

# THE LEGITIMACY OF INTERNATIONAL INSTITUTIONS

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## The Challenge for an Account of Legitimacy

The analysis of legitimacy of international institutions presents a distinct challenge because we do not yet have an entirely clear picture of the nature of international society and the position of international institutions within that society. The institutions are not very much like state institutions or voluntary associations. At the same time international society shares features of both of these kinds of association. This is an important observation because these are the classical kinds of association to which ideas of legitimacy have traditionally been applied. And so the notion of legitimacy that we apply in the case of international law and institutions will have some features of both of these.

It is worth our while to have some further observations about the international system before we proceed. One, we need to have on the table the list of entities that are relevant to the characterization of international society. First, the most important entities are the states that make up the international system. Second are the international institutions that states have created but that in some cases exhibit some independence from the states that have created them. We will discuss these in some detail. Third are nongovernmental organizations that play a role in international society. Fourth are multinational corporations. Fifth are individual persons. All five of these elements are directed by international law and institutions, although states are still the principal subjects. Individuals are only marginally directly subjected to international law; mostly they are indirectly subjected to it.

Two, the system is highly fragmentary. Distinct institutions govern functionally distinct as well as regionally distinct activities. There are regional economic organizations such as the European Union. The World Trade Organization has a kind of legislative function over its members' trade relations. Global environmental treaties such as the Montreal Protocol are designed to regulate some specific global environmental matters. The United Nations Security Council has assumed some quasi-legislative functions since the end of the Cold War, but these are still fairly limited (Szasz 2002). The Security Council also exercises a kind of enforcement authority by permitting states to act against other states that threaten international peace and security. Other institutions

exercise a kind of administrative authority. They make rules within the framework of a treaty that establishes the institution and that mostly help implement the more general treaty law. The Montreal Protocol has provisions for rule making and rule alteration that are along these lines (Kingsbury 2007). Some international institutions exercise judicial authority as well. The dispute-settlement mechanism of the World Trade Organization has the authority to settle disputes between states when a member state complains that another member state has violated its agreements. The International Court of Justice adjudicates as well but only for those states that accept jurisdiction in the case at hand. And there are international lending agencies, which are lenders of last resort to states in economic crisis.

In addition, there are a variety of institutions that create what is called "soft law." This is law that is not binding on the state parties, though there can be pressure on states to conform to this law. Declarations and other acts of the United Nations General Assembly are generally construed as nonbinding. The rule making of many different institutions also has soft-law status.

What can make these institutions legitimate? That is, how might these institutions have the powers to create binding obligations for states and/or individuals? The traditional answer to this question is that international law is binding on states primarily because and only because states consent to it. The *Statute of the International Court of Justice* lists in addition that the sources of international law include custom, the general principles of international law and the opinions of eminent jurists. But the two main materials are treaties and customary international law.

In this essay, I will attempt to lay out the idea of state consent as the ground of the legitimacy of international institutions, its bases and its limits, as well as some proposed ideas about how to extend and modify it. In the end I will argue that state consent, suitably modified, must play a central role within a larger system of international decision-making. I will start with some observations about legitimacy and some of the reasons for which consent has been taken seriously as a basis of legitimacy. I will then articulate the doctrine of state consent. Then I will go through a series of objections to the doctrine that can be met by the doctrine, in some cases only with important modifications. Finally, I will discuss a series of objections that can only be met by supplementing state consent with two other important requirements on the system of international decision-making: a constitutional system with enabling and limiting components and a set of internal standards for particular international institutions.

### Legitimacy

Let us start with some of the elements of the idea of legitimate authority. I will understand legitimate authority as involving at least a moral power to impose a set of rules by which the others must regulate their conduct. These rules can be straightforward duties, they can be power-conferring rules (or rules that specify how persons may bind themselves and others) and they can be rules conferring permissions. Usually legitimate authority involves the power to impose all three of these rules but the imposition of duties on others is the most central case and the hardest case of legitimate authority because it involves the imposition of burdens on persons or groups. Possession of a moral power is a minimal sense in which a person or group can be said to have a right to rule. It is not the only thing that can be meant by this; sometimes the right to rule involves in addition a claim on the part of the ruler to the obedience of the ruled so that the

obedience is owed to the ruler. Though this latter relation holds in some important cases, it is not necessary for legitimate authority.

