

## **State Consent and the Legitimacy of International Institutions**

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Humanity as a whole currently faces a number of fundamental challenges that can only be dealt with on a global scale. Global warming and other environmental problems, severe poverty and the need for a fair system of international trade all call for international solutions that are achieved by means of collective decisions. Solutions to these problems can contribute to global justice and can bring great benefits to human beings generally. But these solutions will require sacrifices on the part of all or at least most persons and there is likely to be a great deal of disagreement about the optimal solutions and the fairest distribution of the burdens imposed by any solution. We need to have means for making collective decisions that all persons and the states of which they are members have good reason to regard as binding upon them.

We do have international law and institutions that attempt to solve some of these problems but the most powerful ones have questionable legitimacy. The Security Council of the United Nations is often criticized as deeply undemocratic in its processes of decision-making. Many have criticized the process of the creation of the World Trade Organization as one in which wealthy and powerful states took unfair advantage of the vulnerability of developing states to produce an organization that greatly favored developed country interests. At the same time, many argue that some parts of international law and institutions do not receive the respect they are due. The United States' rejection of the Kyoto Protocol and the International Criminal Court and subsequent non-cooperation greatly weakened the first and has diminished the second,

but many think that these actions were indefensible and that the United States had duties to cooperate and even submit to the institutions.

An evaluation of these widespread criticisms requires a conception of the legitimacy of international institutions and law because they speak to the question of whether and under what conditions states and (at least indirectly) their members have duties to obey the dictates of international institutions or the rules of international law. The undemocratic character of the Security Council suggests to many that its directives are not worthy of obedience and the unfair advantage taking that made the WTO suggests that its rules do not deserve respect. While others would contend that the Kyoto Protocol ought to have been joined and obeyed and the ICC ought to be supported by all reasonable states and their members.

An institution has legitimacy when it has a right to rule over a certain set of issues. The moral function of the legitimacy of decision-making processes is to confer morally binding force on the decisions of the institution within a moral community even for those who disagree with them and who must sacrifice. This morally binding force is achieved for a decision-making institution when its directives create content independent and very weighty duties to obey the decision maker. There are three main conceptions of the grounds of legitimacy in modern political thought. One says that the legitimacy of an authoritative decision process depends on the quality of the outcomes of the decision process. A second sees the legitimacy of an authoritative process as based on the consent of the members. And the third sees legitimacy as grounded in liberal democratic

processes of decision-making.<sup>1</sup> The latter two forms of legitimacy are particularly salient when there is considerable disagreement on how to assess the quality of outcomes.

My project is to explore the possibility of grounding the legitimacy of international institutions and law from a moral cosmopolitan standpoint devoted broadly to democratic principles. It is premised on the idea that when there is substantial disagreement among the parties who are deeply affected by international law and institutions, moral cosmopolitanism entails the requirement that persons have a say in the making of these entities. Furthermore, the persons must be enabled to participate as equals in the process of decision-making. This implies that the legitimacy of international law and institutions is grounded in one of the following principles or a principle that combines and transcends three central notions of legitimacy available in modern political philosophy: the principle that decisions must conform to minimal standards of morality, the principle of fair voluntary association and the principle of democracy.<sup>2</sup>

But there is a further constraint on this exploration of the possibility of legitimate international law and institutions. The conception of legitimacy of international institutions must be properly attuned to the evolving nature of these institutions and the global political environment they operate in. Much of traditional political philosophy is mostly geared to figuring out the moral norms that apply to modern states. And some basic assumptions about how these political societies operate and what they are capable

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<sup>1</sup> See (Raz 1986) and (Estlund 2007) for mostly results oriented conceptions of authority. (Simmons 2001) and (Singer 1974) have defended voluntarist conceptions of authority. (Waldron 1999) has defended a purely democratic theory. (Christiano 2008) and (Klosko 2004) have defended more complex approaches.

<sup>2</sup> See (Christiano 2008) chapters 3, 4 and 7 respectively.

of are presupposed in most discussions. But our understanding of international political institutions tells us that they are not at all like states. At the same time they are not like the other kinds of institutions that get some legitimacy from their members: voluntary associations. And we must respect these differences when we explore questions of legitimacy and justification with regard to international institutions. But they do nevertheless have some political power and they will need more political power in order to solve some of the problems I described above.

In this paper I discuss the state consent model of the legitimacy of international institutions. I start with a discussion of my concerns about consent as a basis of the legitimacy of the state. In brief consent is at most a marginal contributor to the legitimacy of the state, though I may be an important source of legitimacy for voluntary associations. I then move to a characterization of the state consent model of the legitimacy of international law, and display the effects and limits of the critique of traditional consent theory. And I critique the model. I close with some remarks about the need for a conception of international society.

### *The Limits of Consent as a Source of the Legitimacy of the State*

Here I will discuss the principle that consent is a necessary condition on the legitimacy of the state. My basic concern here is that consent is not well suited to be a basis of the legitimacy of the state. This is not for the well-known reason that people rarely do consent to the state. My concern is that the principles that normally underpin the need for consent do not apply in the case of the state, though they may apply in the case of voluntary organizations. The conclusions of this discussion will help us think about state

consent as a source of legitimacy of international law and institutions, partly because these are similar to domestic institutions and partly because they point to morally relevant differences between domestic political institutions and international institutions.

What is the rationale for making political power constrained by consent? By “political power” I mean that the entity asserts a right to impose duties on others. And by “constrained by consent” I mean that the political power may not impose the duties unless it is consented to by those who are subject to it.

There are really two basic rationales: one based in moral liberty and moral autonomy and the other based on equality and accountability. The requirement of consent protects moral liberty and autonomy in the first rationale. It protects me as an equal in the second rationale by making power accountable to me.

The simple argument from moral liberty goes like this. Persons are morally free, in the sense of not having duties, to choose a variety of options. They are not required to choose one of these options. They can only be required to pursue a particular option if they have consented to it or promised to do it.<sup>3</sup> This is most intuitively realized in the case of being subject to the authority of a voluntary association. For instance, if I have joined the chess club I may thereby agree to being subject to its bylaws and to whatever authority arrangement is established. But if I do not join the chess club, I am under no such obligation. And I am morally free to abandon the chess club when I want. The chess club case is an easy case of consent-based obligation because the reasons for me to join or not to join are a matter of my interests.

