Fostering Regional Health Governance in West Africa: The Role of the WAHO

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Abstract

Global, regional and national responses to the recent Ebola crisis revealed considerable gaps in the various health governance frameworks, leading to calls for reform. While most analyses have focused on national and global institutions and challenges, this paper discusses the role of regional institutions and their governance challenges. It argues that regional institutions can make up for weaknesses in national governance systems. However, they must overcome governance challenges that flow from state control over regional processes, especially where such states have capacity and legitimacy deficits. It discusses the role of the West African Health Organisation (WAHO), the specialized institution of the Economic Community of West African States responsible for health governance in the region. This article is part of a broader research frame on regional governance in areas with governance challenges caused by capacity and legitimacy deficits.

This research proposes new ways of thinking about and practicing regional (health) governance in West Africa, by focusing not only on capacity building but also on enhancing the legitimacy of governance actors. Regional institutions occupy a particularly important position, where they can provide a larger pool of resources that creates an insurance scheme for states

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in the event of crises. They can also enhance the legitimacy of national and global processes and institutions by supplying an alternative governance structure that regulates relations amongst governance actors and targets.

I Introduction

International cooperation, involving global and regional intergovernmental institutions, states acting unilaterally, as well as prominent international Non-Governmental Organizations (NGOs), was central to the response to the 2014 Ebola outbreak in West Africa.[1] While international cooperation is a critical and inevitable element of the current interdependent international community of states, it is more so in the case of states with weak institutions whose citizens can no longer rely on them for the supply of basic needs. Citizens of these states must look beyond the state for governance solutions, and regional institutions might be able to enhance the legitimacy and capacity required to meet their needs. However, in the context of such states, regional institutions must also overcome the control of states in order to be effective, and this has not been the case in West Africa, as the response to the Ebola outbreak revealed.

National and international efforts to contain the spread of the Ebola virus reveal significant gaps in the global framework for the promotion of public health, such as funding deficits in the World Health Organization (WHO), questionable response mechanisms at the national, regional and global levels, and poor coordination of efforts by authorities at different levels;[2] but, a prominent issue that has remained at the core of such discussions is the governance deficit in the countries most affected by the outbreak, the re-

1 This paper adopts a global governance approach to the study of international institutions, thus looking beyond traditional subjects of international law to investigate sites of power, capacity and legitimacy. See Kingsbury, B, Kirsch, N & Stewart, R, "The Emergence of Global Administrative Law" (2005), 68 *Law & Contemporary Problems*, 15; Slaughter, A, *The New World Order*, 2004; Mattli, W & Buthe, T, *The New Global Rulers: The Privatization Of Regulation In The World Economy*, 2011.

2 See Moon, S, Sridhar, D & Pate, M A et al., "Will Ebola change the game? Ten essential reforms before the next pandemic. The report of the Harvard-LSHTM Independent Panel on the Global Response to Ebola" (2015), 386 *The Lancet*, 2204; McKay, B & Wonacott, P, "After Slow Ebola Response, WHO Seeks to Avoid Repeat" (December 29, 2014), *The Wall Street Journal*, http://on.wsj.com/13Px9Et.

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sultant spillover effects, and how these can be addressed. The focus on national institutions appears to overlook important subnational, transnational and regional governance structures.

This paper addresses questions related to regional governance that arise from the Ebola epidemic in West Africa. It seeks to show how the severity of the outbreak was closely linked to the weakness of governance structures that have been unable to fulfill their objectives, particularly with regard to healthcare. Rather than focus on traditional state-building and global governance mechanisms, which have been – and continue to be – prevalent in some of the countries affected by the outbreak, this paper goes further and proposes a more comprehensive approach to fostering governance for the citizens of countries with weak national institutions. The main argument is that regional institutions have significant governance roles that are shaped by the condition of other governance structures. This study provides a basic introduction to the possibilities of focusing on regional institution building to address governance challenges.

This is not a discussion of the technicalities of national, regional or global public health issues. The paper simply uses the Ebola outbreak and the related narratives and responses as a backdrop for discussing issues relating to governance and institutional performance. The choice of the Ebola outbreak as a case study was dictated by the dire nature of the outbreak, as it revealed quite vigorously how national crises can affect regional and global communities and how the latter respond. The relevant themes of state fragility, interacting governance orders, and development assistance and intervention are potent in the Ebola narratives and subsequent evaluations of the experience.

Part II of the paper provides a brief narrative about the outbreak of the Ebola epidemic in West Africa. Part III discusses the response of national and global health governance structures to the epidemic and analyzes the underlying governance implications. Part IV examines the current practice of regional governance in West Africa within the context of the Ebola outbreak, pointing out weaknesses in the existing framework. The paper then discusses the importance of enhancing capacity and legitimacy in regional institutions to develop effective governance structures, and identifies possible challenges to the establishment of such a system. Part V concludes with a summary of the discussions and argument.

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II Ebola: An Infection of Sovereign Statehood

The 2014 Ebola outbreak in West Africa began with the death of a child in Guinea in December 2013. Over the course of four months, the disease spread to neighboring Liberia and Sierra Leone, and by the end of the year, there were reported incidents in Nigeria, Mali, Senegal, Spain and the United States. In August 2014, the WHO declared the crisis a "public health emergency of international concern", which lasted until March 2016.[3]

This analysis identifies three factors as having contributed to the spread of the disease in Guinea and amongst its neighbors, Liberia and Sierra Leone, namely: poor health care and infrastructure; slow government intervention in rural areas; and the porosity of borders. While the disease also spread into Mali, Nigeria and Senegal in West Africa, the outbreak was more effectively contained in these countries; interestingly, the second element, absence of government in rural areas, did not come into play in those states because the identified incidents happened in cities.

1 The Infrastructure and Personnel Deficit

Guinea, Liberia, and Sierra Leone, the countries most affected by the Ebola outbreak and the consequent epidemic, have endured severe political crises over the past three decades, resulting in civil wars in Liberia and Sierra Leone with spillover implications for Guinea.[4] These situations depleted gravely scarce resources and led to the destruction of already limited infrastructure. In addition to the infrastructure deficit, there is also a shortage of qualified health care workers in the countries affected. Consequently, the domestic healthcare system that should have provided a first response to the outbreak was severely broken down and, therefore, insufficient to provide

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3 The contributions of *Wolfgang Hein*, "The Response to the West African Ebola Outbreak (2014-2016): A Failure of Global Health Governance?" and *Michael Marx*, "Ebola Epidemic 2014-2015: Taking Control or Being Trapped in the Logic of Failure – What Lessons Can Be Learned?" in this volume provide details of the timelines and narratives about the conditions under which the outbreak occurred.