The exercise of the moral power grounds the duty in the subject. In this way the subject has a content-independent reason for complying with the directive of the ruler. He has the reason to comply because the ruler has exercised the moral power. Hence he has a reason to obey.

The moral function of legitimacy is to have a public moral standard for making decisions when there is considerable disagreement among the subjects. Subjects have moral reasons to go along with the legitimate authority even when they disagree with it. This enables societies to pursue basic moral purposes in a coordinated fashion.

How does a person or group of persons acquire such a power? There are, in contemporary thought, three main types of answer to this question. They needn't be mutually exclusive. The first answer is that a person or group of persons acquires a moral power to impose duties on others only if the others have consented to the group possessing the moral power. The consenters thereby acquire content-independent reasons to go along with the directives. The second answer is that the moral power is somehow possessed collectively by a democratic assembly, in which case the subjects must comply with the democratically made decisions. The third kind of reason is an instrumental one. If a purported authority is reasonably just and its directives enable subjects to act better in accordance with reason, then the purported authority has a moral power to impose rules on its subjects.

The consent and democratic conceptions of legitimacy are distinctive in two ways. One, they establish, in addition to a moral power in the decision-maker, a claim right in persons to whom the compliance is owed. Consent establishes a claim right either in the power holder or in other persons subjected to the power holder (as in the case of classical consent theory) to the compliance of the consenters. The democratic conception establishes a claim right in the democratic assembly to the compliance of every member in the society. Two, the consent and democratic conceptions are distinctively public standards of legitimacy in the sense that each of these standards is one that subjects can see to be in effect for the most part. In this respect the instrumental basis of authority is a weaker basis. It cannot serve the public function of legitimacy as well as the consent or democratic principles, since the authority is based in the quality of the outcomes, which are precisely the subject of disagreement among the members. For this reason, it is worthwhile trying to figure out whether institutions that purport to have authority can have it on the basis of consent or democratic principles. These will be the focus of this essay, though I do not wish to suggest that the instrumental conception of authority is of no significance. One last remark: I will not focus here on ideas about global democracy because I do not think that we are even close to realizing the kinds of institutions that would be necessary for global democracy (Christiano 2010). Instead, we will see how democratic ideas can inform and modify the traditional idea of legitimacy in international institutions: through state consent.

### Consent

Consent gives a fairly straightforward answer to the question, how does one person acquire the moral power to impose duties on another? Consent does this in part by having the person impose the duty on himself, with the concurrence of the power holder, as one does with a promise. The latter is a fairly uncontroversial form of imposition of

duty. Furthermore, it involves a duty of the right type. When I promise to do *x*, I have a duty to do *x* merely on the ground that I have promised. The promise is a content-independent reason for doing *x*. And if I promise to obey a ruler, that gives me a content-independent reason to comply with the ruler's directives (Simmons 2001).

Usually consent must be given voluntarily and the person or group to whom consent has been given must not have defrauded the consenter. Furthermore, consent must be accompanied by some additional conditions under which the consent creates the moral power. For example, the consent must be given by a minimally competent person and it must not be given to obviously and seriously immoral commands. We shall consider some other conditions in what follows.

There are three traditional grounds for consent as a requirement on legitimate authority. The first is that normally a person is morally at liberty to do or not to do the kinds of things that eventually come under the scope of an authority. She may do it or not and act on the basis of her own moral judgment about the quality of the actions at issue. Consent to the authority is what suspends the moral liberty in the sense that the consenter must now comply with the authority's directives, merely because the authority has said so. Consent suspends this moral liberty in a way that is compatible with the freedom of the consenter. Hence the requirement of consent protects the freedom of persons. The second ground is that the requirement of consent protects the moral equality among persons. Unlike the relation between parent and child, the relation between two adults is normally a relation among equals, which only consent can change. But consent does this by preserving the basic equality. Finally, the requirement of consent and the possibility of refusal as well as of terminating consent creates a relationship of accountability between the purported authority and the subject, since the subject can change the relationship at will. In sum, the requirement of and power to consent enable me to advance my interests and concerns as a free and equal person by binding myself to others.

