

# Legitimacy, Collective Authority and Internet Governance: A Reflection on David Caron's Study of the UN Security Council

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In his 1993 study in the *American Journal of International Law*, *The Legitimacy of the Collective Authority of the Security Council*, David Caron proposed that:

a basic challenge for international governance is to seek designs that promote institutional integrity, and that consequently address in the ordinary course of business the circumstances that make possible the resonance of allegations of illegitimacy. What are the characteristics of a process of decision with integrity, that may be trusted? How does one ensure that an institution is faithful to the promise of the organization, that is, that it acts with integrity?<sup>1</sup>

Consistent with his approach to scholarship across the range of his concerns, Caron addressed two things (at least) at once. In the most immediate sense, he was concerned with the emergent role of “a functioning UN Security Council”—which was then (1991–93) seen as an institution bridging the end of the Cold War and the beginning of what George H.W. Bush called the New World Order<sup>2</sup>—a Council acting with “vitality” to counter a variety of threats to international peace and security.<sup>3</sup> Put more directly, Caron was seeking to understand whether the blowback to a Council that “acted in utterly

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\* UC Irvine School of Law; United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. I want to express my deepest thanks to the editors of the *Berkeley Journal of International Law* for shepherding this essay through to publication and to Professor Laurel Fletcher for her leadership as a human rights scholar and clinician and her work to preserve the extraordinary legacy of our dear friend and mentor, David Caron.

1. David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 561 (1993) [hereinafter *Legitimacy*].

2. See George H.W. Bush, Address Before a Joint Session of Congress, September 11, 1990, <http://millercenter.org/the-presidency/presidential-speeches/september-11-1990-address-joint-session-congress>.

3. *Legitimacy*, *supra* note 1, at 553.

unprecedented ways”<sup>4</sup> would have concrete implications for its functioning. As he described the moment, he saw “no small measure of irony that, as the international community finally achieved” the capability to pursue its role under Chapter VII of the UN Charter, many “began to have second thoughts about the legitimacy of that body’s use of its collective authority.”<sup>5</sup> Bringing to the discussion a clear-eyed understanding of the political threats facing the Council and world order, he introduced the study by noting that his analysis would eventually turn to policy prescriptions to address the possibility of a legitimacy gap in the Council’s exercise of authority. In a narrow sense, the article was a policy-relevant exploration that he would punctuate with proposals to strengthen the central security institution of international law.

But the article speaks beyond its time; it goes much further and deeper than the policy issues of its moment. I read Caron’s conclusions as reflective of his humility and his embrace of scholarly inquiry, a recognition that discussions of legitimacy must take into account the variation in attitudes toward the concept, its subjectivity, and its politicized sheen. Caron asked, what does it mean to speak of an institution’s use of authority as illegitimate?<sup>6</sup> And in the context of the Security Council, does it matter? He analyzed and then concluded that legitimacy does matter and that, in order to bolster its legitimacy, the Security Council must change.<sup>7</sup> But even in his call for change, Caron was measured and cognizant of the realities of international politics. He showed elements of idealism and realism.

I was Caron’s student when he published *Legitimacy*, and his article (like the man himself) strongly influenced the way I think about international law and institutions, not to mention the professional roles of international lawyers. I want to use Caron’s framework to suggest some tentative answers to evaluate another question, just as present today in our global conversation as *Legitimacy* was at the moment of its publication twenty-five years ago: Why are State-driven models of global internet governance so widely appraised as illegitimate? And, by contrast, why have the existing models of internet governance been so attractive not only to civil society and companies but also to the vast majority of States? What can Caron’s assessment of “legitimacy” impart to our own understanding of this major issue of global governance?

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4. *Id.*

5. *Id.*

6. *Id.* at 555.

7. See, for instance, Caron’s call for elimination of the “reverse veto,” in which members of the Council “block[] it from terminating or otherwise altering an action it has already authorized or ordered.” *Id.* at 577–88.