4 See Olonisakin, F, "Children and Armed Conflict" in Adebajo, A & Ismail Rashid, I (eds.), *West Africa's Security Challenges: Building Peace in a Troubled Region*, 2004, 245 (252); Lowenkopf, M, "Liberia: Putting the State Back Together" in Zartman, W (ed.), *Collapsed States: The Disintegration and Restoration of Legitimate Authority*, 1995, 91 (95).

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the necessary healthcare assistance required to address an epidemic of such proportions.[5] Notably, these profoundly underequipped systems were also dealing with other severe disease outbreaks such as cholera, dengue fever, Lassa fever, malaria, yellow fever and HIV/AIDS.[6]

The situation revealed serious capacity deficits in these countries, with external assistance providing the bulk of national healthcare needs.[7] Thus, the state, in these instances, has been unable to provide basic healthcare services to the majority of its population, generating significant implications for the relationship between the state and its citizens.

2 Absence of Government in Rural Areas

African states were built upon a system established to dominate local societies and extract resources for the benefit of non-locals,[8] and governance is built upon the existence of formal, non-indigenous and informal, indigenous systems.[9] The resultant rural-urban divide reveals, in geographical terms, where the state begins and where it ends, not just in influence and penetration but also in legitimate control. Legitimacy in most poor and rural societies lies in informal systems that are usually based on ethnic affiliations while the state and its formal institutions are regarded with suspicion and

5 For details of the health governance deficits in these countries, see the contribution of *Michael Marx*, “Ebola Epidemic 2014-2015: Taking Control or Being Trapped in the Logic of Failure – What Lessons Can Be Learned?” in this volume.

6 Garrett, L, “Ebola’s Lessons: How the WHO Mishandled the Crisis” (September/October 2015), *Foreign Affairs*, https://www.foreignaffairs.com/articles/west-africa/2015-08-18/ebolas-lessons.

7 See Sayegh, J, “Ebola and the Health Care Crisis in Liberia” (October 2014), *Cultural Anthropology*, http://bit.ly/2mfhA6Q; Hughes, J, Glassman, A & Glenigale, W, “Innovative Financing in Early Recovery: The Liberian Health Sector Pool Fund” (February 2012), *288 Working Paper, Centre For Global Development*, http://bit.ly/2lEXFN9.

8 See Nkrumah, K, *Africa Must Unite*, 1963.

9 See Davidson, B, *The Black Man’s Burden: Africa and The Curse of the Nation State*, 1992; Mamdani, M, *Citizen And Subject: Contemporary Africa And The Legacy Of Late Colonialism,* 1996; Young, C, *The African Colonial State in Comparative Perspective*, 1994; Okafor, O, *Redefining Legitimate Statehood: International Law and State Fragmentation in Africa*, 2000, 32.

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hostility. Legitimacy, in the current analysis, refers to sociological legitimacy, especially where parallel institutions perform similar roles.[10]

When the outbreak began in Guéckédou, the distance between the state and the people was depicted by the difficulty faced by institutional bureaucracies in linking resources in the urban capital with those in the hinterlands. Rural and poor communities in Liberia and Sierra Leone suffered a similar fate. But, in Nigeria and Senegal, the first cases occurred in Lagos and Dakar, where there were medical facilities to quickly identify and handle the cases.[11] In Liberia and Sierra Leone, urban slums and rural communities were physically cordoned off and residents "imprisoned" in their communities by gates and "check points" that kept them separate from "the state".[12] Thus, an important theme in the relationship between state and society in many African countries was depicted in the Ebola outbreak. It is not only that the state is separate from the people, but that the people are hostile towards the state, its institutions and officials.[13] In addition, the absence of the state in vast areas of the physical – as well as social, economic, and political – territory makes it less effective to control its "sovereign territory", leading to practically and normatively meaningless border demarcations between countries.[14]

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10 This paper focuses on sociological legitimacy in Weberian terms, following the definition of legitimacy as the acceptance of the validity of exercise of power. "[…] the legitimacy of a system of control has far more than a mere 'ideal' significance […]. What is important is the fact that in a given case the particular claim to legitimacy is to a significant degree and according to its type treated as 'valid'; that this fact confirms the position of the persons claiming authority and that it helps to determine the choice of means of its exercise." Weber, M, *Economy And Society* (Roth, G & Wittich, C (eds.)), 1978.

11 WHO, *The Outbreak of Ebola Virus Disease in Senegal is Over*, 2014, available at http://www.who.int/mediacentre/news/ebola/17-october-2014/en/.

12 See McNeil, Jr., D, "Using a Tactic Unseen in a Century, Countries Cordon off Ebola-Racked Areas" (August 12, 2014), *New York Times*, http://nyti.ms/2muOX1l.

13 Wilkinson, A & Leach, M, "Briefing: Ebola – Myths, Realities, and Structural Violence" (2014), *African Affairs*, 1.

14 See Herbst, J, *States and Power in Africa: Comparative Lessons in Authority and Control*, 2000.

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3 Porous Borders

The spread of the Ebola virus from Guinea to neighboring countries has been attributed to the porosity of the borders purportedly separating these countries.[15] Just as in Guinea, the communities where the first cases occurred in Liberia and Sierra Leone were border communities with limited infrastructure and government presence.[16] And, just as in Guinea, it did not take much time before cases were being reported in the capitals and urban areas, especially in slums where the underserved poor lived.[17]

The combination of poor infrastructure, absence and rejection of the state in societies, and porous borders are related issues that depict state fragility.[18] These factors reveal deficits in the capacity and legitimacy of states. In the Ebola case, these deficits triggered the outbreak and contributed to the difficulty in containing it, but the focus on state deficit has been with regard to capacity, ignoring the critical legitimacy deficit that lies at the root of the state's malfunction.

Based on the above, this paper argues that it is important to address the governance challenges of states in ways that go beyond capacity building. The current state-building framework, comprising external efforts to build capacity, is evidently inadequate for addressing legitimacy gaps. Liberia is a clear example, where despite more than a decade of intense international engagement and participation in governance, most of the citizens live outside the reach of the state and continue to suffer deficient living conditions without access to basic amenities and infrastructure.[19] Regionalism, it is argued here, if properly revised within the West African context, might present an effective alternative that brings together the collective resources of states and external partners while also deconstructing barriers to legitimate communities that exist within and across states.

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15 Wilkinson & Leach, "Briefing: Ebola – Myths, Realities", above Fn. 13, 10.

16 Ibid.

17 See Garrett, "Ebola's Lessons: How the WHO Mishandled the Crisis", above Fn. 6.

18 See OECD, *Glossary of Statistical Terms*, 2007, 314; Zartman, W, "Introduction: Posing the Problem of State Collapse" in Zartman, W, *Collapsed States*, above Fn. 4, 9; Call, C, "The Fallacy of the 'Failed State'" (2008), 29 *Third World Quarterly*, 1491; Call, C, "Ending Wars, Building States" in Call, C & Wyeth, V (eds.), *Building States to Build Peace,* 2008, 1.