The most straightforward application of the consent basis for legitimate authority is voluntary association. When I join a club, I thereby acquire a reason to go along with its rules and I accept the normative power of the duly constituted authority in that group to change the rules. When my consent to this authority is required and I am able to consent, my freedom and equality are preserved even when I bind myself to the voluntary association.

Some have argued that consent is the basis of the legitimate authority of the state (Locke 1986/1690), but this is a weakly grounded application of the consent idea. The reason why the requirement of consent is not very strongly grounded in this context is that it doesn't protect the moral liberty of action or the equality of persons, nor does it secure the accountability of power to the consenter. Possession of the moral liberty usually involves the permission to act in a certain way or not and it involves the permission to act in accordance with one's own judgment about how to act. These permissions clearly hold in the normal case in one's relations to voluntary associations. Furthermore, the fact that I must consent to membership in the club and can exit it makes the club accountable to me to some extent.

But the permissions associated with moral liberty do not hold so clearly in the case of a reasonably just state. Here, in order to coordinate with others on a reasonably just course of action, one must follow the directives of the state officials—so moral liberty seems not to be very extensive with respect to the directives of the state. Thus the requirement of consent that is grounded in the protection of these permissions seems not to be present

to any great degree (Raz 1986). Furthermore, consenting and refusal of consent seem to make for little accountability of the state to the person, except in unusual cases. My consent or lack of consent communicate very little to the state about my attitudes towards the state and impose little or no penalty on the state. Finally, in a democratic state, my equality with others is preserved in the democratic process of collective decision-making. I do not say that consent can play no role here; I want to say that in the case of a reasonably just state, consent is at best required only at the margins.

### State Consent and Legitimacy

As I noted above, international institutions are neither state-like institutions nor voluntary associations, so the application of the consent idea to them poses distinct challenges. State consent is a large part of the traditional account of the legal obligations of international law. The *Statute of the International Court of Justice* lists treaties, custom and the general principles of law as the principal sources of international law (United Nations 1945, Article 38). The obligation of a treaty is grounded in the consent of the state parties to the treaty. The interpretations of treaties are usually based on the negotiations that preceded the treaty as well as the subsequent behaviors and statements of the state parties to the treaty. Furthermore, the Vienna Convention on the Law of Treaties asserts conditions for the validity of state consent that are very much like the usual conditions on valid individual consent to contracts (United Nations 1969, Articles 48–52). Most treaties, in addition, specify that it is permissible to exit the treaty in question (Helfer 2005). And states may tailor the provisions of a treaty to their particular interests by attaching reservations and understandings to their ratification of the treaty. Finally, treaties are agreed to one by one in a relatively fragmentary system. These features suggest a fair degree of accountability of international law to states through the process of state consent. And states have been traditionally conceived as morally at liberty to choose whether to join a treaty or not.

To be sure, I have been speaking in the previous paragraph of legal obligation, but given the power of promising to create obligations, it is reasonable to think that the consent of states under the right conditions and within reasonable moral bounds morally obligates the states.

There are four serious objections to the idea that state consent can ground obligations to international law.

#### *Democratic State Consent*

The first objection is that, while in the past international law may have mainly directed the actions of states, now international law directs the actions of individuals directly or indirectly. International law does hold individuals accountable for the violation of human rights in wartime as well as large-scale human rights violations in peacetime. But international law also directs individual action indirectly by requiring that states impose requirements on individuals. International trade law and international environmental law both impose requirements on states to alter their legal systems in various ways that direct the actions of individuals. But this suggests that the consent of states may not be sufficient for legitimacy since it is individuals who are directed (Bodansky 1999). A conception of the legitimacy of international institutions must somehow reach down to individuals who have content-independent reasons for action.