## I. THE LEGITIMACY FRAMEWORK

*Legitimacy* showcases a familiar feature of Caron’s scholarship, namely that his focus on specific problems (here, the legitimacy claims and counterclaims swirling around the Security Council in the early 1990s) would benefit from an evaluation of a broader theoretical or normative problem.<sup>8</sup> In this case, the Council’s then-newfound success and critique provided him with a vehicle to evaluate the concept of legitimacy in international law and institutions. “[T]his rather nebulous term [legitimacy] is loosely employed,” he noted, but its power over the Council deserved study.<sup>9</sup> He disclaimed any purpose to “set forth a general account of the notion of legitimacy in international governance.”<sup>10</sup> What he wanted to understand was whether *perceptions* of illegitimacy had any practical significance. “Although I think it clear that perceptions of illegitimacy can matter,” he specified, “precisely when and how they matter is hard to say because the determinants of their significance in practice remain unclear.”<sup>11</sup> He explored directly a question that many legal scholars would shy away from, a difficult-to-define concept of *legitimacy* that brought together questions of law and politics, perception and reality, and consequence and principle.

There is much in *Legitimacy* that may elude our attention today because what at the time was cutting edge has become the norm. Writing in the *American Journal of International Law*, he situated his work within a corpus of legal scholarship, especially the then-recent work on legitimacy by Thomas Franck of New York University.<sup>12</sup> But he went beyond that, as Caron was at the forefront of early efforts at interdisciplinarity.<sup>13</sup> He sought to understand, develop, and articulate the concept of legitimacy not just as a matter of law under the UN Charter but also by drawing upon the scholarship especially of two pathbreaking scholars then at Berkeley—the late International Relations theorist Ernst Haas and the social psychologist Tom Tyler—and the work of German sociologist Jurgen Habermas.<sup>14</sup> Today, interdisciplinary work has become a recognizable, if not predominant, feature of international legal scholarship. Caron was not only early onto the value of other disciplines in assessing legal and institutional questions, but his approach had definite influence over succeeding scholars.

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8. See, e.g., *The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, PROC. ASIL ANN. MEETING (2018); *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT’L L. 401 (2006); *The ILC Article on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT’L L. 857 (2002); and *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4 (2000).

9. *Legitimacy*, supra note 1, at 556.

10. *Id.* at 557.

11. *Id.*

12. *Id.* at 556 n.19, citing Thomas M. Franck, *The Power of Legitimacy Among Nations*, 24 N.Y.U. J. INT’L L. & POL. 199 (1991).

13. See, e.g., Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993).

14. See *Legitimacy*, supra note 1, at 557 nn.19, 23.

Caron began the article with basic observations, approaching legitimacy in “social and political terms.”<sup>15</sup> He observed that while illegitimacy claims “reflect subjective conclusions, perhaps based on unarticulated notions about what is fair and just,” they may also reflect genuine “dissatisfaction with an organization.”<sup>16</sup> And in turn, he evaluated whether those perceptions and conclusions have an impact on the actual functioning of the institution. He asked, “Is an organization perceived as legitimate more likely to be used and thus more likely to operate within the full scope of its agenda?”<sup>17</sup> He added: “[A]lthough international organizations are not world government and a realist’s recognition of power is built into their constitutive documents, these organizations hold the promise of something more than politics as usual.”<sup>18</sup> Perceptions of illegitimacy, he wrote, “resonate in the case of international organizations [a]s exemplified by the space between the promise of the preamble to the charter of the organization and the realities of the compromises in the text that follows, a space in which there is discretion regarding the use of authority.”<sup>19</sup> He went on, “one must seek an institution that simultaneously can employ its authority effectively and employs it in a manner that is regarded generally as legitimate.”<sup>20</sup> The challenge: “[S]eek designs that promote institutional integrity, and that consequently address in the ordinary course of business the circumstances that make possible the resonance of illegitimacy.”<sup>21</sup>

While he acknowledged that the underlying substantive norms of the institution may drive core attitudes toward global governance, he nonetheless posited that a process that generates perceptions of legitimacy goes some distance in promoting substantive outcomes that engender trust and acceptance. “What are the characteristics of a process of decision with integrity, that may be trusted?” he asked. “How does one ensure that an institution is faithful to the promise of the organization, that is, that it acts with integrity?”<sup>22</sup> Four factors, in his view, promote those kinds of perceptions:

- 1) the operation of the organization is entrusted to “persons who can claim to be independent of those governed and to have no interest in a particular outcome”;
- 2) “states entrusted with the operation of the organization may be held accountable for the consequences of their actions”;

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15. *Id.* at 557.

