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.[1] 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.[2]

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 of are presupposed in most discussions. But our understanding of international political

[1] 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.
[2] See (Christiano 2008) chapters 3, 4 and 7 respectively.

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 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 amended model. Then I attempt to sketch some broad principles for a conception of international society that is still broadly within the state consent picture.

The State Consent Model of Legitimacy

Here I want to lay out the traditional doctrine of state consent as a 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 require us to go quite far beyond the usual model. 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 and where we need to take it in order to make it a plausible basis of legitimacy.[3]

The traditional idea is that international law and institutions are made legitimate and have binding force as a result of the actual consent states give in the process of making treaties. The act of consenting by a state must have certain basic properties of voluntariness as specified by the Vienna Convention on the Law of Treaties. But once a treaty is voluntarily entered into and as long as the state remains in the treaty the fundamental principle is "*pacta sunt servanda*." With regard to customary international law there is something like a doctrine of tacit consent. When a practice becomes regularized, states begin to conceive of it as having the binding character of law and a state does not make objections to participation in the practice, the state is then often thought of as bound by customary international law. If the state does raise persistent objections and the norm is not a *jus cogens* norm, then it is not bound by the norm. For the most part the consent must be voluntary and in most treaties, states retain rights of exit without having to give an explanation.[4] And finally, states can tailor the agreements they enter into by means of attaching reservations and understandings to the treaty, so that different states can have somewhat different obligations under the same treaty.

There are some exceptions to the requirement of voluntary consent. *Jus cogens* and *erga omnes* norms bind states whether they consent or not and states may not abridge these norms in the making of treaties. These norms include rules against aggressive war, genocide, torture, piracy and slavery. And states may be coerced into accepting peace treaties if they have been the aggressors. Furthermore, and this is a major exception,

[3] See (Christiano 2010).
[4] See (Helfer, 2005)

states do not seem to have rights of exit from customary international law, though some have advocated for this. States may, however, revise and generally overcome customary international law by the creation of treaties. 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 doctrine of state consent as a requirement on being bound by international law and institutions has interesting similarities and differences with the doctrine of the requirement of the actual consent of persons to legitimate political authority in traditional political philosophy. As in the case of traditional consent theory, consent is a necessary though not sufficient ground of obligation since there are constraints on what one may consent to. Consent must be voluntary and without it one does not have content independent duties to comply with the authority or norm, while with it (subject to some conditions) one does have content independent duties. And consent is meant to explain these content independent duties. In this respect, the requirement of consent is meant to protect a kind of moral liberty of action for the individual and for the state.[5]

But there are important differences as well. We can see 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 on the traditional doctrine. In the classical theory individuals consent to a centralized decision-maker. Individual consent seems to give a kind of "blank check" to the state and it seems confer omnibus authority on the totality of the actions of the state (except of course for blatantly immoral acts). This seems to me to

[5] By "moral liberty" I mean the liberty to decide how to act on the basis of one's own assessment of the moral merits of one's action. One can be morally at liberty in this sense while having many moral duties.

threaten to undermine the two major rationales for the requirement of consent. It threatens to make states not very accountable to persons because it is extremely unclear what people are consenting to or not consenting to. And it also seems at variance with the moral liberty of persons, since it does not give them much choice.

In contrast, the system of international law and institutions is decentralized and fragmentary. Since states consent to and can exit 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. This greatly increases the accountability of international law and institutions to states. And it seems to protect a wider and deeper kind of moral liberty. In these respects, the requirement of state consent is more like the requirement of individual consent to voluntary associations, which strikes me as the more natural home of consent theory.

The Rationale for, and Some Remediable Problems of, State Consent

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.

In what follows in this section I want to discuss some objections to state consent as a basis of legitimacy. The ones I consider here, I believe, can be remedied by a set of plausible modifications of the idea of state consent that fall roughly within the meaning of the idea. Later I will consider some difficulties that are more serious.

The Consent of Representative States

The traditional doctrine is based in part on the idea that states are the entities that are directed to act and bound by international law. Individuals are not so directed and bound 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 and bind them (albeit indirectly). Hence the traditional reason for making international law restricted to state consent is being undermined to some extent.[6]

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 it's 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.