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<sup>3</sup> This I think is the central consideration in Simmons’s arguments for the consent theory. See (Simmons, 2001). Many of the remarks here are attempts to answer some of the challenges Simmons lays out for opponents of the consent approach.

This gets a little stickier when it comes to organizations that are performing morally important tasks such as Amnesty International. I really do have a duty to participate in this kind of activity. But I do not have a duty to participate in Amnesty. Presumably this is because the duty I have to participate is an imperfect duty and because there are other ways in which I can discharge my duty to my fellow human beings. I can join or provide support for Human Rights Watch or Doctors without Borders or any number of important associations and thereby discharge my duties to come to the aid of others.

But what if Amnesty is the only effective institution around for a long time, which can help me effectively discharge my imperfect duty? In a sense, I am no longer morally free not to join Amnesty and not to do what it tells me to do. Does the requirement of consent no longer constrain Amnesty in imposing duties on me? It's tricky here. Intuitively consent is still necessary to Amnesty's imposing duties on me. But an intuitive answer may not be entirely trustworthy since we very rarely if ever operate under these conditions. We normally operate under conditions in which we are morally free even in the case of morally important tasks. But this is because we have genuine options. Our intuitions may lead us astray in such an abnormal case.

Perhaps we could say that we ought to do what Amnesty tells us but not because Amnesty tells us to do it. The duties are not content independent. It is the case, let us suppose, that what Amnesty tells us to do is, for the most part, the right thing to do, so we ought to do it. It is not because Amnesty tells us to do it. And perhaps consent can make the difference here. Consent helps generate a content independent duty.

One tricky possibility here is that it could turn out to be the case that only if I take the duties to be content independent will I actually end up doing the right thing. That is only if I take Amnesty's directive as a reason on its own that I do the right thing. This may be because Amnesty knows a lot that I do not know or because it is coordinating the activities of many people. Does this imply that the duties are indeed content independent? In a sense I have a duty to take them as content independent but I am not sure if they are.

But another issue is that the rationale for the consent constraint seems to be cut out from under it in this kind of case. I am no longer morally free for the most part in the Amnesty case. So whether I consent or not does not really affect my moral freedom. If I do not consent, I am still required to do much of what Amnesty tells me to do. If I do consent, I gain a new layer of duty to do those things but my moral freedom is not thereby much lessened. Furthermore, if I do not consent and Amnesty tells me to do something that is seriously morally wrong all things considered, I do not have a duty to do it. But I don't have a duty to do it even if I do consent. This implies that the moral liberty that consent protects in this context is quite slim and in many cases uninteresting.

The state, however, seems to have this characteristic in spades. It is charged with the task of establishing justice and pursuing a justice constrained common good within a limited jurisdiction of persons. The aims it pursues are morally mandatory in the sense that all persons are required to pursue them. And in many contexts the state is morally necessary to the pursuit of those aims. To be sure, it may do a very bad job of this and so ought not to be obeyed but the key point is that it ought to be obeyed when it is

reasonably just and it ought not to be obeyed when it does not act at least minimally justly. And this holds whether one has consented or not.

We need to say more about the moral necessity of the state. This is not a simple notion. What I mean is that under normal human conditions of large societies that are moderately complex, the state is necessary to achieve justice among the persons within its jurisdiction. It establishes justice through the system of rights and duties. It judges of justice and injustice in an impartial way, when it acts well. And it enforces justice.

These are all activities that small groups of isolated persons can do without the state, but we are not capable of doing these without the state in the kinds of societies we live in. So the main thesis here is that the state is necessary to introduce justice among persons in large and complex societies.

I do not mean to say that the state's directives constitute justice. Establishing justice implies that the rules laid down can serve the purpose of justice for a group of persons even if they are not entirely just. For many issues, a reasonably just state acts as a kind of solution to an impure coordination game in which the preferences are determined by competing conceptions of justice and the common good. Some people get more of what they think is just than others but all get enough to make it worthwhile to obey. The state needn't be perfectly just for it to be the case that a person acting against it's directives, in the form of property and contract law, is likely to treat others less justly than when she obeys these directives.

For some issues it is not the case that each and every person makes a key difference to sustaining the activity of establishing justice. In the case of taxation, and other forms of contribution to the political society, individuals violate legal norms in a

political society without the society collapsing or even without directly treating others unjustly. But it is the case that the great majority of persons must, the great majority of the time, comply with and provide support to those institutions if those institutions are to survive and perform moderately well in establishing justice. From an institutional point of view, to have a rule that permits people to opt out without leaving the society, we have a rule that threatens to damage the society, unless the exceptions are few and far between. From the standpoint of each person, fairness implies that it is morally wrong for individuals to opt out of a scheme that is necessary to the achievement of morally obligatory ends even if their opting out does not undermine the pursuit of the ends. Each person has a duty to do his or her fair share in the achievement of the morally necessary ends and part of the state's job is to figure out what a fair distribution of the burdens are.

I think the argument so far establishes a kind of piecemeal legitimate authority. It establishes that for a significant range of cases, individuals act morally only by taking the directives of the state as imposing content-independent and weighty duties. But this authority is likely to be quite gappy and there is likely to be a significant amount of disagreement about where the gaps are. Hence there is some important weakness in the political authority. Still moral liberty is already significantly restricted by these considerations.

A more extensive legitimate authority is established when the state makes decisions reasonably democratically and within minimal bounds of justice. Here, because there is significant disagreement and conflict of interest among persons over how to establish justice, justice demands that each person be given an equal say in the process of collective decision-making. Collective decisions made in an egalitarian way then give

content independent duties for obedience because this is what is necessary to respecting each person's right to an equal say. All of this constrains one's moral liberty quite dramatically. What moral liberty does the requirement of consent protect in this case?<sup>4</sup> Very little if any, I would say.