16. *Id.* This reflection is quintessential Caron. He asks us to look for good faith behind a claim that may be difficult to sustain as an objective matter. Why are people making a claim? That is important to him, regardless of whether the claim ultimately holds up. The claim itself may reflect something problematic in our politics and law even if a legal claim itself would fail.

17. *Id.* at 557–58.

18. *Id.* at 560.

19. *Id.*

20. *Id.* at 561.

21. *Id.*

22. *Id.*

- 3) “an institution may also be accountable in that a court, an entity whose integrity is assured via independence, reviews the institution’s decisions”; and
- 4) “integrity may be promoted by providing the opportunity for representative participation and fostering an ongoing dialogue as to the legitimacy of any action.”<sup>23</sup>

In short, Caron identified four principles that could enable an institutional process to avoid claims of illegitimacy. He disclaimed any suggestion that if an institution met these four criteria, legitimacy would follow. To the contrary, he was alive to the reality that it would be “simplistic to focus on the relation of process to perceptions of illegitimacy without considering the substance of what is being discussed in relation to those perceptions.”<sup>24</sup> But these four principles could enable observers to identify underlying causes for claims of illegitimacy and help organizations identify the concerns that they need to address. Caron argued that independence, accountability, oversight, and representativeness can be significant tools to address the “resonance” of claims of illegitimacy.<sup>25</sup>

Much of Caron’s article is given over to a rigorous evaluation of these principles in the context of the Security Council.<sup>26</sup> As this is not an essay about the Security Council *per se*, I only note that Caron’s assessment of the institution’s commitment to these four factors leads him not to pessimism but to prescription. His analysis suggests that the Council cannot be said to be independent given that its members are also those governed. Neither are member States—particularly the Permanent Five members of the Council but also their close allies—held accountable for their decisions.<sup>27</sup> Oversight exists in the form of the International Court of Justice, but that is a limited form of judicial review.<sup>28</sup> Administrative and political reviews, such as what could be imagined in the form of Secretariat or General Assembly evaluations, are nonexistent. And representativeness is a definite challenge, given especially the makeup of the P-5, the exclusion of major powers in the Global South, and the persistence of a veto that vests extraordinary authority not merely in five governments but simply one, acting alone. The election of nonpermanent States to Council membership could counter issues of representativeness, but given the power disparity on the Council, it does little to address the resonance of the underlying claims.

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23. *Id.*

24. *Id.* at 562.

25. *Id.* at 561.

26. See especially *id.* at 562–66, followed by extensive presentation of proposals in response to his assessment.

27. *Id.* at 561.

28. *Id.*

II. INTERNET GOVERNANCE AND THE *LEGITIMACY* FRAMEWORK

Caron's evaluation of perceptions of the Security Council provides a framework for thinking about legitimacy at the international level and its impact on governance, beyond the UN's central body for international peace and security. Caron's questions may be asked not only of existing institutions with authority to regulate international relations (i.e., peace and security) but also of potential changes in global regulatory regimes. I want to deploy his framework to help understand why the typical global forums for governance have limited if any impact in the context of the global internet.

At this moment, global internet governance faces a set of very serious challenges across a range of areas. The internet has acquired the features of a digital battlefield, a place where State and non-State actors threaten public institutions and processes, conduct national security operations, deploy tools to interfere with human rights across borders, and conduct all sorts of other threats to private actors, including hacking to gain trade secrets or interfere with the work of journalists.<sup>29</sup> Even a brief recitation calls to mind how the internet has become a place of State and non-State competition and insecurity. The examples are proliferating and include such well-known incidents as the transnational hacking of Sony, evidently by North Korea; evidence of internet probing by Russia and China into U.S. critical infrastructure; the United States' use of the Stuxnet virus to interfere with the Iranian nuclear program; the use of internet tools for transnational digital surveillance conducted by intelligence agencies around the world; and cross-border digital attacks on activists, journalists, and academics.<sup>30</sup> At the same time, the promise of a globally accessible internet, advancing the right to "seek, receive and impart information and ideas of all kinds, regardless of frontiers,"<sup>31</sup> is threatened by increasing domestic regulation and censorship—which risks, over the long-term, a breakdown in the way people communicate across borders.