19 See Dwan, R & Bailey, L, "Liberia's Governance and Economic Management Assistance Program (GEMAP)" (2007), *A Joint Review by the Department of Peacekeeping Operation's Peacekeeping Best Practices and the World Bank's Fragile States Group*, available at http://bit.ly/2ljLyT7.

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III Deconstructing Health Governance: National and Global Responses

Two main points that came under scrutiny during and following the Ebola epidemic were its implications for global health governance, particularly in relation to the role of the WHO, and its revelations about national health governance, especially concerning states with weak institutional capacity. Regarding the first, there has been immense criticism of the WHO and its methods – or the lack thereof – in responding to global public health emergencies. The poor performance of the WHO in areas such as fundraising for its projects and clearly defining its goals and priorities, the Organization's inability to coordinate its efforts with those of national, regional and other global organizations as well as NGOs and other private entities, and its inability or unwillingness to rise above the politics of its Member States, have been identified as some of the weaknesses that hampered its response to the Ebola epidemic.[20] On the second issue, the national health infrastructure in the countries that were most affected by the Ebola epidemic has been recognized as fundamentally deficient and incapable of protecting the lives and wellbeing of citizens.

This paper takes a rather broad notion of governance that does not limit itself to public authority but rather covers both functional and relational elements of the concept.[21] As such, the deconstructive stance of new governance theories, which looks beneath and beyond traditional realms such as the state, provides a foundational base for this study.[22]

The state has usually served as the main actor in national and global health governance, but this does not mean that there are no alternative institutions through which other actors can – and do, in many cases – provide

20 See Garrett, "How the WHO Mishandled the Crisis", above Fn. 6.; see also Gostin, L, "A Proposal for a Framework Convention on Global Health" (2007), 10 *Journal of International Economic Law*, 989.

21 See above Fn. 1. See, for a contrast, Bogdandy, A von, Dann, P & Goldmann, M, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities" in Bogdandy, A von, Dann, P & Goldmann, M (eds.), *Exercise of International Public Authority by International Institutions: Advancing International Institutional Law*, 2010, 10.

22 See Bevir, M, "Governance as Theory, Practice, and Dilemma" in Bevir, M (ed.), *The Sage Handbook of Governance*, 2010; Lobel, O, "New Governance As Regulatory Governance" in Levi-Faur, D (ed.), *The Oxford Handbook of Governance*, 2012; Risse, T, "Governance in Areas of Limited Statehood: Introduction and Overview", in Risse, T (ed.), *Governance Without a State? Policies and Politics in Areas of Limited Statehood*, 2011.

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related functions. Private entities such as hospitals, NGOs, and corporations, have become an integral part of the national and global health order.[23] Governance actors – particularly states and International Organizations – exercise authority through the creation of rules that seek to influence or control the behavior or conditions of other players, the targets of such exercise of authority. Governance targets in the health sector include individuals, private-for-profit organizations, NGOs, and states, and they are usually on the receiving side of governance efforts. The relationship between governance actors and their targets is dictated by the exchange of capacity and legitimacy. The focus of this section is on how capacity and legitimacy influence the performance of governance institutions.

1 National Health Governance

The Ebola case reveals significant capacity gaps in the national health governance structures involved. The health sector capacities of Guinea, Liberia, and Sierra Leone were among the lowest in the world. Much of their governance capacity was externally derived and sustained through external funding, research facilities, and, in some cases, manpower.[24]

In addition to this capacity deficit, there was also an important legitimacy dynamic that contributed to the governance challenges that impacted the onset of and response to the Ebola outbreak.[25] The state was not the primary governance actor within the national order. It shared this role with social and cultural institutions that determined how societal life, including healthcare, was regulated in poor and rural communities.[26] In most of the countries in West Africa, more than half of the population who live in rural and urban poor communities have limited access to public facilities and services. These citizens exist within alternate governance structures, ranging

23 See Reich, M, "Introduction: Public-Private Partnerships for Public Health" in Reich, M (ed.), *Public-Private Partnerships For Public Health*, 2002, 1 (12).

24 See generally, the contribution of *Michael Marx*, "Ebola Epidemic 2014-2015: Taking Control or Being Trapped in the Logic of Failure – What Lessons Can Be Learned?" in this volume, describing the infrastructure and personnel deficits in the most affected countries.

25 See Weber, *Economy And Society*, above Fn. 10; Shany, Y, *Assessing the Effectiveness of International Courts*, 2014, 139.

26 See Garrett, "How the WHO Mishandled the Crisis", above Fn. 6.

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from families to religious institutions, which they accept as having legitimate authority over them, while they "avoid" the state as much as they can.[27] The relationship between the state and alternate governance structures within the state is not the focus of this study but it depicts an important legitimacy deficit that reveals gaps in the notion of the state as governance structure that are more than just capacity gaps. It also forms part of the narrative of how the state functions with this internal legitimacy deficit by relying on external legitimacy.

The state relies on external actors to confer legitimacy on it, so those actors determine the rules that govern state existence and performance. The state is, therefore, subject to external influence that is responsible not only for its capacity but also for determining its legitimate existence and performance.[28] Institutions such as the World Bank, the WHO, and other International Organizations, recognize and evaluate the legitimacy of developing countries as governance actors, and they come up with ways to measure state capacity while they make states undertake efforts to enhance their governance capital, but most of this is externally driven and may not enhance internal legitimacy.[29] Consequently, external governance actors are responsible for evaluating the performance of states and thus determining their legitimate status as suppliers of pubic goods in different fields such as healthcare, economic development, security, and so on.[30] Two important points to note are that, first, legitimacy here is usually based on normative standards, which relegates sociological legitimacy to the background.[31]

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27 See Azarya, V & Chazan, N, "Disengagement from the State in Africa: Reflections from the Experience of Ghana and Guinea" (1987), 29 *Comparative Studies in Sociology and History*, 106; Azarya, V, "Reordering State-Society Relations: Incorporation and Disengagement" in Rothchild, D & Chazan, N (eds.), *The Precarious Balance: State and Society in Africa*, 1988, 3.

28 See Krasner, S*, Power, the State and Sovereignty: Essays on International Relations*, 2009, 241.

29 Davis, K, Kingsbury, B & Merry, S, "Indicators as a Technology of Global Governance" (2012), 36 *Law & Society Review*, 73; Davis, K, Kingsbury, B & Merry, S, *Governance By Indicators: Global Power Through Quantification And Rankings*, 2015.

30 This represents a global governance structure in which International Organizations, governance networks, NGOs and so on are governance actors and states, private corporations and individuals are governance targets.

31 Buchanan, A, *Justice, Legitimacy and Self-Determination: Moral Foundations of International Law*, 2009, 146; Sadurski, W, "Supranational Public Reason: On Legitimacy of Supranational Norm-Producing Authorities" (2015), 4 *Global Constitutionalism*, 396.