Let me say a bit more about the moral liberty at issue. There are three stages here. One is morally at liberty with respect to some set of options when one does not have a duty to act one way or another. The presence of a duty terminates the moral liberty. A person does not have moral liberty by virtue of not accepting a moral duty. If the duty is genuinely present, then they are not at liberty. If the duty is not present then their non-acceptance of the duty does not enhance their moral liberty. The relation of consent to this moral liberty is complex. If someone tells me to do something that I have a duty to do, I am not morally at liberty not to do it even if I have not consented to following their directives.

A second stage comes with coordination. I may have a duty to coordinate with others on a common set of rules. Here I do not follow merely my own moral judgment, I follow the rules that all coordinate on. If it is the case that I have a duty to coordinate with others, then I do not have moral liberty as far as joining with them is concerned. I must go along with the other members of the group. It is not merely that I have duties that restrict my moral liberty, I have duties to make my behavior conform to norms that others do. And this is because I act better when I do so. I may not here have content-independent reason to follow the rules, but the rules of others are what I have reason to follow even if I do not regard them as entirely just.

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<sup>4</sup> I take this to be an implication of Leslie Green's treatment of consent in his (Green, 1990), though I am not sure he would agree with my criticism.

But the idea behind consent theory is that there is a kind of moral liberty in being permitted to make one's own decisions about what is morally right and wrong. One may have this moral autonomy and at the same time be bound to act in various ways by morality. It is just that one gets to decide how to act and when. One has a liberty to decide for oneself even if one sometimes makes mistakes and that liberty is what is protected by the requirement of consent. To be sure it is not preserved by consent but one has the liberty to decide when to abandon it. This liberty preserves some aspect of the freedom that one started with. And it is this liberty that is denied when the state claims to impose content-independent duties on its members. So even if one is operating within an arena that is thick with moral duties, the moral autonomy in question protects one not from moral duties generally but from those that are content independent reasons deriving from another's directives.

In response, even this moral autonomy to decide seems quite weak in the case of political institutions. I have two reasons for saying this. First, one must often treat the directives of the state as content independent reasons for action in order for the state's coordinating role to be secured. And if the state is reasonably just and justice is secured through coordination on the state's directives, then it looks like each person has duties deriving from justice to take the state's directives as content independent reasons for action. But if this is so, one does not have the moral autonomy to decide for oneself in a large number of instances in reasonably just modern states. And of course, if the state is not reasonably just, then one's consent cannot legitimate it. Second, and I think as a corollary to the first proposition, if a state is reasonably democratic, it can make decisions that create content independent reasons for actions on the basis of the egalitarian

character of the decision-making process or so I would argue. The consent constraint does not seem to be protecting much if anything in this kind of context. And consent does not seem to have much in the way of productive power here either.

So here, I provisionally state conditions under which the requirement of consent becomes weaker and eventually disappears. If (1) a group pursues morally mandatory aims, (2) I must cooperate and coordinate with them in pursuing and (3) the principal mechanism, the main salient signal, for coordination is the directive of the group or a body constituted by the group, then I am no longer at liberty not to go along and the requirement of consent is suspended. If only the first two conditions hold, then the requirement of consent is significantly weakened because the rights of refusal and exit are significantly weakened.

But, why should I be particularly concerned with the justice of the society of which I am a member? This is a particularly difficult question for the kind of view that I defend, which states that ultimately principles of justice are cosmopolitan principles. I want to give three reasons for the thesis that I ought to attend to the justice and injustice of the society of which I am a member.

The first reason is that I have a special relation to the justice or injustice of this particular society. Though I can promote justice in other societies, in the case of the society of which I am a member I treat my fellow citizens justly. I do not merely promote justice in my society; I act justly. And to the extent that there is an independent consideration in favor of acting justly over and above promoting justice I have a special duty to my own society. For example, there is a difference between abiding by a democratic decision that I disagree with in my society and my helping promote

democracy in, say, Mali by means of financial contributions to international non-governmental organizations. I am treating my fellow citizens as equals in the first case; I don't think that is what is at stake in the second case. This argument relies on the thesis that justice is not an entirely consequentialist affair though consequences play a large role in the correct theory of justice (at least as I understand it). And, to be clear, this consideration is by no means absolute.

But there are some other more consequentialist reasons for each person to be particularly concerned with the justice of his or her own society. These support the thesis that I can best promote justice globally, at least normally, by always also ensuring that my own society is reasonably just. First, for the time being it is important that the world be divided into separate political units, in which the members are devoted to pursuing justice for the unit. This solution suggests a division of labor in the world in which each is first concerned with the establishment of justice and the common good in their own unit. The simple dependence on the cooperation of others who are close by, the shared resources of language, culture and history, the local knowledge of the society's needs and the bonds that are created among persons all contribute to making it the case that separate units remain desirable for establishing justice. Second, one cannot promote justice in other societies without invoking successful living models of the practice of social justice. But the social practice of justice is an extraordinarily sensitive and complex affair that is easily lost and needs to be constantly attended to and replenished. And given the diversity of needs of different societies it is likely that we need a variety of distinct living models. Hence it is deeply unwise to attempt to promote justice elsewhere while ignoring it at home. Third, in my view, cosmopolitan justice generally and successful

efforts to make other societies more just, will require powerful political institutions to implement it (perhaps not necessarily a state, but something not entirely unlike it). But among the main preconditions of the kinds of powerful institutions that make cosmopolitan justice possible or that are able to help transform other unjust societies into just ones is the widespread presence of well-functioning reasonably liberal democracies. Democracies are peaceful societies at least in relation to each other and other societies are not. And democracies are the main sources of international institutions and the most reliable members of those international institutions. The widespread presence of minimally successful democracies is probably a socially necessary condition for the effective promotion of social justice globally and in other societies. Hence we have duties to sustain the democratic societies of which we are members and their practices of social justice.

To be sure that special duty exists side by side with duties to others and perhaps will eventually be replaced by fully cosmopolitan duties as the world becomes more globalized. But it is still there.