The range of threats on the internet—whether to public institutions, corporate security, or individual rights—might present an argument for global regulatory action driven by the typical tools of State initiative. After all, the kinds of threats identified above suggest colorable cases of international instability, perhaps even the kinds of threats that would be subject to the Security Council's attention under Chapter VII of the UN Charter. These threats may be moving the

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29. See, e.g., RICHARD CLARKE, *CYBER WAR: THE NEXT THREAT TO NATIONAL SECURITY AND WHAT TO DO ABOUT IT* (2012); KIM ZETTER, *COUNTDOWN TO ZERO DAY: STUXNET AND THE LAUNCH OF THE WORLD'S FIRST DIGITAL WEAPON* (2015); PETER SINGER AND EMERSON BROOKING, *LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA* (2018).

30. *Id.*

31. International Covenant on Civil and Political Rights, art. 19(2), Dec. 19, 1966, 999 U.N.T.S. 14688.

needle toward State-driven approaches to governance.<sup>32</sup> So far, however, the organizing principle for internet governance has involved multiple actors—not just governments but private, nongovernmental, academic, and others with power over and equities in the internet. Since at least 2005, it is possible to identify a strong preference that the internet be governed not merely by States but by all those who have a stake in its operation.<sup>33</sup> Why is that? And how do we evaluate the legitimacy of competing approaches?

I do not intend to use this space to evaluate in detail the modes of governance of the internet today, much as it is a vast and wide-ranging space that touches upon all manner of global issues from infrastructure development and the emerging 5G network to cyberattacks and cybersecurity, from global surveillance and the private surveillance industry to regulation of terrorist content, hate speech, and disinformation. But I do want to give a sketch of internet governance, a brief introduction, in order to reflect on the value of David Caron's framework for evaluating legitimacy.

Early in the internet's emergence as a global force, it was easy to identify a cultural resistance in democratic societies to centralized, government-driven global internet governance. In 1996, the Grateful Dead lyricist and internet theorist and activist John Perry Barlow's *Declaration of the Independence of Cyberspace* imagined that the internet would usher in "a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity."<sup>34</sup> To governments, Barlow implored, "On behalf of the future, I ask you of the past to leave us alone. You have no sovereignty where we gather."<sup>35</sup> This idea of a kind of ungoverned internet, a space free of government interference, held a certain attraction to societies in North America and Europe, and it continues to exercise a cultural hold on ideas about online space—even if a platonically ungoverned internet was never the reality and is certainly not true today.<sup>36</sup> The values underlying Barlow's *Declaration* persist in serving as a foundation for how many of those actors with a role in internet governance perceive the digital age.

Even if Barlow's internet nirvana no longer captures the public imagination about the internet, its core insight—that government interference could portend

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32. See, e.g., FRANCE DIPLOMATIE, *CyberSecurity: Paris Call of 12 November 2018 for Trust and Security in Cyberspace*, <https://www.diplomatie.gouv.fr/en/french-foreign-policy/digital-diplomacy/france-and-cyber-security/article/cybersecurity-paris-call-of-12-november-2018-for-trust-and-security-in>.

33. See generally JEREMY MALCOLM, MULTI-STAKEHOLDER GOVERNANCE AND THE INTERNET GOVERNANCE FORUM (2008).

34. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (February 8, 1996), <https://www.eff.org/cyberspace-independence>. The Declaration served as a vision document for the Electronic Frontier Foundation, which Barlow co-founded.

35. *Id.*

36. See generally JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006).

new forms of tyranny—has been borne out by the use and abuse of online space by public authorities.<sup>37</sup> Government abuse, in other words, has reinforced for many the idea that government stewardship and regulation would have negative implications for the functioning of the internet.<sup>38</sup> Many governments even share this view.<sup>39</sup> The central UN process on internet governance has expressed this view as well, and one can see in the development of the 2005 UN World Summit on the Information Society (WSIS) the emergence of a governing principle that, while moving away from Barlow’s internet nirvana, nonetheless offers a vision for decision-making that would take into account not just government but civil society and private sector equities.<sup>40</sup>