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Second, significant focus is placed on enhancing the legitimacy of states through capacity building initiatives that focus on meeting a set of normative standards.[32] Thus, domestic constituents who are the final targets of many governance measures have superficial connections to and power over the state as they are not the primary constituents in the contemplation of the state when the latter is making governance decisions.[33] This describes, to some extent, the national health governance structure, which is generally overseen by state institutions but which really derives much of its capacity and legitimacy from actors such as the WHO and external donors that form part of a complex global health governance structure.[34]

2 Global Health Governance[35]

The WHO remains the face of global health governance, but its capacities have also been greatly undermined.[36] States exercise political leadership over the WHO, voting on the organization's agenda at the annual World Health Assembly (WHA). States are also targets of WHO governance, since the organization regulates state activities by prescribing rules and norms for the promotion of national and global health.[37] In addition to this, the WHO

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32 See, for instance Pritchett, L, "Fragile States: Stuck in a Capability Trap?" (2010), *World Development Report 2011, Background Paper*, available at http://bit.ly/2mnhwPb.

33 Of course, governments may use domestic constituents as leverage to evade responsibilities from their other constituencies, so the legitimacy-conferring status of domestic constituents is not altogether pointless, but it is, in many cases, superficial.

34 See Reich, "Introduction: Public-Private Partnerships for Public Health", above Fn. 23.

35 The contributions of *Pedro A. Villarreal*, "The World Health Organization's Governance Framework in Disease Outbreaks: A Legal Perspective" and *Wolfgang Hein*, "The Response to the West African Ebola Outbreak (2014-2016): A Failure of Global Health Governance?" in this volume provide a more comprehensive discussion of the WHO and its governance challenges.

36 See Garrett, "How the WHO Mishandled the Crisis", above Fn. 6; Gostin, "A Proposal for a Framework Convention", above Fn. 20; Fisher, A, "From Diagnosing Under-immunization to Evaluating Health Care Systems: Immunization Coverage Indicators as a Technology of Global Governance" in Davis, Kingsbury & Merry, *Governance By Indicators*, above Fn. 29.

37 See Gostin, "A Proposal for a Framework Convention", above Fn. 20.

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is supposed to provide leadership in a sector that has seen increased participation by other International Organizations, NGOs, and private for-profit organizations, many of which have significantly more resources than the WHO and whose resources are used to influence health policy and programs in the WHO and in its Member States.[38] Unsurprisingly, the WHO has fallen short in its leadership role with the cacophony of powerful governance voices in its domain.

Non-state entities provide capacity and determine the legitimacy of national health governance structures in many developing countries. They do this because they are able to fill a capacity gap in these countries. However, their legitimacy has been called into question by many observers, as they are recognized as governance actors that affect the decision-making of states and control the activities of target populations in the countries they support.[39] Consequently, in 2009, the WHO convened a forum to define policy options to enhance collaborative efforts amongst stakeholders. The result of this meeting was the Venice Concluding Statement on Maximizing Positive Synergies between Health Systems and Global Health Initiatives, which affirmed the central role of the WHO and acknowledged the need for collaborative work.[40] However, the targets of the policies and programs initiated and executed by these "stakeholders" usually do not have a say in how or what policies and programs are adopted or undertaken. Therefore, there is a legitimacy deficit in the global health governance system that is akin to the legitimacy deficit recognized in global governance systems generally.[41]

This legitimacy deficit is revealed in at least two ways. First of all, global governance organizations are not accountable to the publics whose lives or activities their influence affects. Secondly, the inequality in capacity of states means that not all members of the global community or of global

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38 Ibid.; Fisher, "From Diagnosing Under-immunization to Evaluating Health Care Systems", above Fn. 36; Sridhar, D & Gostin, L, "Reforming the World Health Organization" (2011), 305 *Journal of the American Medical Association*, E2.

39 See above Fn. 38.

40 See World Health Organization Maximizing Positive Synergies Collaborative Group, "Venice Statement: Global Health Initiatives and Health Systems" (2009), 374 *Lancet*, 10; World Health Organization Maximizing Positive Synergies Collaborative Group, "An Assessment of Interactions between Global Health Initiatives and Country Health Systems" (2009), 373 *Lancet*, 2137.

41 See Kingsbury, Kirsch, & Stewart, "The Emergence of Global Administrative Law", above Fn. 1, 15.

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governance organizations have an equal say in how global standards are established or implemented.

On the one hand, global governance structures must be held accountable for their exercise of authority, especially where it affects targets who have no direct say in the constitution or operations of the global governance system in question.[42] These targets could be individuals, private corporations, or even states. This is mainly a question of representation of the target by the governance actor, so there is a democratic element to the legitimacy questions it raises. Responses would focus on participation and efforts at increasing representation through democratic processes.[43] On the other hand, global governance structures are sometimes improperly constituted so that there are inequalities within their ranks that raise legitimacy concerns. Here, questions of equality are at the fore, as states are expected to represent themselves as equal participants in international institutions, based on the concept of sovereignty enshrined in the UN Charter and embedded in international legal practice.[44] However, the unequal capacity of states determines the role that they play in international institutions, raising legitimacy concerns within organizations.[45]

These two legitimacy questions are indistinguishable where some states, which are targets of governance action, have limited say in the decision-making process of those governance organizations. Nevertheless, where there are national governance challenges caused by grave capacity and legitimacy deficits, the legitimacy deficit of global governance institutions must be deconstructed to the above two levels, since it is not clear that states can or will represent their populations if their capacity is enhanced. Therefore, legitimacy must be leveraged for both national and global governance processes through a remedial governance structure that will play a dual role

42 See ibid.; Bogdandy, Dann, & Goldmann, *Exercise of International Public Authority*, above Fn. 21.

43 See Sadurski, "Supranational Public Reason", above Fn. 31.

44 See Franck, T, "Legitimacy in the International System" (1998), 82 *American Journal of International Law*, 705 (731); Franck, T, *The Power of Legitimacy among Nations*, 1990, 101; Kingsbury, B, "Sovereignty and Inequality" (1998), 9 *European Journal of International Law*, 599.

45 See Krasner, *Power, the State and Sovereignty*, above Fn. 28; Krasner, S, *Sovereignty: Organized Hypocrisy*, 1999; Jackson, R, *Quasi-States: Sovereignty, International Relations, and the Third World*, 1990.

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of improving representation of targets and participation in global governance institutions. This paper proposes that regional governance structures might serve this purpose.

IV Regionalism: Arguments for a Remedial Governance Structure

Regional integration in Africa has been regarded as a necessary step towards accelerated development on the continent. The belief is that greater gains would be made if states pooled their resources together instead of acting individually. The common history of colonialism, global marginalization, and underdevelopment, is expected to form an important basis for this shared effort.[46] But, in the past half-century, as more efforts have been made towards integration, the expected development has not followed.[47] Despite elaborate regional goals and objectives, regional institutions in Africa have not been effective in facilitating development, for two major reasons. First, they have also suffered significant capacity deficits, especially considering the weak status of their members in this regard. Second, regional institutions have not been effectively utilized as a legitimacy-enhancing mechanism to engage citizens and global actors for effective institutional development.