This is an important objection but it can be mostly met with an important modification to the idea of state consent. We might modify it by conjoining a democratic conception of political legitimacy with the consent theory. If we regard democratic states as having legitimacy with respect to their citizens, then we might think that the consent of democratic states to treaties could conceivably reach down to individuals, providing them with content-independent reasons to go along. Democracy has been thought to be a basis of legitimacy of states on the ground that to obey the decisions of a democratic assembly (within certain morally defined limits) is necessary to treating one's fellow citizens with equal respect, which we are duty bound to do (Christiano 2008). If we combine the state-consent doctrine with the idea of the democratic legitimacy of democratic states, we have a hybrid conception of the legitimacy of international institutions.

The inclusion of democracy as a condition for the validity of state consent greatly strengthens the moral grounds of the state-consent doctrine of legitimacy. We enlist the most powerful and most successful institution we know of for accommodating the interests of large numbers of people in a way that is accountable to those people in order to make international law and institutions accountable to persons. And we enlist an institution on which there is very widespread support within the international system (Franck 1996).

To be sure, this response to the objection leaves us with a difficult dilemma. We must discount the consent of nondemocratic states on the grounds that the consent merely reflects the interests and concerns of the elites ruling the society. Alternatively, we could count societies in some way partially accountable to their people on a scale, as in the case of the scales of democratization. This latter is a hazardous enterprise but at least it might take some account of the interests of the persons subjected to these societies.

#### *Fairness and State Consent*

A second important objection to the state-consent doctrine is that the consent of states is often gotten under conditions of unfair advantage taking. Unfair advantage taking requires its own analysis and I cannot hope to provide that here. But we might think that some exchanges entered into voluntarily and knowingly by individuals might still be morally quite defective. The usual conditions of unfair advantage taking in exchange involve two properly related elements. The first element is that the benefits of the exchange are quite disproportionately distributed when measured on some objective basis. The second is that the exchange occurs under conditions in which one of the parties has much greater bargaining power than the other. In the standard case this occurs because one of the parties can withdraw from the proposed arrangement only at great risk to his or her fundamental interests while the other party can take or leave the arrangement without much loss. The standard illustration is one in which a medical doctor comes upon a person who needs fairly rudimentary first aid to stop a life-threatening blood loss. The bleeding person cannot make it to a hospital on time and no one else is around. The doctor then asks a price that is much greater than the usual price for such treatment. The doctor can leave without much problem, but the bleeding individual must get the aid or face a highly likely prospect of death. Here we see the two elements together. It is crucial of course that the asymmetrical bargaining power explain the highly disproportionate distribution of benefits. Finally, it is crucial that the equitable distribution of benefits from exchange be itself Pareto superior to

no exchange. When these three conditions are met, it is usually thought that there is something morally defective about the exchange. In some cases, exchange under these conditions defeats the generation of any obligation from it (Gordley 2001).

Many have contended that some of the major international institutions have been brought about in just this kind of way. The World Trade Organization was created by the United States and the European Union offering to continue with the liberalized trade regime of the General Agreement on Tariffs and Trade with other countries only on condition that they accept the Trade Related Intellectual Property regime, a watered-down commitment to lowering barriers to agricultural trade and a strong Dispute Settlement Mechanism whose decentralized enforcement strongly favors large, wealthy countries. The relative market shares of the United States and the European Union ensured that they had much less to lose than smaller, poorer countries if the regime just fell apart. So the poor countries agreed (Steinberg 2002). But they have never ceased to complain of the evident unfairness of the arrangement and the legitimacy of the World Trade Organization has suffered greatly, at least in the eyes of the developing world (Narlikar 2009).

We need some notion of fair negotiation that goes beyond mere voluntariness and nondeception if we are to capture what is going on in the frequent criticisms of the World Trade Organization and others. But here, too, we face a difficult dilemma. If the negotiations have displayed substantial unfair advantage taking, does this imply that the agreements reached are not binding and that the institutions created do not have legitimate authority? In many respects, this is an attractive idea—but it does have a downside. Poor countries enter into these agreements because they desperately need the agreements. But wealthy states may refuse to enter agreements that are less advantageous to them for a variety of reasons, including, for example, the political power of agricultural producers. And agreements that are not binding or agreements that have more equitable distributions of the goods exchanged may be spurned in favor of other agreements. Then we will have equity but greater poverty. With the World Trade Organization, we have some improvement in the situations of the world's poorest countries, even though it is inequitable.

