

Legitimacy, Justice and Public International Law

EDITED BY
Lukas H. Meyer



CAMBRIDGE

LEGITIMACY, JUSTICE AND PUBLIC INTERNATIONAL LAW

Do states or individuals stand under duties of international justice to people who live elsewhere and to other states? How are we to assess the legitimacy of international institutions such as the International Monetary Fund and the United Nations Security Council? Should we support reforms of international institutions and how should we go about assessing alternative proposals of such reforms?

The book brings together leading scholars of public international law, jurisprudence and international relations, political philosophers and political theorists to explore the central notions of international legitimacy and global justice. The chapters examine how these notions are related and how understanding the relationships will help us comparatively assess the validity of proposals for the reform of international institutions and public international law.

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Introduction: Legitimacy, justice and public international law. Three perspectives on the debate

LUKAS H. MEYER AND PRANAY SANKLECHA

In this introduction, we attempt to elucidate three theoretical perspectives that are helpful in framing the contributions to this volume. In the course of this elucidation we also attempt to indicate some important problems that the debate currently faces. We do this through discussions of international legitimacy, international justice and the relations between ideal and non-ideal theory.

International legitimacy. From normative authority by consent to instrumental legitimacy

Questions of legitimacy have long been central to both political philosophy and political practice. It is not merely vanity that leads dictators of virtually all stripes to first decide to hold elections and then announce that they have won 96 per cent of the vote in them. Saddam Hussein, for instance, held a referendum in 2002 on whether he should continue as ruler of Iraq for the next seven years, and after the election was held it turned out that out of 11,445,638 eligible voters, every single one voted in favour.¹ The natural question to ask is: why bother? Why bother to hold sham elections with sham results when you hold power anyway? There are many possible answers, but two are especially relevant here. The effect of legitimacy is, or can be, twofold. First, it makes it easier to exercise the power one does possess. Second, and as important, it can often increase the scope of the power one possesses. Legitimacy matters

For very helpful comments on earlier versions of this introduction we would like to warmly thank Keith Bustos, Julian Culp, Thomas Distel, Sarah Kenehan and Nora Kreft.

¹ BBC News. Online, available at: http://news.bbc.co.uk/2/hi/middle_east/2331951.stm.

in the real world because it affects power, and power matters because it creates the ability – on some views, is just the ability – to get things done.

In this section, we will consider three important traditions in the debate on legitimacy. These are the consent, instrumentalist and procedural traditions respectively. We will argue that the consent tradition is generally deemed to be unsatisfactory when applied to the international context, at least when consent is thought of as a sufficient condition for legitimacy. The instrumentalist and procedural traditions have found more favour in the international context, and we will attempt to outline some important ways in which these traditions have influenced the debate on international legitimacy. Besides identifying areas of consensus in the debate, we also attempt to describe some important problems that this consensus faces and will need to resolve.

Before beginning a discussion of legitimacy, however, we must first make a distinction between descriptive and normative senses of the concept of legitimacy. On the dominant descriptive view (which comes from Max Weber²), ‘a norm or an institutional arrangement is legitimate if, *as a matter of fact*, it finds the approval of those who are supposed to live in this group’.³ Legitimacy in this sense is simply the fact that the subjects of the norm or institutional arrangement believe that norm or arrangement to be legitimate.

The normative sense of legitimacy deals with whether this belief is correct – i.e. whether that norm or institutional arrangement satisfies certain specified conditions for possessing legitimacy. As Arthur Applbaum points out, one could of course hold the view that one of the conditions – or even the only one – for possessing normative legitimacy is that most people subject to the rule of an entity believe it to possess normative legitimacy, but ‘this is a claim about the normative criteria for having moral legitimacy – a particular conception – not a claim about the meaning of moral legitimacy’.⁴ It is possible, then, for a political authority to be legitimate in the descriptive sense while being illegitimate in the

² See M. Weber, *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie* (Tübingen: J. C. B. Mohr, 1922). For an English translation, see M. Weber, *Economy and Society. An Outline of Interpretive Sociology*, G. Roth and C. Wittich (eds.), 3 vols. (New York, NY: Bedminster Press, 1968).

³ W. Hinsch, ‘Justice, Legitimacy and Constitutional Rights’, in *Justice, Equality and Democracy*, M. Matravers and L. H. Meyer (eds.) (London and New York, NY: Routledge, in press).

⁴ A. I. Applbaum, ‘Legitimacy in a Bastard Kingdom’, *John F. Kennedy School of Government Center for Public Leadership Working Papers*, Spring 2004, 79. Applbaum also argues, convincingly, that while the view isn’t incoherent, it is wrong.

normative sense; this is what we might say, for instance, of the rule of kings in the Middle Ages. The chapters in this volume, and therefore this introduction, concentrate on normative legitimacy.

There are various ways in which one could argue that entities are legitimate in the normative sense, and there are also various ideas of what follows for the political entity and its subjects from the political entity possessing normative legitimacy. We will outline the more influential views briefly because this background is necessary for placing the contributions to this volume within the tradition of the debate on legitimacy and authority. This will also, we hope, have the effect of identifying some small consensus on which tradition appears best suited to dealing with the specific challenges raised by considering legitimacy in an international rather than domestic context.

One very important understanding is found in the consent tradition, and its basic idea can be stated simply: it is the consent of persons within a state to the authority of the state that legitimates the state with respect to those persons. This simple formulation is obviously not a full expression of a fully worked out consent understanding, but every such understanding has this insight at its heart, and it is sufficient for the purposes of this introduction to work with this simple formulation.

Two main interpretations of consent within this tradition can be distinguished. The first is that consent is to be understood as hypothetical consent,⁵ the second that it is to be understood as historical consent. David Hume raised powerful criticisms against both interpretations. He objected to the interpretation that historical consent could legitimate by first arguing that there never was historical consent in the first place.⁶ Further, even if it was true that the historical parties in given historical circumstances gave their consent, it does not follow from this that presently existing parties are bound by this historical consent. Hume also levelled this kind of objection at the idea of hypothetical consent, the idea being that while the hypothetical parties in the hypothetical position might have hypothetically consented to certain rules, this does not bind actual parties in actual positions.⁷ Those rules may be worth following

⁵ See for example: J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); B. Barry, *Justice as Impartiality* (Oxford University Press, 1995); T. M. Scanlon, *What We Owe To Each Other* (Cambridge, MA: Harvard University Press, 1998).

⁶ D. Hume, 'Of the Original Contract' (1777), in *Essays, Moral, Political and Literary* (Indianapolis, IN: Liberty Classics, 1987).

⁷ See also R. Dworkin, 'The Original Position', in N. Daniels (ed.), *Reading Rawls* (New York, NY: Basic Books, 1975).

for several reasons, and so actual parties may agree to follow them, but they agree to follow them because of those reasons and not because hypothetical parties would have agreed to follow them in hypothetical circumstances – hypothetical consent is, or so the argument goes, both non-binding on and irrelevant to actual people in real situations. The second objection to hypothetical consent, meanwhile, is also simple but powerful. Consenting to being tortured, or killed, does not legitimate being tortured or killed, and promising to obey orders to act in ways that are morally prohibited does not justify acting in such ways. At the very least, then, consent cannot be the only condition for the legitimacy of an authority.

These objections are not decisive but are important to outline because they describe problems that will be faced by any account of international legitimacy that is based on hypothetical consent. Having mentioned these problems we will not further pursue the hypothetical consent model, because one view in the context of international legitimacy has been that it is the actual consent of states to international institutions that legitimates those institutions. When consent theory is discussed in this volume, it is this view which is considered.

The first three chapters in this volume are unanimous in rejecting this view (i.e. the one from actual consent) of international legitimacy. They offer a variety of reasons which together amount to a substantial case against the extension of the consent idea. Many states are themselves illegitimate, for instance, and this makes it difficult to see how their consent could legitimate an international institution. If in response to this one claims instead that it is the consent of democratic states that legitimates international institutions, one faces other problems. First, there is the problem of what Allen Buchanan and Robert O. Keohane call ‘bureaucratic discretion’,⁸ which is the idea that even within democratic states ‘at some point the impact of the popular will on how political power is used becomes so attenuated as to be normatively anaemic’.⁹ This problem would exist for international institutions even if there was a world democracy, but given its absence the problem of bureaucratic discretion becomes even more important at the international level because ‘global governance institutions require lengthening the chain of delegation’,¹⁰ i.e. the chain between the popular will and the exercise of political power. Second, as Simon Caney remarks, the restriction to democratic states also creates the problem of explaining how and why

⁸ A. Buchanan and R. O. Keohane, Chapter 1, this volume. ⁹ *Ibid.* ¹⁰ *Ibid.*

international institutions ‘possess legitimacy over the unfortunate members of illiberal states whose lives are structured by these institutions but have no input into the process’.¹¹

Additionally – and this problem arises whether we limit the legitimating power of consent to democratic states or not – the imbalance of power between states means that weak states may have no choice but to accept a particular international institution, and this makes it difficult to argue that they have truly consented to it. The imbalance of power creates the further problem that even if we could argue that weaker states did somehow consent to international institutions, the design and operation of these institutions would be dominated by the more powerful states and used to serve their ends, thereby creating injustice and making it difficult to claim that the institutions were legitimate.

