

ARTICLE

GOVERNING WITH LIMITED LEARNING CAPACITY?  
THE QUESTION OF INSTITUTIONAL LEARNING  
AND GLOBAL GOVERNANCE'S NEW LEGITIMACY  
CHALLENGE

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ABSTRACT

*The rise of international organizations (IOs) as public authorities in global governance has reinvigorated the debate about IOs' legitimacy. Efforts to address legitimacy concerns raised by IOs' increased role have drawn on their perceived epistemic strength, suggesting that the rationality and soundness of their responses to governance needs lend them legitimacy. Yet IOs' recent crisis responses have cast a shadow on this popular view. Using the state as the foil, this Article aims to cast light on the relationship between IOs' institutional learning and legitimacy by investigating IOs' intervention in recent transnational emergencies. It advances a two-fold argument.*

*First, IOs' institutional learning is limited because it lacks the democratic-reflexive and executive modes of learning, which have grown out of the quest for constitutional legitimacy in state formation and underpinned the state's epistemic strength. Second, given that IOs' institutional limits and the attendant limited learning capacity originate in their non-sovereign constitutional status, to improve their institutional learning on the model of constitutional legitimacy in the state, IOs will need to be reframed on a constitutional basis—the required societal foundation of which is still eluding the current condition of global governance. Such a constitutional project only exacerbates IOs' legitimacy malaise without re-establishing their epistemic superiority or delivering legitimacy for global governance.*

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## I. INTRODUCTION

Governance<sup>1</sup> has long transcended the realms of sovereign states. Well before themes of globalization started to dominate the literature in, *inter alia*, international law, international relations, and governance, IOs played a substantial role in the governance of a wide range of regulatory issues. From navigation of an international watercourse<sup>2</sup> to post-ages of international mail,<sup>3</sup> safety of civil aviation,<sup>4</sup> and agricultural development,<sup>5</sup> various IOs have been key players in governance matters. In addition to their intervention in specialized areas of regulation, IOs have contributed to the administration of territories since the

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1. Governance refers to matters of political rule associated with government but gains traction for its perceived inclusive accommodation of unconventional forms of organization and novel manifestations of power that blur the traditional public-private divide in such matters. See James N. Rosenau, *Governance, Order, and Change in World Politics*, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1, 3–8 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992); cf. Claus Offe, *Governance: An “Empty Signifier”?*, 16 CONSTELLATIONS 550 (2009) (discussing various usages of governance in the literature with scepticism about its usefulness). For present purposes, governance refers to government matters, not government forms.

2. The Central Commission for the Navigation of the Rhine of 1815 is regarded as the oldest international organization in modern history. For a brief official history, see *Organisation, CENT. COMM’N FOR THE NAVIGATION OF THE RHINE*, <https://www.ccr-zkr.org/11000000-en.html> (last visited Nov. 19, 2023).

3. See *About UPU*, UNIVERSAL POSTAL UNION, <https://www.upu.int/en/Universal-Postal-Union> (last visited Nov. 19, 2023).

4. See *The History of ICAO and the Chicago Convention*, ICAO, <https://www.icao.int/about-icao/history/pages/default.aspx> (last visited Nov. 19, 2023).

5. See *About FAO*, FAO, <https://www.fao.org/about/en/> (last visited Nov. 19, 2023).

establishment of the League of Nations (the League) as part of the peace settlement of the First World War.<sup>6</sup> Recently, as even more issues cannot be effectively addressed by individual states through their own policies, governance has further gone global, where responses to such challenges require coordination of individual policies and cooperation of national governments, i.e., a global approach. Pivotal to the required global approach to governance challenges, IOs are evolving into what Jean Cohen calls “global governance institutions.”<sup>7</sup> Through this lens, the increased role of IOs in global governance seems to be inevitable. IOs have virtually become another necessity in human society.<sup>8</sup> Yet, on closer inspection, IOs continue to arise for reasons other than necessity. As Guy Fiti Sinclair persuasively argues, IOs have played a leading role in advancing governance “technologies.”<sup>9</sup> With their dedicated corps of civil servants, IOs stand as exemplars of rational governance. An abundance of information and data—collected and collated by specialists in various areas of governance—enables IOs and their expert civil servants to shape policies of national governments through their advice.<sup>10</sup> IOs had thrived as the pioneering practitioners of the idea of “governmentality” even before its germination.<sup>11</sup> This is why IOs have been instrumental to national governments when the latter needed reforming to deal with new governance challenges.<sup>12</sup> Not only necessity but also rationality lays the foundation for the continuing rise of IOs in global governance.

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6. IOs’ role in territorial administration ranges from direct governance to varying degrees of supervision of the administering powers of such territories. *See also* ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 115–95 (2004). *Compare* RALPH WILDE, *INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY* 107–89 (2008) *with* CARSTEN STAHN, *THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND* 50–70, 162–394 (2008).

7. JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM* 2, 21 (2012).

8. *Cf.* GUY FITI SINCLAIR, *TO REFORM THE WORLD: INTERNATIONAL ORGANIZATIONS AND THE MAKING OF MODERN STATES* 2 (2017) (“IO expansion . . . as *necessary* to a process of [modern state-making]”) (emphasis added).

9. *Id.* at 5, 11.

10. *Id.* at 14–25.

11. *Id.* at 1–20, 286–88. The concept of governmentality was developed by Michel Foucault in the 1970s. *See generally* MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–1978* (Arnold I. Davidson ed., Graham Burchell trans., Palgrave Macmillan 2007) [hereinafter *FOUCAULT, SECURITY, TERRITORY, POPULATION*]; *see also* MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: *LECTURES AT THE COLLÈGE DE FRANCE, 1975–76*, at 34–40 (Arnold I. Davidson ed., David Macey trans., Picador 2003) (1997) [hereinafter *FOUCAULT, “SOCIETY MUST BE DEFENDED”*].

12. *See* SINCLAIR, *supra* note 8, at 284.

Moreover, rationality takes a new lease on life as IOs wield extensive international lawmaking power<sup>13</sup> and stand alongside sovereign states as alternative public authorities amid the globalization of governance.<sup>14</sup> With IOs becoming more and more influential, cloaking the legitimacy of such powerful “global governance institutions” in their constitutive treaties only strains the notion of state consent in the voluntarist international legal order without alleviating concerns over their aggrandizement.<sup>15</sup> Here enters the rationality-based alternative of output legitimacy: IOs’ legitimacy is tethered to their policy outputs as manifested in regulations, guidelines, advice, recommendations, emergency responses, and other governance measures.<sup>16</sup> With substantial information, data, and expertise in hand, IOs are seen as holding the knowledge—the basis of rationality—required for sound policies in response to governance needs. Rationality, which has underpinned IOs as the laboratories of governance innovation, thus further suggests an answer to the legitimacy challenge facing IOs when they are turning into alternative public authorities to sovereign states.<sup>17</sup>

Whether the above rationality-based, output-oriented conception of legitimacy can successfully substitute for input legitimacy and, thus, transform the relationship between IOs and sovereign states remains to be seen.<sup>18</sup> Yet, a prior but unasked question needs to be answered in

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13. See generally JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005) (discussing the lawmaking role played by international organizations in various forms).

14. See generally THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: *ADVANCING INTERNATIONAL INSTITUTIONAL LAW* (Armin von Bogdandy et al. eds., 2010) (discussing how international organizations and institutions have evolved into holders of public authority and the implications of such development to international law).

15. See COHEN, *supra* note 7, at 18, 43; see generally Jonas Tallberg & Michael Zürn, *The Legitimacy and Legitimation of International Organizations: Introduction and Framework*, 14 REV. INT’L ORGS. 581 (2019) (suggesting that the legitimacy of IOs should be better explained especially in terms of more political authority being granted to IOs in recent decades).

16. See, e.g., FRITZ W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 188–90 (1999); SIMONA PIATTONI, *THE THEORY OF MULTI-LEVEL GOVERNANCE: CONCEPTUAL, EMPIRICAL, AND NORMATIVE CHALLENGES* 110–27 (2010); Jens Steffek, *The Output Legitimacy of International Organizations and the Global Public Interest*, 7 INT’L THEORY 263, 276–86 (2015); see also VIVIEN A. SCHMIDT, *EUROPE’S CRISIS OF LEGITIMACY: GOVERNING BY RULES AND RULING BY NUMBERS IN THE EUROZONE* 31–35 (2020).

17. See Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT’L ORG. 699, 707 (1999); see generally IAN HURD, *AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL* (2007) (discussing the importance of legitimacy to IOs through a case study of the United Nations Security Council); WHO GOVERNS THE GLOBE? (Deborah D. Avant et al. eds., 2010) (exploring the question of legitimacy in a variety of agents of global governance, including IOs).

18. See Tallberg & Zürn, *supra* note 15, at 592; SCHMIDT, *supra* note 16, at 32–35.

the first place: are IOs really equipped with the knowledge and rationality that are required to justify their augmented role in global governance? Or, to frame the question another way, do IOs have the capacity to claim authority on the ground that their policy outputs are knowledge-based, rational, and, thus, sound? If the notion that IOs are knowledgeable and rational turns out to be a myth, their role in global governance will be cast into doubt in a fundamental sense. The COVID-19 pandemic put the foregoing question under the limelight. The World Health Organization (WHO)'s early hesitancy over the outbreak of the coronavirus in China has not only shattered its knowledgeable and rational image as an exemplary IO but has also brought the question of institutional learning—an institution's performance in obtaining the knowledge and information that is required for the soundness of its policy—in global governance to the fore.<sup>19</sup>

In this Article, I aim to show that the WHO's limited epistemic capacity, exposed by its stumbling in response to the pandemic, speaks to IOs' inherent weakness in institutional learning, which has been made more acute by the normalization of emergency governance.<sup>20</sup> Using the state, the prototype of public authority in governance,<sup>21</sup> as the foil, I advance the following thesis. IOs' inherent weakness in institutional learning reflects both the epistemic deficiency of global governance and the legitimacy paradox in which IOs find themselves. As IOs wield more powers, their rationality-based, output-oriented legitimacy is placed under closer scrutiny than before. To address the resulting heightened legitimacy challenge, IOs are expected to yield more rational outputs, and this cannot be achieved without overcoming the existing limitation of IOs' learning capacity. Yet, to become more rational with better learning capability, IOs need to be accorded democratic-reflexive and executive modes of institutional learning—which have grown out of the sovereign state's quest for constitutional legitimacy—only to exacerbate their legitimacy problem. To answer the legitimacy question in global governance by improving IOs' institutional

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19. See, e.g., Stephen Buranyi, *The WHO v Coronavirus: Why It Can't Handle the Pandemic*, GUARDIAN (Apr. 10, 2020), <https://www.theguardian.com/news/2020/apr/10/world-health-organization-who-v-coronavirus-why-it-cant-handle-pandemic>; cf. Nicola Fortune et al., *The International Classification of Health Interventions: An 'Epistemic Hub' for Use in Public Health*, 36 HEALTH PROMOTION INT'L 1753 (2021) (discussing the epistemic strength and limits of the WHO in relation to its International Classification of Health Interventions).

20. See André Broome et al., *Global Governance and the Politics of Crisis*, 26 GLOB. SOC'Y 3, 16–17 (2012).

21. See Tanja A. Börzel, *European Governance: Governing with or without the State?*, in THE TWILIGHT OF CONSTITUTIONALISM 73, 75–84 (Petra Dobner & Martin Loughlin eds., 2010).

learning on the model of constitutional legitimacy, IOs will end up resting on a constitutional framing that has little societal foundation. Global governance's epistemic deficiency reflects the inherent limits of the project to recast the legitimacy of global governance in constitutional terms.

To show why crisis governance exposes IOs' limited institutional capacity and, at the same time, reveals the hurdles facing global governance's constitutional legitimation, I develop my argument in the following way. I first explain how flaws in institutional learning have contributed to global governance challenges with an overview of IOs' responses to three transnational crises in the twenty-first century: the global campaign against terrorism, the Eurozone crisis prompted by the global financial crisis, and the continuing COVID-19 pandemic. These three crises and their attendant emergency responses—from the U.N. Security Council, the International Monetary Fund (IMF), and the WHO, respectively—throw the dynamics of information and knowledge in global governance into sharp relief and, thus, reveal IOs' limited institutional learning capacity.<sup>22</sup> Next, I shift focus to the sovereign state—as the foil—to draw out the relationship between the growth of the state's epistemic strength and its quest for legitimacy under the constitutional project. I continue to provide a pathology of institutional learning on the international plane, suggesting that IOs' learning capacity is limited because they are denied the democratic-reflexive and executive modes of institutional learning that states possess. The pathology of global governance's epistemic deficiency further reveals why the project to recast the legitimacy of global governance in constitutional terms falls short. I conclude by suggesting that the international community needs to see through the aura of expertise that has shrouded IOs in order to rethink the question of institutional learning in global governance.