What of the idea of the consent constraint as making political power accountable to persons? One may say that by voting with one's feet or perhaps not consenting at all, one can sanction problematic activities of states. Clearly this is a very powerful device in ordinary economic and civil associations. Can it be harnessed to tame the power of states?

I don't think the answer to this question is a simple yes or no. There are times when exit, for example, has a great impact on states such as in the case of the fall of the Berlin Wall. So we should not discount the potential in some circumstances for exit to

make the state accountable to persons. But as a general matter, in relation to reasonably just states, I think we have to say that the consent constraint is not a powerful tool of accountability. Consent to the state seems like an exceptionally blunt instrument for making the state accountable to persons. One somehow agrees to a whole raft of things, some of which one agrees with and some of which one does not agree with. And one subjects oneself to a process that may be quite open ended, in some cases acquiring obligations to do things that one cannot any longer be free of. The reason for consent is quite unclear from one's actions. This unclarity is greatly increased by the fact that consent may be motivated by the cost to the non-consenter of losing whatever goods are granted to consenters. If one does not consent or withdraws consent, then it is unclear what it is that one is opposed to in a reasonably just state. Since it is normally very uncertain what the reason for non-consent is, non-consent conveys little information about the problems for which the state is being held to account for. And consent conveys little information about what the state is being consented to for. But this paucity of information defeats the idea that there is a great deal of accountability. On the other hand, this notion of consent seems to ignore the moral necessity of the state at least under conditions of significant disagreement and conflict of interests. The possibility of coordination on the establishment of justice seems to dissipate if we grant each person the right to withdraw consent at any time. And it is precisely the need for persons to give up the right of acting on independent judgment of justice that must be given up if we are to establish justice.

These considerations also suggest that the second rationale for the consent constraint, namely accountability (because I can vote with my feet) is also not an

appropriate constraint on the legitimacy of the state. The instrument is an extremely blunt one from the standpoint of accountability and at the same time it is potentially highly destructive to the purposes the state is supposed to pursue. Clearly democratic rights of participation are much more powerful and fine-tuned instruments for making the state accountable to its members.

In contrast, the consent constraint makes a great deal of sense in relation to the morally optional and relatively simple but extremely important activities of voluntary association and contract. The sphere of voluntary association is a sphere of moral liberty in which persons have great interests in being able to bind themselves to others. And the possibility of the withdrawal of consent seems a reasonable way of making many of these associations accountable to their members. The two spheres of voluntary association and the state are crucially different in ways that undercut the consent constraint on the legitimacy of the latter but that support it in the case of the former.

In brief, the consent constraint seems inappropriate to the task of legitimizing the state and more generally to the task of legitimizing political institutions.

### *The State Consent Model of Legitimacy*

Here I want to lay out the traditional doctrine of state consent as the basis of the legitimacy of international law and institutions. I want to push the doctrine as far as it can go. I will discuss objections to the doctrine and I will amend it in several ways that are I think consistent with a plausible way of understanding the doctrine. In the end, I think there are problems with the doctrine that cannot be fixed. But since there are I think conclusive problems with the global democratic way of legitimizing international

institutions, it is worth our while to think carefully about the strengths and weaknesses of the consent model.<sup>5</sup>

The traditional idea is that international law and institutions are made legitimate and have binding force as a result of the consent states give in the process of making treaties. The fundamental principle is “*pacta sunt servanda.*” There is something like a doctrine of tacit consent to customary international law. When a practice becomes regularized and a state does not state objections to participation in the practice, the state is then often thought of as bound to customary international law. For the most part the consent must be voluntary. The idea is that because states are bound to act in accordance with international law they must consent to it. Furthermore, it is worth noting that in most treaties, states retain rights of exit without having to give an explanation. And finally, states can tailor the agreements they enter into by means of reservations and understandings to the treaty, so that different states can have somewhat different obligations under the same treaty. I think we can also see here how the idea that state consent legitimates international law and institutions is more appealing than the idea that individual consent legitimates states. State consent is not quite as blunt an instrument as individual consent to the state is. Since states consent to each treaty separately and they can tailor agreements to meet their needs, they have more of a say in the making of the laws that bind them.

There are some exceptions to the requirement of voluntary consent. *Jus cogens* norms bind states whether they consent or not and states may not abridge these norms in the making of treaties. These norms include norms against aggressive war, genocide,

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<sup>5</sup> See (Christiano 2010).

torture, piracy and slavery. And states may be coerced into accepting peace treaties if they have been the aggressors. But instead of rejecting the state consent model altogether we could say that the model is one of state consent within a limited scope.

The traditional doctrine is based on the idea that states are the entities that are directed to act in international law. Individuals are not so directed in traditional international law. But as international law begins to intrude on national legal systems through requirements on the domestic economic system in trade law and environmental law as well as in human rights law, it is beginning to direct the actions of individuals (albeit indirectly). Hence the traditional reason for state consent is being undermined to some extent.<sup>6</sup>

But we might think that we can preserve the doctrine of state consent as long as we introduce the requirement that the states represent the persons in them. This extends the binding character of consent through states to the individuals in those states whose actions are now being more and more constrained by international law. To be sure, this requires that the state be robustly democratic, that it give adequate protection and representation to minorities and that its foreign policy establishment be significantly more democratic than it currently is. Only then is there some reason to think that the consent of the state really does in some way reach all the way down to the individuals. The consent of highly representative states may be a kind of hybrid of consent and democratic legitimacy.

In addition to the requirement of democracy, the state consent model needs to be supplemented with an account of fair negotiation of treaties, so that the consent of a state

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<sup>6</sup> See (Bodansky 1999) for a discussion of this issue.

is not only given voluntarily but in conditions in which states are not taking unfair advantage of each other. Since we are concerned here with the consent of states binding the equal individuals in the states, we must have a conception of fair negotiation that does not allow inequalities among states to play a large role in determining the distribution of advantages that arise from the agreements among states. To be sure, the conception of equality required here does not require equality in welfare or material wealth. It is derived from something analogous to the equality in democratic decision-making. Broadly speaking we can say that persons have an equal say in the determination of the treaties that bind them when the state parties are democratic and when states do not take unfair advantage of each other. This conception of fair negotiation is the least well worked out part of the whole picture I am hoping to elaborate.