Theorists of international legitimacy seem to agree that the consent tradition cannot be used as an exclusive explication of the conditions required for international legitimacy. This looks like being one of the areas of consensus referred to earlier. Note that this is, as one would expect in such a contested field, a very limited claim – we suggest that the consensus is only that the consent tradition cannot be used to provide sufficient conditions for international legitimacy; whether state consent is a necessary condition or not is still up for grabs. Buchanan and Keohane, for instance, argue that ongoing democratic state consent *is* a necessary but insufficient condition for international legitimacy.¹²

Turning away from the consent tradition, we consider now a second major tradition in the debate on legitimacy, namely that of instrumentalist accounts of legitimacy. The most sophisticated account in this tradition comes from Joseph Raz, and consists of what he terms the service conception of authority.

The idea at the root of the service conception is that an authority is legitimate for a person when (a) by obeying its orders that person will do better at acting for the reasons that she ought to act for independently (the normal justification condition), and (b) the authority takes those independent reasons into account when it issues its directives (the dependence condition). It follows from these two conditions, argues Raz, that the directives of a legitimate authority are not an additional

¹¹ S. Caney, Chapter 3, this volume.

¹² Buchanan and Keohane, Chapter 1, this volume.

independent reason for action, but rather a reason for action that excludes some independent reasons (the pre-emption thesis).¹³

This is an account of authority that specifies both a justification right on the part of the agent exercising power *plus* a content-independent obligation to obey on the part of the subjects under the authority of that agent. Rather than directly attacking this interpretation of authority, one important strategy in the debate on international legitimacy has been to attempt to drive a wedge between what we will call 'authority' and 'legitimacy'.¹⁴ Many seem to adopt this strategy and doing this might well be another area of consensus in the debate. Roughly speaking, the idea has been to first suggest that legitimacy consists only of the justification right on the part of the agent exercising that power without any corresponding obligation to obey, then to attempt to secure legitimacy rather than authority for international institutions.

This is an understandable move, because the normal justification condition and the dependence condition are clearly very difficult to satisfy. Because of its importance in the international legitimacy debate, we would like to briefly point out one important problem that has to be dealt with if the move is to be successful. This is the question of whether the distinction between authority and legitimacy, as it is outlined above, can be sustained at all. Does an agent-justification right make sense without a corresponding duty?¹⁵ Broadly speaking, there are two possible options. One would either have to deny that an agent-justification right implies any duties on the part of others, or one could accept an implication but argue that what was implied was something less than a duty. If one takes the first option, one faces the problem that it then becomes more difficult to understand what the right in question actually means. Normally, when we say, for instance, that one has a right to free speech, we understand this right as entailing some sorts of duties on the part of others; and even if this duty is simply not to interfere with, rather than promote, free speech, when fleshed out this often amounts to substantial

¹³ J. Raz, *The Morality of Freedom* (Oxford University Press, 1986), part I. For criticisms of the pre-emptive thesis see L. Green, *The Authority of the State* (Oxford: Clarendon Press, 1988), 113–14; Stephen Perry, 'Second-Order Reasons, Uncertainty and Legal Theory', *Southern California Law Review*, 62 (1989), 913; F. Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991), 913–94.

¹⁴ See for example A. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2004).

¹⁵ For attempts to argue that it does, see Applbaum, 'Legitimacy in a Bastard Kingdom', 85–88; R. Ladenson, 'In Defense of a Hobbesian Conception of Law', in J. Raz (ed.), *Authority* (Oxford: Basil Blackwell, 1990), 32–55, esp. 32–40.

duties. If one were to take the second option instead, a difficulty would lie in explaining exactly what was implied, and how these demands, whatever they were, were to be meaningfully distinguished from duties.

The stringent requirements of the service conception along with how influential it has been have together made a major contribution, then, to the direction the international legitimacy debate has taken. In addition, the tradition the service conception exemplifies (i.e. instrumentalist interpretations of legitimacy) has also been very influential in the debate on international legitimacy.

We can see this influence in Arthur Applbaum's contribution to this volume (Chapter 10). He attempts in it to identify conditions under which the use of force in international relations is morally permissible. He puts the question thus: is forcing a people to be free possible, and if so, is it ever morally permissible? Now, forcing a people to be free, if possible, seems like a classic case of a paternal action, and Applbaum argues that paternal actions are most likely to be just when three conditions are met: the freedom of the agent being paternalised is already impaired, the good at stake is that agent's future freedom, and the agent's retrospective endorsement is likely. The agent's retrospective endorsement is most likely, of course, when the paternal action results in the agent's future freedom being secured. Applbaum claims, that is, that a necessary condition for the legitimacy of forcing a people to be free is that the use of force should *result in certain effects*, namely that the agent's future freedom be secured.

Buchanan and Keohane argue in Chapter 1 for a standard of legitimacy which contains, amongst other things, the following two conditions: in order to be legitimate, international institutions must (1) not violate the least controversial human rights and (2) provide benefits that would otherwise not be obtained, compared to other practically feasible institutions and not compared to the optimal case. The second condition is clearly in the tradition of instrumental justifications of legitimacy, and while the first can be seen as a constraint, it is also plausible to either see it, or recast it, as an instrumental condition that needs to be satisfied for institutions to be legitimate. Similarly, Caney also argues in Chapter 3 for a standard of legitimacy which includes the condition that for an institution to be legitimate it must ensure that 'persons' most fundamental rights are upheld', and he explicitly refers to this as 'an instrumental component'¹⁶ of his standard of legitimacy.

¹⁶ Both quotes are from Caney, Chapter 3, this volume.

This seems to be another of those areas of consensus in the debate on international legitimacy. Again, however, it is necessary to be clear about what we are claiming exactly. It is the limited claim that any account of international legitimacy seems to pay homage to the tradition of instrumentalist justifications of legitimacy by accepting that at least one part of the standard for legitimacy is that the institution in question satisfies certain instrumental considerations. We are not claiming that there is a consensus that instrumental considerations constitute sufficient conditions for the legitimacy of international institutions, but rather that there seems to be agreement that they are necessary ones.

Samantha Besson's chapter in this volume (Chapter 2) brings out very clearly, in fact, that there isn't agreement on instrumental considerations being sufficient to legitimate international institutions. She attempts to provide a feasible model of instantiating global democracy. The idea is that given the weaknesses of the view that state consent can legitimate international institutions, the model of global democracy she proposes could serve as a better way of legitimating those institutions. Her chapter can be seen as flowing from a third important tradition in the debate on legitimacy and authority, namely the idea that the legitimacy of institutions derives from the procedures they follow in issuing their directives.¹⁷ One strand in this tradition, and the one that Besson's chapter can be understood as belonging to, is that these procedures are democratic ones,¹⁸ but this is not settled, for there seem to be ways in which procedures could legitimate without them being democratic.

Buchanan and Keohane, and Caney, include different procedural elements in the conditions for legitimacy that they propose in their respective contributions to this book. One of Caney's conditions, for instance, is that in order to be legitimate international institutions must 'provide a fair political framework in which to determine which principles of justice should be adopted to regulate the global economy'.¹⁹ Buchanan and Keohane, meanwhile, argue that legitimate international institutions must make 'provision for ongoing, inclusive deliberation about what global justice requires'.²⁰

¹⁷ For an influential sociological account of the significance of procedural legitimacy, see N. Luhmann, *Legitimation durch Verfahren* (Frankfurt: Suhrkamp, 1983) (first published 1969).

¹⁸ See J. Waldron, *Law and Disagreement* (New York, NY: Oxford University Press, 1999); P. Singer, *Democracy and Disobedience* (Oxford University Press, 1973).

¹⁹ Caney, Chapter 3, this volume.

²⁰ Buchanan and Keohane, Chapter 1, this volume.

It is not the aim of Steven Ratner's chapter (Chapter 4) to provide procedural conditions for legitimacy, but his contribution can also be fruitfully seen as being part of the debate that centres on this tradition. He takes existing international institutions as a fundamental starting point and subjects these to analysis aimed at answering the question: do they act 'impartially in the broad sense of not playing favourites in the way they treat certain actors and situations with which they deal?'²¹ Among the institutions he considers are the Security Council and the IMF, and the decision-making processes of both these organisations can certainly be said to use partial procedures.²²

Given this partiality, the tradition of procedural legitimacy could be understood as providing a basis for the claim that these international institutions are illegitimate. Ratner argues, however, that in many cases unequal treatment can be justified from a second-order impartial perspective. For example, the nature of the Security Council could be defended on impartial utilitarian-type grounds by arguing that it would be paralysed with a large membership, or that the veto promotes stability and peace. This is an impartial justification because the limited and exclusive composition of the Security Council is justified on the basis of the benefits that such a composition would in theory generate for *all* countries, namely the preservation of international peace and security.

Ratner does not argue that the possible second-order impartial justifications of unequal treatment are conclusive or even uniformly persuasive. Rather, the point is that any appraisal of international organisations needs to move beyond knee-jerk opposition to unequal treatment – it can be legitimate for these organisations to make distinctions in whom they admit, who will decide how they act, and what will be the target of their decisions. Further, these distinctions need to be justified from an impartial perspective, because while partiality may be justifiable – even desirable – in private interaction, justice in the context of international institutions demands the higher standard of impartiality.

Ratner can be understood, then, as arguing that while international institutions ought to be impartial this does not mean that the partial procedures that they actually follow should be rejected out of hand. He

²¹ S. R. Ratner, Chapter 4, this volume.