## II. GLOBAL GOVERNANCE IN STATES OF EMERGENCY: THE PROBLEM OF INSTITUTIONAL LEARNING UNMASKED

Since the terrorist attacks against the World Trade Center in New York on September 11, 2001 (9/11), high hopes for perpetual peace and liberal democracy entertained during the “golden era of the

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22. It should be noted that the following discussion of IOs' response to global terrorism centres on the role of the U.N. Security Council, which is not an IO itself but a constituent body of the United Nations—an IO—instead. For a differentiating notion of IOs, see Jan Klabbbers, *The EJIL Foreword: The Transformation of International Organizations Law*, 26 EUR. J. INT'L L. 9, 30–31 (2015).

international rule of law” have gradually given way to anxieties about the regression of post-Cold War international law.<sup>23</sup> In light of the challenges to global governance amid concerns over the sustainability of the international legal order, emergency talks have taken on a transnational (or international) character.<sup>24</sup> While the post-9/11 global “war” on terrorism, the management of the euro crisis, and the WHO’s declaration of COVID-19 as a “public health emergency of international concern (PHEIC)” have prompted emergency talks at the international and transnational levels,<sup>25</sup> I look at these crisis responses in global governance from a different perspective. In this Article, I investigate the challenges in institutional learning surrounding the three instances in order.

### A. *The Global Terror*

Soon after the 9/11 attacks in 2001, the U.N. Security Council took action under Chapter VII of the U.N. Charter in response, ushering in the decades-long global war on terrorism led by the United States. Among the controversial measures taken by the Security Council is Resolution 1373,<sup>26</sup> which mandates the U.N. member states to take measures against international terrorism, including the criminalization

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23. Compare Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT’L L. 221, 241–43 (2020), with Jochen von Bernstorff, *The Decay of the International Rule of Law Project (1990–2015)*, in THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE? 33, 34 (Heike Krieger et al. eds., 2019).

24. See, e.g., Kim Lane Scheppele, *The International Law of Emergency: Terrorism and the Post-9/11 Security Empire*, 173 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 28 (2008) (discussing how the global war on terror resulted in an international state of emergency); Ming-Sung Kuo, *The Moment of Schmittian Truth: Conceiving of the State of Exception in the Wake of the Financial Crisis*, in THE EUROPEAN CRISIS AND THE TRANSFORMATION OF TRANSNATIONAL GOVERNANCE: AUTHORITARIAN MANAGERIALISM VERSUS DEMOCRATIC GOVERNANCE 83 (Christian Joerges & Carola Glinski eds., 2014) (discussing the emergency character of responses to the euro crisis); J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT’L L.J. 1 (2016) (discussing the WHO’s role in international health emergencies); Pedro A. Villarreal, *Public Health Emergencies and Constitutionalism Before COVID-19: Between the National and the International*, in CONSTITUTIONALISM UNDER EXTREME CONDITIONS: LAW, EMERGENCY, EXCEPTION 217 (Richard Albert & Yaniv Roznai eds., 2020) (discussing the relationship between constitutionalism and international public health emergencies); Christian Kreuder-Sonnen, *The WHO After Corona: Discretionary Powers for the Next Pandemic?*, VERFBLOG (Mar. 27, 2020), <https://verfassungsblog.de/the-who-after-corona-discretionary-powers-for-the-next-pandemic/> (discussing the WHO’s role in international health emergency in the midst of the COVID pandemic).

25. The WHO’s power to declare a PHEIC had entailed discussion of the WHO as a holder of international emergency power before the COVID pandemic. See CHRISTIAN KREUDER-SONNEN, EMERGENCY POWERS OF INTERNATIONAL ORGANIZATIONS: BETWEEN NORMALIZATION AND CONTAINMENT 152 (2019).

26. S.C. Res. 1373 (Sept. 28, 2001).



of terrorist acts in domestic law.<sup>27</sup> This resolution has been questioned for imposing *general* legal obligations on states without going through the traditional routes of international lawmaking.<sup>28</sup> With the adoption of Resolution 1373 alongside other controversial measures,<sup>29</sup> the Security Council seems to have deviated from its envisaged role, suggesting a global state of emergency outside the Charter.<sup>30</sup>

Much ink has been spilled on the legitimacy of the Security Council's responses to terrorism in terms of their legality. Imposing *general* legal obligations on U.N. member states through decisions taken under Chapter VII of the Charter, the Security Council has been accused of acting *ultra vires*, turning itself into a "global legislator."<sup>31</sup> Such criticisms rest on the assumed distinction between general legal obligations and enforcement measures. Yet, the rationale behind this assumption itself has received little attention. Why should we be concerned about whether the Security Council has imposed general legal obligations or just taken enforcement measures? After all, the line between individual measures and general legislation in domestic law has long been blurred.<sup>32</sup> Thus, centering discussions of the legitimacy of the Security Council's response on the legal interpretation of the U.N. Charter sheds little light on the assumed distinction between general legal obligations and enforcement measures and the competence of the Security Council. Moving beyond the discussion framed in terms of legality, we will see much more at stake in the Security Council's assertion of legislative power.

Alongside legality and legitimacy, rationality—meaning the soundness of a decision—or rather the pursuit of rationality, is another

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27. Equally controversial is the enhancement of the targeted or smart sanctions with the adoption of Security Council Resolution 1390. S.C. Res. 1390 (Jan. 16, 2002). For the early origin of the targeted sanctions and the ensuing development, see Francesco Giumelli & Filippo Costa Buranelli, *When States and Individuals Meet: The UN Ombudsperson as a 'Contact Point' between International and World Society*, 34 INT'L REL. 46, 54–55 (2020).

28. Compare Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 179–82 (2005), with José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874–75 (2003).

29. For a discussion of the serious concerns over human rights raised by the targeted sanctions and the responses, see Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1, 9 (2016).

30. See KREUDER-SONNEN, *supra* note 25, at 82.

31. *Id.* at 82–86.

32. This concerns the emergence of 'differentiated and specialized forms of legislation' in the welfare state, which first came to the attention of public lawyers when the administrative state emerged in the late 19<sup>th</sup> century. For a critical discussion, see WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW 211–13 (1999).



essential element in allocating decision-making powers. Because the rationality of decisions is expected to be maximized through institutional learning as built-in decision making,<sup>33</sup> institutional design must take into account what kind of decision-making processes are best for an institution's mission and function.<sup>34</sup> Seen in this light, the U.N.-imposed general legal obligations and other emergency measures against global terrorism taken by the Security Council are contentious because such responses are beyond what is expected of the designed Security Council decision-making process.<sup>35</sup>

In the U.N. Charter's design, the Security Council was originally envisaged as a special steering executive committee that would respond quickly to international emergencies resulting from the threat or breach of peace.<sup>36</sup> The Security Council should be able to take swift action to restore international peace in its own right, if necessary.<sup>37</sup> Responsiveness underlies its original design. Through this lens, the enforcement power vested in the Security Council is aimed at the breach of international peace or the immediate threat thereof. The coercive measures adopted by it are not expected to last too long. Once the breached peace is restored or the threat to international peace fades away, the adopted coercive measures should be lifted without

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33. This points to what David Estlund calls the variety of 'epistemic proceduralism' instead of 'correctness theory' under the epistemic theories of democracy when it comes to democratic decision making. David Estlund, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 173, 181 (James Bohman & William Rehg eds., 1997).

34. See generally Donald Chisholm, *Problem Solving and Institutional Design*, 5 J. PUB. ADMIN. RSCH. & THEORY 451 (1995) (suggesting that choices about institutional forms are mostly directed at solving problems).

35. The targeted sanctions mechanism is controversial because the Security Council extends its arms to individuals. Devika Hovell notes the Security Council's "underestim[ation] of the consequences of its assuming decision-making authority over individuals" in shifting towards targeted sanctions. Hovell, *supra* note 29, at 8. The following discussion of the discrepancy between the role of the Security Council in practice and the Charter design focuses on the controversy over the Council's assumption of legislative powers.

36. See Andrew J. Carswell, *Unblocking the UN Security Council: The Uniting for Peace Resolution*, 18 J. CONFLICT & SEC. L. 453, 456–57 (2013) (noting the U.N. Charter framers' entrusting the "hegemonic Security Council" with "primary responsibility for international peace and security" and its "predominant position" vis-à-vis other U.N. constituent bodies); see also Frederic L. Kirgis, Jr., *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 507–08 (1995); Bardo Fassbender, *The United Nations Charter as a Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529, 574–75 (1998); Michael Fremuth & Jörn Griebel, *On the Security Council as a Legislator: A Blessing or a Curse for the International Community?*, 76 NORDIC J. INT'L L. 339, 358 (2007).

37. See U.N. Charter arts. 43–48; see also Kirgis, *supra* note 36, at 507–08; Fremuth & Griebel, *supra* note 36, at 358–59.

delay. This is why responsiveness took precedence over representativeness in the design of the Security Council.<sup>38</sup>

There is no denying that the practice of sanctions imposed by the Security Council has been worlds apart from its original design in the U.N. Charter. With the inception of the Cold War and the process of decolonization following the end of the Second World War, the ideological divide between the Soviet Union and the United States soon defied the U.N. framers' assumption that the wartime allies would remain united in their new role as the veto-holding permanent members of the Security Council.<sup>39</sup> As a result, the U.N. Security Council became more of a talking shop than the expected rapid responder to international crises, and it remained so until the end of the Cold War.<sup>40</sup> Yet, as the Cold War gave way to a new golden era of globalization,<sup>41</sup> another problem soon arose with the Security Council.<sup>42</sup> When it responded to a crisis with coercive power, as its reaction to the First Gulf War illustrates,<sup>43</sup> such coercive action tended to outlast the immediate cause, turning temporary measures into longstanding conditions.<sup>44</sup> This problematic post-Cold War practice of open-ended Security Council resolutions was further aggravated when it reached beyond concrete measures aimed at a particular threat to or a breach of peace. While issues arising from the open-ended nature of Security Council resolutions can be addressed through better drafting,<sup>45</sup> the

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38. The decision to not include Brazil in the permanent membership of the UNSC illustrates this point. See MARY ELLEN O'CONNELL, *THE ART OF LAW IN THE INTERNATIONAL COMMUNITY* 112 (2019); see also Kirgis, *supra* note 36, at 508 (noting the Security Council as "a formidable body" in the original plan on the U.N.).

39. See Kirgis, *supra* note 36, at 508; O'CONNELL, *supra* note 38, at 111–12, 125; cf. SINCLAIR, *supra* note 8, at 116 (suggesting the discrepancy between the institutional framework as prescribed in the U.N. Charter and the postwar development driven by the divergence among wartime allies and other members as a result of the Cold War and decolonization).

40. See Robert S. Snyder, *Reforming the Security Council for the Post-Cold War World*, 14 INT'L J. WORLD PEACE 3, 5–6 (1997).

41. See G. John Ikenberry, *The End of Liberal International Order?*, 94 INT'L AFFS. 7, 9 (2018).

42. As the world is seeing a new ideological divide between Western powers (and their allies) and autocratic regimes led by China and Russia, this post-Cold War problem—the overreach of the Security Council—seems to be ebbing away. See Kirgis, *supra* note 36, at 512–16.

43. See S.C. Res. 678 (Nov. 29, 1990); S.C. Res. 687 (Apr. 3, 1991). But see Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 179–229 (2004).

44. See Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'*, 11 EUR. J. INT'L L. 541, 560–66 (2000).

45. For a discussion of how the Security Council resolutions under Chapter VII of the U.N. Charter can be drafted in a way to limit interpretive maneuvers, see Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT'L L. 124, 137–44 (1999).

extension of its reach into general legal obligations calls the designed primacy of responsiveness over representativeness into question in a fundamental sense.