This section describes the current framework for regional integration in West Africa, using the Economic Community of West African States (ECOWAS) to illustrate the regional response to the Ebola outbreak. Then, it examines the governance challenge of regional institutions. Finally, it discusses the need to enhance the capacity of and leverage legitimacy through regional institutions.

1 The Current Regional Framework

ECOWAS is the primary regional institution in West Africa, established by treaty in 1975 with the primary purpose of promoting economic development in West Africa. Membership consists of 15 countries, most of which

46 Nkrumah, *Africa Must Unite*, above Fn. 8, 170.
47 See Senghor, J, Ashurst, M & Bhalla, J et al., *Going Public: How Africa's Integration can Work for the Poor*, 2009.

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have experienced violent conflict, military coups, and authoritarian governments within the past five decades.[48] Consequently, in a revised treaty in 1993, ECOWAS expanded its mandate and institutions to include non-economic principles such as the promotion of democracy, maintenance of peace and security and respect for human rights.[49]

ECOWAS functions through political and administrative institutions with general functions as well as specialized institutions with particular functions. It has an executive, a legislative, and a judicial arm. Community institutions rely on states for implementation of Community policies and decisions, while they provide administrative and technical guidance and support. It is a largely state-driven process that involves limited collaboration with and no room in essential decision-making for civil society and the private sector. This is the framework within which a regional response was crafted to address the Ebola crisis.

The two main institutions responsible for managing the response to the Ebola crisis were the Commission and the West African Health Organisation (WAHO).[50] WAHO, the specialized institution responsible for health matters within the region, was established in 1987 and came into operation in 1998 when its Headquarters was instituted in Bobo-Diolassou, Burkina Faso, but it did not begin active operations until 2000. It was established in an effort to create a health institution that would serve francophone and non-francophone states in West Africa. The ECOWAS Commission, which was also responsible for providing a response to the Ebola outbreak, is described as “the main engine room for all ECOWAS programmes, projects and activities”,[51] and its Directorate of Humanitarian and Social Affairs is also responsible for regional health matters.

Although WAHO regards itself as financially autonomous, its funding comes from the ECOWAS budget, which is approved by the recommendation of the Council of Ministers (the Council),[52] and from donors. Its governance framework is also tied to the ECOWAS political leadership.[53]

48 The Republic of Benin, Burkina Faso, Cape Verde, the Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo.

49 See Kufuor, K O, *The Institutional Transformation of the Economic Community of West African States*, 2006; Ogwu, J & Alli, W (eds.), *ECOWAS: Milestones in Regional Integration*, 2009.

50 See Article III, Protocol of WAHO (1987).

51 About the Commission see, http://www.comm.ecowas.int/about-ecowas/.

52 See Articles 10 and 69 of the 1993 Revised ECOWAS Treaty.

53 See Article IX of the Protocol on the Establishment of a West African Health Organisation (A/P.2/7/87).

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WAHO also relies significantly on states for the implementation of regional health policies and plans, including health financing.

Under this framework, WAHO informed Member States of its critical capacity deficit and its consequent inability to provide an adequate response to the Ebola outbreak. In addition to this capacity deficit, it was also constrained by the institutional hierarchy of ECOWAS, as it could not execute a comprehensive plan to control the outbreak without clear approval from the Authority. Approval was given at the July Summit of the Authority, about four months after the diagnosis was made. At the Summit, the Authority directed WAHO and the Commission to adopt a regional approach to contain the spread of the virus, and it established a solidarity fund for Member States to contribute towards these efforts.[54] The consequent regional approach devised by WAHO consisted of policy, advocacy and intervention strategies, described below.

After the July Summit of the Authority, WAHO convened a meeting of the Health Ministers of the region to develop a regional response. This response involved setting up institutional structures to address the crisis as a regional rather than a national challenge.[55] Non-state actors were also involved in implementation mechanisms set up by WAHO but not in the decision-making that was to drive the regional response. The strategy was meant to assist states to coordinate their response through information campaigns and workshops to foster community responses. However, weaknesses in the broader regional structure were revealed by the incidence of border closures, quarantines and travel bans, which affected citizens who were ordinarily used to crossing the borders freely for economic, social and cultural reasons. These border closures also constrained regional efforts at addressing the crisis. This affected two core aspects of the integration mandate – open borders and Community citizenship. The free movement of persons, capital, and goods across borders is a core component of the West

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54 Final Communiqué: Forty Fifth Ordinary Session of the Authority of ECOWAS Heads of State and Government (July 10, 2014), No. 134/2014, available at http://news.ecowas.int/presseshow.php?nb=134&lang=en&annee=2014.

55 See Traore, M, "Ebola in West Africa: ECOWAS Health Ministers Pledge for Synergy of Appropriate Strategies and Efficient Response to Ebola Virus Disease (EVD) outbreak in ECOWAS Member States" (August 2014), *WAHO Press Release*, available at http://www.wahooas.org/spip.php?article731&lang=en.

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African integration agenda.[56] In fact, ministers of Member States declared ECOWAS a borderless region in 2001, because national borders were to be open to Community citizens, who were entitled to the rights of free movement, residency and establishment in all states within the region.[57] However, in the wake of the epidemic, the regional obligation of states to respect the right of free movement of Community citizens was violated by Member States that were, in reality, accountable only to themselves.[58] While the right to free movement is not an absolute right, the Community's legal and policy framework has not been clear as to its boundaries. One of the guiding principles of WAHO is that it will avoid the spread of diseases in the region that may arise from the free movement of persons, but the Organization has no clear mechanism in its latest strategic plan on how to do this, and when Member States responded with unilateral border closures, WAHO did not appear to have provided any guidance on appropriate responses.[59] Thus, regional efforts to control the outbreak were undermined not only by unilateral national actions but also by unclear regional mechanisms to guide members in their response. These factors have made it difficult for regional institutions to compel state compliance with regional obligations.

The advocacy aspect of the regional response involved organizing cross-border initiatives that brought together stakeholders from different countries to provide information and support for border communities.[60] But these efforts were thwarted by national responses to the crisis which, as explained above, undermined the regional response.

As part of the intervention strategy, WAHO was to deploy personnel to the affected countries. The Organization sent out fewer than ten technical officials into the field after the outbreak began. It was not until December 2014, a year after the first case and more than half a year after the diagnosis was made, that WAHO sent out its first robust team of 150 trained medical

56 Article 27 of the 1975 ECOWAS Treaty, Article 1 of the 1993 Revised Treaty, a 1979 Protocol on Free Movement of Persons, and subsequent Decisions and Declarations of the Authority of Heads of State and Government and the Council of Ministers guarantee a right of free movement to Community citizens.