### *The Independence of International Institutions*

A third objection to the idea that state consent is the ground of legitimacy is that international institutions have a certain degree of independence from the states that have created them. This can come in a variety of forms. Some international institutions, such as the World Trade Organization, have independent judicial bodies that judge the complaints of members against other members on the basis of the agreements they have entered into and that authorize limited retaliatory action by one member against another that has been found in violation of an agreement. Some institutions, such as the Montreal Protocol, include modest rule-making committees that can bind states. And some institutions, such as the United Nations Security Council, have power to authorize military force and economic sanctions as means of enforcing basic rules of international security. Here the enforcement activity is carried out by the member states in accordance with the mandate given to them by the Security Council.

This objection can be understood in a number of ways. One, it may simply be asserting that there is some independence of the institutions from the states. But this does not by itself show that these institutions are not the voluntary products of states and

that they do not have their binding force from the voluntary acts of creation or joining by states. We see voluntary organizations in ordinary domestic societies with partially independent decision-making bodies and this fact does not undermine the idea that they obligate only those who have joined.

Two, some of these institutions involve modest delegations of powers to highly specialized and expert bodies. And one might think that these bodies have become unaccountable to the people in the states that have created these bodies. But it is hard to know how to take this objection. The problem of delegation to independent, specialized bodies is one that exists in contemporary democratic states. This problem has not been solved entirely but there are mechanisms of accountability in those states that work more or less well (Lupia and McCubbins 1998). It is unclear why this couldn't be done in the case of international institutions that are the products of democratic states.

### *Customary International Law*

The fourth objection to the state-consent approach starts from the observation that not all international law is created through treaties. A significant part of international law consists in customary international law. And customary international law is only weakly based on the consent of states. A rule of custom becomes binding on a state only if the state has not asserted persistent objections to it. If it has asserted such objections, the rule is not binding on it. If it has not asserted persistent objections, then the rule binds. This looks very much like a doctrine of tacit consent, but without the problems that have beset the Lockean idea of tacit consent to the state. First, the problem of how to interpret the lack of persistent objections is solved because states understand the persistent-objector rule. Second, the law has no authority over the persistent objector before it objects.

One problem with customary international law from the standpoint of the state-consent view is that there appears to be no way unilaterally to exit customary international law, unlike most treaty law. To be sure, the law can be modified, particularly through the making of treaties. But this cannot be done unilaterally. To this extent there are limits to the voluntariness of adherence to customary international law. But those limits are more serious than this, because subsequent generations also do not have a unilateral power to exit customary international law. So, from the point of view of a state-consent doctrine that is supposed to be grounded in individuals, this implies a serious limitation to the individualistic version of state consent. To my knowledge, this problem has never been properly addressed.

### *The Basic Constraints on State Consent*

Another serious problem with customary international law from the standpoint of the state-consent view is that there are some parts of customary international law that are binding on states and persons regardless of their consent. *Jus cogens* norms are norms of international law that arise through custom but acquire a peremptory status such that every state is bound by the norms and no state can create a treaty that violates one of these norms. *Jus cogens* norms include norms against aggressive war, against slavery, against genocide, against piracy and against torture. The basis of these norms as legal norms is much contested, though there seems to be less and less skepticism about their existence. This kind of norm is described in the Vienna Convention on the Law of



Treaties as a “. . . norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” (United Nations 1969, Article 53). Some have argued that these norms suggest the truth of a natural law approach to international law.

In addition to what are normally described as *jus cogens* norms, there are other, nearly equally important norms in the international system, such as the norm of *pacta sunt servanda* (that pacts must be performed). This too is a norm that has not been, until recently, embodied in treaty law.