In contrast to the Charter's vision of coercive measures aimed at a particular incident, general legal obligations are required to respond to threats to international peace that mostly result from complex societal conflicts.<sup>46</sup> Thus, to address such complex issues effectively, their life span is likely to extend beyond the immediate crisis, prompting the U.N. Security Council to apply sanctions. As these sanctions are general in character and expected to continue to apply in the future, their imposition amounts to the enactment of legislation.<sup>47</sup>

To make sound "legislation" of such general sanctions, a wide range of scenarios need to be considered, investigated, and debated in the lead-up to their adoption. For example, how will freezing bank accounts affect individuals? What impact will it have on countries that rely heavily on remittances from the diaspora? Should the difference in impact on such countries and those who receive only limited remittances be taken into account in the legislative design of general sanctions? How can the disproportionate impact on the former group of countries be mitigated?<sup>48</sup> Without a representative and deliberative institutional setting, such issues cannot be duly considered or debated, nor can their investigation be adequately conducted.<sup>49</sup> Studies of institutional epistemology have shown that representation is not only a matter of authority and legitimacy<sup>50</sup> but also a way to enhance the rationality of decisions. With all interested parties included in the decision-making process, the

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46. Terrorism illustrates this point. See generally Javier Argomaniz & Orla Lynch, *Introduction to the Special Issue: The Complexity of Terrorism—Victims, Perpetrators and Radicalization*, 41 *STUD. CONFLICT & TERRORISM* 491 (2018) (discussing the complex interactions between experience of suffering, victimization, radicalization, and terrorism); Donald Holbrook & John Horgan, *Terrorism and Ideology: Cracking the Nut*, 13 *PERSPS. ON TERRORISM* 2, 2 (Dec. 2019) (noting that "the search for satisfactory answers [to 'what causes terrorism?'] continues to elude even the most dedicated researchers").

47. See Georg Nolte, *The Limits of the Security Council's Powers and Its Functions in the International Legal System: Some Reflections*, in *THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 315, 321–22 (Michael Byers ed., 2001).

48. For a discussion of the unequal impact of anti-terrorist finance in the context of the war on terrorism, see Laura K. Donohue, *Anti-Terrorist Finance in the United Kingdom and United States*, 27 *MICH. J. INT'L L.* 303, 417–25 (2006).

49. See HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* 89–117 (2013).

50. See, e.g., Elizabeth Anderson, *The Epistemology of Democracy*, 3 *EPISTEME* 8 (2006); see also MICHAEL SAWARD, *THE REPRESENTATIVE CLAIM* 138–68 (2010).

issue can be examined from different perspectives so distinct interests can be taken into account. Through deliberation among the representatives of interested parties, flaws can be detected, and errors corrected and avoided.<sup>51</sup>

Seen in this light, it becomes clear that the current Security Council membership and composition make it unfit to decide on imposing general legal obligations on the U.N.'s over 190 member states.<sup>52</sup> The U.N. Charter provisions establishing the Security Council reflect the primacy of responsiveness over representativeness in institutional design. As a result, the decision-making structure of the Security Council falls far short of the epistemic capacity required for future crises in global governance that would call for U.N.-sanctioned "legislative" responses under the guise of general obligations.<sup>53</sup>

### B. *The Eurozone Crisis*

The EU's responses to the Eurozone crisis have generated great interest among scholars in the EU's crisis management. In light of, *inter alia*, the EU's deviation from its foundational treaties and the extraordinary measures it has taken, such as the mandatory individual "bail-ins" introduced as part of the Cypriot rescue package, the EU's responses have been seen as taking on an emergency character.<sup>54</sup> Such emergency responses are controversial as they raise concerns over human rights, the rule of law, and the democratic legitimacy of supranational institutions and international technocracy.<sup>55</sup> Yet, a closer look reveals that controversies surrounding institutional responses to the Eurozone crisis further raise issues about the epistemic foundation of relevant policies.

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51. See Hélène Landemore, *Deliberation, Cognitive Diversity, and Democratic Inclusiveness: An Epistemic Argument for the Random Selection of Representatives*, 190 SYNTHESE 1209, 1210 (2013); see also Estlund, *supra* note 33, at 179–81.

52. I confine the present critique to the Security Council's extended role in general sanctions. For a legitimacy critique focused on its representativeness and limited and hierarchical membership, see Ramesh Thakur, *Law, Legitimacy and United Nations*, 11 MELB. J. INT'L L. 1, 18 (2010).

53. This problem was further intensified when the Security Council required compliance of the non-member states. Compare Fassbender, *supra* note 36, at 593–94, with Kelvin Widdows, *Security Council Resolutions and Non-Members of the United Nations*, 27 INT'L & COMPAR. L.Q. 459, 459–62 (1978).

54. See Kuo, *supra* note 24, at 84.

55. See also *id.* at 96; see generally Claire Kilpatrick, *On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts*, 35 OXFORD J. LEGAL STUD. 325, 331 (2015) (critiquing the erosion of the rule of law and "bureaucratic diktat" in the Eurozone crisis).

Notably, the EU and its member states are not the only protagonists in the management of the Eurozone crisis. The IMF joined the EU to provide financial rescue packages to those debt-racked European Monetary Union (EMU) economies at the height of the euro crisis, following its early intervention in the debt crisis of the EU countries outside the Eurozone in 2008.<sup>56</sup> The IMF has since been one institutional pillar of the “troika” at the core of euro crisis management.<sup>57</sup> Notably, the IMF was favored not only for its financial resources;<sup>58</sup> it was also involved in lending its expertise and rich experience in financial rescue and structural reform around the globe to the EU and the bailout-receiving EMU countries.<sup>59</sup> In response, the IMF staff experts helped the EU and its institutions administer liberal shock therapy to those EMU members in need, resulting in the contentious austerity measures that were once thought to have shaken the European social model to its foundations.<sup>60</sup>

Some commentators have criticized and attributed the IMF’s conditioning the bailout on structural reform to its predilection for

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56. See Dermot Hodson, *The IMF as a de Facto Institution of the EU: A Multiple Supervisor Approach*, 22 REV. INT’L POL. ECON. 570, 570 (2015).

57. The other two components of the troika are the European Commission and the European Central Bank. See *id.* at 578.

58. The IMF contributed capital to the rescue packages for Greece, Ireland, Portugal, and Cyprus. In the case of Spain, it played a role in the implementation and monitoring of the reform program attached to the rescue package but made no financial contribution. See *id.* at 570, 579–80.

59. See Daniela Schwarzer, *Building the Euro Area’s Debt Crisis Management Capacity with the IMF*, 22 REV. INT’L POL. ECON. 599, 612–13 (2015); Manuela Moschella, *Managing the Eurozone Crisis: Why Enlist the IMF?*, in THE GOVERNOR’S DILEMMA: INDIRECT GOVERNANCE BEYOND PRINCIPALS AND AGENTS 223, 226–30 (Kenneth W. Abbott et al. eds., 2020). Apart from the EU’s lack of experience and expertise in crisis management, a more political reason for the EU member states to have the IMF on board was to deflect the resistance of the credit-receiving member states against the required reform with the reputation and independence of the IMF professional staff. Thomas Jost & Franz Seitz, *The Role of the IMF in the European Debt Crisis* 9–12 (Hochschule Amberg-Weiden, Working Paper No. 32, 2012), <https://www.econstor.eu/bitstream/10419/56452/1/689266685.pdf>.

60. See KLAUS BUSCH ET AL., FRIEDRICH-EBERT-STIFTUNG, EURO CRISIS, AUSTERITY POLICY AND THE EUROPEAN SOCIAL MODEL: HOW CRISIS POLICIES IN SOUTHERN EUROPE THREATEN THE EU’S SOCIAL DIMENSION 11 (Feb. 2013), <https://library.fes.de/pdf-files/id/ipa/09656.pdf>; Wade Jacoby & Jonathan Hopkin, *From Lever to Club? Conditionality in the European Union During the Financial Crisis*, 27 J. EUR. PUB. POL’Y 1157, 1163–67 (2020); see generally Willi Semmler, *The Macroeconomics of Austerity in the European Union*, 80 SOC. RSCH. 883 (2013). Notably, the policy to relieve the people of the COVID pandemic suggests a turn of the tide. See Jean De Munck, *Three Political Regimes, Three Responses to the COVID-19 Crisis*, in SOCIAL MOVEMENTS AND POLITICS DURING COVID-19: CRISIS, SOLIDARITY AND CHANGE IN A GLOBAL PANDEMIC 26, 29–32 (Breno Bringel & Geoffrey Pleyers eds., 2022).

economic liberalization;<sup>61</sup> others have questioned the wisdom of the policy in focusing on structural adjustment, contending that economic growth by means of expanding government expenditure and investment in infrastructure is the right way out of national debts.<sup>62</sup> Both contain some elements of truth. Yet, neither is sufficient on its own. The IMF's predilection for economic liberalization does not mean that its prescriptions to cut structural expenditure in the bailout-receiving EMU countries should not be considered as if they were the fruit of some poisonous tree.<sup>63</sup> Failing to see this, critics who challenge the IMF's choice of structural adjustment over expenditure and investment expansion sound more like the IMF's ideological rivals than its engaged interlocutors. After all, both cutting structural expenditure and expanding government spending and investment in infrastructure can be instrumental in the economic regeneration of debt-racked countries.<sup>64</sup> Also, focusing on policy choice alone—structural adjustment vis-à-vis expenditure or investment expansion—obscures other governance issues arising from the IMF's intervention in the Eurozone crisis.<sup>65</sup> What is questionable about the IMF's policy response lies beyond its underlying economic philosophy or its policy choice. Rather, the way that the IMF administered its standard therapy amid an unfolding crisis has laid bare the gap between the IMF's institutional learning capacity and its crisis response.

Specifically, the IMF—whose staff experts share professional training in economics in their formative stage<sup>66</sup>—has developed a standing

61. See Anna Visvizi, *The Crisis in Greece and the EU-IMF Rescue Package: Determinants and Pitfalls*, 62 ACTA OECONOMICA 15, 30–31 (2012).

62. See also Paul Krugman, *The Case for Cuts Was a Lie. Why Does Britain Still Believe It? The Austerity Delusion*, GUARDIAN (Apr. 29, 2015), <https://www.theguardian.com/business/ng-interactive/2015/apr/29/the-austerity-delusion> (noting that government spending and budget deficits can be “a good thing” under circumstances such as in Europe in 2008–09).

63. When properly designed and implemented appropriately, structural reform can have lesser impact on society and improve the national financial situation in the long run by enhancing economic performance.

64. See BEN CLIFT, *THE IMF AND THE POLITICS OF AUSTERITY IN THE WAKE OF THE GLOBAL FINANCIAL CRISIS* 86–87 (2018); Albi Tola & Sébastien Waelti, *Financial Crises, Output Losses, and the Role of Structural Reforms*, 56 ECON. INQUIRY 761, 763, 788 (2018) (noting “differences in the effectiveness of monetary policy easing across types of crises and types of economies” and “caution[ing] not to overgeneralize the effectiveness of structural and financial reforms”); see generally Vassilis Monastiriotis, *(When) Does Austerity Work? On the Conditional Link between Fiscal Austerity and Debt Sustainability*, 8 CYPRUS ECON. POL'Y REV. 71 (2014).

65. See, e.g., Kevin Featherstone, *Conditionality, Democracy and Institutional Weakness: The Euro-Crisis Trilemma*, 54 J. COMMON MKT. STUD. 48 (2016).

66. See CLIFT, *supra* note 64, at 59–65; Jeffrey M. Chwieroth, “The Silent Revolution:” *How the Staff Exercise Informal Governance over IMF Lending*, 8 REV. INT'L ORGS. 265, 271 (2013).



interest in how national debt can remain on a sustainable level. IMF experts do not view debt sustainability as calculated for political needs. Rather, it is defined professionally and estimated in accordance with the expertise-based prognosis of the national economy and government expenditure.<sup>67</sup> Regardless of the variations in economic performance and government expenditure and revenue among countries, the estimated sustainable level of individual national debts is decided in accordance with the same methodology.<sup>68</sup> Thus, controlling structural expenditure excesses comes into the equation of the IMF's plan to keep the national debt sustainable.<sup>69</sup> It bears emphasis that there is nothing wrong with this policy orientation per se. The underlying technocratic mindset also need not be rejected outright. Yet, such orientation and mindset become problematic when they apply to a momentous crisis. Called in to make an emergency response to the debt crisis, the IMF seemed to have struggled in distinguishing their firefighting function to extinguish a burning crisis from their professional role as civil servants specializing in the regular periodic prognosis of national debt and government expenditure. As a result, a long-term reform, such as the lowering of structural expenditure, has been carried out as a shock therapy within the compressed time frame of a sudden crisis.<sup>70</sup>

The shock implications of structural adjustment indicate that the debt crisis seen through the economic lens of IMF experts is far away from reality. In the real world, the national debt crisis is more than a matter of financial discipline. It is rather the culmination of a myriad of longstanding governance issues, reflecting the state of national life—

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67. See also Charles Wyplosz, *Debt Sustainability Assessment: Mission Impossible*, 2 REV. ECON. & INSTS. 1 (2011) (discussing the elusiveness of debt sustainability and how it can be better grasped with principles).

