement. Legitimacy-creating arguments are generalisable and impersonal in nature as these are the two key conditions for presenting them in the public forum (Elster, 1986). Legitimation can only be generated through public discourse and, similarly, any challenge to already existing legitimacy must enter the public discourse first. There is no other way of challenging the existing legitimacy of domination in the modern state than through public debate, which can in the widest sense of the term demand new rules and functional regimes or challenge the legitimacy of existing ones. The decision, however, about concrete new rules has a clearly defined institutional place, in international as well as domestic governance.

In representative democracies the institutional place for rule-setting and -revision is clearly the parliament. Challenges to the legitimacy of the existing order can be raised outside the parliament but must be processed within it to change this order. International institutions provide an analogous forum, the regular conference of the parties or a permanent assembly. Inis Claude has highlighted the character of the United Nations' General Assembly as a forum in which legitimation debates take place:

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<sup>14</sup> See also Habermas, 1984, 1996.

“While statesmen have their own way of justifying their foreign policies to themselves and to their peoples, independently of external judgements, they are well aware that such unilateral determinations do not suffice. They are keenly conscious of the need for approval by as large and impressive a body of other states as may be possible, for multilateral endorsement of their positions – in short of collective legitimization.” (Claude, 1967: 83)

By virtue of being the most inclusive forum for international legitimation debates, open to participation of all states, the General Assembly of the UN is the main ‘dispenser of legitimacy’ in the international system. It is also a catalyst for (re-) defining the scope of international governance: by organising grand conferences on newly emerging topics such as environmental protection, demography, gender issues, etc. the UN has regularly provided the forum for a discursive process that approved and defined new issues of international governance and initiated the process of institutionalisation.

The UN General Assembly is a good example to demonstrate the relation between the institutional and discursive dimension of governance. Inclusiveness creates repercussions on the argumentative logic in the forum: arguments uttered in the General Assembly must be formulated in such a way that all other states concerned could agree – they have to be taken into account. This is precisely why rules created on the UN level are usually viewed as more legitimate than rules created on the club-level of the, let us say, G-8. The logic of the big audience requires most-inclusive arguments. The applied Kantianism which is inherent in Habermas’ theory of communicative action is mirrored on a very practical level in arguing behaviour: the maximum inclusion of the forum requires arguments to be formulated in such a way that everybody concerned can - in principle - agree to them. This is of particular importance for international governance which, as self-governance, requires permanent consensus-building and is in many cases hostile to majority voting.

International governance emerges from a process of argumentation and is mainly formulated in terms of international law. Thus international law can be viewed as a discursive consensus that has evolved into legal terminology. William Coplin has thoughtfully described international law as “an institutional device for communicating to the policy-makers of various states a consensus on the nature of the international system.” (1964: 617) By deriving rules of conduct from this consensus international law sets the limits and formulates the principles of international governance. What is more, and Coplin points this out, is that international law not only contains legitimate rules of conduct but also an authoritative statement what international relations are like. This is important for

what legitimate behaviour is depends on the nature of the social situation, and this nature, somewhat paradoxically, is ‘a nature by agreement’.<sup>15</sup>

No matter if in respect to regulative rules or authoritative description, the binding force of international law is always inseparably connected to the fact that it comes into being by agreement (Arend, 1996). This is not to say that it is this act of consenting alone that leads to legitimacy. Undoubtedly, the very fact of having made a commitment to a rule exerts a force towards feeling bound by it – and be it only for the sake of consistency. Such a position, close to legal positivism, cannot explain why certain legal rules are obeyed strictly, whilst other rules, which also have a legal character, are neglected and violated without eliciting protest or coercion measures. Apparently, the specific content of the consent is at least as important as the fact that there was consent when the rule was established.

This draws our attention back to one view on international law as originating from a deliberative process and deriving its legitimacy and authority from it. It exploits a discursive legitimation potential, which is inherent in rational processes of deliberation, and thus attains the potential to elicit voluntary compliance. That international law does not have the full and smoothly functioning enforcement potential of domestic legal systems at its disposal is obviously rather an argument in favour of than against its inherent legitimacy. The puzzling effect of supranational governance structures is not that they are potentially susceptible to defection but that they elicit compliance in very many cases despite this (Koh, 1997).