Consent and Fair Negotiation

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 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

[6] See (Bodansky 1999) for a discussion of this issue.

the equal individuals in the states, we must have a conception of fair negotiation that does not allow economic or military inequalities among states to play a large role in determining the distribution of advantages that arise from the agreements among states.

The conception of fair exchange is derived from something analogous to the equality in democratic decision-making. There are different ways in which this can occur. In one case one party takes unfair advantage of another when (1) the parties do not think of the exchange as one of gift giving or just a part of a larger more diffuse exchange, and (2) one of the parties is highly vulnerable if they fail to make the exchange and (3) the exchange is highly disproportionate in favour of the non-vulnerable party[7]

[7] The equality involved is not a distributive equality. It is equality in the things exchanged. An exchange is fair when what is received is roughly equivalent in value to what is given. The way to think about equivalence of value is to think in terms of a hypothetical agreement made in circumstances where each party has equal bargaining power (or equal access to relevant information and equal access to alternative arrangements). One common way of measuring the value of the things involved is in terms of the competitive market price for the goods involved. 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. But my sense is that the price under perfectly competitive conditions is only a special case of a more general principle, which articulates the relative values in terms of what the parties would have agreed to when differences in bargaining power are minimized. To my knowledge courts have tended to invalidate only the most seriously disproportionate contracts. See Gordley, 2001 for a discussion of this.

and (4) the disproportionate distribution of advantages is explained by the disproportion in bargaining power. In another kind of case, condition 2 is replaced by significant asymmetries of information or opportunities to acquire information between the two parties. It seems to me that in these conditions, it makes sense to say that the exploited party has less of a say in the making of the arrangement at issue than the other does. The arrangement may be voluntary, but one party has had less influence on how the arrangement was made.

Both of these kinds of exploitation are alleged in international politics. The formation of the WTO is often described as a case of wealthy states taking advantage of the vulnerabilities of poor states. It is also described as an instance of wealthy states taking advantage of the relative paucity of information and expertise on international trade among poorer states. But this conception of fair negotiation is the least well worked out part of the whole picture I am hoping to elaborate.

Broadly speaking we can say that persons have something approaching an equal say in the determination of the treaties than bind them when the state parties are adequately democratic and when states do not take unfair advantage of each other.

Independence and Legitimacy

One objection to the idea of state consent as a basis for the legitimacy of international institutions is that many international institutions have some independence from their members when it comes to international law making and decision-making more generally. They have a kind of agency and legal personality. And they have

bureaucracies and internal chains of authority that operate independently of the states that are members. Let us say that an organization has independence from it members when, in their normal accepted operations, they do things the members do not control, that affect the interests of their members in ways that at least some of the members disapprove of. There are a number of shapes that this independence can take. First is judicial decision making concerning when members have violated agreements or not as in the dispute settlement mechanism of the World Trade Organization (WTO). This is motivated by two different considerations. One, it allows for a degree of impartiality on the part of the international adjudicative body that is hard to achieve without some independence.[8] Two, it allows for the exercise of expertise in the complex system of agreements of the WTO and between particular states and it requires some specialized knowledge of the issues at stake.[9] A second kind of delegation consists in administrative policy and rule making. This kind of delegation is essential to environmental agreements in which scientific expertise plays a role in determining particular rules.[10] A third form of independence, which does not involve delegation is some kind of majority or supermajority rule as in the case of the Security Council of the United Nations. Do these kinds of independence imply that state consent is not the basis of legitimacy of the institutions?

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[8] See Michael Barnett and Martha Finnemore, "The Power of Liberal International Organizations," in *Power in Global Governance* ed. Michael Barnett (Cambridge: Cambridge University Press, 2005), pp. 161-184, esp. 173.

[9] See Robert Howse, "The Legitimacy of the World Trade Organization," in *The Legitimacy of International Organizations* eds. Jean Marc Coicaud and Veijo Heiskanen (Tokyo: United Nations University Press, 2001), pp. 355-407, esp. pp. 374-394 for a careful discussion of the dispute settlement mechanism.