68. See *id.*; see also MARK S. COPELOVITCH, THE INTERNATIONAL MONETARY FUND IN THE GLOBAL ECONOMY: BANKS, BONDS, AND BAILOUTS 56–57 (2010); Xavier Debrun et al., *Debt Sustainability*, in SOVEREIGN DEBT: A GUIDE FOR ECONOMISTS AND PRACTITIONERS 151, 153–65 (S. Ali Abbas et al. eds., 2019). Even with risk and other external variables taken into account, debt sustainability analysis remains vulnerable to the influence of context-sensitive factors, including subjective knowledge. See KENNETH DYSON, STATES, DEBT, AND POWER: 'SAINTS' AND 'SINNERS' IN EUROPEAN HISTORY AND INTEGRATION 191–99 (2014). As will be discussed next, the limitation of formal debt sustainability analysis becomes even more acute in a real crisis.

69. See Monastiriotis, *supra* note 64, at 74–76.

70. See Larry Li et al., *Insights into the IMF Bailout Debate: A Review and Research Agenda*, 37 J. POL'Y MODELING 891, 892 (2015) (noting that the short-term focus of IMF bailout policies contributes to "[r]ecipient countries [being] forced to implement economic reforms... in a short period of time").



including the people's lifestyle and the average living standard.<sup>71</sup> Thus, structural adjustment is not just a matter of budget management geared towards the reduction of (unnecessary) government expenditure. Rather, it has broad implications for people's spending power and savings and, thus, their lifestyles.<sup>72</sup> To put it bluntly, how to lead one's life is at stake when structural reform and austerity measures, as advised by the IMF, are introduced at speed. For example, in the depths of the Eurozone crisis, salary cuts and structural unemployment could force estranged couples to change their minds or simply leave divorcees with no alternative but to continue to live under the same roof because of austerity.<sup>73</sup> Notably, how society should be adjusted in what aspects of everyday life varies among countries. Only those living and suffering hardship there have the information, experience, and, as a result, the knowledge required for making those life-changing decisions.<sup>74</sup> Enlightened economists, wherever they are trained or based, are not equipped with such local knowledge.

To carry out structural reform within a compressed time frame means suddenly changing national life in a fundamental sense.<sup>75</sup> Even in an exceptional situation where some momentous changes need to be rushed through, it would still be hard to imagine entrusting such decisions to the IMF and its international civil servants.<sup>76</sup> To make matters worse, the prepared standard reform package from remote IMF experts, which was barely informed by local knowledge and on-the-ground experiences of the people suffering, was virtually impervious to

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71. See Alberto Alesina & Andrea Passalacqua, *The Political Economy of Government Debt*, in HANDBOOK OF MACROECONOMICS: VOLUME 2, at 2599, 2642–43 (John B. Taylor & Harald Uhlig eds., 2016); cf. Björn Bremer & Reto Bürgisser, *Do Citizens Care About Government Debt? Evidence from Survey Experiments on Budgetary Priorities*, 62 EUR. J. POL. RSCH. 239, 255–56 (2023) (observing the differentiating effect of various government spending and fiscal policies on different social sectors).

72. See Lisa A. Keister et al., *Lifestyles Through Expenditures: A Case-Based Approach to Saving*, 3 SOCIO. SCI. 651, 653–56 (2016).

73. See, e.g., Dan Bilefsky, *In Spain, for Better or Worse, Too Poor to Break Up*, N.Y. TIMES, Jan. 9, 2013, at A9.

74. See Scott Greer, *Structural Adjustment Comes to Europe: Lessons for the Eurozone from the Conditionality Debates*, 14 GLOB. SOC. POL'Y 51, 63–64 (2014); see also Hayley Stevenson, *The Wisdom of the Many in Global Governance: An Epistemic-Democratic Defense of Diversity and Inclusion*, 60 INT'L STUD. Q. 400, 402–04 (2016).

75. See, e.g., Daniel M. Knight, *Living through the Greek Crisis: An Anthropologist Reports from Thessaly*, CONVERSATION (Feb. 16, 2017), <https://theconversation.com/living-through-the-greek-crisis-an-anthropologist-reports-from-thessaly-73091>; see also CARLO BASTASIN, *SAVING EUROPE: HOW NATIONAL POLITICS NEARLY DESTROYED THE EURO* 139 (2012).

76. See Kuo, *supra* note 24, at 95–97.

indigenous resistance, as evidenced by the frustrated 2015 Greek referendum on the third bailout from the troika.<sup>77</sup> In sum, the IMF's emergency response to the Eurozone crisis is not only politically unwelcome but also epistemically unsound, revealing the limitation of institutional learning in international technocracy in times of crisis.<sup>78</sup>

### C. *The COVID Pandemic*

Because the COVID pandemic continues to unfold, it is too early to pass judgment on the WHO's overall performance in this world-changing crisis. Nevertheless, the WHO's institutional weaknesses have not escaped commentators' attention. Apart from its meager budget and reliance on big donors' goodwill, lack of enforcement power, interference from powerful member states, and want of transparency and political accountability have been identified as the causes that have hampered the WHO.<sup>79</sup> Failure to warn the world of the human-to-human transmissibility of the novel coronavirus in time and the delay in declaring the spread of COVID-19 a Public Health Emergency of International Concern (PHEIC) gave away the foregoing defects in the WHO's institutional design.<sup>80</sup> Even so, the WHO has mostly escaped the criticism of epistemic failure. Rather, it continues to be seen as the authoritative provider of public health guidance and medical advice as

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77. See Ashoka Mody, *The IMF Abetted the European Union's Subversion of Greek Democracy*, OPENDEMOCRACY (Sept. 1, 2018), <https://www.opendemocracy.net/en/can-europe-make-it/imf-abetted-european-union-s-subversion-of-greek-democracy/>.

78. See Susanne Lütz & Matthias Kranke, *The European Rescue of the Washington Consensus? EU and IMF Lending to Central and Eastern European Countries* 12–21 (London Sch. of Econ. & Pol. Sci., LEQS Paper No. 22, 2010), [https://eprints.lse.ac.uk/53450/1/\\_Libfile\\_repository\\_Content\\_European%20Institute\\_LEQS%20Discussion%20Paper\\_LEQSPaper22.pdf](https://eprints.lse.ac.uk/53450/1/_Libfile_repository_Content_European%20Institute_LEQS%20Discussion%20Paper_LEQSPaper22.pdf); cf. Barnett & Finnemore, *supra* note 17, at 718–25 (discussing the pathologies of IOs associated with international bureaucrats).

79. See Buranyi, *supra* note 19; Michael Peel et al., *WHO Struggles to Prove Itself in the Face of Covid-19*, FIN. TIMES (July 11, 2020), <https://www.ft.com/content/c2809c99-594f-4649-968a-0560966c11e0>; see also Allyn L. Taylor & Roojin Habibi, *The Collapse of Global Cooperation Under the WHO International Health Regulations at the Outset of COVID-19: Sculpting the Future of Global Health Governance*, ASIL INSIGHTS (June 5, 2020), <https://www.asil.org/insights/volume/24/issue/15/collapse-global-cooperation-under-who-international-health-regulations>.

80. Compare Buranyi, *supra* note 19 (questioning the WHO's early response to the COVID pandemic), with Ayelet Berman, *The World Health Organization and COVID-19: How Much Legal Authority Does the WHO Really Have to Manage the Pandemic?*, CENT. FOR INT'L L., NAT'L UNIV. OF SING. (Jan. 5, 2020), <https://cil.nus.edu.sg/the-world-health-organization-and-covid-19-how-much-legal-authority-does-the-who-really-have-to-manage-the-pandemic-by-dr-ayelet-berman/> (suggesting that the WHO had only limited legal authority to respond).

to how to respond to the pandemic.<sup>81</sup> On this view, the WHO may have institutional sins that are rooted in its design, but epistemic deficiency is not one of them. A closer look, however, suggests otherwise. The WHO's early hesitancy over the outbreak of coronavirus in China is rather revelatory of the limitation of its institutional learning capacity, which is only amplified in times of crisis.

The WHO stands as the "intelligence coordinator and informational hub" of global public health.<sup>82</sup> Through its treaty-based organization and global reach, the WHO is able to include experts in medicine, public health policy, epidemiology, virology, and other relevant areas around the globe in, *inter alia*, the monitoring, and prevention of outbreaks of infectious diseases and the planning of attendant policy response.<sup>83</sup> Locally embedded throughout the world, experts with immediate access to facts on the ground are able to provide and share information and data through the WHO.<sup>84</sup> Building on local knowledge and working with experts around the globe,<sup>85</sup> the WHO is expected to take advantage of collective intelligence through its epistemic communities in responding to unexpected disease outbreaks.<sup>86</sup> The

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81. See generally RICHARD HORTON, *THE COVID-19 CATASTROPHE: WHAT'S GONE WRONG AND HOW TO STOP IT HAPPENING AGAIN* (2020) (criticizing national governments' failure to follow the WHO's recommendations while suggesting that the WHO could have done more). This does not mean that the WHO is beyond criticism on the matter of science. Its changed guidance on whether SARS-CoV-2 is airborne is one example. See JV Chamary, *WHO Finally Admits Coronavirus Is Airborne. It's Too Late*, FORBES (May 4, 2021), <https://www.forbes.com/sites/jvchamary/2021/05/04/who-coronavirus-airborne/?sh=5d0a7f7f4472>.

82. See KREUDER-SONNEN, *supra* note 25, at 157.

83. See also Chris Ansell et al., *The Promise and Challenge of Global Network Governance: The Global Outbreak Alert and Response Network*, 18 GLOB. GOVERNANCE 317 (2012) (discussing how the WHO-supported GOARN network of technical partners has the capacity and expertise to contribute to an international, coordinated response to outbreaks of epidemic-prone and novel infectious diseases); see generally WHO, *MULTISECTORAL APPROACH TO THE PREVENTION AND CONTROL OF VECTOR-BORNE DISEASES: A CONCEPTUAL FRAMEWORK* (2020), <https://iris.who.int/bitstream/handle/10665/331861/9789240004788-eng.pdf>.

84. See generally Stephen S. Morse, *Global Infectious Disease Surveillance and Health Intelligence*, 26 HEALTH AFFS. 1069 (2007).

85. See *id.* at 1070.

86. See generally WHO, *WHE Learning Strategy* (2018), <https://www.who.int/docs/default-source/documents/publications/whe-learning-strategy.pdf?sfvrsn=4ad5fd43>; see also GEOFF MULGAN, *BIG MIND: HOW COLLECTIVE INTELLIGENCE CAN CHANGE OUR WORLD* 145–46 (2018) (illustrating how collective intelligence can work to eradicate diseases and the WHO's influence with the case of smallpox). For a discussion of the distinction between intelligence and wisdom, compare Hélène Landemore, *Democratic Reason*, in *COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS* 251, 254 (Hélène Landemore & Jon Elster eds., 2012), with Daniel Andler, *What Has Collective Wisdom to Do with Wisdom?*, in *COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS*, *supra* note 86, at 72. For the role of epistemic communities in global public health governance, see Colin

decentralized network structure of knowledge and information enables the WHO to coordinate intelligence and policy responses for global public health and disease prevention.

Epistemic strength is not the only quality that network structure lends to the WHO. With its epistemic network, the WHO has multiple sources of intelligence and information. Theories of network and cybernetics have shown that a network is less prone to systemic failure than traditional organizational forms.<sup>87</sup> Its myriad of interconnected “nodes” provide organizational resilience, as the network can continue to rely on some nodes to function when others are blocked.<sup>88</sup> Thus, the multiple informational sources within the WHO’s epistemic network are expected to enable the WHO to continue to access knowledge and intelligence, even if some are shut off.

Nevertheless, one chink in the armor of the decentralized epistemic network is the susceptibility of locally embedded knowledge to indigenous interference.<sup>89</sup> While geographical proximity enables local experts to observe the situation firsthand, it also allows indigenous authorities to control access to the facts on the ground and communication of information without much constraint. In a case where an unknown communicable disease breaks out, the problem of indigenous interference can become even graver. Given the urgency to trace the origin of the disease in order to find out its vector and host and determine the solution, no alternative source of information or data can be found for those close to Ground Zero.<sup>90</sup> And this is what the world witnessed when COVID-19 first broke out in China.

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McInnes & Anne Roemer-Mahler, *From Security to Risk: Reframing Global Health Threats*, 93 INT’L AFFS. 1313, 1319 (2017); see also Olga Löblová, *Epistemic Communities and Experts in Health Policy-Making*, 28 (SUPPLEMENT 3) EUR. J. PUB. HEALTH 7 (2018).

87. See, e.g., Robert Flood & Michael C. Jackson, *Cybernetics and Organization Theory: A Critical Review*, 19 CYBERNETICS & SYS. 13, 18–24 (1988) (analyzing how cybernetics contributes to the effectiveness and viability of systems in organization); Raymond E. Miles & Charles C. Snow, *Causes of Failure in Network Organizations*, 34 CAL. MGMT. REV. 53 (1992) (critically discussing how the network form can help to address organizational challenges).