## **5. The Dimensions of International Legitimacy**

### *5.1 International Governance as Governance by Agreement*

Having traced the way from societal modernisation and enlightenment to the changes in legitimation patterns in these societies, I have finally argued that the specifically modern force of rational-discursive legitimacy is at work on the international level as well. With some delay the specifically modern tendency towards bureaucratisation and functional differentiation has reached the supranational level. In the name of efficient problem-solving, functional international organisations tackle an increasing number of problems which affect more than one state. This functional co-operation has established an international functional bureaucracy that is founded on precisely the same principles as modern bureaucracy inside the state – the bureaucracy described by

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<sup>15</sup> Alexander Wendt has made the important argument that ‘anarchy’ in the international system is a social convention and not a matter of fact, cf. Wendt, 1992, 1999.

Weber in *Economy and Society*. The technique of legitimation that international governance employs is exactly the same: linking concrete rules to abstract principles, most prominent among them the principles of equality and universality, by means of rational argumentation.

International governance is governance by agreement, i.e. by concluding treaties. As I have outlined above, international governance is partial and fragmented domination in the sense that not all aspects of state conduct are subject to international rule. By signing treaties, states give up only certain sovereignty rights, i.e. freedom to pursue whatever policy pleases them in a certain issue area, and in many cases they concomitantly set up supranational executive bodies. Through a negotiation process they agree on a specific range of aims and competencies for the new organisation, on the principles its decision-making and executive processes will be based on, and on a scheme of sharing costs and benefits which arise from it. Although an international organisation is a *deus ex machina* in the sense that it does not exist before the treaty is concluded, many foundatory principles and even more specific rules are taken over by analogy from existing institutions. They are not as arbitrary as the image of a *deus ex machina* might suggest.

## 5.2 Legitimacy and the Scope of International Governance

The first dimension of international legitimacy I want to outline here concerns the scope and limits of international governance.<sup>16</sup> International governance can only be perceived as legitimate if states agree *that certain values should, or can only, be realised on an international level*. Thus the question is crucial which goods should be achieved by international co-operation and which should be left to the states own policies (Sinnott, 1995). Here we have to be cautious in order not to fall into an explanatory ex-post trap suggesting that certain problems at a certain point in time can only be resolved by international co-operation. Which problems “can only” be solved by international co-operation is not a matter of facts but a matter of agreement. Problems have to be framed as issues which require internationally co-ordinated action. If we accept that international problems are problems by agreement and therefore always open to argumentative challenges, the scope dimension of international legitimacy gains contours and shape.

If international co-operation in one issue area is widely viewed as necessary and is almost undisputed in principle, we can assume that legitimacy in the scope dimension has emerged. There are cases, however, in which the

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<sup>16</sup> This dimension of legitimacy is stressed e.g. (with reference to the European Union) by Beetham and Lord, 1998.

legitimate scope of international governance is hotly debated. Think, for example, of the debate whether or not the European Union should handle employment policy. In this case, the economic debate about the viability and effectiveness of community-wide employment measures is only one of the issues under discussion. The other contested point is whether such a sensitive issue as employment should be (at least partially) transferred from the discretion of national governments to the Union level at all.

As far as the scope of legitimate international governance is concerned we can assume that there is a rock bottom of almost “classic” values, which are universally acknowledged. This rock bottom is covered by a layer of more contested issues which are viewed as legitimate under certain conditions and in certain cases. Examples of “classic” international values (which are nowadays under erosion) include sovereign conduct and non-interference in domestic affairs. These very basic international values are somewhat rudimentary, i.e. they must be and are promoted on an international level but they are values that, so to speak, can exist only in the international sphere. The problems they are designed to resolve, such as possible interference in the domestic affairs of other states, only exist because of the co-existence of different states. Thus the very basic values pursued by international co-operation are not transferred to the international sphere from the domestic realm but are international values *sui generis*.