²² As Ratner explains, in the case of the Security Council this claim is made on the basis of the special powers of the Security Council, the privileged position within the Security Council of the five permanent members, and the veto power they enjoy. In the case of the IMF, the grounds are that votes on decisions are allocated based on each state's financial contribution to the IMF, leading to a situation where the rich states dominate the institution.

provides a possible defence of the (first-order) partial procedures of institutions like the IMF and the Security Council, and this defence makes most sense when it is understood as a challenge to the influential view that legitimacy requires that specific sorts of procedures – in this case (first-order) impartial ones – be followed. This defence, as we have said, consists of suggesting second-order justifications, such as defending the partial nature of the Security Council on the basis of the benefits this provides to all countries. This type of justification could also be read as being in line with the instrumentalist tradition of legitimacy, because such a defence rests on the first-order partial procedures having certain effects.

Ratner's chapter shows that there can be, and is, much debate over what procedural legitimacy requires. The general debate, however, seems to be inching towards a consensus that a procedural element, whatever it might consist of, is one of the necessary conditions for the legitimacy of international institutions, and more slowly towards the idea that this procedural element has to be, if possible, democratic. This makes sense if we take into account the minimal consensus we claimed existed on the necessity of an instrumental element in the conditions for the legitimacy of international institutions. The least controversial, and most plausible, necessary instrumental condition for the legitimacy of these institutions seems to be that they uphold basic human rights, i.e. the rights that there is the least disagreement over, and that are the least susceptible to charges of parochialism. Now, it is notoriously difficult to ground even the most basic of human rights satisfactorily, but their plausibility does seem to depend on some sort of generally shared assumption about the equal worth of human beings as human beings and the treatment this implies towards them.

It is clearly not the case that the use of democratic procedures guarantees that basic human rights will be upheld. Indeed, a well-known difficulty with accounts that claim that democratic procedures are a necessary and sufficient condition for legitimacy is that democratic procedures can result in outcomes that clearly and systematically violate basic human rights, leading to the thought that a state which produces such outcomes, even if through democratic procedures, cannot be legitimate.

It also seems plausible, however, to argue that democratic procedures have a better chance of upholding basic human rights than any other feasible political procedures.²³ Second, one might further (and differently)

²³ See A. Sen and J. Dreze, *Hunger and Public Action* (Oxford University Press, 1989); P. Dasgupta, *An Inquiry into Well-Being and Destitution* (Oxford University Press, 1993).

argue that a belief in the equal worth of human beings implies that they should be able to participate equally in the business of governing themselves and, once again, democratic procedures seem to be the types of procedures which, if other conditions hold, can secure this. Neither of these arguments is uncontroversial, and we do not mean to suggest otherwise. They are, however, prominent, and they can help explain why a commitment to the upholding of human rights as being a necessary part of any standard of legitimacy can lead to a further commitment to democratic procedures as also being a necessary part of a standard of legitimacy.

It is important to note, however, that we are not claiming that there is a consensus that democratic procedures are necessary ideal conditions for legitimacy, only that there are theoretical pressures which tend to push the debate that way.²⁴ The discussion also brings out the idea that while the instrumental and procedural conceptions of legitimacy are different they impact on each other. Additionally, the discussion had a speculative purpose, namely to air the idea that, given the apparent consensus on the necessity of instrumental conditions as part of any set of necessary and sufficient conditions for legitimacy, and further given the apparent consensus that these instrumental considerations are to do with upholding basic human rights, one important future direction for theorists in this field to take might be to consider how basic human rights are best grounded, and what, if anything, follows from those grounds for the conditions required for procedural legitimacy.²⁵

This has been a rather involved discussion, so a summary is in order. We have suggested that there is a small consensus on some aspects of the debate on the legitimacy of international institutions – the consent theory in its unadulterated form has been largely abandoned in this field, and some form of instrumentalist justification seems to be generally considered necessary. This instrumentalist condition is often thought to be insufficient on its own, and there seems to be a general view that a further procedural condition is necessary. The most common instrumental condition (that institutions uphold basic human rights) seems to create theoretical pressures towards further adopting a particular conception of

²⁴ In his ideal theory of relations between ‘peoples’ Rawls considers decent societies as legitimate even though they are in his understanding non-democratic. See J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 62–78.

²⁵ For an extended discussion of the relation between justice, human rights and international legitimacy, see Buchanan, *Justice, Legitimacy and Self-Determination*.

procedural legitimacy, namely a democratic one. We also suggested two possible (and compatible) directions for the debate – the first has to do with justifying the most common instrumental condition, and what that would imply, and the second has to do with investigating the common strategy of separating legitimacy and authority when it comes to international institutions.

Justice. Rawlsian social liberalism and cosmopolitan liberalism

We have been talking so far of legitimacy but the discussion has already taken us in the direction of justice. This is not surprising, as there is a close connection between the two. Recall, for instance, that one of the objections to consent theory was that consent alone could not legitimate, because certain sorts of injustice – systematic torture, for instance – could not be legitimated by any means. This kind of criticism is similar to a problem that proponents of the democratic conception of procedural legitimacy face. The problem is that democratic procedures do not seem able to legitimate every result they generate; so for instance, a democratically decided policy of apartheid could not be legitimate. Recall, too, that one instrumental condition proposed for the legitimacy of international institutions is that they uphold basic human rights. In other words, one common condition for international legitimacy is a substantive justice condition, and more generally, justice considerations seem relevant to legitimacy no matter what conception of legitimacy one works with.

Apart from this close connection, justice and legitimacy are similar in that the philosophical debates surrounding the two concepts both have long and venerable traditions.²⁶ Just as with legitimacy, however, for most of this long tradition philosophers have concentrated on asking what justice is *within* societies. Even as late as 1971, for instance, when the book that has dominated work in political philosophy since was first

²⁶ See, to refer to only two classical texts: Plato, *The Republic*, G.R.F. Ferrari (ed.), T. Griffith (trans.) (Cambridge University Press, 2000); T. Hobbes, *Leviathan*, R. Tuck (ed.) (Cambridge University Press, 1991). For accounts of the history of these debates, see G. Vlastos, *Studies in Greek Philosophy, Volume II: Socrates, Plato, and Their Tradition*, Daniel W. Graham (ed.) (Princeton University Press, 1996); O. Höffe, *Political Justice. Foundations for a Critical Philosophy of Law and the State* (Cambridge: Polity, 1995), part I; J. Rawls, *Lectures on the History of Philosophy* (Cambridge, MA: Harvard University Press, 2007).

published, John Rawls outlined a theory of justice that was explicitly meant to apply to ‘the basic structure of society conceived for the time being as a closed system isolated from other societies’.²⁷

Rawls does briefly discuss international justice in *A Theory of Justice*, where he suggests that principles of international justice can be found by ‘extend[ing] the theory of justice to the law of nations’.²⁸ To arrive at these principles, he proposes an international original position in which agents would represent nations rather than individuals. It was only much later, however, that Rawls began to develop these suggestions.²⁹ By this time, the questions constituting this problem had begun to come to the forefront of political philosophy.³⁰ This is not the place to attempt a history of ideas but one can nonetheless make some remarks as a partial explanation. Increased globalisation has led to both increased interdependence between societies and, as importantly, an increased awareness of this increasing interdependence. Recall that for Rawls the ‘primary subject of justice is the basic structure of society’.³¹ There can be, and is, disagreement over what constitutes the basic structure and whether there is an international basic structure at all.³² The very existence of this disagreement, however, owes something to the increased interdependence between societies, and therefore this increased interdependence is one of the reasons for the increasing attention questions of

²⁷ Rawls, *A Theory of Justice*, 7–8. ²⁸ *Ibid.*, 377.

²⁹ First in J. Rawls, ‘The Law of Peoples’, in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York, NY: Basic Books, 1993), 41–82; and then in J. Rawls, *The Law of Peoples*.

³⁰ See, for instance, C. Beitz, *Political Theory and International Relations* (Princeton University Press, 1979 and 1999); T. Pogge, *Realizing Rawls* (Ithaca, NY: Cornell University Press, 1989); H. Shue, *Basic Rights. Subsistence, Affluence and U.S. Foreign Policy*, 2nd edn (Princeton University Press, 1996); T. Pogge and D. Moellendorf (eds.), *Global Justice. Seminal Essays* (St. Paul, MN: Paragon House, 2008); T. Pogge and K. Horton (eds.), *Global Ethics. Seminal Essays* (St. Paul, MN: Paragon House, 2008). For an extensive list of related literature see M. Blake, ‘International Justice’, E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2008 Edition), online, available at: <http://plato.stanford.edu/archives/win2008/entries/international-justice>.

³¹ For Rawls’s own view of what the basic structure consists of, see Rawls, *A Theory of Justice*, 7; J. Rawls, *Political Liberalism* (New York, NY: Columbia University Press, 1993), 255–88; Rawls, *The Law of Peoples*, 108.

³² See Beitz, *Political Theory and International Relations*, 151; B. Barry, ‘Humanity and Justice in Global Perspective’, in J. Pennock and J. Chapman (eds.), *NOMOS XXIV, Ethics, Economics and the Law* (New York, NY: Harvester Wheatsheaf, 1982), 233; Pogge, *Realizing Rawls*, 23–24; G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), 129–32.

international justice have recently been given in political philosophy. Another development that has contributed to this increased attention has been the establishment and development of non-state actors, and the increased power these actors have.³³ Traditionally, the theoretical focus had been concentrated solely on states, as they were thought to be the only influential actors in the international arena. Changing circumstances have made this exclusive focus seem, at the least, incomplete, leading naturally to the question of how to accommodate the widened range of actors within any systematic explanation of what justice (and legitimacy) involve at the international level.