88. See generally LOET LEYDESORFF, A SOCIOLOGICAL THEORY OF COMMUNICATION: THE SELF-ORGANIZATION OF THE KNOWLEDGE-BASED SOCIETY 143–77 (2d ed. 2003); Marco A. Janssen et al., *Toward a Network Perspective of the Study of Resilience in Social-Ecological Systems*, 11 ECOLOGY & SOC’Y 1 (2006), <https://www.ecologyandsociety.org/vol11/iss1/art15/>.

89. See Pedro A. Villarreal, *The Multilevel Dimension of Rules-Based Disease Surveillance Beyond the State*, 29 EUR. J. HEALTH L. 7, 12–13 (2022).

90. See Bhavan Jaipragas & Sarah Zheng, *WHO Coronavirus Team at Ground Zero in Wuhan to Work Out Next Containment Step*, S. CHINA MORNING POST (Feb. 22, 2020), <https://www.scmp.com/news/china/society/article/3051917/who-coronavirus-team-ground-zero-wuhan-work-out-next-containment>.

To be sure, as noted above, the very idea of network gives the underlying epistemic structure resilience, thanks to the widespread nodes of knowledge and information supply that could eventually circumvent the censorship of indigenous authorities.<sup>91</sup> Whistle-blowing local experts may still outplay the secretive indigenous authorities and pass concealed information on, enabling the WHO-coordinated epistemic network to function again.<sup>92</sup> Yet, despite the invaluable information from whistle-blowers, it is inevitably fragmented. Under indigenous interference, the *whole* picture of the local situation may well remain unknown to the outside world, even with the help of the local expert whistle-blower.<sup>93</sup> The epistemic network is resilient but not without limits.

Such limitation of the WHO's epistemic network was taken up by the revision of the International Health Regulation (IHR) in 2005, which drew lessons from the experience of the 2003 SARS epidemic.<sup>94</sup> Under the revised IHR, the Director-General has the power to declare a PHEIC in a SARS-like disease outbreak based on the assessment of the situation in light of state and non-state information with the help of an emergency committee of WHO-affiliated experts.<sup>95</sup> In other words, the Director-General may act on limited information when the relevant member states fail to provide the required data in time. Yet, the 2005 reform still falls short of addressing all the institutional issues surrounding the WHO, only with its limitation fully exposed in the WHO's response to the COVID pandemic.

According to the revised IHR, the Director-General is expected to take a more active role in deciding on the declaration of a PHEIC.<sup>96</sup>

91. For a philosophical account of how scattered information is translated into knowledge, see LUCIANO FLORIDI, *THE LOGIC OF INFORMATION: A THEORY OF PHILOSOPHY AS CONCEPTUAL DESIGN* 71–100 (2019).

92. For the role of the whistle-blower in the reaction to the 2003 SARS outbreak in China, see Tom Christensen & Martin Painter, *The Politics of SARS – Rational Responses or Ambiguity, Symbols and Chaos*, 23 *POL'Y & SOC'Y* 18, 29–30 (2004).

93. *See id.* at 34.

94. *See id.* at 39–40.

95. WHO, *INTERNATIONAL HEALTH REGULATIONS*, arts. 12, 15, 48–49 (3rd ed. 2005). Under Article 12(1), in determining whether a PHEIC is occurring, the Director-General is not confined to the information and data received from the state party where an IHR “event” is taking place, while Article 9(1) provides, “WHO may take into account reports from sources other than notifications or consultations . . . .” According to Articles 6 and 8, which provide for notifications and consultations, such procedures are directed at state parties. *See also* Heath, *supra* note 24, at 21–26.

96. WHO, *supra* note 95, arts. 12(3)–(5), 49(5); *cf.* Heath, *supra* note 24, at 44–45 (noting the consensual decision-making culture in relation to the Director-General's declarations of PHEIC); KREUDER-SONNEN, *supra* note 25, at 168 (noting that while the Director-General is entrusted with the authority to make PHEIC declarations, she must consult the Emergency Committee of health experts).

Yet, such reform does not change the fact that the WHO gains “recognition . . . as the rightful [global health] crisis manager” because of “an advance in knowledge.”<sup>97</sup> The recognition the WHO has received for its role in managing the global health crisis not only reflects that the WHO is at an advantage in obtaining health information and intelligence but also suggests that the WHO draws authority in global public health from its own epistemic strength.<sup>98</sup> Denied the epistemic advantage, the WHO would lose authority. This is what the revised IHR failed to envisage.

The example of indigenous interference in reporting an unknown disease, as noted above,<sup>99</sup> throws the blind spot in the 2005 IHR reform into the limelight. In that fictitious case, the local authorities of the epicenter of the disease outbreak refuse to cooperate, and the information concerning the unknown disease is only leaked to the outside world thanks to whistle-blowing experts on the scene. As a result, the WHO can barely claim to be at an advantage in knowledge because the leaked information falls far short of giving a full picture of the outbreak. Even so, the Director-General can still rely on other sources of information and take a decisive role in declaring a PHEIC under the revised IHR.<sup>100</sup> Yet, the authority of such a decision would likely be liable to questioning due to its fragmented epistemic foundation. Lacking a sound epistemic foundation, the WHO is caught between a rock and a hard place: choosing to hold off until the whole picture emerges, the WHO would be accused of dropping the ball, as evidenced in the COVID crisis. Alternatively, deciding to act without complete knowledge, it could not self-assuredly claim authority on the grounds of epistemic soundness. Notwithstanding its many innovative changes, the 2005 reform underestimates the nexus of epistemic strength and authority in the WHO.<sup>101</sup> In sum, as the WHO’s institutional learning builds on the deliberation among experts, given the best available information and sound scientific evidence, it is thrown into doubt when a recalcitrant member state decides to block the sharing of information at the outbreak of an unknown disease. Informational dependence is the WHO’s Achilles heel in institutional learning.

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97. See KREUDER-SONNEN, *supra* note 25, at 157.

98. Granted, an expertise-based technocratic legitimacy is not sufficient for the WHO to take more aggressive action. Yet, it would be a step too far to further infer that such technocratic legitimacy is not necessary. It is doubtful that the WHO can turn away from expertise in asserting its authority.

99. See *supra* notes 89–92 and accompanying text.

100. See WHO, *supra* note 95; see also Heath, *supra* note 24, at 22; KREUDER-SONNEN, *supra* note 25, at 168.

101. See Heath, *supra* note 24, at 9–10, 15–16, 26–36.



III. LEARNING IN THE STATE: (SOVEREIGN) KNOWLEDGE, GOVERNANCE, AND LEGITIMACY

The foregoing examples of the Security Council, the IMF (on the EU's invitation), and the WHO falling short in their responses to a crisis cannot be entirely attributed to the emergency character of the issues concerned. After all, IOs—the Security Council, the IMF, and the WHO included—cannot simply turn their backs on the crises at present or in the future, especially when crises have become part and parcel of global governance.<sup>102</sup> Rather, as discussed above, the three instances of IOs' emergency responses bring up the question of institutional learning in global governance.<sup>103</sup> To better understand why IOs have been held back in addressing global governance issues, I now turn to the state, the foil, and draw out how issues of legitimacy and institutional learning are interlocking in the state's formation as the principal governance entity.<sup>104</sup>

Sovereignty evidently differentiates states from IOs,<sup>105</sup> although both species of public authority are indispensable to global governance.<sup>106</sup> Lacking the sovereign faculty to enforce,<sup>107</sup> IOs are limited in the face of uncooperative Member States.<sup>108</sup> Does this suggest that the state continues to be the principal player in global governance only because of power?<sup>109</sup> The answer lies in the way state power works. As Michel Foucault posits, discipline by knowledge is where the strength of the modern state lies. Through the Foucauldian lens, “governmentality” overshadows sovereign power as the face of the Hobbesian Leviathan,

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102. See Broome et al., *supra* note 20, at 3 (noting the close relationship between global governance and crisis).

103. See, e.g., Peter M. Haas, *International Institutions and Social Learning in the Management of Global Environmental Risks*, 28 POL'Y STUD. J. 558 (2005).

104. The remainder of this Part draws on part of Ming-Sung Kuo, *Democracy and Emergency: Finding the Constitutional Foundation of the Knowledgeable State in Social Dynamics*, 50 J. L. & SOC'Y 545 (2023).

105. See Joseph Raz, *The Future of State Sovereignty*, in LEGITIMACY: THE STATE AND BEYOND 69, 76 (Wojciech Sadurski et al. eds., 2019).

106. See COHEN, *supra* note 7, at 23–24; see, e.g., Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 19, 20–27 (2005).

107. A noticeable exception is when the Security Council acts under Chapter VII of the UN Charter.

108. See, e.g., Blaine Sloan, *Implementation and Enforcement of Decisions of International Organizations*, 62 PROC. AM. SOC'Y INT'L L. 1 (1968); Leslie Johns, *The Design of Enforcement: Collective Action and the Enforcement of International Law*, 31 J. THEORETICAL POL. 543 (2019).

109. See generally Stephen D. Krasner, *New Terrains: Sovereignty and Alternative Conceptions of Power*, in BACK TO BASICS: STATE POWER IN A CONTEMPORARY WORLD 339 (Martha Finnemore & Judith Goldstein eds., 2013).



suggesting that knowledge gradually displaces power in the frontline administration.<sup>110</sup> This view on the power-knowledge nexus reflects the trajectory of bureaucratization with the rise of the administrative state in response to a plethora of governance issues in the late nineteenth century.<sup>111</sup> Bureaucracy renders the state power intelligent by accumulating knowledge, statistics, data, and information required for governance through daily administration.<sup>112</sup> In this view, bureaucracy provides the state with sovereign knowledge, augmenting state power. Yet, as Max Weber elaborated in his sociology of domination (*Herrschaft*), bureaucratic rationality as an ideal-type source of legitimate authority is not considered in terms of raw power.<sup>113</sup> It is part of the story of how the state has consolidated authority through the pursuit of legitimacy in its exercise of power. Not only does the bureaucratic administration of the modern state find itself in the state's continuing quest for legitimacy. Its contribution to the power-knowledge nexus in modern governance is also a chapter of that grand story about the state and thus needs to be considered accordingly.<sup>114</sup>

The question of legitimacy became acute just as state power reached its peak when the fragmented politics of medieval feudalism faded

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110. See generally FOUCAULT, SECURITY, TERRITORY, POPULATION, *supra* note 11; FOUCAULT, "SOCIETY MUST BE DEFENDED," *supra* note 11; cf. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen trans., Stan. Univ. Press 1998) (1995) (suggesting that the role of sovereign power in political rule is not completely replaced by Foucault's idea of governmentality).

111. EDWARD L. RUBIN, SOUL, SELF, AND SOCIETY: THE NEW MORALITY AND THE MODERN STATE 6–7, 116–29 (2015).

112. See generally CHARLES T. GOODSELL, THE NEW CASE FOR BUREAUCRACY (2015) (analyzing how bureaucracy enhances governance with specialized knowledge among other strengths).

113. See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 215–23 (Guenther Roth & Claus Wittich eds., 1968).

114. Notably, all states need to answer the question of legitimacy in the sense that their rule is acceptable to the ruled. See Alan Hyde, *The Conception of Legitimation in the Sociology of Law*, 1983 Wis. L. REV. 379, 391 (1983). Yet, not all states are faced with the question of legitimacy at the same time as their formation as the central holder of sovereign powers. Rather, the latter makes experiences of state formation in Europe distinct as such state formation was historically coeval with the quest for legitimacy through constitutional framing, adding normative elements to the notion of legitimacy. See also MARTIN LOUGHLIN, *FOUNDATIONS OF PUBLIC LAW* 183–272 (2010); see generally KENNETH H. F. DYSON, *THE STATE TRADITION IN WESTERN EUROPE: A STUDY OF AN IDEA AND INSTITUTION* (1980) (discussing the longstanding relationship between the constitutionalist idea and state formation in Western Europe). Considering the normative character of the legitimacy challenge to IOs, the following discussion of the relationship between state formation and legitimacy will draw on experiences in Europe. For a discussion focused on the relationship between IOs and state formation or state-building in relation to territories subject to the West's colonial policies, see SINCLAIR, *supra* note 8.

away. The absolutist state would be condemned as a tyranny and prone to rebellious challenge if its power could not be seen wielded in a legitimate way.<sup>115</sup> Paralleling the concentration of power was the emerging secularization of authority,<sup>116</sup> rendering the question of legitimacy more political than theological.<sup>117</sup> As religion alone could no longer legitimize political authority, the state had to seek alternative sources of legitimacy to stabilize its power vis-à-vis the increasingly secular bourgeois society, redefining the relationship between the state and society.<sup>118</sup>

Specifically, with the middle-class beginning to rise in the seventeenth century, the traditional control over personal conscience and conviction by the church, the religious constraints on the pursuit of knowledge, and the continuing moralistic disapproval of individual economic transactions all crumbled in the face of new outlooks and practices incubated in the spirit of the Enlightenment and the Scientific Revolution.<sup>119</sup> As a result, the church's domination of morality was broken to make room for individual choices, the spirit of science and reason displaced theological teachings in guiding the pursuit of knowledge, and self-interest was no longer condemned as a sin but rather considered the basis of rational behavior. In response to such social changes, the constitutional project arose as a new way of legitimizing the political order in the modern state's formative stage, enshrining, *inter alia*, freedom of religion and speech, freedom of science, and freedom of contract.<sup>120</sup>

It bears emphasis that the rise of constitutional legitimacy is not only a normative story about state formation and its evolution. The instituting of constitutional freedoms has vested the state with epistemic strength. Thanks to constitutionally enshrined freedoms, moral particularism gave way to value pluralism and freedom of opinion, faith-based truth faltered in the face of scientific progress, and the sin of greed was converted into the driver of the market in response to the scarcity of

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115. See DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE 42–43 (2016).