However, since the rise of functional international co-operation in the 19th century, the face of international governance has changed rapidly: over the last one-and-a-half centuries we have seen an unprecedented growth of international agreements, tackling issues such as international security, communication, international trade, transboundary travelling, environmental protection and many more. The fundamental difference with the classic values of international governance lies in the nature of the problems addressed on the international level. Whereas the very first tasks of international governance have been problems that were solely created by the co-existence of different states, additional issues have been moved from the domestic to the international level; that is to say, problems which were formerly solved on the national level. Many of these issues are not yet part of the sediment but still in flux and drift according to the *zeitgeist*. The tendency of the last few decades seems to indicate, however, that the solid sediment is constantly growing in that more and more issues are now taken for granted as tasks of international governance, including human rights, environmental protection and developmental aid. “Taken for grantedness” is the best indicator of a successful legitimation process.



One cannot talk about the scope of governance without immediately proceeding to its means. Are the specific means of governance, the pathways to reach defined goals, a question of legitimacy? In this typology I suggest separating the technical questions of efficacy and efficiency of international governance from the legitimacy problem. The reasoning behind this is the following: legitimacy was defined as a specifically normative urge to support international governance. Thus legitimacy questions are questions of good or right conduct, not of goal attainment.

The search for means, in contrast, is in most cases not about rightfulness but about efficiency: what is the best way of attaining a desired goal, given the scarcity of resources? Continuous failure to reach the declared goals will quite likely undermine the acceptance of a rule and create a demand for revision. It is, however, not a problem of legitimacy as this is understood in this paper. In addition, such a choice can be perfectly well explained by rational institutionalist theories focusing on cost-benefit calculations. There is no value added by re-labelling efficiency as a legitimacy problem. Having said that, I should underline that means of governance can indeed become legitimacy problems when they clash with standards of procedural fairness or ethical norms regulating international relations.

### *5.3 Legitimacy and the Process of International Governance*

As Max Weber stated in the context of societal modernisation, rationally legitimated governance requires a process of decision-making that respects the core principles of equality and generalisability. According to Max Weber, legitimacy of the legal-rational type means that rules are obeyed because the ruled over believe in the correct process of rule-setting and application, i.e. a process “within the limits laid down by legal precepts and following principles which are capable of generalised formulation and are approved in the order governing the group, or at least not disapproved in it.” (Weber, 1978: 217)

There is hardly any other realm of social life where this could be more true than in international politics. The making and application of international rules and decisions is clearly prescribed and usually carefully obeyed. In this section I will concentrate on these formal, procedural aspects of international legitimacy, which basically means on right process in accordance with the principles guiding *the setting and application of international norms by states and international organisations*. Since there is a remarkable number of approved principles in international society which guide the conduct of international affairs, it can be assumed that legitimate international rule-setting and application must be in accordance with these prescriptions.

Here I must refer to the seminal work of Thomas Franck since it provides an excellent enquiry into some conditions under which governance will be viewed as legitimate in the international sphere (1990).<sup>17</sup> For Franck, legitimacy is “the quality of a rule *which derives from a perception on the part of those to whom it is addressed that it has come into being with right process*” (1988: 706) One very important factor of right process is determinacy: the text of the international rule has to convey a clear message. If a rule prescribes exactly what will happen under certain circumstances, compliance will be more likely than in the case of an indeterminate or unclear prescription. Another factor concerns the application of rules: to guarantee perceived fairness rules should be applied coherently rather than inconsistently, or on an unclear case-to-case basis.

A third important factor is the adherence of a single rule to more general systems of legal principles. For example, today it is widely accepted that the General Assembly of the United Nations is organised according to the principle 'one state - one vote'. To see the significance of this argument we should keep in mind that other criteria for organising the process of international governance are also available. Why not weigh states' votes according to size, population or economic power? The procedure of 'one state - one vote' is consistent with the overarching principle of state equality that is so prominent in the UN system. Therefore, it can be argued, one state - one vote is the only legitimate mode of voting in the General Assembly of the UN.<sup>18</sup>

International governance, as Franck rightly points out, has to adhere to the accepted standards of international law and custom to be seen as legitimate. By concentrating on the constellation of interests as their core variable, rationalist scholars have widely neglected this aspect of international co-operation. Another lesson that Franck teaches us, is that rules cannot be invented *ad hoc*, or as seems appropriate to reach an “optimal” solution for a problem. Every newly emerging norm has to be viewed in the context of already existing norms and more general principles underlying the international order.