Why should we pay attention to the state consent model of legitimacy? The basic reason is that it makes use of the most effective mechanism we know of to make international law accountable to persons. The modern democratic state, built up over a couple of centuries, is reasonably successful at accommodating the interests of many persons within the society. And modern democratic states employ this method of accommodation to some degree in the making and ratification of international treaties. Without the mechanism of state consent, it is hard to see how international law could be anything but a system of elite domination. This is especially so in the light of the problems in establishing anything like global democracy.

It is worth noting here how conceiving of the legitimacy of international law and institutions as based in state consent provides some relief from the three central problems I have noted elsewhere with global democracy: the problem of unequal stakes in

international law, the problem of persistent minorities and the problem of the paucity of international civil society. First, to the extent that it is liberal democratic states that engage in contract making for their advantage, the problem of citizenship that looms so large in the case of global democracy is diminished somewhat. Citizens can use all the devices of civil society within their own societies to inform themselves of the activities of their governments (assuming the foreign policy establishments are more democratic than they currently are). Second, the problem of persistent minorities is diminished because states can refuse to enter into negotiations and agreements and can limit their obligations through reservations. The system of fair voluntary association implements a standard way of solving the problem of persistent minorities. Third, to the extent that the peoples in states have different stakes in decisions, they can regulate their interactions with others to reflect that fact. States with high stakes in an agreement can invest a lot of time and energy in it, while states with lesser stakes presumably will invest less time and energy.

#### *The Contract Model of International Treaties*

Many criticisms have been addressed to the state consent model of legitimacy. Some have claimed that the increasing independence of international organizations from states vitiates the state consent model. Others say that because some many societies are not sufficiently democratic and international negotiation is often unfair advantage taking it cannot be made legitimate. Alternatively they argue that a conception of legitimacy that avoids these difficulties is too ideal. I do not think these criticisms are conclusive since a conception of state consent can be designed by reference to fair negotiation among democratic states. Furthermore, the fact that voluntary associations sometimes have

some independence from their members does not undermine the claim that the consent of members is the basis of the members being rightfully obligated to them.

Here I want to address another more fundamental set of worries. The key problem is that the requirement of state consent may be problematic because states do not have the kind of moral liberty that is supposed to be protected by the requirement of consent. Hence, as in the case of the relations of individuals to states, consent may not be necessary to obligate states to go along with the treaty or organization. I will approach this by describing and then rejecting a standard way of thinking about international law, that is, as if it were like contracts among states. The basic worry is that contracts normally generate obligations where there was moral liberty. But this is because contracts do not serve the same functions normally as many treaties do. And so the standards for evaluating contracts are different and that difference vitiates the contract model and calls the state consent model into question.

A natural way of thinking of the state consent view is in terms of the contract model of international treaties. The contract model thinks of treaties as if they were contracts between states. In doing this they suggest that the norms that govern the making of contracts ought to hold over the making of treaties as well. This fundamental idea is at the basis of many modern conceptions of the legitimacy of international law and institutions.

Here I want to discuss some considerations that have seemed to make the contract model plausible as an interpretation of treaty law. First the point of treaties has often been thought to be the mutual advantage of the state parties in the sense that they advance the interests of the states or their peoples understood in a non-moral sense. The thought

is that states engage in an exchange with each other of rights. Once the state has made the treaty it is required to perform by right of the other state. Hence, we have the principle of “*pacta sunt servanda*.”

We might think then that the normative evaluation of treaty making is the same as the evaluation of contracts. Contracts have procedural and substantive dimensions that can be evaluated in terms of fairness. The procedural conditions on the fairness of contract making mostly have to do with the voluntariness of the participant in the making of the contract. The party must be at least minimally informed or responsible for being informed and the party must not be coerced or forced into the agreement. A third condition often asserted is that the bargaining powers of the parties are not wildly asymmetric.

The substantive conditions on the fairness of the exchange can include some notion of equality or at least proportionate advantage in the exchange between the participants. This notion is very hard to define clearly. But it is often invoked in domestic law in the context of unconscionable contracts where both procedural and substantive elements combine to render contracts invalid. The standard philosophical description of such contracts involves taking unfair advantage of a person. The idea is that one party takes unfair advantage of another when (1) the parties do not think of the exchange as one of gift giving, and (2) one of the parties is highly vulnerable to failure to make the contract and (3) as a consequence of 2 the exchange is highly disproportionate in favour of the non-vulnerable party.

The equality involved is not a distributive equality. It is equality in the things exchanged. An exchange is fair when what is received is equivalent in value to what is

given. The usual way of measuring the value of the things involved is in terms of competitive market price for the goods involved.<sup>7</sup> Here is a fairly straightforward application of this idea. Suppose  $p$  is the usual price a hospital charges for administering a kind of life saving first aid to a person. Now someone finds himself not far from a hospital bleeding to death but he is far enough that he cannot get there before death sets in and a doctor comes upon him with the means to save him by standard first aid. The doctor demands a promise of payment that is ten times  $p$  and so massively greater than the standard price. And let us suppose that the doctor does not have any unusual costs of her own at stake. The contract between the bleeding person and the doctor for first aid in exchange for ten times  $p$  will not normally be thought to be a valid one. Most have thought that this would constitute an exploitative offer and that the doctor was taking unfair advantage of the vulnerable person. Though there are some straightforward cases such as the above one, the evaluation of agreements in terms of whether each gives and receives in accordance with the competitive price is often going to be quite difficult. This will depend on the proper characterization of the circumstances in which the pricing takes place. How exactly to specify the conditions that are at least normally necessary and sufficient is quite difficult. To my knowledge courts have tended to invalidate only the most seriously disproportionate contracts.

So the standard conditions under which contracts are thought to be problematic are some kind of absence of voluntariness and exploitation. And these considerations have dominated discussions of the legitimacy of international treaties. The Vienna Convention on the Law of Treaties makes the voluntariness conditions essential to valid

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<sup>7</sup> See (Gordley 2001) for a defence of this principle.

treaty making and many of the standard criticisms of international trade law have invoked ideas of unfair advantage taking. So it looks as if the contract model is a good fit with international treaty making.