116. See generally CHARLES TAYLOR, A SECULAR AGE 3–20, 159–211 (2007).

117. See generally CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 51 (George Schwab trans., MIT Press 1986) (1922); ERNST-WOLFGANG BÖCKENFÖRDE, RELIGION, LAW, AND DEMOCRACY: SELECTED WRITINGS 152–67 (Mirjam Künkler & Tine Stein eds., 2021).

118. See GRIMM, *supra* note 115, at 47; TAYLOR, *supra* note 116, at 159–218.

119. See ULRICH K. PREUSS, CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS 100–05 (Deborah Lucas Schneider trans., Humanities Press 1995) (1990).

120. See *id.* at 26–37.

resources.<sup>121</sup> Taken as a whole, “reflexive learning” underlay the idea of constitutional progress.<sup>122</sup> Public opinion manifested itself in the processes whereby individual moral opinions were subject to one another’s critical reflection; progress in science was achieved through trial and error under constant peer review; and limited resources were allocated efficiently when the force of greed was released and channeled by the free competition of the market.<sup>123</sup> With these reflexive mechanisms institutionalized under the constitutional project, knowledge and information about the moral, scientific, and economic orders grew exponentially, setting social progress in motion.<sup>124</sup> Here lay the early foundation of the knowledge society.<sup>125</sup>

Corresponding to the enshrinement of freedoms in the pursuit of constitutional legitimacy was the absolutist *ancien régime* evolving into the governance of separation of powers.<sup>126</sup> Notably, the separation of powers is more than a normative feature of the constitutional framing of state power.<sup>127</sup> Dividing government power and subjecting divided powers to each other’s checks and balances, separation of powers institutes a multistage decision-making process through which policies can be reflexively scrutinized in the interaction of divided powers.<sup>128</sup> With such institutionalized inter-power “reflexivity,”<sup>129</sup> governance decisions are made after going through multiple stages of deliberation among separate powers and are, thus, less prone to error than those resulting from a monolithic government structure. Enriched by the epistemic dividends accruing from the separation of powers, the state’s learning capability has grown in its quest for constitutional legitimacy.<sup>130</sup>

121. See *id.* at 100–05.

122. See Ming-Sung Kuo, *Making Constitutionalism Progressive Again: A Primer on City Constitutionalism and State (Re)Formation in a New Constitutional Geography*, 85 MOD. L.R. 801, 801 (2022).

123. See PREUSS, *supra* note 119, at 110–13; see also Miguel Poiars Maduro & Paul W. Kahn, *Part II: Knowledge*, in DEMOCRACY IN TIMES OF PANDEMIC: DIFFERENT FUTURES IMAGINED 85, 86 (Miguel Poiars Maduro & Paul W. Kahn eds., 2020).

124. See MARKUS J. PRUTSCH, CAESARISM IN THE POST-REVOLUTIONARY AGE: CRISIS, POPULACE AND LEADERSHIP 5–6 (2020).

125. See PREUSS, *supra* note 119, at 113–25.

126. See GRIMM, *supra* note 115, at 4–14, 21–22.

127. See generally CHRISTOPH MÖLLERS, THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS (2013) (relating the separation of powers to the idea of self-determination); JEREMY WALDRON, POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 45–71 (2016).

128. See WALDRON, *supra* note 127, at 62–65.

129. Ulrich K. Preuss, *The Political Meaning of Constitutionalism*, in CITIZENS IN EUROPE: ESSAYS ON DEMOCRACY, CONSTITUTIONALISM AND EUROPEAN INTEGRATION 147, 152–53 (2016).

130. See Stephen Holmes, *Constitutions and Constitutionalism*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 189, 202–04 (Michel Rosenfeld & András Sajó eds., 2012).

Historically, the state's institutional strength in moral and cognitive learning that accompanied its pursuit of legitimacy in the secular age further evolved with the advent of democracy. As "the social question" came to the fore when various issues emerged in the relentless societal pursuit of progress driven by the released force of freedom,<sup>131</sup> the state expanded suffrage to address the looming legitimation crisis.<sup>132</sup> Yet, democracy not only bolstered political legitimacy but also enhanced the state's institutional learning capacity as it functioned as the conduit through which ramifications from the relentless pursuit of progress to society could be conveyed to the state.<sup>133</sup> With the introduction of electoral democracy, the lead-up processes to voting helped channel diverse views and inputs through discussion, facilitated government decisions on problems of public concern, and opened democratic decisions to dynamic error correction underpinned by periodic elections.<sup>134</sup> Through the post-decision error correction, electoral democracy enhanced political accountability, suggesting an "experimentalist" governance where disappointing policies could be replaced by innovative choices following the election of a new government.<sup>135</sup> Democratic processes thus have institutionalized an epistemic mechanism of error detection and correction with the government placed under the constant watch of society.<sup>136</sup> By virtue of democratic reflexivity, constitutional legitimacy not only indicates a normative concept of political ordering

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131. See PREUSS, *supra* note 119, at 63–71, 81–89; cf. FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 11–53 (Routledge 1993) (addressing the relationship between freedom and social progress with skepticism about "the social question").

132. See Adam Przeworski, *Conquered or Granted? A History of Suffrage Extensions*, 39 *BRIT. J. POL. SCI.* 291, 292 (2008).

133. For how private citizens and their needs are connected to the state via parties in parliamentary and electoral democracy, see GRIMM, *supra* note 115, at 27–31.

134. For the current strains that communication technologies put on reflexive learning in democratic processes, see Ming-Sung Kuo, *Against Instantaneous Democracy*, 17 *INT'L J. CONST. L.* 554 (2019).

135. Anderson, *supra* note 50, at 11–15.

136. See PREUSS, *supra* note 119, at 70–72; see also Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 *ANN. REV. POL. SCI.* 387, 402–06 (2008) (discussing nonelectoral democratic representation in aiding electoral processes to better process effective response-required information); cf. Axel Honneth, *Democracy as Reflexive Cooperation: John Dewey and the Theory of Democracy Today*, 26 *POL. THEORY* 763, 773–76 (1998) (engaging with John Dewey's view on the rational and epistemic value of democratic procedures). For a critique of the stagnation of democratic self-correction and the emergence of alternative politics, see Miguel Poiars Maduro & Paul W. Kahn, *Introduction: A New Beginning, in DEMOCRACY IN TIMES OF PANDEMIC: DIFFERENT FUTURES IMAGINED*, *SUPRA* note 123, at 1, 15.

but also engenders the state's epistemic role in moral and cognitive learning.<sup>137</sup>

Far from a tale of the end of sovereignty, the state's quest for stable power relations through constitutional legitimacy, as schematically recounted above, is only half the story of the state's evolution as a governance entity with learning capabilities under the constitutional project. The constitutional project arose when state power was augmented while traditional authority no longer reigned. As an ordering of the state's sovereign faculty, constitutional legitimacy only tamed sovereignty without neutering it.<sup>138</sup> This is the underpinning of the democratic-reflexive mode's other half in contributing to the state's institutional learning capacity.

As suggested above, knowledge accruing from democratic-reflexive learning is embedded in dynamic social processes,<sup>139</sup> which take time to complete. Thus, when the state has to act under urgency in times of crisis, the democratic-reflexive mode of learning would not quite live up to expectations. Yet, under such circumstances, the state may overcome the epistemic deficit by altering the power-knowledge nexus. Departing from the democratic-reflexive mode in which the success of state power pivots on society-embedded knowledge, the state can instead turn to sovereign power to actively gather intelligence and extract information and data from the society required for decision-making.<sup>140</sup> I hasten to add that information and intelligence alone do not guarantee rationality in policy making or sound policy outputs. Nevertheless, it is hard to believe that policy will be sound when policy-makers make choices without information or intelligence.<sup>141</sup> Moreover,

137. See Ulrich K. Preuss, *The Significance of Cognitive and Moral Learning for Democratic Institutions*, in *RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE* 303, 304–16 (Ian Shapiro et al. eds., 2006); see also PIERRE ROSANVALLON, *DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY* 128–32 (Arthur Goldhammer trans., Princeton Univ. Press 2011) (2008).

138. See DIETER GRIMM, *SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT* 33–75 (Belinda Cooper trans., Colum. Univ. Press 2015) (2009).

139. HAYEK, *supra* note 131, at 22–38; see also Luigi Pellizzoni, *Reflexive Modernization and Beyond: Knowledge and Value in the Politics of Environment and Technology*, 16 *THEORY, CULTURE & SOC'Y* 99, 118–20 (1999) (critically discussing the “extended peer review” in reflexive production of knowledge).

140. See Ira S. Rubinstein et al., *Systematic Government Access to Personal Data: A Comparative Analysis*, 4 *INT'L DATA PRIV. L.* 96, 98–103 (2014).

141. Notably, information is only a component of knowledge. See KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* 164–65 (1999). Also, as Hélène Landemore rightly notes, mere possession of information is not equal to epistemic competence. See Landemore, *supra* note 86, at 255–56. Acknowledging such conditions, I include possession of information as part of the state's epistemic strength as it is potentially beneficial to the rationality and reasonableness of decision making.

aggressive extraction of information and gathering of intelligence enhances the state's epistemic strength in crisis governance in a particular way: it gives the state an epistemic advantage *if* the newly-gathered information and intelligence result in the state undertaking policy measures that will further allow society to respond to the government's measures proactively. It is in this way that the state manages to remain a knowledgeable governance authority when time is compressed, and emergency response is needed. In trying times, the state switches from the democratic-reflexive to the executive mode of institutional learning to improve knowledge with data, information, and intelligence acquired by power.<sup>142</sup>

Together with its democratic-reflexive other half, the executive mode of institutional learning underlies the epistemic strength of the modern state, which lies beyond any massive bureaucracy in the administrative state.<sup>143</sup> As the state sought to (re)legitimize its power at the dawn of the secular age, the institutions that underlay the new legitimacy of the state also inadvertently enhanced the state's learning capacity. Apart from the executive mode of learning that relies on the state's sovereign status, the constitutional enshrinement of freedoms, the separation of powers, and electoral democracy jointly now enable the democratic-reflexive mode of institutional learning. Both hold the key to understanding how the modern state has gained epistemic strength in governance in its quest for legitimacy under the constitutional project.

#### IV. LEARNING FROM THE STATE: LIMITED INSTITUTIONAL LEARNING AND THE LEGITIMACY OF GLOBAL GOVERNANCE

With democratic-reflexive and executive learning that parallels the state's quest for constitutional legitimacy revealed, I now turn to the question of institutional learning in global governance. I first provide an epistemic pathology of global governance in light of the strained power-knowledge nexus on the international plane. Next, I discuss how the pathology of global governance's epistemic deficiency speaks to the inherent limits of the project to recast the legitimacy of global governance in constitutional terms.

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142. See generally SEAN GAILMARD & JOHN W. PATTY, *LEARNING WHILE GOVERNING: EXPERTISE AND ACCOUNTABILITY IN THE EXECUTIVE BRANCH* (2013).

143. See generally *id.* at 78–136; see also John O'Neill, *The Disciplinary Society: From Weber to Foucault*, 37 BRIT. J. SOCIO. 42, 42–46 (1986).