#### *5.4 Legitimacy and Justice in International Relations*

However, the trouble with Franck's work is that it concentrates overly on the *formal characteristics* of rules and thus takes no account of other factors which, at least in my view, significantly influence the perceived legitimacy of the rule in question. The problem of scope has already been mentioned. Another issue

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<sup>17</sup> One criterion I leave out here is 'symbolic validation' as it transcends the formal and rational character of legitimacy: the authority of symbols, which Franck insinuates is at odds with the rational reasoning underlying his notion of 'right process'.

<sup>18</sup> For the legitimation of the divergent mode of voting in the Security Council and the tension between the two principles see Koskeniemi, 1995.

that clearly affects the perceived legitimacy of governance besides the fairness of procedures is substantive justice of outcomes. In Franck's work "justice" is quite awkwardly detached from legitimacy and is conceptualised as a separate factor of normatively motivated rule compliance (1995). In the light of Weber's definition it is hard to find a compelling reason why 'legitimacy' should refer only to right process and exclude substantive criteria which in practice might equally affect a state's willingness to accept international governance.<sup>19</sup> If legitimacy is a normative force urging states to comply with international rules why should it only be a question of *right process*? Legitimacy as a social force clearly transcends formal characteristics and regards the output dimension of governance as well.

The history of the 20<sup>th</sup> century indeed provides a good example of an international legitimation crisis that revolved around the 'output' of global governance rather than the procedures. At the beginning of the 1960s developing countries started to revolt against the liberal international economic order claiming that the *Bretton Woods* Institutions worked in favour of the industrialised countries. In their view, international market allocation caused growing disparity of incomes since the starting positions of the competitors were uneven. International governance should therefore intervene into the global market and make sure that developing countries received a 'fair share' of world trade.

Thus the legitimation crisis in the 1960s and 70s was not fought about procedural fairness but mainly about questions of distributive justice: after the dawn of the colonial empires, formal equality among states was reached in international relations. What the developing world demanded, was substantial equality. Therefore a third set of factors should be introduced into the categories, factors which are normative but not procedural in nature. The justice dimension as I think of it here, concerns the *consequences* of international governance. If the world trade regime is criticised for producing unjust allocations of wealth, this is such an outcome problem.

As every kind of international governance has distributive consequences, quarrels about the criteria for distribution occur quite regularly. The amounts of money involved may sometimes be marginal, but in the vast majority of cases they are quite significant. Distributive effects from international cooperation are twofold: on the one hand, every cooperative agreement that leads to the establishment of a (more or less costly) institutional structure *directly* causes financial burdens to be shared among the participants. On the other hand,

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<sup>19</sup> In his writings on legitimacy Thomas Franck (1988: 708ff.) explicitly invokes the Weberian and Habermasian notion of legitimacy. As I have demonstrated above neither of them seems to have advocated a purely formal approach to legitimacy similar to Franck's.

specific provisions in international agreements have *indirect* distributive consequences which are in many cases hard to calculate beforehand. An agreement on generalised tariff reductions, for instance, may favour highly competitive national economies over less developed ones and, to make the picture even more complicated, specific economic sectors inside countries over others. Consequently, the economic performance of the participating countries is severely affected by international trade rules. Benefits from international cooperation are normally distributed unequally and much harder to control than direct financial burdens.

The justice dimension of international governance is largely, but not exclusively, about distribution of material wealth. It can also concern many types of more or less unintended consequences of international governance. If international development aid leads to environmental damage, increases regional migration or gender inequalities, this may be considered as an outcome problems as well. Notorious are the many instances in which international governance has failed to intervene in processes which are clearly within its regulation competence – with ethically devastating consequences. The lethargy of the UN faced with the civil war in Rwanda is a case in point, the incapacity to prevent the genocide in Bosnia is another. These outcomes of failed international governance are perceived as morally unjust and in many cases lead to a re-opening of the debate on the appropriate scope of international governance. They also direct the attention back to the first dimension of international governance: if international institutions claim to be in charge of keeping the peace, they are also perceived to be responsible for it.