WSIS does not reflect all aspects of internet governance, but it is a UN-driven process that has provided a framework for thinking about internet governance. As such, it reflects an agreed-upon view of what that governance should entail. Even while rejecting the notion of the internet as ungoverned space, the UN process retained an idea about governance that recognized Barlow’s insight that the internet offered more than merely a space for commerce. That is, it would offer a space for community across borders. It would offer the development of an information society: a new way of thinking about development, rooted in knowledge and information-sharing. The UN General Assembly launched the WSIS process late in 2001 in order

to marshal the global consensus and commitment required to promote the urgently needed access of all countries to information, knowledge and communication technologies for development so as to reap the full benefits of the information and communication technologies revolution, and to address the whole range of relevant issues related to the information society, through the development of a common vision and understanding of the information society and the adoption of a declaration and plan of action for implementation by Governments, international institutions and all sectors of civil society[.]<sup>41</sup>

One year later, General Assembly Resolution 57/238 welcomed the WSIS preparations and “encourage[d] non-governmental organizations, civil society

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37. See generally FREEDOM HOUSE, FREEDOM ON THE NET 2018 (Oct. 2018), [https://freedomhouse.org/sites/default/files/FOTN\\_2018\\_Final%20Booklet\\_11\\_1\\_2018.pdf](https://freedomhouse.org/sites/default/files/FOTN_2018_Final%20Booklet_11_1_2018.pdf). The report opens darkly, “The internet is growing less free around the world, and democracy itself is withering under its influence.”

38. Consider, for instance, the debate over encryption and whether governments should impose restrictions on its commercial and personal use. In the context of my 2015 report to the UN Human Rights Council on encryption and anonymity (UN Doc. A/HRC/29/32) civil society organizations repeatedly expressed concern about government regulation’s impact on the functioning of the internet. See <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>.

39. *Id.*

40. For a detailed study of multi-stakeholder governance in the WSIS and Internet Governance Forum of the UN, see generally JEREMY MALCOLM, MULTI-STAKEHOLDER GOVERNANCE AND THE INTERNET GOVERNANCE FORUM (2008).

41. G.A. Res. 56/183, at 1 (Dec. 21, 2001).



and the private sector to contribute further to, and actively participate in, the intergovernmental preparatory process for the Summit and in the Summit itself, according to the modalities of participation established by the Preparatory Committee.”<sup>42</sup> The phrasing here suggests that the General Assembly saw the process as State-driven—that nongovernmental actors could participate in a State process according to the rules States establish. But it is nonetheless a step toward an idea of sharing responsibility to govern the internet.

By 2005, internet governance had become “an odd patchwork of United States government fiat, decentralized [sic] private action and *ad hoc* national and international regulation.”<sup>43</sup> But by the end of that year, the UN consolidated a vision of shared governance that acknowledged meaningful roles for multiple stakeholders. The so-called Tunis Agenda, adopted by the UN as part of the WSIS process, would create the basis for the Internet Governance Forum (IGF), a rolling national, regional, and international “forum for multi-stakeholder dialogue”<sup>44</sup> about internet policy and regulatory issues. The IGF itself would be “multilateral, multi-stakeholder, democratic and transparent.”<sup>45</sup> The multi-stakeholder formula did not mean that the IGF would take decisions on matters of internet governance, but that all manner of stakeholders—governments, private companies, non-governmental organizations, inter-governmental organizations, regional institutions, activists, academics, and independent technologists—could participate in the debates that would lead to recommendations, evaluations, and the creation of emerging norms. It was understood that no party could dictate outcomes to any other. To be sure, governments retained significant power over the political process, adopting the Tunis Agenda itself, but it was a process that recognized the value of integrating nongovernmental voices and interests in the governance itself.

In 2015, on the tenth anniversary of the adoption of the multi-stakeholder format in Tunis, the UN adopted a resolution to mark what it called “WSIS+10.” The resolution reaffirmed

the value and principles of multi-stakeholder cooperation and engagement that have characterized the World Summit on the Information Society process since its inception, recognizing that effective participation, partnership and cooperation of Governments, the private sector, civil society, international organizations, the technical and academic communities and all other relevant stakeholders, within their respective roles and responsibilities, especially with balanced representation from developing countries, has been and continues to be vital in developing the information society.<sup>46</sup>

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42. G.A. Res. 57/238, at 2 (Dec. 20, 2002).

43. MALCOLM, *supra* note 40, at xxvii.

44. International Telecommunication Union, *Tunis Agenda for the Information Society*, WSIS-05/TUNIS/DOC/6(Rev.1), ¶ 72 (Nov. 18, 2005).

45. *Id.* ¶ 73.