57 Community citizenship was defined in the 1982 Protocol on the Definition of Community Citizenship.

58 For restrictions on the right, see Article 4 of the 1979 Protocol Relating to the Free Movement of Persons, Residence and Establishment.

59 WAHO, *Strategic Plan 2009-2013*, 2009, 25.

60 Ibid.

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professionals from Member States (Cote d'Ivoire, Ghana, Mali, Niger, Nigeria, and Togo) to assist with the medical response.[61] WAHO worked with the African Union in the implementation of its African Union Support to the Ebola Outbreak in West Africa (ASEOWA), which deployed more than 700 national and regional health workers. Meanwhile, at this point, the international NGO, *Médecins Sans Frontières* (MSF), had already engaged more than 300 international medical professionals and more than 3000 locals to tackle the outbreak.[62] However, there has been no evidence of coordination between the regional workers and NGOs responding to the crisis. In fact, responders complained about the poor coordination and the absence of a central leadership.[63] Needless to say, the intervention strategy of WAHO did not reveal an effective regional response.

In addition to policy constraints, WAHO complained of funding and staffing shortages, amongst other things. So, while a paper strategy was being developed by the Organization, actual implementation was not underway – nor was it realistically foreseeable – as the resources for any such intervention were unavailable. Hence, WAHO has not featured significantly in discussions about the response to the epidemic because its role on the ground was minimal at best.[64]

From the above, the limitations placed on the regional response can be attributed to a regional capacity deficit as well as lack of accountability of Member States towards the fulfillment of their regional (and national) obligations.[65] The control of WAHO by ECOWAS states, in terms of both participation and output, has meant that the governance deficit of those states

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61 See WAHO, *WAHO Recruited Medical Personnel Finally Deployed to Boost EBOLA Response Effort*, http://www.wahooas.org/spip.php?article836&lang=en; WAHO, *Fact Sheet: African Union Response to the Ebola Epidemic in West Africa, as of 1/26/2015*, available at http://bit.ly/2mOCh5D.

62 See Doctors without Borders, *Ebola*, http://www.doctorswithoutborders.org/our-work/medical-issues/ebola.

63 See Garrett, "How the WHO Mishandled the Crisis", above Fn. 6.

64 An exception is Bappah, Y H, "In Ebola Response, ECOWAS Offers Best Hope of Success" (August 2015), *IPI Global Observatory*, https://theglobalobservatory.org/2015/08/ebola-ecowas-manu-river-union-liberia-sierra-leone/.

65 See El-Ayouty, Y & Zartman, W (eds.), *The OAU after Twenty Years*, 1984; Asante, S K B, *The Political Economy of Regionalism in Africa: A Decade of The Economic Community of West African States*, 1986; Kufuor, *The Institutional Transformation Transformation of the Economic Community*, above Fn. 49; Bach, D, *Regionalism in Africa: Genealogies, Institutions and Trans-State Borders*, 2015.

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has been transferred to the regional level.[66] Therefore, regional institutions like WAHO are unable to provide a buffer for states to overcome domestic and global challenges. In order to improve the performance of regional institutions, it is important to address capacity and legitimacy challenges through the regional framework to build strong alternative institutions in regions with significant governance challenges.

2 Why Regional Governance?

Alesino and Spolaore note that, "borders […] are the outcome of choices and interactions by individuals and groups who pursue their goals under constraints".[67] They argue that "the sizes of national states (or countries) are due to trade-offs between the benefits of size and the costs of heterogeneity of preferences over public goods and policies provided by government".[68] The authors try to produce an economic analysis of optimal state effectiveness based on considerations relating to size. This is important for the study of African states because the borders have defined not just the legitimacy but also the capacity of those states.[69] Control over territory in Africa has been undermined by limited infrastructure, governance deficits, and low citizen loyalty, and the size of the states has, along with their historical, economic and political development, contributed to their lack of control. There are indeed domestic collective action problems because the central state is unable – sometimes unwilling – to supply public goods, and individual (or group) incentives to cooperate are greatly limited. Therefore, the capacity and legitimacy deficit of African states are inextricably linked.

Regional institutions can provide the opportunity to combine big development with small development by raising resources to support members to cover risks that they face from capacity and legitimacy deficits, in areas such as healthcare, financial security, peace building, and infrastructure.[70] The incentive for states to participate would be access to this increased capacity, which will help alleviate their capacity deficits. Citizens will also

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66 See WAHO, *ECOWAS Launches Full Scale Fight against Ebola*, http://www.wahooas.org/spip.php?article802&lang=en.

67 Alesina, A & Spolaore, E, *The Size of Nations*, 2003, 2.

68 Ibid., 3.

69 See Ibid., 11. Okafor, *Redefining Legitimate Statehood*, above Fn. 9, 127; Herbst, *States and Power in Africa*, above Fn. 14.

70 See Pritchett, "Fragile States: Stuck in a Capability Trap?", above Fn. 32.

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benefit from increased capacity where regional institutions are not focused on upholding unaccountable states but rather on fostering communities that exist within states and across borders. Thus, regional institutions must provide access to resources that are not available at the national level.[71] This is one of the objectives of WAHO in its strategic plan, but as the Organization recognized even before the outbreak, it did not have the resources to play this role in the region.[72]

In addition to capacity enhancement, regional institutions can also enhance state legitimacy and tackle fragmentation by deemphasizing borders and providing citizens with access to resources across borders. Migration and trade policies as well as cross-border programs have the binary effect of facilitating regional trade while also bringing together societies and giving citizens greater freedom to develop their capacities. Although functioning regional institutions are detrimental to certain rent-based interests in Member States that seek to consolidate power by strengthening the borders and undermining regional policies,[73] the growing participation of non-state actors, foreign states and International Organizations in national, regional and global processes can bring multidimensional power dynamics into play in regulating the control of states and other political interest groups in regional institutions.

Therefore, regional institutions can serve two very important functions in addressing the governance challenges of Member States. First, with regard to the capacity deficit, regional institutions will pool together the resources of Member States as, amongst other things, a premium for indemnifying states against losses that may arise from national and regional challenges. Second, the legitimacy deficit of states can be addressed by providing a venue for citizens to seek public goods that cannot or will not be supplied by other governance actors, including states. Although WAHO sees itself as playing an important coordination role among stakeholders, the Organization does not appear to recognize its role as a legitimizer of its

71 See Karen, A K, Helfer, L, & MacAllister, J, "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" (2013), 107 *American Journal of International Law*, 1; Ojomo, E, "Competing Competencies in Adjudication: Reviewing the Relationship between the ECOWAS Court and National Courts" (2014), 7 *African Journal of Legal Studies*, 87.