### *5.5 On the Use and Limits of these Categories*

This example now points to the interrelations between the three spheres of legitimacy, which were presented as different for analytical purposes. The typology I have outlined here is intended to facilitate the analysis of argumentative processes in international relations by delivering categories to keep certain realms of normative problems distinct. However, this typology does not suggest that every issue-specific international discourse must fall exclusively into one of these categories. Given the complexity of the political problems on the international agenda it should rather be the rule than the exception that discourses touch *all these fields* in one way or the other. This should not be seen as a disadvantage since the typology can help to identify certain phases in the discourse in which aspect 1,2, or 3 prevailed. This also refers to long-term developments: whereas, I would suggest, the years after World War II saw debates on the scope and procedures of legitimate international governance, the focus in the 1960s clearly shifted to the distributive dimension. Thus it seems to be rather likely that in creating a policy for a specific target, debates on scope

(What should be done?) and boundaries (How far should we go?) alternate with debates on procedural questions (Who can participate? What should concrete procedures look like?) and deliberations on justice (Who should pay the cost? Should we make exceptions and if so, on what grounds?).

Therefore the three dimensions have to be envisaged as interacting rather than separated. For example, norms of distributive justice and procedural fairness can interact in the sense that deviations from the principle of equality are made to adjust the outcome in a way that is perceived as sound. Preferential treatment for developing countries in the world trade system is a case in point here. Whereas trade rules are universal in the sense that their prescriptions apply equally to all states in principle, certain countries enjoy special treatment since they are supposedly not competitive. Thus, de facto inequality is countered with normative inequality. In a historical view on the subject one can also remark interactions between the scope and the ethical dimension. It was one of the major questions in the 1960s if concerns of development should be tackled at all by the international trade and finance institutions.<sup>20</sup> In more recent years similar developments are visible in the attempt to “green” the world trade and finance system, and to include ecological sustainability in the agenda of the respective international organisations.

## **6. Conclusion**

In this essay I have outlined the nature and main dimensions of international legitimacy, understood as an empirical fact. Legitimacy is a force that pulls state actors towards voluntary compliance with international regulation. Drawing on the works of Weber and Habermas I also have shown that this de facto legitimacy of governance in the present international system is established and challenged discursively. It is built on arguments that have the capacity to successfully link shared values of the international community to practice type regulations. Legitimacy comes into being by collective adherence to these arguments. The circumstances under which such a legitimating consensus can be reached are anything but arbitrary: legitimacy can only be produced in a discursive environment that fulfils some basic conditions like the acknowledgement of equality, that parties abstain from threats, and that they are not only arguing themselves but are prepared to acknowledge and reflect other views.

Since it is not based on any transcendental or mythological foundations, international legitimacy probably is the purest type of rational legitimacy we know. That it is such a clear-cut example does, of course, not imply that

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<sup>20</sup> Cf. Chapter 4 in Finnemore, 1996.

international politics, or international policy makers, are particularly modern or rational. It is rather due to the fact that all other possible sources of legitimacy that a normal nation-state can rely on are absent on the international level. International legitimacy cannot draw its legitimating force from metaphysical symbols and foundatory myths, from alleged providence or the will of a *demos*. It relies solely on the sober power of reason and good arguments, and thus it is as potentially unstable as it is specifically modern.

Three sets of factors have been identified that determine the perceived legitimacy of international governance: an agreed scope of competence, fairness of procedures, and justice of outcomes. In principle this is true for governance inside the modern state as well. A nation-state, however, has other sources of legitimacy at its disposal and thus attains a specific legitimation mix between purely rational and 'irrational' elements. In particular, national governments can exploit the individual's feeling of belonging to an imagined community that is represented by them. In this connection it is interesting that supranational bodies like the EU try to create such feelings of belonging by invoking a common European culture and European values. Grounded on functional reasoning, international governance is an extremely rational form of domination. This is its key virtue but at the same a heavy burden for its legitimation.

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