There has been a methodological similarity in the development of the debates on international legitimacy and international justice, and it is an entirely unsurprising one. We saw in the section on legitimacy that theories of legitimacy that had been developed within the context of closed societies were used as starting points from which a theory of legitimacy in the international context could be developed. Similarly, given the long tradition of theorising about justice within closed societies, the obvious move to make in tackling international justice is, in Rawls's words, to 'extend the theory of justice to the law of nations'.³⁴ Controversy arises, however, when we attempt to work out how theories of justice are to be so extended. Outlining the different attempts to work this out is one useful way of beginning to place the contributions in this volume within the context of the wider philosophical discourse on international justice.³⁵

Those who argue that the principles of justice which have been designed for the domestic context can and ought to be extended completely to the international context can be called cosmopolitans. There are many variants of cosmopolitanism, but the idea at the heart of all these variants is that national boundaries are arbitrary and irrelevant, and therefore indefensible, limitations on the application of principles of justice.³⁶ A cosmopolitan might agree, for instance, that Rawls is correct

³³ See C. Beitz, 'Social and Cosmopolitan Liberalism', *International Affairs (Royal Institute of International Affairs 1944 -)*, 75 (1999), 515–29, 517.

³⁴ Rawls, *A Theory of Justice*.

³⁵ For a good and more extended account of the varying answers possible, see M. Blake, 'International Justice'.

³⁶ See S. Caney, *Justice Beyond Borders. A Global Political Theory* (New York, NY: Oxford University Press, 2006); Pogge, *Realizing Rawls*; Beitz, *Political Theory and International Relations* (1979 edition); K.-C. Tan, *Justice without Borders* (New York, NY: Cambridge University Press, 2004).

in claiming that the difference principle ought to govern the design of institutions within closed societies, but would further claim that it (i.e. the difference principle) ought to be applied across the entire world, rather than just across say Germany. This position can be placed at one end of the spectrum of possible views regarding the extendibility of domestic principles of distributive justice to the international order.

Peter Koller's contribution to this volume (Chapter 6) provides a systematic and rich discussion of a cosmopolitan interpretation of what justice requires globally. Koller delineates four abstract kinds of justice: transactional, political, distributive and corrective. According to his taxonomy, transactional justice is applicable in exchange relationships, political justice in power relationships, distributive justice in communal relationships and corrective justice in wrongness relationships. He then argues that the types of social interactions that are required for these types of justice to apply are all instantiated at the global level: nations and their members maintain international trade relationships; authorised power is either exercised by international institutions or required for a just global order; the existence of, for example, international economic cooperation and negative effects of societal activities across borders raise distributive problems across nations; nations can be held subject to the demands of corrective justice in the case of wrongs done to each other. He goes on to argue that the international system fails to meet the demands of these four kinds of justice insofar as they apply, but the relevant point here is the prior claim that the international system *can* be held to the demands of these four kinds of justice insofar as they apply. This is a claim that places Koller, and his contribution to this volume, firmly in the cosmopolitan camp.

Rawls, of course, is an exemplar of a different kind of position. He argues that the difference principle cannot be extended to global society, and that at most just societies have a duty of assistance to burdened societies. One argument that is often used for the existence of special duties to members of one's own society rests on the alleged relevance of the existence of social cooperation to determining the scope of principles of justice.³⁷ Charles Beitz provided an early and succinct description of

³⁷ See, for example, S. Scheffler, *Boundaries and Allegiances. Problems of Justice and Responsibility in Liberal Thought* (Oxford University Press, 2001), chs. 5 and 6; M. Blake, 'Distributive Justice, State Coercion, and Autonomy', *Philosophy and Public Affairs*, 30 (2001), 257–96; A. Sangiovanni, 'Global Justice, Reciprocity, and the State', *Philosophy and Public Affairs*, 35 (2007), 3–39.

the difference between the two positions (the second of which he calls social liberalism) in the following way: 'social liberalism holds that the problem of international justice is fundamentally one of fairness to societies (or peoples), whereas cosmopolitan liberalism holds that it is fairness to persons'.³⁸

One could legitimately – but perhaps not uncontroversially – argue that Rawls's own position is consistent with some sort of cosmopolitanism, since it is possible to interpret the duty of assistance as a cosmopolitan duty, and also because he thinks that certain kinds of human rights are limits on the sovereignty of states even within their own territories. He is anti-cosmopolitan to the extent that he denies principles of distributive justice can be extended from domestic to international contexts, but he nonetheless holds some principles to be valid universally.³⁹ This brings out an important point, namely that the dispute between cosmopolitans and social liberals often centres on the extendibility of principles of distributive justice, rather than on the universal validity of *all* principles of justice.⁴⁰

David Miller's contribution to this volume (Chapter 8) can be understood as coming from this tradition, broadly speaking. For while he accepts the cosmopolitan responsibility that 'we all share in a general responsibility to protect human rights that crosses national borders',⁴¹ he specifies that these rights are 'to be understood in a fairly narrow sense, as basic rights – rights to life, bodily integrity, basic nutrition and health, and so forth'.⁴² As Miller says in his chapter, he has elsewhere argued that a wider set of rights should not 'be seen as human rights proper, (but) as something else – rights of citizenship, for example'.⁴³ This is not a view that cosmopolitans could accept. It is important to note, however, that while he clearly comes from the tradition of social liberalism, in this

³⁸ Beitz, 'Social and Cosmopolitan Liberalism', 515.

³⁹ However, Rawls leaves open whether his duty of assistance is best understood as a principle of distributive justice. See Rawls, *The Law of Peoples*, 106.

⁴⁰ There is a third position, at the opposite end of the spectrum to cosmopolitanism, which holds that *no* principles of justice can be extended from the domestic to the international context. We do not discuss it here because it isn't relevant to the chapters in this volume. But see T. Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005), 113–47, A. MacIntyre, 'Is Patriotism a Virtue?' (The Lindley Lecture) (University of Kansas, 1984); and M. Walzer, *Spheres of Justice* (New York, NY: Basic Books, 1983).

⁴¹ D. Miller, Chapter 8, this volume. ⁴² *Ibid.*

⁴³ *Ibid.* Miller's argument for the wider set of rights being citizenship rights can be found in D. Miller, *National Responsibility and Global Justice* (Oxford University Press, 2007).

chapter he explicitly tries to avoid the dispute over whether the wider set of rights should be understood in cosmopolitan or Rawlsian terms.

Herlinde Pauer-Studer's contribution (Chapter 7), too, can be seen as coming from this tradition. She first makes the distinction explained above, retaining the term 'cosmopolitan' and referring to what we have so far called 'social liberalism' as a 'political conception of justice'. She then attempts in her chapter to defend this political conception of justice, i.e. a conception that holds that 'justice applies to the basic structure of a particular society (nation-state), and, moreover, that duties of justice in a strict sense hold merely between the members of a particular society (nation-state)'.⁴⁴ Pauer-Studer focuses on one influential cosmopolitan account of international justice, namely that of Thomas Pogge's, which she characterises as being 'monist', i.e. as claiming that the same 'normative principles should apply to institutions and individual choices'.⁴⁵ This monist view is criticised, and various grounds for retaining the institution of the nation-state are offered. Thus, as the contributions of Koller, Miller and Pauer-Struder show, understanding the distinction between cosmopolitans and Rawlsians is essential to understanding both the general debate on international justice and the chapters in this volume that contribute to this debate.

Matthias Lutz-Bachmann takes a similar line in a different context (Chapter 9). He suggests that Michael Walzer's just war theory first argues for a moral reading of the validity claims of human rights and then uses this to justify the use of force in international relations. Lutz-Bachmann argues that this theory fails, and one of the grounds for this claim is that the theory does not distinguish between moral obligations and legal obligations for collectives like states. He makes, that is, a distinction between "moral obligations" and "legal duties", that means between "obligations" which address moral subjects like individual actors and "duties" which bind collective actors like states or international organisations constituted by legal and coercive frameworks'.⁴⁶ This distinction suggests a commitment, in Pauer-Studer's terms, to a political conception of justice, because it implies that different normative principles apply to individuals as opposed to institutions.

Daniel Butt, meanwhile, attempts in Chapter 5 to limit the importance of the controversy. He calls social liberalism 'international libertarianism', on the basis that 'those within this school adopt principles of distributive justice between states which are analogous to those principles of distributive

⁴⁴ H. Pauer-Studer, Chapter 7, this volume. ⁴⁵ *Ibid.*

⁴⁶ M. Lutz-Bachmann, Chapter 9, this volume.

justice which libertarians such as Robert Nozick maintain should obtain between individuals in domestic society'.⁴⁷ He argues that while cosmopolitan liberals can easily accept the claim that the current international order is distributively unjust, international libertarians – i.e. social liberals – might want to claim that it isn't. However, international libertarians have to be sensitive to the provenance of the current distribution, and Butt argues that this distribution has not come about according to principles of just acquisition and just transfer. Consequently, he claims, even international libertarians have to admit that the present international order is distributively unjust.