But there some important respects in which the model of contract does not apply well to international treaties and this is what we will discuss now.

### *Treaties and Justice*

Both Grotius and Vattel observe that many international treaties are concerned with establishing in treaty what the parties and individuals involved already have obligations to do.<sup>8</sup> This is perhaps most obvious in the case of the modern law of human rights. But it is also evident in the case of peace treaties, treaties not to interfere with each other's commerce and other kinds of treaties. In this respect, treaty making resembles the normal activities of law making in a political society. Political societies legislate against murder, theft and rape not in order to create obligations where there were none before but in order more clearly to lay out the exact expectations that people are to have of one another so that the possibilities of misunderstanding are greatly diminished. And in the modern system of treaties some institutions of arbitration, deliberation and judgment usually accompany the treaties, such as the Committees on Human Rights established by the two major international covenants and the European Court of Human Rights. And in some cases enforcement mechanisms are set in place to rectify wrong-doing by states. This is still relatively rare. But one can see that treaties and the institutions that they establish play some of the roles that the political and legal institutions of domestic political

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<sup>8</sup> See (Grotius 2005 Book II: 821) and (Vattel 2008: 345).

societies play. Their object is to establish by known and settled law the terms of justice by which states are to interact with each other and with individuals.

And the cases of coercively imposed treaties against unjust aggressors are put in a new light when we think of treaties as often pursuing a just peace.

This is distinct from the usual function of contracts, which are usually made in pursuit of partial concerns against the background of purportedly just institutions. Contracts create obligations against a background of law. They do not normally claim to establish justice. But treaties create law and many do claim to establish justice. To be clear here, I am referring to redistribution in the content of the contract. Many modern democratic states shape the law of contract so as to have some desirable effect on the distribution of goods. Minimum wage legislation is an example. But this is not what I am referring to here. I am referring to the fact that the contracting parties normally do not use contracts to achieve justice. They are usually concerned with more partial interests even though the state may attempt to effect the distribution of advantages by shaping the law of contracts.

Furthermore, some treaties attempt to bring about global public goods such as the protection of the ozone layer and the prevention and mitigation of global warming. These are morally mandatory aims that, were they to be dealt with in domestic societies, would be dealt with by the state and not individual contractors.

Some treaties do not purport to establish justice between the parties; they purport to be mutually advantageous agreements between the parties. But even these are often structured in such a way as to acknowledge the importance of broader societal considerations of justice and fairness in the body of the treaty. They express

commitments to globally fair terms among the parties. For example the treaties making up the WTO make the principles of non-discrimination and reciprocity the centrepieces of the agreements. Partly this is to create more efficient treaties but partly it is to realize fairness in the trade system overall.

In addition, the treaties creating the WTO and those that have been agreed upon within the structure of the WTO also are designed with an eye to the background of global distributive justice. In the case of contracts, the usual theory essentially involves setting the level of advantage of each party at zero for all the parties at the moment before the exchange. There is no concern for the differential starting points of the different parties. Distributive justice concerns are bracketed. Only equality between the things exchanged seems to matter. But treaties do not attempt to abstract fully from the background distributive concerns. They seem to adjust for background disparities. To be sure, they do not attempt to rectify the injustice of unequal distribution entirely but unequal starting points in terms of distribution of advantages are taken into account so that many treaties are decidedly asymmetrical. Developing societies are given special trade preferences in many such treaties and the principles underlying these trade preferences have affected the structures of the treaties ever since. Furthermore developing countries are to be allowed special exemptions on grounds of their vulnerability to changing prices in international trade, and of their needs to protect infant industries. The language of fairness accompanies all these exemptions in the negotiations and texts.<sup>9</sup> To be sure, there is still much unfairness in the outcomes and the protestations of fairness are often window dressing but the point is that these are seen as necessary to a

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<sup>9</sup> See (Franck 1996) for a discussion of trade preferences and (Albin 2001) for a general discussion of fairness considerations in international negotiation.

proper treaty. The same holds of international environmental treaties. They give special exemptions to developing countries so as not to retard their development. These are normally defended in terms of fairness to the developing countries. And such a concern for fairness and justice in the terms of contracts is not a usual feature of the content of contracts. What are these special treatment provisions gesturing towards? One natural interpretation is that they are gesturing towards a minimal concern for global distributive justice and fairness among peoples in the world.

*Important Differences between Treaties and Contracts*

So far my argument has been an interpretative argument concerning contemporary practices in making treaties. But I think that there are good substantive reasons for the differences between treaties and contracts that we see.

First, there is a much greater difference between macro justice considerations and micro justice considerations in the case of contract law. In the case of contracts it often seems unfair to impose the main burdens of redistribution on individual agents. The problems of distributive justice require large-scale collective action in which millions of persons chip in their fair shares. In the absence of enforceable collective action, requiring redistribution through contract would seem to be excessively and unfairly demanding on those persons who are reasonably conscientious. They are only a few among many contributors to distributive inequity, but solving the problems through contracts would seem to impose the burden on them alone. Second, attempting to achieve redistribution through contracts seems to be an inefficient way of doing it because it is a highly uncoordinated way of doing this and because it would seem to dampen the incentives to

trade. The way distributive justice is best achieved in a political society is through some kind of unified tax and transfer system and through some kind of overall external regulation of markets.

These two points suggest that transactions among individuals are not a suitable place for redistribution in domestic economies. By contrast, transactions among states may be more suitable for redistribution in the global environment. First, given the smaller number of states and the very small number of very wealthy states, the type of collective action or coordination problems we see at the individual contractor level in domestic societies do not occur to nearly the same degree at the level of international society. Each of the few very large and wealthy states can make significant dents in the distributive inequalities we see today, thus helping solve the collective action problem. And the wealthy states could fairly easily coordinate with each other to achieve much more sizable redistribution. Though there is no global agency for creating redistribution, there is the possibility of coordinated redistribution.