[10] See Benedict Kingsbury, "Global Environmental Governance as Administration: Implications for International Law," in *The Oxford Handbook of International Environmental Law* ed. Daniel Bodansky, Jutta Brunnee, and Ellen Hey (Oxford: Oxford University Press, 2007), pp. 64-84, esp. 75-79.

Certainly the independence of international organizations from their members is compatible with the protection of the moral liberty of their members. Many organizations of which we are members in domestic societies have parts that operate independently in this way. Clubs, churches, political parties, interest group associations all have independence of this sort. Yet we do not think that this is incompatible with their getting their legitimacy from the consent of the members. The key here is that the members' obligations to them are dependent on our consent and can be terminated by exiting the organizations.

Furthermore, the fact that members feel constrained by the organization of which they are members is a natural outcome of the fact that the organizations have other members. Each member has to compromise some of what he or she wants in order to join with others. Every form of voluntary association has this feature and every contract has this feature. To some extent, each member is at least partly at the mercy of other members. And this is at least sometimes registered in the fact that each member can be constrained by an independent board or decision-making group in the association. But this is not a reason for thinking that the rights of entry and exit are not powerful tools of accountability or are not the bases of legitimacy of the group or the authority constituted by the group.

Refusal and termination of consent are the key elements in making international organizations accountable to us as well. These organizations do what they can in a way that is compatible with retaining their other members to assure that members do not exit. They are highly sensitive to the interests of members (most particularly of powerful

members) in their operations as seems to be the case in the WTO.[11] Or the institutions have strong oversight by states as in environmental treaties.

So it is not clear that the independence of decision-making bodies within an organization *per se* implies that consent is not the fundamental basis of the authority of the organization over an individual.

Another consideration that is sometimes used to criticize state consent as a basis of legitimacy is that the independent bodies of the organizations engage in quite complex reasoning in issuing their directives. They require expertise and arcane and specialized deliberations in choosing policy. To the extent that the deliberations are specialized and difficult for ordinary citizens to grasp, it is thought that the bodies that engage in this activity are not accountable to ordinary citizens. The examples above of scientific and judicial expertise illustrate this phenomenon well. And if it is the consent of democratic states that we are after, this might seriously undermine the voluntariness of the consenting acts on the part of citizens.

This is an important concern but I am not convinced that it defeats the voluntariness of democratic consent. Democratic societies have extensive mechanisms for making expert and specialized deliberations accountable to ordinary citizens. These are imperfect and they sometimes don't work at all. But they do work to some significant degree in the kinds of complex decisions that are made by independent agencies in democracies such as central banks and environmental agencies. I don't see why in principle they cannot be made to work in the case of international agencies.

[11] See Howse and see Gregory Shafer, "Power, governance and the WTO: a comparative institutional approach," in *Power in Global Governance* eds. Michael Barnett and Raymond Duvall (Cambridge: Cambridge University Press, 2005), pp. 130-160, esp. 139.

Still we need to take note of the central importance of a division of labor as it is developing in important parts of international law. It is moving beyond the stage in which the states must consent to every action of the organization as was the case primarily in the General Agreement on Tariffs and Trade (GATT) before the development of the WTO dispute settlement mechanism. This suggests that states see the need for coordination partly on rule makers, appliers and interpreters in order to carry out their tasks. By "parties coordinating on x" I mean that each party does better in terms of the goals they have by following x than not and sets back the goals of other parties by failing to follow x. A party that fails to follow x does worse by their own goals and sets back the pursuit of goals of others as well. The goals could be understood in terms of the interests of the parties or in terms of the moral goals of the parties. Of course, states often coordinate on norms in international law.[12] But what I am referring to here is that states seem to see the need to coordinate on rule makers, appliers and interpreters. In this case they each do better by following the directives of the rule maker, applier or interpreter and act disruptively by not following those directives. This observation will prove relevant to the question of legitimacy when we combine it with some other observations in coming sections. But, by itself, it does not defeat the consent basis of legitimacy.

Too Ideal?