Butt is not alone, in fact, in attempting to limit the importance of the controversy between cosmopolitans and Rawlsians. Recall that in his contribution, Miller specifies a non-cosmopolitan list of basic human rights. At the same time, he deliberately avoids engaging with the debate on whether a more extended list of rights should be seen as human rights or citizenship rights, and argues that the conclusions in his chapter can be accepted regardless of the view one takes on this issue. Similarly, Pauer-Studer makes concessions to cosmopolitanism and attempts to dissolve some of the differences between it and the political conception of justice by arguing that even if one holds that there are principles of international distributive justice, nation-states would still be necessary in order to achieve more international justice according to those principles.

The point here is not to determine whether these different attempts at limiting the importance of the controversy were successful or not, but rather that all three authors felt it necessary to make the attempt at all. When a controversy is important and alive, one important strategy for making progress is to attempt to come to relatively uncontroversial conclusions; conclusions, that is, that all parties can agree with while retaining their differing views. It is precisely the fact that these chapters attempt to limit the importance of the controversy, therefore, that brings out its significance, and the extent to which it is unresolved.

Ideal and non-ideal theory. How to understand the practical relevance of international justice and legitimacy

The debate on ideal and non-ideal theory is the third and final theoretical perspective we will consider. Non-ideal theorists argue that normative theorists have to take seriously empirical realities that hinder the

⁴⁷ D. Butt, Chapter 5, this volume.

applicability of their principles, because if they don't they will provide principles which are not politically feasible and these principles will therefore fail to be action-guiding.⁴⁸ Normative principles which require a world state with a universal adult franchise for example, are often criticised on this ground. Ideal theorists, on the other hand, argue that allowing political feasibility this central role in justifying principles of justice will lead to normative theorists endorsing injustice. So, for example, theorists operating with this political feasibility constraint in the mid eighteenth century would, or so the charge goes, have endorsed slavery because of the political infeasibility at the time of abolishing it.⁴⁹

The twin horns of this dilemma, i.e. the charges of 'practical irrelevance' and 'adaptive preference formation' (or 'conservatism') respectively, are highly relevant to the theoretical debate on the justice and legitimacy of international institutions. The problems that international institutions try to address – for example global poverty, climate change, widespread human rights violations – strike many as particularly urgent and compelling. On the one hand, these problems are so important, and any whole-scale reform of the international order so unlikely, that it can seem as though if one is to make any contribution to the problem one has to take the existing order as given and only suggest reforms that are realisable here and now; but on the other adopting this strategy might mean accepting more injustice than one ought to accept, and it might also limit the possibility of substantial reform which might be required to solve these problems.

One solution to the dilemma is, of course, simply to impale oneself on one of its horns. That is to say, one could hold that a theory of justice should either only contain non-ideal principles, or that it should only contain ideal principles. This could be called an exclusive understanding of ideal and non-ideal theorising, but the problem with this understanding is that both horns are sharp and painful. Both the practical irrelevance and the adaptive preference charge are serious criticisms, and any exclusive understanding will be susceptible to at least one of them.

One natural response to this is to try and develop a complex and complementary understanding, one which argues that a theory of justice

⁴⁸ See for instance C. Farrelly, 'Justice in Ideal Theory: A Refutation', *Political Studies*, 55 (2007), 844–64.

⁴⁹ Andrew Mason points out this difficulty very clearly in the course of developing his own multi-level understanding in A. Mason, 'Just Constraints', *British Journal of Political Science*, 34 (2004), 251–68.

must contain both ideal and non-ideal principles. This understanding attempts to accommodate the insights of both ideal and non-ideal theorising, and by doing so defuses the strength of both the practical irrelevance and adaptive preference charges. This benefit comes, however, at the cost of problems elsewhere, the most important of which is this: if a theory of justice contains both ideal and non-ideal principles, how are we to understand the relation between them? The 'theory of the second-best' prevents us from saying that under non-ideal conditions the optimal strategy is to realise as many of the elements of the ideal as we can, to the extent that we can.⁵⁰ But if this is the case then it seems difficult to explain what exactly the relevance of ideal principles is to non-ideal principles.⁵¹

This is a considerable problem, and not one to be glossed over. In what follows we use a complementary understanding of ideal and non-ideal theorising as a tool with which to frame and organise some of the papers in this collection but we do not claim to have addressed the problem of the second-best, or even that this problem could be overcome. Rather, we claim that this is a useful and interesting way to understand some of these contributions and we then make the limited claim that such an understanding is helpful in developing the debate on international institutions because it allows for criticisms and contributions on different levels.

In order to explain and defend this limited claim, however, it is first necessary to outline the understanding we will be working with. On this understanding, there are four different types, and two distinct levels, of principles in a theory of justice. The four different types of principles are:

- (1) ideal non-institutional principles;
- (2) ideal institutional principles;
- (3) non-ideal non-institutional principles; and
- (4) non-ideal institutional principles.

Principles (1) and (2) constitute the first level, and principles (3) and (4) the second level.

An example of an ideal non-institutional principle is the following: human rights ought to be fully realised. The principles of justice in Rawls's special conception⁵² are further examples of ideal non-institutional

⁵⁰ On this see for instance R. E. Goodin, 'Political Ideals and Political Practice', *British Journal of Political Science*, 25 (1995), 37–56.

⁵¹ A. Sen, 'What Do We Want From a Theory of Justice?', *The Journal of Philosophy*, 103 (2006), 215–38.

⁵² See footnote 55, below, and accompanying text.

principles, for example the equal basic liberties principle. Ideal non-institutional principles specify, in other words, what it is that we ought to aim at under ideal conditions – they tell us that the social ideal consists of *a*, *b* and *c* rather than *x*, *y* and *z*. They are, that is, constitutive of the ideal. Ideal institutional principles, on the other hand, specify how (under ideal conditions) institutions ought to be designed in order to achieve the aims specified by ideal non-institutional principles. Suppose, for instance, that the social ideal of *a*, *b* and *c* would be fully realised by the institution of constitutional democracy. In this case, the ideal institutional principle would direct us to implement such a system. Ideal institutional principles that are correct have two main features: implementing them leads to the full realisation of the ideal non-institutional principles, and they tell us what the institutions required for this full realisation will look like.⁵³

Let us suppose for a moment that the ideal institutional principles require the creation of a world democracy with a universal adult franchise, and they specify that this means institutions like a world parliament and so on. It's uncontroversial to claim that under current non-ideal conditions the institutions required by the ideal institutional principles are not realisable. But what kinds of institutions ought we design instead? It is to answer this question that non-ideal institutional principles are introduced. These principles specify what, under non-ideal conditions, our institutions ought to look like so that we can realise the non-institutional principles we want to realise.⁵⁴

There is a deliberate ambiguity in that last sentence, because there is a contentious issue at the heart of it. Let us agree that non-institutional principles specify what institutions ought to look like under non-ideal conditions in order to realise the non-institutional principles we want to

⁵³ For further discussion of the distinction between ideal non-institutional and ideal institutional principles see A. Swift, 'The Value of Philosophy in Nonideal Circumstances', *Social Theory and Practice*, 34 (2008), 366–68. (Swift distinguishes between 'evaluative' and 'action-guiding' principles.)

⁵⁴ Compare Lutz-Bachmann's proposals for a transitional regime in order to promote the establishment of a just international order in Chapter 9, this volume. Lutz-Bachmann's proposed ideal and non-ideal institutional principles reflect the Kantian tradition of political philosophy. He argues that the UN, especially the Security Council and juridical institutions like the ICC, should be reformed such that a global public law which can be effectively specified, applied and executed can be put in place. We should also aim at deeper legal and more inclusive cooperation between democratic states, and we should try to build a global democratic public, which would help to undermine totalitarian regimes and violent cultures, which are the main source of threats to the international order.

realise. But are these non-institutional principles ideal or non-ideal? One view is that there is no such category as non-ideal non-institutional principles. Under non-ideal conditions, it is still the ideal non-institutional principles that specify the social ideal, and it is still those principles and that ideal which guide us in specifying what our institutions, under non-ideal conditions, ought to look like. The opposing view, which is exemplified by Rawls's distinction between his special and general conception of justice,⁵⁵ is that what one ought to aim at might itself be different under non-ideal conditions, and that therefore there are such things as non-ideal non-institutional principles.⁵⁶ Under ideal conditions the Rawlsian theory of justice gives strict lexical priority to ensuring political liberty. Under extremely non-ideal conditions, however, Rawls gives up this lexical ordering and grants that, for example, in the case of a very poor society it could be required that we promote economic welfare at the expense of some political liberties. The claim is that under non-ideal conditions we may well have different aims from those we have in ideal conditions, which means that we must introduce the category of non-ideal non-institutional principles.⁵⁷

We will use a complementary understanding of ideal and non-ideal theory that contains all four types of principles (ideal non-institutional and institutional, and non-ideal non-institutional and institutional) because, as we mentioned earlier, we think that such an understanding is the most helpful when it comes to the debate on international institutions, but we are very much aware that this understanding is by no means universally accepted and needs to be defended against some substantial charges.

In this volume, Buchanan and Keohane (Chapter 1) propose a standard of legitimacy that international institutions have to satisfy under current conditions.⁵⁸ One part of this standard is that given current reasonable and widespread disagreement over what global justice requires, international institutions, in order to be legitimate, have to make provisions for ongoing, inclusive deliberation that allows for a reinterpretation of what the role of that institution is in securing global justice.

⁵⁵ Rawls, *A Theory of Justice*, sections 11, 26, 39, 46, 83.