Second, contracts as equal exchanges are normally morally acceptable only against the background of a reasonably fair distribution of advantages. One, it makes little sense to require equal exchange between those who are severely impoverished and those who have a great deal. Equal exchange in this context is morally bankrupt. Two, equal exchange between very rich and extremely poor is highly unlikely since the opportunities for unfair advantage taking are too great in number. The idea in modern mixed economies is that markets can be legitimate to the extent to which everyone has enough to participate in them roughly as equals. And the state makes some attempt, however imperfectly, to achieve the wide distribution of wealth necessary for this.

At the global level the extent of poverty and inequality seem to me to vitiate the idea that all the peoples of the world ought to engage in equal exchange with each other even if they could. In addition, the extent of poverty and inequality also seem to me to imply that it is very difficult for many states to engage in equal exchange with other states. The poorest countries often are very vulnerable and are liable to be taken unfair advantage of in the current circumstances. There is significant evidence of this taking unfair advantage in the case of the WTO in the last fifteen years. This again points to the fact that with such extremes of inequality and poverty, the background conditions that can ensure fair negotiations are not present.

One main way to express this substantive argument is via the idea of the moral division of labour between institutional and individual pursuits in society and its relative absence in international relations. That contract is normally used in a society to advance the partial concerns of the contractors within the limits set by fairness is a function of the fact that the central concerns of justice are primarily assured by institutional arrangements. These arrangements established by property and contract law, regulation, public ownership and tax and transfer assure distributive justice and the basic political and civil rights. The institutions are designed so as to ensure that when people act on their partial concerns, the aims of distributive justice are secured. In contracting and associating with others, individuals are not required to take justice as their aim at least most of the time. They are permitted to act partially, again within limits set by fairness and the background institutions of society (framed with the purpose of achieving justice). This division of labour is justified by four main considerations. One, individuals' actions have very small effects on justice and there is great difficulty in organizing coordination

and cooperation without state institutions. Two, this permits a reasonably fair distribution of burdens and benefits. Three, it is important for the aim of justice that each pursues his or her interests in his or her own way. Four, there may also be some room for persons to pursue their own projects without always focusing on the impartial good.

This characteristic structure of aims in the case of contract and voluntary association is distinct from the structure of aims of a person *qua* citizen or legislator. In the role of citizens persons are expected to aim at justice and the common good in their actions of voting, organizing, negotiating and deliberating. Of course, they may look out for their own interests in the process but the dominant concern is normally justice and the common good. Here the division of labour can be understood as a division between the roles of persons *qua* citizens and persons *qua* individual agents.

The considerations that favour the role of contracts in the division of labour do not suggest such a role for treaties. First of all, treaty making does not take place against a background set of institutions that secure justice for all. Or if it does, those institutions are themselves established by treaty. In fact, they take place against the background of horrendous inequality and poverty. Secondly, treaties are made by states that are small in number and that are relatively easy to coordinate and organize for the common good (especially the small number of wealthy states). These can have a great impact on global justice. The burdens must be distributed fairly but this is much easier to do at the level of states. Finally, states *per se* do not have interests, individuals do and so the kind of personal prerogative that contract serves is not served by giving free rein to states. States already provide room for this prerogative within their political societies.

So, it seems to me that states must pursue the aims of justice in the context of treaty making. The structure of motivation behind many treaties here should be much like the situation or motivation of citizens or legislators.

To take stock here, I am arguing that international treaties ought not to be understood on the model of contracts because many treaties simply establish justice, they often depart from the principle of equality in exchange and treaties are a much more plausible site of distributive justice than contracts since they do not have the same role contracts to in a moral division of labor.

The centrality of justice to treaty making suggests that the aims are mandatory aims much like many of the aims that are pursued by states domestically. To the extent that very extensive and complex coordination is necessary to achieve those aims, it seems that states are not at moral liberty to refuse to participate in the relevant institutions and law. As a consequence, state consent may not be necessary to obligate states to go along with some large parts of international law.

Here are two examples worth thinking about in this connection. The United States' refusal to participate in the Kyoto Protocol, despite its having had a very significant say in its formulation, has effectively wrecked the effectiveness of that treaty. It seems to me that we have some reason to think from the above considerations that the US was not at liberty to refuse consent. Another example along these lines is the current behaviour of the United States in making mildly threatening noises suggesting an abandonment of the WTO just as development issues are becoming the most prominent ones and developing countries are beginning to find their footing in the Doha round. The US can wreck the WTO. Is this permissible? It may well be that on the contrary it is

obligated to participate and attempt to sort out the differences because of the great moral importance of the issues.

*Morally Important External Effects*

Another related worry is that the idea of legitimacy of treaties grounded in state consent may allow for large external effects on those states that do not consent or that are not included in decision making.<sup>10</sup> This is an obvious worry for the contract model in which states agree to treaties based primarily on their interests. To the extent that the interests of non-participants are negatively affected and there is no larger set of institutions to rectify the illegitimate setbacks to interests, the scheme does not adequately take into account the interests of all affected.

But the worry remains even if expect states to act on the basis of an assessment of justice and the common good. The reason why is grounded in a fairly basic principle behind democracy. We expect people's judgments of justice and the common good to be biased towards their own interests, in ways that are hard to defeat even if they are acting conscientiously. So we can expect that when states make agreements amongst themselves, the external effects of those actions on others, who do not participate, will not usually adequately take into account the interests of those negatively affected.

Individuals have recourse to law in domestic societies when they are harmed by serious negative externalities. But this recourse needs to be provided in the case of international law.

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<sup>10</sup> See (Bodansky 1999) for this.

Furthermore, when the negative externalities are of grave moral importance such as is the case with global warming, states have duties to participate in attempting to solve these problems and have duties to include others in the process. Hence, refusal of consent may not be sufficient to avoid obligation. The morally important external effects argument also suggests that state consent may not be sufficient to legitimate international institutions and law. If these have been made in ways that exclude persons and societies have important stakes in the institution, the institution may be illegitimate even if consented to.