These objections suggest that important modifications must be made to the state-consent approach to the bindingness of international law and the legitimacy of international institutions. They imply that there are deep constraints on what arrangements states may voluntarily enter into or exit. And these constraints appear to have a legal character. In some respects many of these constraints may have the character of constitutional norms, which in effect are beyond the ordinary processes of lawmaking in international law, just as constitutional norms are beyond the ordinary processes of lawmaking in domestic systems of law. And just to push the analogy a bit further, they have the character of an unwritten constitution of the sort we see in the British constitutional system.

If we assimilate the *jus cogens* norms and the norm of *pacta sunt servanda* to something like constitutional norms of the international system as a whole, then the state-consent model can be seen as the basic model of ordinary lawmaking for an international system that is bound by certain constitutional norms.

From a moral standpoint, we can think of the state-consent account of legitimacy as a morally bounded system of voluntary association among peoples. The boundaries of that system reflect the commitment to the fundamental interests of persons that no system of voluntary association may violate.

### *Morally Mandatory Aims and State Consent*

There is another related and difficult issue to face for such a system. The global community is currently facing some fundamental moral challenges, which can be recognized as such on virtually any scheme of morality. The aims of the preservation of international security and the protection of persons against serious and widespread violations of human rights are already recognized in Article 1 of the Charter of the United Nations, which lays out the purposes of the United Nations. In addition, there are aims of equally great moral importance that must be pursued by the international system. First, it must pursue the avoidance of global environmental catastrophe. Second, it must pursue the alleviation of severe global poverty. And third, it must establish a decent system of international trade. These challenges will require significant cooperation from most of the world's states at least.

The morally mandatory character of the aims and the necessity of general cooperation in the pursuit of the aims imply that there are certain tasks that are morally mandatory for states to participate in. This suggests a set of moral imperatives that are not the usual context for voluntary association. The usual context of voluntary association is that persons are morally at liberty whether to join or not and even if some associations do pursue morally important aims, there are enough of them that one may pick and choose among them without moral cost.

There may still be room for the moral liberty that state consent protects in such a society but it must be heavily bound by constraints. The justification for the state-consent

requirement may be grounded in the fact that, though we are morally required to cooperate in solving these fundamental moral problems, there is a great deal of uncertainty as to how these problems can be solved. Though there is general agreement among scientists that the earth is warming due to human activity, there is disagreement as to how much this is happening and how quickly. There is also substantial disagreement about how to mitigate global warming and what a fair and efficient distribution of costs might be. The same uncertainties attend thinking about how to alleviate global poverty, how to create a decent system of international trade and how to protect persons from widespread human rights abuses.

This kind of uncertainty provides a reason for supporting a system of state consent with freedom to enter and exit arrangements because it supports a system which allows for a significant amount of experimentation in how to solve the problems. Experimentation within different regional associations as well as within competing global arrangements may be the best way to try to solve the problems we are facing. And democratic states are the ideal agents for this kind of experimentation because of their high degrees of accountability and transparency.

But the system of state consent must be heavily bounded given the morally mandatory need for cooperation. In the usual case of treaties, refusal of entry and exit are permissible and require no explanation. In the cases of any treaty that attempts to realize a system of cooperation that is morally mandatory, the exit from or the refusal to enter it would require an acceptable explanation that lays out the reasons for thinking that the treaty would not contribute to solving the problem and that some alternative might be superior. Exit or withdrawal is permissible but only with an adequate explanation. By "adequate explanation" I mean an explanation that is not irrational, unscrupulous or morally self-defeating and that displays a good-faith effort to solve the problem at hand. The explanation must be in terms of the morally mandatory aims or in terms of a crushing or severely unfair cost of cooperation. The explanation need only be adequate, in the sense that it need not be the correct explanation, but it falls within the scope of what reasonable people can disagree on. An irrational explanation goes against the vast majority of scientific opinion. An unscrupulous explanation free rides on others' contributions to morally mandatory aims or it refuses to shoulder any share in a morally mandatory pursuit. A morally self-defeating explanation is one that insists on a different coordination solution, defeating a coordination solution that in the circumstance advances everyone's aims.