72 See WAHO, *Strategic Plan 2009-2013*, above Fn. 59.

73 See Herbst, *States and Power in Africa*, above Fn. 14, 253; Englebert, P & Hummel, R, "Let's Stick Together: Understanding Africa's Secessionist Deficit" (2005), 104 *African Affairs*, 399.

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Member States and of global institutions like the WHO. Instead it has focused mainly on building its own capacity by enhancing its resources.[74]

3 Addressing the Capacity Deficit in Regional Institutions

When the officials of WAHO were faced with the Ebola outbreak in ECOWAS Member States, they had to rely, to a large extent, on national institutions in Member States to provide a response.[75] Also, since WAHO relies significantly on ECOWAS for its budget, the capacity deficit that makes ECOWAS Member States unable to handle the outbreak also exists at the regional level, creating a challenge for WAHO to provide the adequate response to tackle the epidemic.[76] This capacity deficit has been recognized as a major hindrance to WAHO's fulfillment of its objectives of fostering national and regional health governance.

While regional institutions can be relied upon for the supply of national public goods, especially in small states or weak states that are unable to supply those goods by themselves, they must incentivize states to participate in the regional enterprise.[77] Since the pursuit of individual interests will usually outweigh the pursuit of collective interests, weak states are more likely to cooperate to gain from the benefits of collective action, especially if their contributions are minimal and if the goods in question are exclusive public goods, which do not require "jointness of supply".[78] Public health issues such as the eradication of contagious disease involve the supply of weakest link public goods so that the supply of the good depends on the

74 Institution building of WAHO has been a part of the Organization's two strategic plans, in 2003 and 2009.

75 See Asante, S K B, *Report on a Study on National Focal Pints for ECOWAS and NEPAD Initiatives*, July 2004, (On File with Author).

76 See WAHO, *Strategic Plan 2009-2013*, above Fn. 59; WAHO, *Programme – Diversification of Health Financing Mechanisms*, (On File with Author).

77 See Snidal, D, "Relative Gains and the Pattern of International Cooperation" (1991), 85 *American Political Science Review*, 701.

78 See Olson, M, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 1965, 38; Ostrom, E, *Governing the Commons: The Evolution of Institutions for Collective Action*, 1990, 6.

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participation of the weakest link.[79] However, where the members of regional organizations consist of relatively small and large states, the large states may be expected to bear the bulk of the cost of providing the collective goods if cooperation provides sufficient incentives for them to do so.[80] Large states, like Nigeria, with significant interest in the regional integration process, have invested remarkable capacity, including funding and personnel, towards the initiation, development and maintenance of regional integration in West Africa.[81] However, smaller states with access to fewer resources are more committed to the integration process for their individual benefits and may not be committed to the supply of regional public goods. Consequently, where there are opportunities to develop state capacity, smaller states will pursue such opportunities instead of opportunities for regional capacity development.[82] This would mean that, in regions with fragile states, the regional system is held together by large states with governance challenges, while the smaller states rely on the regional system, the larger states, and whatever other external capacity they can generate to boost their weak capacity, thus placing added strain for the supply of weakest link public goods on larger states. In other words, the hegemon must provide incentives to hold together the collective, and this includes providing rewards to smaller states for cooperating, usually through its significant contribution to the regional project.[83] In the West African context, Nigeria has played this role, but, the country's desire to play a leadership role in the region, its interest in limiting the influence of extra-regional powers such as Gaddafi's Libya, and its pursuit of regional stability have shaped its commitment to making significant unilateral contributions to the West African

79 See Barrett, S, *Why Cooperate? The incentive to Supply Global Public Goods*, 2007; Bodansky, D, "What's in a Concept? Global Public Goods, International Law and Legitimacy" (2012), 23 *European Journal of International Law*, 651.

80 See Snidal, "Relative Gains and the Pattern of International Cooperation", above Fn. 77.

81 See Bach, D, "The Politics of West African Economic Cooperation: CEAO and ECOWAS" (1983), 21 *Journal of Modern African Studies*, 605 (616); Vogt, M A, "The Involvement of the Economic Community of West African States in Liberia's Peace-keeping" in Vogt, M & Aminu, L S (eds.), *Peace Keeping as a Security Strategy in Africa*, vol. 1, 1996, 342, for a discussion of the role of Nigeria in the peace-keeping intervention.

82 See Olson, *The Logic of Collective Action*, above Fn. 78.

83 See Snidal, "Relative Gains and the Pattern of International Cooperation", above Fn. 77.

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regional process.[84] Additionally, Nigeria's own governance challenges mean that its commitment to and engagement in the regional process is not consistent. In the case of health, Nigeria has not shown as much interest as it has in other areas, such as collective security and money laundering. This has meant that, until recently, regional health governance has remained underfunded and under-resourced.

In West Africa, capacity deficits make it difficult to set up the kind of "insurance scheme" required at the regional level to "share the risk of an uncertain environment" [85] caused by state weakness, as can be seen from the spillover of regional crises in areas ranging from health to terrorism. The insurance benefits of regional integration are many, but states must determine "whether such insurance benefits […] can be sufficient to offset the political and economic costs associated with [… cooperation]".[86] Thus, regional integration must provide added incentives for states to not only channel their limited resources towards the supply of regional public goods for collective interests, but also give up limited external resources to regional development.[87] One way for regional institutions to provide the incentives required for states to invest in the regional process is by protecting individual states from the cross border risks associated with the weakness of national institutions. This way, the collective interest will be tied to addressing individual interests of states by providing a security against domestic and external risks.[88] This is a driving force for WAHO's current health financing program which seeks to enhance and diversify funding opportunities for national and regional health programs, as well as its capacity building program that aims to build its personnel and infrastructure to enable it to fulfill its objectives.[89]

Based on the foregoing, WAHO has recognized its capacity deficit and emphasized the role of capacity for fostering regional health governance in West Africa, but it has neglected to discuss national, global and regional legitimacy concerns that must also be addressed. This paper introduces the

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84 See Bach, "The Politics of West African Economic Cooperation", above Fn. 81; see also Nwokedi, E, "Sub-Regional Security and Nigerian Foreign Policy" (1985), 84 *African Affairs*, 195; Babangida, I B, "Reaffirming the Raison D'etre of the ECOWAS" in Nwachukwu, I (ed.), *Nigeria and the ECOWAS since 1985: Towards a Dynamic Regional Integration*, 1991.

85 Ostrom, *Governing the Commons*, above Fn. 78, 13.

86 Alesina & Spolaore, *The Size of Nations*, above Fn. 67, 6.

87 Olson, *The Logic of Collective Action*, above Fn. 78.

88 See Alesina & Spolaore, *The Size of Nations*, above Fn. 67.

89 See generally, WAHO, *Strategic Plan 2009-2013*, above Fn. 59.

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argument that it is important to build the capacity of regional institutions while also leveraging their legitimacy in order to make them more effective to deal with the governance challenges in Member States.