Some might argue that a state consent view that requires democratic government in the state parties is problematic because most states are not sufficiently democratic. Others might suggest that the requirement of fair negotiation is problematic because many

[12] To be sure, there are some important parts of international law that do not involve much in the way of coordination such as human rights law.

treaties have been created in manifestly unfair ways. These objections suppose that contemporary international institutions are legitimate or could plausibly be made legitimate for all the parties that are members of those institutions. But I do not see it as a requirement of a conception of legitimacy of international institutions that it entails that contemporary international institutions are legitimate for all parties or that they could likely be made legitimate for all parties. A conception of legitimacy should explain when and how an arrangement is illegitimate or not legitimate just as much as it explains some arrangements legitimacy.

To be clear, the state consent view does not entail that these institutions are illegitimate *simpliciter*, only that they do not have a right over the individuals who are members of non-democratic states or those who are members of states that have been unfairly pushed into agreements. Other states that have democratically agreed under fair conditions, may still be obligated to obey at least as long as performance of those obligations does not depend on improper treatment of states that have not been fairly included.

Finally, even if the conditions of legitimacy as stated in the amended state consent view are not met in international society and are difficult to meet, they may still serve as conditions to be approximated by international society. They might have action-guiding force in this way. Here I think we should take the notion of legitimacy as having a kind of scalar character, from illegitimacy to moderate legitimacy to full legitimacy. This might correspond to weaker and stronger content independent reasons on the part of members and perhaps exclusionary reasons that exclude more or less alternative considerations. The reason for thinking that legitimacy has a scalar character is that even

institutions that seem manifestly not legitimate by democratic standards, such as the Security Council, are perceived to have some kind of legitimacy even for less powerful states. They see the requirement of nine positive votes for Security Council action as imposing some kind of constraint on powerful states and thus want international intervention to go through the Security Council. This is because at least four of the nine positive votes have to be from non permanent members and so the voting rule provides some protection against great power unilateralism and even great power collusion.[13] It may be that we should describe the UN Security Council as having a kind of weak legitimacy.

The Contract Model of The Function of International Treaties

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 the function of international law, that is, as if it had the function of mere contracts among states. The basic worry is that contracts normally generate obligations where there was moral liberty. But many treaties do not serve the same functions normally as contracts. And so the usual standards for evaluating many treaties and the system of treaties as a whole are different from the usual standards for evaluating contracts and that difference vitiates the

[13] See Miles Kahler, "Legitimacy, Humanitarian Intervention, and International Institutions," *Politics, Philosophy and Economics* 10 (1) (Winter 2011),

contract model and calls the state consent model into question. We will then consider what modifications to the state consent view are possible.

A natural way of thinking of the state consent view is in terms of the contract model of the function of international treaties. The contract model thinks of all treaties as if they had the same function as 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 sometimes 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.

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 treaty making and many of the standard criticisms of international trade law have invoked ideas of unfair advantage taking.[14] So it looks as if the contract model is a good fit with international treaty making.

Treaties and Morally Mandatory Aims

But there some important respects in which the model of contract does not apply well to international treaties. The basic trouble with the application of the contract model to treaties is that treaties often have purposes that do not fit naturally with the activity of contract making. Many treaties serve fundamental and morally mandatory purposes such as justice, the struggle against severe poverty and morally necessary public goods such as

[14] This is in essence the approach Richard Miller takes in his *Globalizing Justice: The Ethics of Poverty and Power* (Oxford: Oxford University Press, 2010) chap. 3. It is a widespread objection to the WTO among less developed countries and NGOs that purport to advance their interests. See also Amrita Narlikar, "Law and Legitimacy: The World Trade Organization," in *The Routledge Handbook of International Law* ed. David Armstrong (Abingdon, UK: Routledge, 2009), pp. 294-302, esp. 296. It was also a source of major controversy in the conference devoted to drafting the Vienna Convention on the Law of Treaties.

the mitigation of global warming and the protection of the ozone. And it is primarily through treaties that these purposes are pursued.

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.[15] 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 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.

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[15] See (Grotius 2005 Book II: 821) and (Vattel 2008: 345).

This is distinct from the usual function of contracts, which are usually made in pursuit of the partial concerns of each of the parties 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 justice 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.

I would include treaties that attempt to create a reasonably fair system of international trade as pursuing morally mandatory global public goods in a just way. They express commitments to globally fair terms of international commerce 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.