⁵⁶ According to Rawls these are to be understood as transitional principles whose validity depends on their contributing (in the long run) to the realisation of the conditions under which the ideal principles are valid. This is best explained using Rawls's own example.

⁵⁷ See Rawls, *A Theory of Justice*, 245. (Rawls does not exactly specify at what point the general conception is to be used. Sometimes the special conception is still applicable under non-ideal circumstances.)

⁵⁸ Buchanan and Keohane, Chapter 1, this volume.

What follows is not a view that Buchanan and Keohane are committed to, but rather an illustration of how the theoretical framework we are suggesting might be used. On the complementary understanding of ideal and non-ideal theory outlined above, their standard can be seen as a non-ideal institutional principle – it is global justice that international institutions should try to bring about but we cannot agree on what global justice requires either generally or of international institutions specifically. Given this international institutions should, under non-ideal conditions, be designed such that they contribute to developing a consensus both on the requirements of global justice, and the role international institutions have to play in delivering it.

A similar idea to this is found in Caney's chapter, where he argues for his 'Hybrid Model' of legitimacy, which includes the requirement that international institutions should 'provide a fair political framework in which to determine which principles of justice should be adopted to regulate the global economy'. This requirement is defended on grounds similar to those offered by Buchanan and Keohane, namely the idea that there currently exists widespread and reasonable disagreement over both what global justice requires, and about what the role of international institutions ought to be in pursuing global justice.⁵⁹

An important point can be made here, namely that it is difficult to identify which category any given principle falls into. This difficulty can be illustrated at both the non-ideal and ideal levels. For example, take the principle that international institutions ought to follow democratic procedures. This could be thought of as a non-ideal institutional principle if we understand it as specifying a particular type of procedure required to create a fair political framework, but as a non-ideal non-institutional proposal if we interpret it as being the idea that under current non-ideal conditions international institutions ought to aim at legitimacy rather than justice. However, it is also possible to understand both the proposals (i.e. Buchanan and Keohane's, and Caney's) as operating at the ideal level, as either institutional or non-institutional principles. On such an understanding, the fact of reasonable disagreement is not one that can be assumed away even in ideal theory and it is one that has to be dealt with either through procedures – i.e. institutional design – specified in ideal theory; or it has to be dealt with by arguing for a complex ideal in which the fact of reasonable disagreement, and the desirability of it persisting, is taken into account. Despite this difficulty, the distinction is useful. To

⁵⁹ Caney, Chapter 3, this volume.

paraphrase Wittgenstein, dispute over national borders does not call into existence entire national territories. The vagueness at the boundaries does mean, however, that where possible theorists should attempt to be explicit about what kind of principle they think themselves to be proposing.

We can now ask the questions: does this all matter? Should we bother with making these distinctions and attempting to organise principles on different levels? We think it does, and we should, because the types of justifications and criticisms that are applicable will vary appreciably according to the type of principle that is being proposed. Suppose, for instance, that Caney's proposals for procedural fairness operate at the level of non-ideal institutional principles. If so, it becomes legitimate to criticise it, for instance, on the grounds of feasibility, and on particularly strict grounds – if someone could plausibly argue that such procedures are not politically feasible in the here and now, then this would be a strong criticism of the principle as it operates on the non-ideal institutional level. Alternatively, suppose the proposals operate at the level of ideal institutional principles because they are allied to the view that reasonable disagreement over conceptions of justice cannot be assumed away even in ideal theory. It may still be possible to criticise this on grounds of feasibility – though some, like G. A. Cohen, would argue not⁶⁰ – but the feasibility requirements would certainly be less strict than if the principle were thought to operate at the non-ideal level.

We think this complementary understanding is useful, then, because it allows us to justify and criticise proposals on their own terms. By identifying the level on which principles operate we are able to consider those principles while bracketing, even if only temporarily, many of the complications introduced by the problems of ideal and non-ideal theory. One might not want to do this bracketing, of course, because one might have a strong view on ideal and non-ideal theory that implied a strong view of the kind of thing that justice is, and this strong view on justice further implied views on the role of international institutions. Nevertheless, the distinctions introduced by the complementary multi-level understanding of ideal and non-ideal theory allow one to be clear that rather than criticising the proposals on their own terms, one is criticising the assumptions about ideal and non-ideal theory, and what those mean for justice, that are inherent in those proposals.

⁶⁰ Cohen, *Rescuing Justice and Equality*, for example 250–54.

An example of the sort of helpful clarity that this complementary understanding can bring is found in Butt's chapter (Chapter 5). As mentioned earlier, he makes the claim that the current distribution of resources has not come about in a just (here 'just' means 'just according to libertarians') way and that this creates a justified demand for rectification. Given that this rectification has not been carried out, he argues that this allows us to tentatively claim that the international legal system is illegitimate, given the notion that legitimacy requires meeting some minimal threshold of distributive justice. But this claim might be contested, he says, on the grounds that under current non-ideal conditions the priority for the international legal system must be protecting basic human rights and that therefore distributive justice should not be part of the criteria by which the legitimacy of international institutions should be judged. This counter-claim clearly operates at the non-ideal level, and seems to be based upon some kind of background thought like the following: under non-ideal conditions what matters is protecting human rights, and under these conditions anything that prevents institutions from protecting human rights is undesirable. A lack of legitimacy is one of those things, and given that under current non-ideal conditions it is not feasible to rectify past injustice and protect basic human rights, we ought not to claim that the legitimacy of international institutions is weakened if they don't rectify past injustice and protect these basic human rights. Butt responds to this claim by arguing that even under current non-ideal conditions rectifying past injustice and protecting basic human rights are things that are feasible. The point in this context is not to determine whether it's Butt or his imagined critic who is right, but rather that Butt's response is the right *type* of response to the claim of his imagined critic, and this is because both the claim and the response operate on the same level. They are fighting on the same ground; this is no guarantee, of course, of there ever being a winner, but it does mean that the blows they land have a chance of affecting each other.

In Chapter 2, Samantha Besson responds to a common charge made against global democracy, namely that it is unfeasible, by providing a feasible institutional structure that could realise it. One way this attempt can be understood is to see it as a set of non-ideal institutional principles. Once we understand it this way we get a much clearer picture of how it is to be judged, and how it might be criticised. The most obvious criticism is of course simply to argue that the proposals aren't feasible, but there are others. For example, one could call into question the non-institutional principles that Besson's non-ideal institutional principles are meant to

realise. First, which level do these non-institutional principles work on? Are the values that would be realised by global democracy values that we want to realise under ideal conditions, or are they values that we settle for in non-ideal conditions? And for both the former and latter, we can ask, are these values actually realised by Besson's proposals? This, of course, is not meant to suggest that Besson's proposal is not valid. Rather, the point is that these questions need to be answered if one is to adequately evaluate Besson's proposal, or to suggest proposals oneself, and the complementary multi-level understanding helps us to identify what it is that Besson, or anyone else, is attempting to do with the proposals they suggest, and this helps us to see what the relevant questions are in each particular case.

To summarise, then, we suggest using a complementary multi-level understanding of ideal and non-ideal theory along the lines we have outlined as a way in which to frame and understand much of the work in this collection, and questions of international justice and legitimacy generally. Such an understanding, we argue, is useful in clearly distinguishing the aims of particular proposals and theorists, and therefore helps in responding to these proposals and theorists in a meaningful way. Further, such an understanding forces one to reflect on the problems of ideal and non-ideal theory as they apply to questions of international justice and legitimacy, and this is desirable because of the relevance and importance of these problems to the concerns of this collection, and of the debate generally.

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The legitimacy of global governance institutions

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An institution is legitimate in the *normative* sense if it has *the right to rule* – where ruling includes promulgating rules and attempting to secure compliance with them by attaching costs to non-compliance and/or benefits to compliance. An institution is legitimate in the *sociological* sense when it is widely *believed* to have the right to rule.¹ When people disagree over whether the WTO is legitimate, the disagreement is typically normative. They are not disagreeing about whether they or others *believe* that this institution has the right to rule; they are disagreeing about whether it *has* the right to rule.² This chapter focuses on legitimacy in the normative sense.

We articulate a global public standard for the normative legitimacy of global governance institutions – henceforth GGIs, for brevity. This standard can provide the basis for principled criticism of GGIs and guide reform efforts in circumstances in which people disagree deeply about the demands of global justice and the role that GGIs should play in meeting them. We stake out a middle ground between an increasingly discredited conception of legitimacy that conflates legitimacy with international legality understood as state consent, on the one hand, and the unrealistic view that

¹ A thorough review of the sociological literature on organisational legitimacy can be found in M. C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', *Academy of Management Review*, 20 (1995), 571–610.

² For an excellent discussion of the inadequacy of existing standards of legitimacy for global governance institutions, see D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', *American Journal of International Law*, 93 (1999), 596–624. For an impressive earlier book on the subject, see T. Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990). Franck's account focuses on the legitimacy of rules more than institutions and in our judgment does not distinguish clearly enough between the normative and sociological senses of legitimacy.

legitimacy for these institutions requires the same democratic standards that are now applied to states, on the other.