4 Effectiveness, Control and the Legitimacy Deficit: Leveraging Legitimacy through Regional Institutions

As noted above, legitimacy here refers to sociological legitimacy; thus, it is the acceptance by a governance target of the exercise of power by a governance actor.[90] If we think of citizens as the main governance targets affected by the exercise of power by national, regional and global health governance actors, then they are legitimate to the extent that these targets accept them as such. This is quite distinct from legitimacy based on effectiveness, capacity or some other normative value.[91] Acceptance, for the current purpose, can be based on historical, cultural or some other sociopolitical affiliation, and it is an origin-based phenomenon more than it is a goal- or consequence-based phenomenon.[92]

In the Ebola case, where the state lacks the resources to foster the supply of public goods, this is not the basis for the absence of its legitimacy but only further entrenches the legitimacy gap. On the other hand, the legitimate communities that form the basis for cooperation amongst citizens do not derive their legitimacy from being effective at fostering the supply of public goods, so, their capacity deficit does not diminish their legitimacy. Finally, external actors such as intergovernmental organizations and NGOs that have significant capacity cannot accumulate legitimacy simply by being effective. Hostility towards health workers in rural communities is evidence of this.[93]

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90 See Weber, *Economy And Society*, above Fn. 10.

91 See Buchanan, *Justice, Legitimacy and Self-Determination*, above Fn. 31.

92 Weber distinguished between *zweckrational* and *wertrational*, the former referring to rational action influenced by the expectation of outcomes and the latter referring to that influenced by the belief in the absolute value of an action or condition. Origin-based legitimacy is rational in the second sense. Weber, M, *The Theory of Social and Economic Organization*, (translated by Henderson, A M and Parsons, T), 1947, 115.

93 See, for instance, Sandner, P, “Attacks on Health Workers Hamper Ebola Fight” (Februar 18, 2015), *DW*, available at http://bit.ly/2mi9Y31.

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The legitimacy of regional institutions in this context flows from two realities: first, the citizen, marginalized by the state and without access to basic resources, is constantly in search of an alternative system for the supply of public goods – a parallel system, if you will; second, the trans-border realities of African societies whose social, cultural and political networks are not adequately represented within clear border territories are better represented within a "borderless" framework.[94] Thus, the regional system provides an alternative governance structure that focuses more on inclusion than on sovereign power or effectiveness, thus diffusing the central power of the state without undermining it.[95]

Where regional institutions serve as instruments for the facilitation of free flowing relations amongst communities, they would enhance legitimacy by diffusing the central power of the state.[96] For instance, if ECOWAS institutions had been effective in maintaining border flows and fostering cross border activities, they would have enhanced not only regional institutional legitimacy but also state legitimacy by fostering relations between subnational and transnational groups, sites of legitimacy, on the one hand, and national, regional and global institutions on the other. Furthermore, regional institutions can also serve as a buffer between national and global institutions, to address issues of legitimacy where states are governance targets.[97] In this regard, WAHO had an opportunity to coordinate the multitude of governance actors that intervened in responding to the outbreak. The affected states were not in a position to provide such coordination, and ECOWAS should have provided not just an intervention mechanism but a coordinating mechanism, being representative of the affected states and other states in the region as well as of the communities that were being affected within and across state borders. In other words, regional institutions could address different levels of the legitimacy gap in health governance.

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94 Okafor, *Redefining Legitimate Statehood*, above Fn. 9; Kaplan, S, *Fixing Fragile States: A New Paradigm for Development*, 2008; Young, *The African Colonial State in Comparative Perspective*, above Fn. 9; Herbst, *States and Power in Africa*, above Fn. 14.

95 See above Fn. 27.

96 See Kaplan, *Fixing Fragile States*, above Fn. 94; Joseph, R & Herbst, J, "Responding to State Failure in Africa" (1997), 22 *International Security*, 175 (182).

97 See Loevy, K, "The Legal Politics of Jurisdiction: Understanding ASEAN's Role in Myanmar's Disaster, Cyclone Nargis" (2014), 5 *Asian Journal of International Law*, 1.

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The regional system can serve as a means of diffusing national and global power by fostering decentralized and collective systems of power, respectively. It does this without necessarily challenging the central systems of power at the national and global level, so national ministries and IGOs would still play a significant role in region-led processes. But, by allowing their processes to pass through regional institutions, they help overcome fear of domination by governance targets that they seek to influence.[98] Where regional institutions build capacity without addressing these legitimacy concerns, they run the risk of alienating citizens and communities and providing even fewer incentives for cooperation amongst their Member States.

5 Challenges to a Regional Alternative

The greatest challenge to constructing a regional alternative is in providing incentives for states to participate in a process that might be seen as undermining their power by fostering alternative institutions that compete with them for authority and for scarce resources. The current reality is that states control the regional process. States control the level of accountability that regional institutions can promote as well as the level of competition between national institutions and regional institutions for scarce global resources. Thus, in order for states to allow greater cooperation in the regional process, the regional enterprise must provide significant individual benefits for states. Additionally, the bulk of the cost must be borne by state and non-state actors with greater incentives to cooperate than to deflect. Realistically, the cost of forfeiting political supremacy and capacity building resources should not surpass the benefit of building strong regional institutions that foster the supply of regional public goods not just to national institutions but to citizens. One way to address this challenge is by providing regional frameworks in selected areas of intervention that would pose the least challenge to states and provide significant gains to them and their citizens.[99] This paper provides broad conceptions of the issues to be considered in developing such a system in the hope that this would serve as a starting point for thinking differently about the development of innovative

98 This is Weber's definition of power without legitimacy. See Weber, *Economy And Society*, above Fn. 10.
99 Alesina & Spolaore, *The Size of Nations*, above Fn. 67, 210.

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regional systems that comprehensively address the weakness of state institutions in West Africa and similar regions.

V Conclusion: Rethinking Regional Governance

As the Ebola epidemic comes to an end in West Africa and development actors focus their attention on building the capacity of the states most affected, especially in healthcare provision, it is important to place significant focus on the comprehensive governance deficits in those states and the development of innovative frameworks for overcoming those deficits. The current international legal system does not address state legitimacy as it places critical importance on the territorial sovereignty of states, thus underpinning the state as the primary locus of political community. However, in many instances, the state has come under attack from within and without. Regional institutions were meant to address this crisis by innocuously deemphasizing the borders – and in effect the territorial dominance of the state – and leveraging the legitimacy of systems that are recognized by citizens as valid representation of their interests and identities. They are also meant to serve as buffers against external "attacks" against the state. However, the current regional framework is undermined by governance challenges that reveal capacity and legitimacy gaps, mostly flowing from the control of regional processes by troubled states.

In order to address the shortcomings of the current regional system, it is important to focus on enhancing the capacity and harnessing the legitimacy of regional organizations such as ECOWAS so that they can foster the valid exercise of power by political institutions, which is lacking in the current governance system.

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