A. *The Power-Knowledge Nexus Under Strain: Towards an Epistemic Pathology of International Organizations*

Juxtaposed with the modern state, IOs comprise sovereign states and lack formal direct access to society.<sup>144</sup> It is true that many IOs are open to the emerging global civil society and other nongovernmental stakeholders in their decision-making processes.<sup>145</sup> Yet, even with the increasing involvement of nongovernmental organizations (NGOs) and other stakeholders in decision making, the channeling of society-embedded epistemic capital to IOs falls far short of democratic-reflexive institutional learning in the state.<sup>146</sup>

The democratic-reflexive mode of institutional learning emerged in the state when traditional authorities crumbled, and society became diverse. With democracy tethered to the pursuit of common interest,<sup>147</sup> elections, despite their many issues, occupy center stage in democracy in terms of legitimacy.<sup>148</sup> Election is also pivotal to learning what common interest means. As has been well discussed in democratic theory, decision making by majority voting and the lead-up deliberation and discussion in electoral democracy help identify what counts as a genuine common interest.<sup>149</sup>

As Elizabeth Anderson describes, by “talk” and “votes,”<sup>150</sup> electoral democracy is instrumental in the pooling of “asymmetrically distributed information,” which is key to addressing complex problems in modern society. Electoral democracies channel diverse views and inputs through discussion, choose the policy response to problems of public concern through elections, and open decisions up to dynamic error correction underpinned by periodic elections.<sup>151</sup> Thus, regardless

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144. This results from the so-called ‘state veil’ in the international legal order. See Samantha Besson, *Institutionalising Global Democracy*, in LEGITIMACY, JUSTICE AND PUBLIC INTERNATIONAL LAW 58 (Lukas H. Meyer ed., 2009).

145. See ALVAREZ, *supra* note 13, at 610–11.

146. See generally Jonas Tallberg et al., *NGO Influence in International Organizations: Information, Access and Exchange*, 48 BRIT. J. POL. SCI. 213 (2018). This can be seen as the epistemic limitations of bureaucratic knowledge. See Barnett & Finnemore, *supra* note 17, at 718–25.

147. See ROSANVALLON, *supra* note 137, at 6–9, 128–34; see also Robert E. Goodin, *Institutionalizing the Public Interest: The Defense of Deadlock and Beyond*, 90 AM. POL. SCI. REV. 331, 341 (1996).

148. See ROSANVALLON, *supra* note 137, at 131–34; ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 128–32 (1956).

149. See Anderson, *supra* note 50, at 9–10, 13–15; Joshua Cohen, *An Epistemic Conception of Democracy*, 97 ETHICS 26, 29, 31 (1986).

150. Anderson, *supra* note 50, at 8–9.

151. *Id.* at 11–15.



of its many epistemic defects, electoral democracy shows a cognitive advantage when problems that need solving are complex and involve competing interests, and their solution is likely to entail unintended consequences.<sup>152</sup> Electoral democracy is indispensable to full-fledged democratic-reflexive institutional learning in the state.<sup>153</sup> Democratic-reflexive learning in governance only materializes through the dynamic interaction between the state and society.

In contrast, with no direct link to societal forces, decision-making processes concerning global governance can still be reflexive, thanks to interventions from activists and experts in various policy consultations organized by IOs.<sup>154</sup> Yet, as governance issues increasingly take on complex characters, the approach that relies on expertise and activism centering on individual governance issues falls short of providing an apt pooling of information concerning “asymmetrically distributed effects” at the center of contemporary governance challenges.<sup>155</sup> Also, lacking a robust post-decision error-correction mechanism, IOs’ decision making is far from an experimentalist democracy.<sup>156</sup> To make the lack of an electoral democracy worse, crises in global governance, such as global terrorism, financial breakdown, and epidemic diseases, are structural in nature, involving competing interests and requiring comprehensive and long-term responses.<sup>157</sup> All in all, IOs are denied the full epistemic strength of democratic-reflexive learning.

I have pointed out that when the democratic-reflexive mode of institutional learning falls short, the state can choose to make up for the democratic-reflexive learning deficit with executive learning. Thus, it seems that IOs may learn from the state to remedy the shortfall in democratic-reflexive institutional learning with the executive alternative.

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152. *Id.* at 11.

153. See Preuss, *supra* note 137; cf. LANDEMORE, *supra* note 49 (defending the epistemic value of majoritarian democracy).

154. See Klaus Dingwerth et al., *The Rise of Democratic Legitimation: Why International Organizations Speak the Language of Democracy*, 26 EUR. J. INT’L RELS. 714, 716 (2020).

155. Cf. ALVAREZ, *supra* note 13, at 627–28 (noting criticisms of “unrepresentative, unaccountable, and typically single-issue NGOs” in international lawmaking).

156. For the experimentalist concept of democracy, see generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* (Melvin L. Rogers ed., 2016); Anderson, *supra* note 50; Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Barry Allen, *Experiments In Democracy*, 9 CONTEMP. PRAGMATISM 75 (2012). But c.f. James Brassett et al., *Private Experiments in Global Governance: Primary Commodity Roundtables and the Politics of Deliberation*, 4 INT’L THEORY 367 (2012) (framing primary commodity roundtables in global governance as the manifestation of the experimentalist idea of democracy).

157. See, e.g., Ian Goldin & Tiffany Vogel, *Global Governance and Systemic Risk in the 21st Century: Lessons from the Financial Crisis*, 1 GLOB. POL’Y 1 (2010).

Yet, an analysis of how executive institutional learning works suggests otherwise.<sup>158</sup> Although the executive mode can be switched on when democratic-reflexive learning ceases functioning in the state, strictly speaking, the former is not on equal footing with the latter. Instead, learning by power—or rather gathering information and data by power—under the executive mode is aimed at making blocked democratic-reflexive learning work again.<sup>159</sup> Thus, where democratic-reflexive learning is not fully developed, there is no such thing as an executive alternative.<sup>160</sup> This is what happens to IOs who have no full-fledged democratic-reflexive learning. More importantly, the fundamental constraint on IOs' access to executive learning—as opposed to bureaucratic learning in daily administration—lies in IOs' lack of sovereign faculty. As discussed above, executive learning that enables the state to compensate for the democratic-reflexive learning deficit in times of crisis is pivoted to the state's sovereign status. IOs, being non-sovereigns, are not accorded the executive mode of institutional learning capability.

It is noteworthy that the executive has emerged as what Cass Sunstein calls “the most knowledgeable branch” of constitutional power in the state thanks to its experienced technocrats and the unrivaled informational advantage and expertise they bring in.<sup>161</sup> Seen in this light, the face of executive learning seems to be bureaucratic in the Weberian sense. Yet, the executive mode of institutional learning that relies on the state's sovereign faculty is more “dictatorial”—in the Schmittian sense—than bureaucratic.<sup>162</sup> Entrusted with the emergency power to decide and act swiftly based on its judgment amid uncertainty,<sup>163</sup> the executive may demand the supply of extraordinary information that is

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158. See *supra* notes 135–39 and accompanying text.

159. Cf. Olivier Godard, *Social Decision-Making Under Conditions of Scientific Controversy, Expertise and the Precautionary Principle*, in *INTEGRATING SCIENTIFIC EXPERTISE INTO REGULATORY DECISION-MAKING: NATIONAL TRADITIONS AND EUROPEAN INNOVATIONS* 39, 70–73 (Christian Joerges et al. eds., 1997) (discussing how the transitory but beneficial role of the imperfect precautionary principle in responding to uncertain environmental challenges).

160. As will be further discussed, this explains why the Security Council's response to global terrorism has fallen short.

161. See Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608–09 (2016).

162. Carl Schmitt considered (the head of) the executive to be the modern rendering of the dictator. See generally CARL SCHMITT, *DICTATORSHIP: FROM THE ORIGIN OF THE MODERN CONCEPT OF SOVEREIGNTY TO PROLETARIAN CLASS STRUGGLE* (Michael Hoelzl & Graham Ward trans., Polity Press 2014) (2006); see also Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1795–96 (2010).

163. Levinson & Balkin, *supra* note 162, at 1840–43.

needed for emergency decisions and, thus, enhance the rationality of crisis response.<sup>164</sup> Without the dictatorial half, IOs' administrative bodies remain bureaucratic and are less knowledgeable than the state's executive branch, even if the former is staffed with no less experienced and equally informed technocrats compared to the latter.

Now, let us revisit the three instances discussed earlier in light of the pathology of institutional learning on the international plane above. Start with the Security Council's de facto legislative role in the global campaign against terrorism. For the Security Council, its limited membership is a problem in and of itself. Despite the emphasis on the geographical representation of its non-permanent members,<sup>165</sup> the Security Council's club-like character—five permanent members plus ten elected fixed-term members—remains unchanged. For this reason, the Security Council is doomed to miss the epistemic benefit generated by full-fledged democratic-reflexive institutional learning. After all, a decision of fifteen out of the over 190 states in the world by the Security Council cannot be said to result from what Sunstein calls “many minds,” and it is, therefore, hard to rationalize in terms of the Condorcetian collective wisdom.<sup>166</sup> Also, there is no post-decision error correction with respect to the Security Council's decisions.<sup>167</sup> Thus,

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164. See Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3, 10–12, 17–21 (2008); see also Arjan Kleinhout, *Declaring a State of Emergency in the Netherlands—What Additional Powers for Government?*, DE BRAUW (Mar. 29, 2020), <https://www.debrauw.com/articles/declaring-a-state-of-emergency-in-the-netherlands-what-additional-powers-for-government>.

165. See generally SAM DAWS ET AL., *WHAT IS EQUITABLE GEOGRAPHIC REPRESENTATION IN THE TWENTY-FIRST CENTURY* (Ramesh Thakur ed., 1999).

166. The Condorcetian collective wisdom here refers to the general epistemic advantage of decision making by large numbers. For comparison of different modes of decision making by large numbers, see LANDEMORE, *supra* note 49, at 163–65. For a critique of decision making by large numbers that is based on Condorcet's Jury Theorem, see generally CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006) (critically analyzing aggregate knowledge and its conditions). According to David Estlund, Condorcet's Jury Theorem contends that “on a dichotomous choice, individuals who all have the same level of competence (or probability of being correct) above 0.5, can make collective decisions under majority rule with a competence that approaches 1 (infallibility) as either the size of the group or individual competence goes up.” David M. Estlund, *Opinion Leaders, Independence, and Condorcet's Jury Theorem*, 36 THEORY & DECISION 131, 131 (1994). Thus, even if, for Condorcet's Jury Theorem to function, the optimal number of participants may be much smaller than that in mass democracy, 15 out of over 190 is far from the Condorcetian optimum. See generally Jason Brennan, *Condorcet's Jury Theorem and the Optimum Number of Voters*, 31 POL. 55 (2011).

167. Whether the International Court of Justice can exercise scrutiny of the resolutions of the Security Council through advisory opinions is contentious. Compare W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 88–92 (1993) (raising issues concerning review of the Security Council acts by the International Court of Justice (I.C.J.)), with

even if the executive mode of institutional learning does not entirely elude the Security Council, given the enforcement power under Chapter VII of the U.N. Charter, its lack of democratic-reflexive learning has doomed its responses to global terrorism.

Regarding the structural reform advised by the IMF, its decision making is anything but democratic-reflexive. Relying on the expertise and experience of civil servants is the epitome of technocratic rule. Like-minded experts have less difficulty coming to a consensus on the package of structural reform, but their shared attributes—such as expertness and careerism—also preclude them from seeing things through other lenses and keep their proposals from being exposed to differing views from outside the “iron cage” of international bureaucracy.<sup>168</sup> Moreover, structural reform is far from simply a technical issue that fits into the IMF’s expertise. Rather, as suggested above, it is a complex problem that requires democratic solutions in light of its broad implications for everyday life. A learned international bureaucracy like the IMF was still unable to address the underlying structural issues of the euro crisis, even if it was backed up by the EU and vested its member states with extraordinary powers.<sup>169</sup> Taken together, both the Security Council’s forceful response to global terrorism and the IMF’s austerity proposal amid the euro crisis reflect their deficiency in democratic-reflexive learning.

The epistemic deficiency constraining the WHO in the early stage of the COVID-19 pandemic is different but no less serious. The WHO’s early hesitancy over the COVID crisis is symptomatic of the lack of an executive mode of institutional learning. As envisaged in the post-2005 IHR, in global health emergencies, the WHO, with its experts in various fields, is expected to set out impromptu directions.<sup>170</sup> Despite the advisory character of the WHO’s directions, or rather recommendations, such recommendations always exert enormous influence on state response strategies.<sup>171</sup>

Thus, the problem with the WHO’s role in a PHEIC is not whether its recommendation is advisory or mandatory. Rather, it concerns whether, in such circumstances, the WHO and its expert clusters will make timely recommendations—i.e., decisions at all. For its early response to the COVID crisis, the WHO was accused of delays in action,

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Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1, 4 (1996) (exploring the I.C.J.’s possible engagement with the Security Council).