46. G.A. Res. 70/125, ¶ 3 (Dec.16, 2015).

The signaling here is important: the resolution—adopted only by States—affirms these values as central to decision-making about the internet. The substantive provisions of the resolution reinforce the idea that the internet should be governed with multiple stakeholders in mind. Its first operative paragraph expresses a substantive vision rooted in human rights and sustainable development.<sup>47</sup> The resolution takes note of “abusive uses” of digital technologies but it is within the context of an overall celebration of the internet.<sup>48</sup>

This approach has been borne out in specific areas of governance. Kal Raustiala summarized the essentials of global internet governance crisply in discussing domain name registration and the evolution of the Internet Corporation for Assigned Names and Numbers (ICANN). The United States established ICANN which, after significant domestic American debate, is now a nonprofit organization responsible for assigning domain names and ensuring the workability of the network. ICANN has significant regulatory power over the organization of the internet, and its description of its process captures the ethic of multi-stakeholderism:

ICANN’s inclusive approach treats the public sector, the private sector, and technical experts as peers. In the ICANN community, you’ll find registries, registrars, Internet Service Providers (ISPs), intellectual property advocates, commercial and business interests, non-commercial and non-profit interests, representation from more than 100 governments, and a global array of individual Internet users. All points of view receive consideration on their own merits. ICANN’s fundamental belief is that *all users of the Internet deserve a say in how it is run*.<sup>49</sup>

The U.S. Government (and others that are like-minded, such as the more than two dozen governments that are members of the so-called Freedom Online Coalition<sup>50</sup>) as well as users and most of industry value, in Raustiala’s words, the internet’s “high degree of openness, its diversity, its completeness, and its fundamental resilience.”<sup>51</sup> These are the underlying values that led—rather organically at first—to “the elaborate multi-stakeholder governance structure that exists today.”<sup>52</sup> Developed and democratic governments have strongly supported an approach to internet governance that involves all those actors with an interest in outcomes, not just governments but also private sector companies and civil society.

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47. *Id.* ¶ 1.

48. *Id.* ¶ 11.

49. ICANN, *Welcome to ICANN (Internet Corporation for Assigned Names and Numbers)* (last visited Apr. 18, 2019), <https://www.icann.org/resources/pages/welcome-2012-02-25-en> (emphasis added).

50. See FREEDOM ONLINE COALITION, <https://freedomonlinecoalition.com/> (last visited Apr. 18, 2019).

51. Kal Raustiala, *Governing the Internet*, 110 AM. J. INT’L L 491, 492 (2016).

52. *Id.*

One may see the multi-stakeholder principle expressed in the institutional framework that dominates global internet policy discussions beyond the specific subject of domain names. Standard-setting organizations involving companies, academics, and various technologists establish rules for a common infrastructure, protocols, and languages necessary for the internet to work, for networks to communicate with one another. These standards are developed by the Internet Engineering Task Force (IETF), the World Wide Web Consortium, the ITU's Telecommunications Standardization Sector, the European Telecommunications Standards Institute, the Institute of Electrical and Electronics Engineers, and the 3rd Generation Project.<sup>53</sup> Most of these organizations have a concrete impact on the internet as we know it, making decisions (typically by consensus) that influence everything from accessibility and security to speed and integration. These organizations have significant power over the operation of the internet's ability to meet the values Raustiala identified above.

Not all States have celebrated the multi-stakeholder approach. In the face of WSIS+10, some States, led by China and Russia, have countered with a different agenda fed by a different set of values. In a letter sent to the UN Secretary General in 2015, China, Russia, and four Central Asian governments shared a draft "code of conduct for information security," updating a code they had initially prepared and presented to the UN in 2009.<sup>54</sup> The draft code does not include the words or the values of multi-stakeholderism. Instead, the code begins with the foundation that governance is necessary to combat "criminal misuse" of the internet or other uses that interfere with international security.<sup>55</sup> It proposes that States "cooperate fully with other interested parties in encouraging a deeper understanding by all elements in society, including the private sector and civil-society institutions, of *their responsibility* to ensure information security[.]"<sup>56</sup> This is a model of State-driven, State-maintained internet governance—a model of multilateralism, not multi-stakeholderism, and it presents the other stakeholders as second-tier actors, if not potential miscreants.