Most 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 as way as to acknowledge the importance of broader societal considerations of justice and fairness in the body of the treaty. For example, 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.[16] 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 proper treaty. The same holds of international environmental treaties. They give special exemptions to developing countries so as not to retard their

[16] See (Franck 1996) for a discussion of trade preferences and (Albin 2001) for a general discussion of fairness considerations in international negotiation.

development. These are normally defended in terms of fairness to the developing countries.

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 at a concern to make some progress towards global distributive justice and fairness among peoples in the world. They acknowledge the importance of the aims of distributive justice and the common good. Of course there is a lot of disagreement on what distributive justice requires but there is a quite strong sense that it involves the alleviation of the most severe forms of poverty at the very least.

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 than in the case of many treaties. 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 is 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 contract is 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.[17]

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

[17] We do see some modest efforts in this direction in the Millennium Development Goals.

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 moral division of labour within the state do not suggest such a role for treaties generally. 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 morally mandatory aims of justice and global public goods 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 much treaty making suggests that the aims are mandatory aims much like many of the aims that are pursued by states domestically.

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.

But we need to note here that the fact that these aims are morally mandatory does not settle the case of moral liberty. It is possible that the morally mandatory aims can be pursued by other means than those chosen by the particular treaties. We will need to consider this fact once we have the two main issues in front of us.

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.[18] 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 the interests of others, who do not participate, will not usually be adequately taken into account.

[18] See (Bodansky 1999) for this.

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.

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 Problems of Consent

These two big issues of morally mandatory aims and negative externalities pose problems for the state consent model. But on order to see this more clearly we need to think again about consent theory more generally. As I see it, the role of the requirement that in order to be bound by an authority or by a conventionally established norm one must have actually consented to it is to protect the moral liberty of the person or group and to make the authority or norm creation process responsive to the concerns of the entities that are bound by it or affected by it. By moral liberty, I mean the liberty to decide for oneself how one ought to act. This includes the liberty to decide on what moral norms apply to one and the liberty to decide how to satisfy or realize those norms. And it usually involves a kind of immunity from the imposition of duties by others.

Here I want to summarize very briefly some theses about the activity of the state and its relation to individual consent. In the case of the relation of an individual to a reasonably just state, it is not clear that he or she has moral liberty in the sense described above. The reason for this is that a reasonably just state pursues morally mandatory aims in such a way that requires a high degree of coordination among the members, which coordination is usually achieved through the directives of the state. In other words individuals must use the directives of the state as the basic coordination point in order to advance their morally important aims. In these kinds of circumstances, an individual must take the directives of the state as providing content independent duties to comply. Thus individuals do not have moral liberty in the case of reasonably just states. They must go along for the most part. This is especially true in the case of reasonably just democratic states, where not to go along amounts in many cases to refusing to treat one's fellow citizens as equals. This doesn't mean that they must agree with what their state does, they may disagree and attempt to change the law. But except in cases of egregious departures from justice, they have a duty to take the state's commands as giving content independent duties for action. Moreover, the options of consent and non-consent do not provide a serious avenue of accountability of the state to persons, at least on the traditional version offered by Grotius, Hobbes and Locke. These are the reasons why consent is not a plausible requirement of political legitimacy in the case of the state; the requirement of consent does not protect a real moral liberty in this case and it does little to make the state accountable to individuals.

In contrast, consent makes sense as a source of the legitimacy of voluntary associations. This is because in the case of voluntary associations persons are morally

free to join or not to join and these actions do usually make associations accountable to persons. The reason for the moral liberty is that in most cases the association does not pursue morally mandatory aims. But even when the association does pursue morally mandatory aims such as in the case of Amnesty International or Doctors without Borders, it is not the duty of each person to go along with them since there are many ways in which one can pursue these morally mandatory aims.

These observations help account for what seem to me to be the most compelling criticisms of the consent theory of political authority. Consent has been thought to be a poor necessary condition of legitimate political authority because the consent requirement protects too little and too much. The consent requirement does not protect a genuine moral liberty, as I argued above. At the same time and for this reason, it seems to protect the wrong things. It protects irrational non-consent, unscrupulous non-consent (such as free riding) and, most importantly, morally destructive non-consent (such as unwillingness to go along with a morally mandatory coordination solution). So the implication of the need for coordination on the directives of the state to achieve morally mandatory aims is that non-consent has no effect because one must still treat the directives of the state as supplying content independent duties.