### *The Puzzle of Legitimacy*

A consequence of the above arguments is that many treaties are concerned with achieving morally mandatory aims and these aims must be pursued in many cases in a highly coordinated fashion such as international trade law and environmental law. In order to treat members of other societies properly one must be on the same page with them regarding basic rules of trade and constraints on environmentally threatening production and consumption. To the extent that we aim at just and efficient regimes for pursuing these aims, we depend on a high degree of coordination. No state is free simply to refuse to pursue these aims with others. To that extent, states are not morally at liberty to refuse to participate in the making of international law at least on these issues.

These considerations significantly weaken the rights of refusal and exit that are so important to consent theory. They display the respects in which international society cannot be seen as a voluntary association or set of voluntary associations, at least from a moral point of view. In these respects international society performs some functions that

states perform in more limited jurisdictions. Yet there is no global state with democratic mechanisms of accountability to ensure legitimacy. Hence the consent requirement seems problematic because it does not protect a defensible moral liberty.

Still, our assessment here must be mixed. Though the first two conditions of coordination based authority are satisfied in many institutions, it is not clear that the third is in many institutions. That is it is not clear in every case that the directives of the organization are normally the necessary mechanisms of coordination. It seems that in the case of trade and the environment, the level of coordination does satisfy the three requirements. But other parts of international law that pursue morally mandatory aims do not involve the same degree of coordination and mutual dependence, such as human rights law. More study is needed here.

With respect to consent and its refusal as a way of ensuring accountability, we have a kind of impasse here. On the one hand we have a world in which a great deal of coordination is necessary to achieve morally mandatory aims. But the only major channels of accountability we have for the proper achievement of these aims are individual states. This suggests that the principal avenue of accountability of global power to persons is through individual states acting in concert. But the main mechanisms by which states can serve as channels of accountability, exit and refusal of consent, is closed off in many instances at least morally speaking. Now this conclusion can be moderated somewhat. It is perhaps not the case that every state should be prohibited from exiting. Only the most powerful states ought to be. But these are the states that have most incentive to use the exit mechanism to affect agreements.

Furthermore, if we set aside the issue of lack of moral liberty, we can also see that the refusal and exit options for states produces a very severe kind of inequality in the accountability of international law to persons. Powerful states have a great deal more ability to withdraw and destroy institutions than weak states. This gives them a much greater say in the creation and modification of international institutions. Hence, state consent cannot be said to realize anything like an equal say for persons.

This means that the two central ways in which group decisions come to be legitimate in domestic societies are not in the offing in the case of international collective decision-making. Democracy and voluntary association are both problematic from the standpoint of justice and legitimacy when in the context of international decision making. Clearly this menu of choices for grounds of legitimacy is too small but it is hard to know where to proceed to from here.<sup>11 12</sup> We need a conception of society that is distinct from

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<sup>11</sup> One possible avenue for further exploration might be to examine some different varieties of multilateral institutions in which many states must agree together on certain policies. (Moellendorf 2008) chapter 8. Some of the bargaining disadvantages of developing societies could be partly offset in this context by the fact that there are many developing societies and that they can form powerful coalitions to counter the bargaining power of the developed societies. I do not have the time to explore this option here in sufficient detail but this method suffers from the usual defects of consensus based systems in which there is a very diverse set of parties who do not share common goals or values. When serious interests conflict, they fail to make decisions and tend to favour the status quo. And it tends to be the most powerful and wealthy states who benefit most from the status quo, so they have significant bargaining advantages in multilateral institutions, particularly if the wealthy and powerful states can make common cause. And we have clear records of very great disparities in bargaining power playing a large role in determining how these multilateral institutions develop. We need only look at the formation of the United Nations in the San Francisco conference and the formation of the WTO in the Uruguay round to see how powerful states, when they can form coalitions, can determine how these go. See (Steinberg 2002) for the WTO. See (Schlesinger 2003:223) for a discussion of the hard bargaining behind the creation of the Security Council Great Power veto. Perhaps there is some way to limit this kind of unfair taking advantage but it is hard to see how given the distribution of wealth in the world as a whole.

two of the three traditional categories of society: civil society and state. It shares with civil society the fact that its bases are still primarily founded in its members. It shares with the state the fact that the aims are mandatory and that there is some moral necessity to construct political institutions.

### *Conclusion*

The arguments of this paper are very sceptical. I have argued elsewhere against global democracy. Here I have called into question the idea that fair voluntary association among democratic states, as I have understood it, gives us a complete picture of legitimate global institutions. It may be that the best we can do in constructing global institutions is to make sure that they respect and protect human rights and that they satisfy some basic standards of accountability such as transparency. I am not satisfied with this account partly because I don't think it gives us legitimacy. It may give us reason to think that the institutions will produce minimally desirable outcomes. We may

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<sup>12</sup> The other approach that has been taken by a number of recent theorists is the idea of informal democracy. The idea here is that global society can be regulated in some way by a global civil society in which non-governmental organizations and other non-state groups, which are made accountable to people, engage in a decentralized global process of deliberation that is meant to exert pressure on states and corporations. See the contribution of (MacDonald 2010) in this volume for this approach. The study of global civil society and its potential contribution to a genuinely cosmopolitan approach to global decision-making is essential, but there are a number of difficulties with this approach. One is that there is no real way of publicly realizing equality in this highly complex and fluid process of deliberation. One suspects that power could well be wielded by elites in this process. The suspicion is increased when one notes that the non-governmental organizations that exist seem primarily to represent the standpoints of groups in wealthy western democracies. Two, while non-governmental organizations are clearly a very important part of global decision-making it is hard to see how they can be more than inputs into a more formal system of decision-making. This kind of view has not given us an adequate account of how power is exercised and decisions are made. See (Bohman 2007) for this insight.

often have reason therefore to go along with those outcomes. But it does not give us the kind of moral legitimacy that implies reasons to go along even when we disagree with the outcomes.

To the question, is legitimacy possible in the current global order for the foreseeable future, the answer is I don't know yet. I continue to think that some variation on fair voluntary association among democratic states is the most likely account to give us a plausible model of legitimacy in a contemporary global society characterized by states being the main powers, but it is not clear to me how to work out the difficulties I have discussed.

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