Our approach to the problem of legitimacy integrates conceptual analysis and moral reasoning with an appreciation of the fact that GGIs are novel, still evolving, and characterised by reasonable disagreement about what their proper goals are and what standards of justice they should meet. Because both standards and institutions are subject to change as a result of further reflection and action, we do not claim to *discover* timeless necessary and sufficient conditions for legitimacy. Instead, we offer a principled *proposal* for how the legitimacy of these institutions ought to be assessed – for the time being. Essential to our account is the idea that to be legitimate a GGI must possess certain *epistemic* virtues that facilitate the ongoing critical revision of its goals, through interaction with agents and organisations outside the institution. A principled global public standard of legitimacy can help citizens committed to democratic principles to distinguish legitimate institutions from illegitimate ones and to achieve a reasonable congruence in their legitimacy assessments. Were such a standard widely accepted, it could bolster public support for valuable GGIs that satisfy the standard or at least make credible efforts to do so.

‘Global governance institutions’ covers a diversity of multilateral entities, including the World Trade Organisation (WTO), the International Monetary Fund (IMF), various environmental institutions, such as the climate change regime built around the Kyoto Protocol, judges’ and regulators’ networks, the UN Security Council, and the new International Criminal Court (ICC). These institutions are like governments in that they issue rules and publicly attach significant consequences to compliance or failure to comply with them – and claim the authority to do so. Nonetheless, they do not attempt to perform anything approaching a full range of governmental functions. They do not seek, as governments do, to monopolise the legitimate use of violence within a territory, and their creation and continued functioning require the consent of states.

Determining whether GGIs are legitimate – and whether they are widely perceived to be so – is an urgent matter. These institutions can promote international cooperation and also help to construct regulatory frameworks that limit abuses by non-state actors (from corporations to narcotraffickers and terrorists) who exploit transnational mobility. At the same time, however, they constrain the choices facing societies, sometimes limit the exercise of sovereignty by democratic states, and impose burdens as well as confer benefits. For example, states must

belong to the WTO in order to participate effectively in the world economy, yet WTO membership requires accepting a large number of quite intrusive rules, authoritatively applied by its dispute settlement system. Furthermore, individuals can be adversely affected by global rules – for example, by the blacklists maintained by the Security Council’s Sanctions Committee or by the WTO’s policies on intellectual property in ‘essential medicines’. If these institutions lack legitimacy, then their claims to authority are unfounded and they are not entitled to our support.

Judgments about institutional legitimacy have distinctive practical implications. Generally speaking, the judgment that an institution is legitimate should shape the character of both our responses to the claims it makes on us and the form that our criticisms of it take. We should support or at least refrain from interfering with legitimate institutions. Further, bona fide institutional agents deserve a kind of impersonal respect, even when we voice serious criticisms of them. Judging an institution to be legitimate focuses critical discourse by signalling that the appropriate objective is to reform it, rather than to reject it outright.

It is important not only that GGIs be legitimate, but also that they are perceived to be legitimate. The perception of legitimacy matters because, in a democratic era, multilateral institutions will only thrive if they are viewed as legitimate by democratic publics. If standards of legitimacy are unclear or unrealistically demanding, public support for global governance institutions may be undermined and their effectiveness in providing valuable goods may be impaired.

Assessing legitimacy

The social function of legitimacy assessments

Global governance institutions are valuable because they create norms and information that enable member states and other actors to coordinate their behaviour in mutually beneficial ways.³ They can reduce transaction costs, create opportunities for states and other actors to demonstrate credibility, thereby overcoming commitment problems, and provide public goods, including rule-based, peaceful resolutions of

³ The emphasis here on the coordinating function should not be misunderstood: global governance institutions do not merely coordinate state actions in order to satisfy *pre-existing* state preferences. As our analysis will make clear, they can also help shape state preferences and lead to the development of new norms and institutional goals.

conflicts.⁴ An institution's ability to perform these valuable functions, however, may depend on whether those to whom it addresses its rules regard them as binding and whether others within the institution's domain of operation support or at least do not interfere with its functioning. It is not enough that the relevant actors agree that *some* institution is needed; they must agree that *this* institution is worthy of support. So, for institutions to perform their valuable coordinating functions, a higher-order coordination problem must be solved.

GGIs are not pure coordination devices in the way in which the rule of the road is, however. Even though all may agree that some institution or other is needed in a specific domain (the regulation of global trade, for example), and all may agree that any of several particular institutions is better than the non-institutional alternative, different parties, depending upon their differing interests and moral perspectives, will find some feasible institutions more attractive than others. The fact that all acknowledge that it is in their interest to achieve coordinated support for some institution or other may not be sufficient to assure adequate support for any particular institution.

The concept of legitimacy allows various actors to coordinate their support for particular institutions by appealing to their common capacity to be moved by *moral reasons*, as distinct from purely strategic or exclusively self-interested reasons. If legitimacy judgments are to perform this coordinating function, however, actors must not insist that only institutions that are *optimal* from the standpoint of their own moral views are acceptable, since this would preclude coordinated support when moral views diverge. More specifically, actors must not assume that an institution is worthy of support only if it is *fully just*. We thus need a standard of legitimacy that is both accessible from a diversity of moral standpoints and less demanding than a standard of justice. It should appeal to various actors' capacities to be moved by moral reasons, but without presupposing more moral agreement than exists.

Legitimacy and self-interest

As Andrew Hurrell points out, the rule-following that results from a sense of legitimacy is 'distinguishable from purely self-interested or instrumental behaviour on the one hand, and from straightforward

⁴ R. O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, 20th anniversary edition, 2005 (Princeton: Princeton University Press, 1984).

imposed or coercive rule on the other'.⁵ Sometimes self-interest may speak in favour of treating an institution's rules as binding; that is, it can be in one's interest to take the fact that an institution issues a rule as a weighty reason for complying with it, independently of a positive assessment of the content of particular rules. This would be the case if one is likely to do better, from the standpoint of one's own interest, by taking the rules as binding than one would by evaluating each particular rule as to how complying with it would affect one's interests. Yet clearly it makes sense to ask whether an institution that promotes one's interests is legitimate. So legitimacy, understood as the right to rule, is a moral notion that cannot be reduced to rational self-interest.

There are advantages in achieving coordinated support for institutions on the basis of moral reasons, rather than exclusively on the basis of purely self-interested ones. First, the appeal to moral reasons is instrumentally valuable in securing the benefits that only institutions can provide because, as a matter of psychological fact, moral reasons matter when we try to determine what practical attitudes should be taken towards particular institutional arrangements. For example, we care not only about whether an environmental regulation regime reduces air pollutants and thereby produces benefits for all, but also whether it fairly distributes the costs of the benefits it provides. Given that there is widespread disagreement as to which institutional arrangement would be optimal, we need to find a shared evaluative perspective that makes it possible for us to achieve the coordinated support required for effective institutions without requiring us to disregard our most basic moral commitments. Second, and perhaps most important, if our support for an institution is based on reasons other than self-interest or the fear of coercion, it may be more stable. What is in our self-interest may change as circumstances change and the threat of coercion may not always be credible, and moral commitments can preserve support for valuable institutions in such circumstances.

For questions of legitimacy to arise there must be considerable moral disagreement about how institutions should be designed. Yet for agreement about legitimacy to be reached, there must be sufficient agreement on the sorts of moral considerations that are relevant for evaluating alternative institutional designs. The practice of making legitimacy judgments is grounded in a complex belief – namely, that while it is

⁵ A. Hurrell, 'Legitimacy and the Use of Force: Can the Circle Be Squared?', *Review of International Studies*, 31 (2005), 16.

true that institutions ought to meet standards more demanding than mere mutual benefit (relative to some relevant non-institutional alternative), they can be worthy of our support even if they do not maximally serve our interests and even if they do not measure up to our highest moral standards.⁶

Legitimacy requires not only that institutional agents are justified in carrying out their roles, but also that those to whom institutional rules are addressed have content-independent reasons to comply with them, and that those within the domain of the institution's operations must have content-independent reasons to support the institution or at least to not interfere with its functioning.⁷ One has a content-independent reason to comply with a rule if and only if one has a reason to comply regardless of any positive assessment of the content of that rule. For example, I have a content-independent reason to comply with the rules of a club to which I belong if I have agreed to follow them and this reason is independent of whether I judge any particular rule to be a good or useful one. If I acknowledge an institution as having authority I thereby acknowledge that there are content-independent reasons to comply with its rules or at least to not interfere with their operation.

⁶ Legitimacy can also be seen as providing a 'focal point' that helps strategic actors select one equilibrium solution among others. For the classic discussion of focal points, see T. C. Schelling, *The Strategy of Conflict* (Cambridge: Harvard University Press, 1960), ch. 3. For a critique of theories of cooperation on the basis of focal point theory, and an application to the European Union, see G. Garrett and B. Weingast, 'Ideas, Interests, and Institutions: Constructing the European Community's Internal Market', in J. Goldstein and R. O. Keohane (eds.), *Ideas and Foreign Policy* (Ithaca: Cornell University Press, 1993), esp. 178–85.

⁷ Most contemporary analytic philosophical literature on legitimacy tends to focus exclusively on the legitimacy of the *state* and typically assumes a very strong understanding of legitimacy. In particular, it is assumed that legitimacy entails (1) a content-independent moral *obligation* to comply with all institutional rules (not just content-independent moral reasons to comply and/or a content-independent moral obligation to not interfere with others' compliance), (2) being justified in using *coercion* to secure compliance with rules, and (3) being justified in *using coercion to exclude* other actors from operating in the institution's domain. (See, for example, C. H. Wellman and A. J. Simmons, *Is There a Duty to Obey the Law? For and Against* (Cambridge University Press, 2005)). It is far from obvious, however, that this very strong conception is even the only conception of legitimacy appropriate for the state, given what is sometimes referred to as the 'unbundling' of sovereignty into various types of decentralised states and the existence of the European Union. Be that as it may, this state-centred conception is too strong for global governance institutions, which generally do not wield coercive power or claim such strong authority. For a more detailed development of this point, see A. Buchanan, 'The Legitimacy of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, in press (2009)).