One possible example of unscrupulous nonconsent might be the unwillingness of the United States and the European Union to lower their barriers to trade in agricultural goods with developing countries. It seems clearly unscrupulous since these societies have spared nothing in advocating for the benefits of free international trade. They simply refuse to do so when that would involve setting back certain domestic interests. Another more contentious possible example of problematic refusal to participate would be the United States' refusal to participate in the Kyoto Protocol. A complete defense of these claims would require a lot more study and discussion than I have space for here, but they are potential candidates.

When a state refuses to participate in a cooperative venture for the pursuit of morally mandatory aims and has no adequate explanation, it may be subjected to some kind of sanction or coercion. States would be within their rights to contemplate noncooperation or even more coercive responses to those states that refuse to participate for unscrupulous, irrational or morally self-defeating motives. Hence there are severe limits

to the moral liberty of states when it comes to morally mandatory aims.

This is, I think, the farthest one can take the system of state consent. It contemplates a heavily bounded system of consent and exit. It is bounded on the one hand by *jus cogens* norms and the underlying principles of voluntarily incurred obligation. It is also bounded by the moral imperative on every state to pursue certain basic moral goods. In these respects one can see how international institutions and law occupy some kind of middle ground between voluntary associations and state-like political institutions.

### Beyond State Consent

Now that we have a view of the highly constrained process of state consent, we can see some ways in which the system must be supplemented by other ideas. One worry is that the system has little in the way of resources to constrain the power of the most powerful states. Though I have suggested that states may be coerced if they fail to offer an adequate reason for nonparticipation in a regime designed to pursue one of the morally mandatory aims, this can provide a check on the most powerful states only in certain circumstances, e.g., when there are a number of other powerful states willing to put pressure on the recalcitrant state. The consequences of this are that weaker states are constrained while the most powerful state or states are not. This is the most serious institutional-design problem confronting any normative approach to international institutions. At this point, it has not been solved.

A second worry is that the scheme is too conservative. It requires states to agree. If a powerful state does not agree and its agreement is essential to the successful cooperation among states, generally the chosen arrangement will not work. This is especially an issue for the mitigation of global warming, which will require some kind of global solution. It will be hard to move beyond the status quo because powerful states, which prefer the status quo, will be favored.

A third related worry is that the scheme is unwieldy. Requiring states to consent to major changes to international law makes for a slow process of making law and may have very serious transaction costs (Buchanan and Tullock 1962). The worry is that the needs for coordination and for adjustments to coordination are too great to allow it to be the case that all decisions are made by state consent.

To be sure, states do set up on occasion more streamlined mechanisms for collective decision-making. As noted above, there are parts of international law that have some modest independence from states. Some parts require some kind of majoritarian decision-making, some involve modestly independent judicial institutions and some constitute committees that are empowered to make proposals. But the question is whether this shouldn't be required as part of a system of international lawmaking, particularly when dealing with issues of such moral weight and urgency as the prevention of global warming and the alleviation of global poverty, which may require very timely decision-making.

John Locke argued that when a group of persons comes together to form a political body they implicitly agree to make subsequent decisions by some non-unanimity method. His grounds for this were that unanimous agreement would be hard to come by when there is a lot of disagreement and that every person who joins knows that this would make the political society ineffectual (Locke 1986/1690, § 95–96). This has mostly not been the case for the associations that contemporary states have entered into; they remain heavily committed, with a few exceptions, to state consent being the

basis of further obligations. The fear of external costs imposed by other states seems to outweigh the concern that consensual decision-making is very slow and cumbersome and threatens to undermine the capacity of international organizations to solve major problems.

For institutions to be legitimate, they must have at least a moderate capacity to pursue the aims that are morally mandatory or at least not block the pursuit of morally mandatory aims. Hence if the state-consent requirement is too unwieldy for the pursuit of the morally mandatory aims it must be in some way replaced or supplemented by other requirements. These internal constraints would be broadly constraints of effectiveness and fairness to the affected parties.