168. Barnett & Finnemore, *supra* note 17, at 708–09.

169. See CLIFT, *supra* note 64, at 91–111.

170. See Heath, *supra* note 24, at 21–26.

171. See Villarreal, *supra* note 24, at 225.

even if its doubts about the state of the SARS-CoV-2 were not without reason.<sup>172</sup> As discussed above, it is the lack of up-to-date information and firsthand knowledge of the initial outbreak in China that prevented the WHO from making evidence-informed recommendations in the early stage of the crisis. Without the resources or the mandate that would enable it to gather intelligence and extract information and data from member states, the WHO balked at making the much-needed emergency recommendation at the crunch moment.<sup>173</sup> In times of emergency, the absence of the executive mode of institutional learning in the reformed IHR has incapacitated the expertise-underpinned WHO.

In sum, the Security Council's flawed response to global terrorism indicates that an IO lacking democratic-reflexive learning failed to address a crisis that required more than limited emergency response measures, and this cannot be remedied by executive learning through the invocation of enforcement power. The IMF's much-criticized austerity prescription to the bailout-receiving EMU countries amid the euro crisis is evidence that unmoored from democratic reflexivity, an IO of learned bureaucracy still had no epistemic advantage in the face of a structural crisis. The WHO's early hesitancy over the COVID crisis shows how an IO steered by expertise fumbled where it was denied the executive mode of institutional learning.

Taken as a whole, these three instances point towards a pathology of institutional learning in global governance. Cut off from the democratic processes in which the capability of self-correction is institutionalized under a trial-and-error ethos and enabled by electoral processes with the aid of nonelectoral democratic representation,<sup>174</sup> IOs have no direct access to full-fledged democratic-reflexive knowledge. Lacking full executive power, IOs' institutional learning in global governance is crippled as they can neither extract information and data nor gather intelligence in their own right. The power-knowledge nexus that has engendered the state's epistemic strength is thus further strained on the international plane when IOs are tasked with structural crisis response in global governance.

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172. See Gideon Meyerowitz-Katz, *Our Knowledge of Covid-19 Changes Every Day. Hindsight Is Misleading When It Comes to Science*, GUARDIAN (June 19, 2020), <https://www.theguardian.com/commentisfree/2020/jun/19/our-knowledge-of-covid-19-changes-every-day-hindsight-is-misleading-when-it-comes-to-science>.

173. See Heath, *supra* note 24, at 27–30 (critically discussing the WHO's delayed emergency response to the 2014 Ebola outbreak); see also Taylor & Habibi, *supra* note 79.

174. See Urbinati & Warren, *supra* note 136, at 402–06.

B. *Institutional Learning in Times of Emergency: A Coda to the Constitutional Project of Global Governance*

The question of IOs' institutional learning capacity is not only concerned with how knowledgeable IOs are amid the globalization of governance. As noted in the introduction, it lies at the center of the legitimacy debate over global governance as IOs are becoming public authorities alongside national governments. If IOs are limited in terms of institutional learning capabilities, their policy outputs—whether in the form of advice, guidelines, or regulations—cannot claim authority on the basis of epistemic soundness. As a result, efforts to construct the legitimacy of global governance around the idea of output legitimacy in light of growing epistemic communities and their contribution to the rationality of IOs' decisions would not go very far.<sup>175</sup> This raises a *constitutional* question for global governance as well.

It should be noted that efforts to answer the legitimacy challenge to global governance are not completely dependent on the soundness of IOs' policy outputs. Rather, it is part of the attempt to cast and, thus, legitimize IOs as public authorities vis-à-vis national governments in global governance in constitutional terms. Informed by the experiences of state formation, advocates of global governance are conscious of the link between the legitimacy question and normative concerns that have been considered through the constitutional lens.<sup>176</sup> Thus, apart from the soundness of IOs' policy outputs, the rule of law, due process, human rights, accountability, and other administrative law principles are invoked to help address their legitimacy deficit, resulting in framing global governance in constitutional terms.<sup>177</sup> Both are essential in

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175. See Daniel Bodansky, *Legitimacy in International Law and International Relations*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* 321, 329–32 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) (noting the deficiency in applying democracy to the legitimacy of the international order with suggestions that none of alternative approaches – including output-based legitimacy provided by technical expertise – to IOs' legitimacy is satisfactory on its own terms); see also PIATTONI, *supra* note 16, at 213–18. For a discussion of epistemic communities in the functioning of IOs, see Jeffrey L. Dunoff, *A New Approach to Regime Interaction*, in *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* 136 (Margaret A. Young ed., 2012).

176. See generally Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach to International Constitutionalization*, in *RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 3 (Jeffrey K. Dunoff & Joel P. Trachtman eds., 2009) (analyzing how the legitimacy question in global governance has engendered the idea of global constitutionalism).

177. See Ming-Sung Kuo, *Law-Space Nexus, Global Governance, and Global Administrative Law*, in *THE OXFORD HANDBOOK OF GLOBAL POLICY AND TRANSNATIONAL ADMINISTRATION* 328, 340–41 (Diane Stone & Kim Moloney eds., 2019) (noting global administrative law scholars' changed attitude towards global constitutionalism).



efforts to address the new legitimacy challenge arising from the globalization of governance, suggesting a *sui generis* constitutional project for global governance.<sup>178</sup>

What is distinctive about this constitutional project is its attempt to frame IOs as global governance institutions with constitutional values and principles, as noted above, without the backing of formal constitutional instruments, suggesting a “small-c global constitutionalism.”<sup>179</sup> This should come as no surprise. In the absence of demos,<sup>180</sup> sovereignty, and other characteristic features associated with the state, the constitutional project framing the state’s quest for legitimacy is regarded as having no place in the legitimation of global governance.<sup>181</sup> Modeling global governance’s constitutional legitimacy after the state’s experience would only deepen current legitimacy concerns raised by IOs’ increased role in governance.<sup>182</sup> Thus, small-c global constitutionalism, centered on the ideas of legality and accountability, as elaborated in the project of global administrative law, appears as the best constitutional option for global governance to answer its legitimacy challenge.<sup>183</sup> Settling on small-c global constitutionalism, global governance has a strong need for its policy outputs to be epistemically sound to claim authority in the quest for legitimacy. Attempts to consolidate IOs as exercisers of international public authority in terms of small-c global constitutionalism and output legitimacy suggest “constitutional legitimacy lite.”<sup>184</sup>

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178. See Ming-Sung Kuo, *Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism*, 44 N.Y.U. J. INT’L L. & POL. 55, 81–87 (2011); see also Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOB. LEGAL STUD. 397, 404–05 (2009).

179. Drawing on the distinction between the small-c constitution and the large-C Constitution, the notion of small-c global constitutionalism is focused on how global governance has increasingly taken on constitutional character through the adoption of the rule of law and other constitutional principles without an overarching, global large-C Constitution. See Kuo, *supra* note 178, at 66–80.

180. The concept of demos refers to “the collective behind constitution-making, [i.e.,] the ‘people’ . . . .” NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 55–56 (2010).

181. See *id.* at 27–68; cf. Samantha Besson, *The Authority of International Law: Lifting the State Veil*, 31 SYDNEY L. REV. 343, 357–60 (2009) (contending that “the state veil” in international law obstructs theoretical search for convincing accounts of the legitimacy of the international order).

182. KRISCH, *supra* note 180, at 52–66; cf. Jonathan W. Kuyper, *Against Global Parliament*, 21 SWISS POL. SCI. REV. 158, 158–59, 167–71 (2014) (arguing against projecting the liberal model of parliamentary democracy onto the global arena).

183. See Kuo, *supra* note 178, at 81–85.

184. See *id.* at 93–101; cf. Klabbers, *supra* note 22, at 72 (noting the limited reach of the constitutionalist approach to the legitimacy of IOs). “Constitutional legitimacy lite” is an adaptation of what Jan Klabbers calls “constitutionalism lite.” See generally Jan Klabbers, *Constitutionalism Lite*, 1 INT’L ORG. L. REV. 31 (2004).



Seen in this light, IOs' limited institutional learning capacity, as diagnosed above, calls global governance's constitutional legitimacy lite into question. Short of epistemic advantage, IOs can hardly claim rationality-based authority for their policy outputs. With the pillar of output legitimacy faltering, small-c global constitutionalism alone is not sufficient to deliver constitutional legitimacy lite for global governance. Making the *sui generis* constitutional project for global governance work requires redressing the limitation of IOs' institutional learning capacity. Thus, installing the democratic-reflexive and executive modes of institutional learning—which are absent in global governance at present—in IOs seems to be the next step in thinking about global governance in constitutional terms. Strengthened by both democratic-reflexive and executive learning capabilities, IOs will be able to reclaim epistemic superiority and lend constitutional legitimacy lite to global governance when crisis governance makes IOs' epistemic deficiency more acute.

The problem is that vesting IOs with democratic-reflexive and executive learning capabilities will have to go beyond the current constitutional project for global governance that centers on small-c global constitutionalism, envisaging a comprehensive constitutional framework. Yet, the emergence of small-c global constitutionalism as the preferred option in conceiving of global governance's constitutional legitimacy arises from the concern that IOs do not have the social foundation required of a comprehensive constitutional project that we have seen in the state.<sup>185</sup> Investing IOs with executive prerogatives and instituting democratic-reflexive decision making in them must go beyond the limited design of small-c global constitutionalism. Going down this road, global constitutionalism would then deviate from the current small-c version and be seen as portending a looming global Leviathan—albeit constitutionalized—sitting atop states with weak links to society.<sup>186</sup> Instead of re-establishing IOs' epistemic superiority or delivering legitimacy for global governance, such a constitutional project lacks the required social foundation, only exacerbating global governance's current legitimacy malaise. This is the legitimacy paradox IOs find themselves in.

Given that IOs' limited learning capacity originates in their constitutional status as non-sovereigns, improving their epistemic strength with the democratic-reflexive and executive modes of institutional learning

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185. See Kuo, *supra* note 178, at 57–61, 77–80.

186. Cf. COHEN, *supra* note 7, at 45–58 (conceptualizing global governance as a constitutional order with the U.N. Charter as the overarching constitution).

requires IOs to adopt a constitutional framework—which requires a societal foundation that is still eluding global governance. IOs’ current epistemic deficiency gets to the heart of the inherent limits of the project to recast the legitimacy of global governance in constitutional terms.

## V. CONCLUSION

In his highly acclaimed book, Guy Fiti Sinclair perceptively argues that the modern state has remade itself through the experiments and practices launched by IOs.<sup>187</sup> Seen in this light, the state seems to have learned from IOs in the business of governance. The move towards *global* governance consolidates this historical trend. Yet, that the exemplary IO, the WHO, fumbled in the early stage of the COVID crisis casts a shadow on IOs’ superiority in governance. It suggests that even equipped with expertise, IOs confronted by emergencies or crises could still fail to fulfill their expected roles in global governance. With crisis response becoming a new normal, IOs have difficulty claiming superiority in the business of governance on the grounds of expertise. If expertise does not account for the state of IOs’ institutional learning capacity, then what do IOs need in order to improve their epistemic strength? What is lacking in IOs’ current institutional learning?

I have tried to answer these questions by looking into IOs’ recent crisis responses. My investigation of respective responses from the Security Council, the IMF, and the WHO to recent crises suggests that IOs’ emergency governance has been hampered by their limited learning capacity despite the conventional praise for the soundness of policies coming out of IOs’ rational decision-making processes. IOs’ epistemic deficiencies result from their weakness in democratic-reflexive and executive learning that are central to the state’s performance in governance. I further argue that the state has acquired both modes of institutional learning while it strove to consolidate power and authority in constitutional terms when traditional authority was crumbling. The experiences of state formation and its evolution show that democratic-reflexive and executive learning that have given the state the epistemic edge over IOs have grown out of the constitutional consolidation of legitimate authority. Thus, the lack of full-fledged institutional learning further reveals the inherent limitation of the agenda of constitutional legitimation lite—i.e., global constitutionalism—that aims to place global governance on constitutional grounds to address the legitimacy

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187. See SINCLAIR, *supra* note 8, at 14–16.

question raised by IOs' increased power. Yet, to answer the legitimacy question in global governance by improving IOs' institutional learning on the model of constitutional legitimacy in the state, IOs will end up resting on a constitutional framing that has little societal foundation. As their role continues to grow in global governance, IOs find themselves in a legitimacy paradox.

To make sense of institutional learning in global governance and to get to the core of its challenge, we need to see through the aura of expertise shrouding IOs. Only then can we do justice to IOs' institutional learning capacity and better appreciate the complex relationship between the configuration of institutional learning and the legitimation of power in global governance.