The debate about the legitimacy of GGIs engages both the perspective of states and that of individuals. Indeed, as recent mass protests against the WTO suggest, politically mobilised individuals can adversely affect the functioning of global governance institutions, both directly, by disrupting key meetings, and indirectly, by imposing political costs on their governments for their support of institutional policies. Legitimacy in the case of global governance institutions, then, is the right to rule, understood to mean both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people have moral, content-independent reasons to follow them and/or to not interfere with others' compliance with them.

If it becomes widely believed that an institution is illegitimate, the result may be a lack of coordination, at least until the institution changes to conform to the standards or a new institution that better conforms to them replaces it. Thus, it would be misleading to say simply that the function of legitimacy judgments is to achieve coordinated support for institutions; rather, their function is to make possible coordinated support based on moral reasons, while at the same time supplying a critical but realistic minimal moral standard by which to determine whether institutions are *worthy* of support.

Justice and legitimacy

The foregoing account of the social function of legitimacy assessments helps clarify the relationship between justice and legitimacy. Collapsing legitimacy into justice undermines the valuable social function of legitimacy assessments. There are two reasons not to insist that only just institutions have the right to rule. First, there is sufficient disagreement on what justice requires that such a standard for legitimacy would thwart the eminently reasonable goal of securing coordinated support for valuable institutions on the basis of moral reasons. Second, even if we all agreed on what justice requires, withholding support from institutions because they fail to meet the demands of justice would be self-defeating from the standpoint of justice itself, because progress towards justice requires effective institutions.

Competing standards of legitimacy

Having explicated our *conception* of legitimacy, we now explore *standards* of legitimacy: the conditions an institution must satisfy to have the

right to rule. We articulate three candidates for the appropriate standard of legitimacy – state consent, consent by democratic states, and global democracy – arguing that each is inadequate.

State consent

On this view, GGIs are legitimate if (and only if) they are created through state consent. Legally constituted institutions, created by states according to the recognised procedures of public international law and consistent with it, are *ipso facto* legitimate or at the very least enjoy a strong presumption of legitimacy. Call this the International Legal Pedigree View (the Pedigree View, for short). A more sophisticated version of the Pedigree View requires the periodic reaffirmation of state consent, on the grounds that states have a legitimate interest in determining whether these institutions are performing as they are supposed to.⁸

The Pedigree View fails because it is hard to see how state consent could render GGIs legitimate, given that many states are non-democratic and systematically violate the human rights of their citizens and are for that reason themselves illegitimate. State consent in these cases cannot transfer legitimacy for the simple reason that there is no legitimacy to transfer. To assert that state consent, regardless of the character of the state, is sufficient for the legitimacy of GGIs is to regress to a conception of international order that fails to impose even the most minimal normative requirements on states.

It might be argued, however, that even though the consent of illegitimate states cannot itself make global governance institutions legitimate, there is an important instrumental justification for treating state consent as a necessary condition for their legitimacy: doing so provides a check on the tendency of stronger states to exploit weak ones. In other words, persisting in the fiction that all states – irrespective of whether they respect the basic rights of their own citizens – are moral agents whose consent confers legitimacy serves an important value. This fiction, however, is not one that those who take human rights seriously can consistently accept.

The proponent of state consent might reply as follows: ‘My proposal is not that we should return to the pernicious fiction of the Morality

⁸ For a more detailed discussion, see A. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2003), esp. ch. 5.

of States. Instead, it is that we should agree, for good cosmopolitan reasons, to regard a global governance institution as legitimate only if it enjoys the consent of all states.' Withholding legitimacy from GGIs simply because not all states consent to them, however, would purport to protect weaker states at the expense of giving a legitimacy veto to tyrannies. The price is too high. Weak states are in a numerical majority in multilateral institutions. Generally speaking, they are less threatened by the dominance of powerful states within GGIs than they are by the actions of such powerful states acting outside of institutional constraints.

The consent of democratic states

The idea that state consent confers legitimacy is much more plausible when restricted to democratic states. On reflection, however, the mere fact of state consent, even when the state in question is democratic and satisfies whatever other conditions are appropriate for state legitimacy, is not sufficient for the legitimacy of GGIs.

From the standpoint of a particular weak democratic state, participation in GGIs such as the WTO is hardly voluntary, since the state would suffer serious costs by not participating. Yet 'substantial' voluntariness is generally thought to be a necessary condition for consent to play a legitimating role.⁹ There may be reasonable disagreements over what counts as substantial voluntariness, but the vulnerability of individual weak states is serious enough to undercut the view that the consent of democratic states is by itself sufficient for legitimacy.

There is another reason why the consent of democratic states is not sufficient for the legitimacy of GGIs: the problem of reconciling democratic values with unavoidable 'bureaucratic discretion' that plagues democratic theory at the domestic level looms even larger in the global case. For a modern state to function, much of what state agents do will not be subject to democratic decisions, and saying that the public has consented in some highly general way to whatever it is that state agents do is clearly inadequate. The difficulty is not in identifying chains of delegation stretching from the individual citizen to state agents, but

⁹ For a perceptive discussion of how consent to new international trade rules in the Uruguay Round (1986–94) was merely nominal, since the alternatives for poor countries were so unattractive, see R. H. Steinberg, 'In the Shadow of Law or Power? Consensus-based Bargaining and Outcomes in the GATT/WTO', *International Organization*, 56 (2002), 339–74.

rather that at some point the impact of the popular will on how political power is used becomes so attenuated as to be normatively anaemic. Given how problematic democratic authorisation is within the modern state and given that global governance institutions require lengthening the chain of delegation, democratic state consent is not sufficient for legitimacy.

Still, the consent of democratic states may appear to be necessary, if not sufficient, for the legitimacy of GGIs. Indeed, it seems obvious that for such an institution to attempt to impose its rules on democratic states without their consent would violate the right of self-determination of the people of those states. Matters are not so simple, however. A democratic people's right of self-determination is not absolute. If the majority persecutes a minority, the fact that it does so through democratic processes does not render the state in question immune to sanctions or even to intervention. One might accommodate this fact by stipulating that a necessary condition for the legitimacy of GGIs is that they enjoy the consent of states that are democratic *and* that do a credible job of respecting the rights of all their citizens.

This does not mean that *all* such states must consent. A few such states may wilfully seek to isolate themselves from global governance (for example Switzerland only joined the UN in 2002). Furthermore, democratic states may engage in wars that are unnecessary and unjust, and resist pressures from international institutions to desist. It would hardly delegitimise a GGI established to constrain unjust warfare that it was opposed by a democratic state that was waging an unjust war. A more reasonable position would be that there is a *strong presumption* that global governance institutions are illegitimate unless they enjoy the ongoing consent of democratic states. Let us say, then, that ongoing consent by rights-respecting democratic states constitutes *the democratic channel* of accountability.¹⁰

However valuable the democratic channel of accountability is, it is not sufficient. First, as already noted, the problem of bureaucratic discretion that attenuates the power of majoritarian processes at the domestic level seems even more serious in the case of global bureaucracies. Second, not all the people who are affected by GGIs are citizens of democratic states, so even if the ongoing consent of democratic states

¹⁰ How the requirement of ongoing consent should be operationalised is a complex question we need not try to answer here; one possibility would be that the treaties creating the institution would have to be periodically reaffirmed.

fosters accountability, it may not foster accountability to *them*. If – as is the case at present – democratic states tend to be richer and hence more powerful than non-democratic ones, then the requirement of ongoing consent by democratic states may actually foster a type of accountability that is detrimental to the interests of the world’s worst-off people. From the standpoint of any broadly cosmopolitan moral theory, this is a deep flaw of domestic democracies as ordinarily conceived: government is supposed to be responsive to the interests and preferences of the ‘sovereign people’ – *the people whose government it is* – not all people or even all people whose legitimate interests will be seriously affected by the government’s actions.¹¹ For these reasons, the consent of democratic states seems insufficient. The idea that the legitimacy of GGIs requires democracy on a grander scale may seem plausible.

Global democracy

Because democracy is now widely thought to be the gold standard for legitimacy in the case of the state, it may seem obvious that GGIs are legitimate if and only if they are democratic. And since these institutions increasingly affect the welfare of people everywhere, surely this must mean that they ought to be democratic in the sense of giving everyone an equal say in how they operate. Call this the Global Democracy View.

The most obvious difficulty with this view is that the social and political conditions for democracy *on the domestic model* – with a central role for majoritarian decision-making in which each individual has an equal vote – are not met at the global level and there is no reason to think that they will be in the foreseeable future. At present there is no global political structure that could provide the basis for that sort of democratic control over global governance institutions, even if one assumes that democracy requires little direct participation by individuals. Any attempt to create such a structure in the form of a global democratic federation that relies on existing states as federal units would lack legitimacy, and hence could not confer legitimacy on global governance institutions, because, as has already been noted, many states are themselves undemocratic or lack other qualities necessary for state legitimacy. Furthermore, there is at present no global public – no worldwide political community constituted by a broad consensus recognising a common domain as the proper subject of global collective decision-making and

¹¹ Buchanan, ‘The Legitimacy of International Law’.