We might then envision a three-stage conception of legitimacy for international institutions, along broadly Lockean lines. The three stages are a constitutional stage of *jus cogens* norms and other general principles of law, a heavily bounded system of fair voluntary association among democratic states and some internal principles for the design of international institutions. Legitimate international institutions must be created through a constitutionally constrained and heavily bounded process of state consent and they must satisfy certain other, more internal constraints, which enable them effectively to pursue the aims in a broadly egalitarian way.

It is in this spirit that we should look at the proposal offered by Allen Buchanan and Robert Keohane, which they call the "complex standard" of legitimacy for global governance institutions. This standard has three elements: one, the ongoing consent of democratic states; two, minimal moral acceptability (in the sense of nonviolation of basic human rights), comparative benefit (relative to other feasible institutions) and institutional integrity (the institution is pursuing the goals to which it is committed); and three, epistemic virtues that enable the participants in the institutions and the stakeholders to determine whether the standards are being met and enable them to contest and revise the standards and goals of the institutions (Buchanan and Keohane 2006: 432).

The second part asserts some basic outcome benchmarks for the institutions. The third part of the standard involves some partially democratic norms for the manner in which the goals are pursued.

My account above gives the rationale and the limits to the state-consent part. It can supply the rationale and some substance to the second standard in terms of the *jus cogens* norms, but it also supplies an essential supplement to their account by asserting the necessity of pursuing the morally mandatory aims. The third part of the standard is designed to introduce a democratic element in the independent decision-making institutions of the organization. What it lacks, however, is a firm conception of fairness in the internal structure of international institutions.

Devising fair internal standards for institutions is one of the most difficult problems in thinking about international institutions. There are legislative, administrative, enforcement and judicial institutions and there are also lending agencies. The norms of fairness vary significantly from one type of institution to another. Each must arise through the bounded process of state consent. Legislative institutions ought to have a more democratic character, though the exact character will depend on the relative stakes and shares of the stakeholders. In contrast, judicial institutions must be judged on the basis of the quality of the statutes that they apply in adjudication, the impartiality and fairness with which they assess liability, the impartiality with which they determine remedies and the impartiality of the processes by which those remedies are imposed. For example, the Dispute Settlement Mechanism of the World Trade Organization usually receives

high marks on the second and third parts of the criterion but since enforcement is up to each aggrieved state, poor and weak states do not even bother bringing cases against wealthy states. Administrative rulemaking bodies must be judged by the quality of the mandate they are trying to implement, the openness of the process of rulemaking, the competence of the experts and their faithfulness to the mandates. Lending agencies that are lenders of last resort to desperate countries must ensure that those countries have adequate voice in the process of structuring the loans. These are just some examples of the very distinct internal standards that must be realized by legitimate institutions.

To be sure, our conception of these internal standards must be quite abstract because we want states to have significant latitude to experiment with creating and modifying international institutions.

### Remarks on Method

This essay sheds harsh light on the current international system. The aim has been to define a conception of legitimacy based on consent and democracy that can be realized in the international system as we know it and as we expect it to be for the medium-term future. To this end, I have developed an ideal theory that draws on the best resources actually available in the international system. The basic facts of the system we have been dealing with are: the primacy of states as players in the international system, the high degree of disagreement and uncertainty we currently face in trying to solve the most important problems, and the need for institutions that are capable of timely decision-making. The focus on consent and democratic grounds of legitimacy will imply that the ideas sketched have an important element of ideal theory in them. While no model of legitimate institutions will correspond to the way the world actually works, a model is illuminating to the extent that it helps us articulate and shed light on the major problems that the current system faces and that it defends standards against which one can reasonably evaluate the current system.

### Conclusion

I have argued that state consent has an important role to play within a multistage conception of how international law and institutions must be constructed. The first stage is the quasi-constitutional stage of *jus cogens* norms and basic norms of lawmaking, such as *pacta sunt servanda*, as well as the central role of morally mandatory aims in thinking about the justification of international law and institutions. The second stage is the heavily bounded process of fair democratic state consent. The third stage is a set of principles for ensuring that international institutions that pursue morally mandatory aims are reasonably effective and fair in their internal structure.

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### Further Reading

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