Consent and International Institutions

It seems clear that international institutions and law are quite different from domestic political institutions and law and from voluntary associations. And both these observations are important for assessing the importance of state consent as a basis of the legitimacy of international law and institutions. The difference with voluntary

associations is that international law and institutions do pursue morally mandatory aims. Here we can add the observation that we made on the independence of international institutions. This independence suggests that a significant degree of coordination on the directives of the institution's directives is acknowledged by states as necessary to the achievement of the aims of the institutions. To the extent that the successful pursuit of the morally mandatory aims requires in many cases a significant degree of coordination among states it seems that states have a diminished 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.

Another interesting and distinctive implication of the fact that a significant part of international law is concerned with morally mandatory aims is that deliberation among states is part of the process by which international law must arise. To the extent that there are morally mandatory aims, there are common and shared aims and so it will be necessary for states to discuss the natures of the aims and how to achieve them. The making of international law cannot merely be a matter of negotiation among parties with conflicting aims. It includes discussion on what justice and the common good require with an eye to making decisions binding on all.

Still, it would be hasty to infer that state consent is not a basis of legitimate international law and institutions in the global realm. The basic reasons for this are that there is still some place for moral liberty in the international realm and because states are the principal mechanism of accountability of international institutions to persons and the mechanisms of accountability are refusal of consent and exit.

The basic reasons for assigning some moral liberty to states in the international realm are Millian in character and not Lockean. Given the morally mandatory aims that must be pursued by international law, states must participate in the process of international law making in pursuit of these aims. But there is still reason to preserve some moral liberty because of the uncertainty about how best to pursue the morally mandatory aims. Partly this is because the exact nature of the aims themselves is partly in question. Partly it is because the means for achieving the aims is in question as well. Partly it is because the proper constraints on the pursuit of the aims are in question.

The basic argument for retaining a limited moral liberty for states comes in two parts. The first part of the argument, we have already seen. The state is the principal large-scale mechanism of accountability of political power to persons that we know of. Nothing else comes close to it in its ability to bring together many diverse interests and opinions under one system of collective decision-making. There is nothing on the horizon to take its place. We may hope for global democracy in the centuries to come, but for now we need the independent states of the world. Non-governmental organizations may greatly enhance the process of making international law and the process of implementing it. But they must play primarily a civil society role, which in my view amounts to organizing people to monitor, contest, inform and put pressure on state and international institutions. They are not primarily decision-making instruments. We must make use of the mechanisms of accountability of states to persons in making international law accountable to persons. We can do this by making the process of the creation of international law more democratic in each state, or at least this seems a reasonable aim to push for.

The second part of the argument is that international law and institutions are accountable to states primarily via the route of consent, exit and non-consent. These are the main avenues of accountability. This is desirable at the moment because of the great uncertainty facing the globe about what the best solutions to global problems are. The consequence of this uncertainty is that we need a variety of experiments in transnational organization in order to make some progress towards a more just and humane international order.

I take the uncertainty to be pretty clearly evident. But let us just look at one of the problems. Global poverty is one of the central problems that must be solved by human beings. But there is a great deal of uncertainty about how to do this. What are the relative roles of redistribution, domestic political reform, and reform of international institutions of trade in a reasonably well-functioning system of poverty mitigation?[19] Furthermore, there is a sizable literature on the difficulties with many of the standard efforts to solve the problem of poverty in other countries.[20]

The source of the immense uncertainty is in large part the fact that the world is divided into states with different histories, political systems, languages, traditions and cultures and very different bases for economic development. We have some sense of how to alleviate poverty within the modern democratic nation-state, but across borders and certainly across regions the issues become very different.