The Chinese-Russian code has not found widespread support, but it does highlight that there is some growing skepticism and opposition—at least among a certain set of governments—towards the current model of multi-stakeholderism. And it is plausible that, over the next several years, attitudes toward internet governance could change, especially given the threats identified above and the rise of authoritarian models of governance worldwide. Even

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53. See Rept. of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression, Addendum: Supplementary Materials Accompanying Annual Report, at 3–11, U.N. Doc. A/HRC/35/22 (May 22, 2017).

54. Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, U.N. Doc. A/69/723 (Jan. 13, 2015) ("Code of Conduct").

55. *Id.* 3–4.

56. *Id.* 5 (emphasis added).

democratic States could decide that online threats are so great that they need to “multilateralize” internet governance and adopt State-centric approaches.

Despite objections, multi-stakeholderism remains the overriding organizing principle for internet governance, one embraced by nearly all participants, including especially activists from civil society.<sup>57</sup> As one activist put it, “Many, probably most, people in the ‘Internet community’ cherish multistakeholder processes as a fundamental principle.”<sup>58</sup> The embrace is not surprising; private and nonprofit actors make the decisions that keep the internet working and its multiple parts capable of communicating with one another. Excluding them from governance would be difficult, if not impossible, and States may also lack the technical capacity to direct private and other actors to take certain kinds of action.

Multi-stakeholderism promotes elements of independence, accountability, oversight, and participation, the four that Caron’s framework identifies as legitimacy-promoters in the context of international governance. They are not, however, guarantors of legitimacy. As Caron put it, “the problem of legitimacy will be an ongoing one for any effort at international governance.”<sup>59</sup> But they are factors that help to generate legitimacy, which in turn allows the global system to work. In the internet governance context, all four appear to be present. The multi-stakeholder approach ensures that, with its multiple actors, no single actor can dominate—either in the making of decisions or in the veto of outcomes. The predominance of consensus as the defining decision-making approach promotes an environment in which no actor can guarantee a self-dealing outcome. The activities of most multi-stakeholder processes are transparent, with all outcomes subject to public disclosure, encouraging oversight and public debate. Participation is open to all and, over time, has increased in representativeness.

These are some of the features that have contributed to the sense that multi-stakeholderism advances the interests of most of those with a stake in the internet’s governance. It is not one that always works to the benefit of States that, like China and Russia, would prefer to have greater unaccountable control over decision-making. It is also one that does not always advance the interests or the rights of users, depending on the forum at issue. Private sector interests may have outsized voices in some forums. All in all, however, the only serious attack on the legitimacy of multi-stakeholderism has come from States that would prefer to have a system that looks more like the Security Council approach that drew—and continues to draw—so much criticism for its legitimacy deficits.

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57. See, e.g., Peter Micek, *Let it go: It’s time for global, multi-stakeholder oversight of the Internet* (Sep. 13, 2016), <https://www.accessnow.org/let-go-time-global-multistakeholder-oversight-internet/>.

58. David Souter, *Inside the Information Society: The what and why of multistakeholder participation*, ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (Jan. 23, 2017), <https://www.apc.org/en/blog/inside-information-society-what-and-why-multistakeholder-participation>.

59. *Legitimacy*, *supra* note 1, at 588.

CONCLUSION

Caron ended *Legitimacy* with a step back from the Security Council. He writes that “[t]he renewed sense of global community means, at least for now, that it is possible in more areas to judge whether the conduct of a State is acceptable.” He then wrote:

Challenges to power framed in terms of the illegitimacy of that power cannot be dealt with merely on the level of general principles. Rather, the means of confronting the challenges to legitimacy must be institutionalized. This conclusion places a heavy emphasis on process, not because I believe justice is merely procedural, but because I believe our diverse global community is more likely to find its vision of substantive justice through a process involving debate.<sup>60</sup>

These last words have been with me since I read them and talked to Professor Caron about them in 1993. It seemed to me bold to conclude in the first person. *I believe*, he wrote. He suggested, even if implicitly, that the omniscient impersonal voice of scholarship could give way to the personality and the person behind it. And in its substance, the concluding point is about what legal scholars and practitioners can and should value. It contains an undeniable truth about world politics: we are diverse, we have interests that may be difficult to reconcile, but we must find processes that build confidence in decisions about their reconciliation and solution, and ultimately about the exercise of power.

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60. *Id.*

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