This is not meant as an apologia for the modern world's unconscionably tepid response to severe poverty; it is meant as a plea for a limited moral liberty of states to

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[19] See Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton: Princeton University Press, 2008) for a strong emphasis on domestic political institutions. For an argument against this thesis see Jeffrey Sachs, *The End of Poverty* (New York: Penguin Books, 2005).
[20] Most striking is William Easterly's *The Elusive Quest for Growth* (Cambridge, MA: MIT Press, 2002).

experiment with different ways of solving problems we do not now know how to solve. Regional transnational institutions of states and competing global associations are necessary for this process of experimentation. Experimentation may produce alternatives from which we can choose the best solution. It may also bring about different optimal solutions for different regions and societies.

Though state consent still has a role to play it must be severely constrained. Because the aims of parts of the international system are morally mandatory, the exit or refusal of states must be limited. Opportunities for irrational non-consent, unscrupulous non-consent and morally destructive non-consent must be diminished.

Constraints on Exit and Refusal

What I think we need to conceive of is a highly constrained system of state consent. We have already observed that there are some constraints on state consent: *jus cogens* norms and *erga omnes* obligations. No state may enter any agreement that violates these and these norms are binding on states whether they agree to them or not. And there are some treaties that do not permit exit as well as some treaties that permit exit only on condition that an explanation of a certain kind is given. So we already see some legal constraints on states' treaty making and treaty denouncing powers. But my guess is that these constraints are not sufficient to tackle the problems currently faced by the global community such as global warming, severe poverty and fair trade.

What new constraints am I envisioning? First, since some of the aims of international law are mandatory and require a fair degree of unified cooperation among states, states may not refuse consent to or exit these institutions for unscrupulous reasons

or for irrational reasons. How is this to be articulated? We could require that when states exit, or refuse consent to, a treaty that pursues mandatory aims, they give an explanation in terms of those aims and in terms of accepted scientific doctrine for why they do not consent. That is, they explain why the treaty in question does not pursue the aims very well at all or why their participation does not help pursue those aims. We may require that states not only offer these explanations but also offer alternatives.

Second, if a state exits or refuses consent to a treaty that pursues a morally mandatory aim without offering the above kind of explanation, then it may permissibly be coerced or pressured into compliance in part or in whole with the treaty by the other states. This would be a case of unscrupulous non-consent or exit. Third, if a state exits or refuses consent to a treaty that pursues a morally mandatory aim but offers only an irrational or morally bankrupt explanation, the same implication holds.

These two ideas are based on the thought that we are dealing with morally mandatory aims that must be pursued in one way or another by states. The idea is that some degree of coercion or non-cooperation are justified when states act in manifestly immoral or irrational ways with regard to morally pressing issues. This does not make the actions of other states legitimate, it only justifies them.

The explanations states give for their actions should be the subject of general deliberation by the community of states. The community does not have to agree with the explanation but it does have to judge whether the explanation is within the range about which reasonable persons can agree.

But the situation is a bit more complicated than this. The explanation that a state gives for refusing to go along with an institution must not only express a reasonable

alternative view, it must also give an explanation for why it is better to opt out of the coordination point. Most coordination games will be impure games where some moral preferences are better met than others. So there will be disagreement even within a coordination point. But it may be the case that to fail to go along with a coordination solution because one reasonably disagrees with the dominant view is manifestly self-defeating. That is, the reasonable alternative view will be less well satisfied if one does not go along with the coordination. In this case of morally destructive refusal the international community will be justified in coercion or pressure as well.

But in some circumstances, the explanation that a state or a group of states gives will be in terms of a reasonable account of the morally mandatory aims and in terms of reasonably acceptable scientific theory. And its rejection of the coordination point will not be manifestly self-defeating by its own moral ideas. As a general rule I think the international community does better in these circumstances by allowing the state or group of states to go its own way.

Conclusion

I have amended the state consent doctrine of legitimacy so that it includes the need for democratic states to engage in fair agreements with other such states. And I have amended it so that the opportunities for non-consent are hemmed in even more than they currently are. The basis for this highly revised account of state consent is the importance of the modern democratic state in ensuring accountability and the need for experimentation in devising solutions for global and regional problems. I take the principles I have outlined to offer a kind of realistic way forward in devising a broadly

democratic and cosmopolitan approach to the creation of legitimate international institutions. I have only provided the barest sketch and I have said very little about the difficult problems of institutional design that my approach engenders. But I hope it can be thought of as a reasonable basis for reflection on institutional design.

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