

Legitimacy, Justice and Public International Law

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habitually communicating with one another about public issues. Nor is there consensus on a normative framework within which to deliberate together about a global common interest. Indeed, there is not even a global consensus that some form of global government, much less a global democracy, is needed or appropriate. Finally, once it is understood that it is *liberal* democracy, democracy that protects individual and minority rights, that is desirable, the Global Democracy View seems even more unfeasible. Democracy worth aspiring to is more than elections; it includes a complex web of institutions, including a free press and media, an active civil society, and institutions to check abuses of power by administrative agencies and elected officials.

GGIs provide benefits that cannot be provided by states and, as we have argued, securing those benefits may depend upon these institutions being regarded as legitimate. The value of these institutions, therefore, warrants being more critical about the assumption that they must be democratic *on the domestic model* and more willing to explore an alternative conception of their legitimacy. In the next section we take up this task.

A Complex Standard of legitimacy

Desiderata for a standard of legitimacy

Our discussion of the social function of legitimacy assessments and our critique of the three dominant views on the standard of legitimacy for GGIs (state consent, democratic state consent, and global democracy) suggest that a standard of legitimacy for such institutions should have the following characteristics:

- (1) It must provide a reasonable public basis for coordinated support for the institutions in question, according to moral reasons that are widely accessible in spite of the persistence of significant moral disagreement – in particular, about the requirements of justice.
- (2) It must not confuse legitimacy with justice but nonetheless must not allow that extremely unjust institutions are legitimate.
- (3) It must take the ongoing consent of democratic states as a presumptive necessary condition, though not a sufficient condition, for legitimacy.
- (4) It should not make authorisation by a global democracy (on the domestic model) a necessary condition of legitimacy, but nonetheless should *promote* the key values that underlie demands for democracy in the state.

- (5) It must properly reflect the dynamic character of GGIs: the fact that not only the means they employ, but even their goals, may and ought to change over time.
- (6) It must address the two problems we encountered earlier: the problem of bureaucratic discretion and the tendency of democratic states to disregard the legitimate interests of foreigners. The standard of legitimacy must therefore incorporate mechanisms for accountability that are more robust and inclusive than that provided by the consent of democratic states.

Moral disagreement and uncertainty

The first desideratum of a standard of legitimacy is complex and warrants further explication and emphasis. We have noted that a central feature of the circumstances of legitimacy is the persistence of disagreement about, first, what the proper goals of the institution are (given the limitations imposed by state sovereignty properly conceived), second, what global justice requires, and third, what role if any the institution should play in the pursuit of global justice.

There are two circumstances in the case of GGIs that exacerbate the problem of moral disagreement. First, in the case of the state, democratic processes, at least ideally, supply a way of accommodating these disagreements, by providing a public process that assures every citizen that she is being treated as an equal, but no such process is available at the global level. Second, although there is a widespread perception, at least among cosmopolitans broadly speaking, that there is serious global injustice and that the effective pursuit of global justice requires a significant role for global institutions, it is not possible at present to provide a principled specification of the division of institutional labour for pursuing global justice. In part the problem is that there is no unified system of GGIs within which a fair and effective allocation of institutional responsibilities for justice can be devised. How responsibilities for justice ought to be allocated among GGIs and between states and GGIs depends chiefly on the answers to two questions: what are the proper responsibilities of states in the pursuit of global justice, taking into account the proper scope of state sovereignty (because this will determine how extensive the role of global institutions should be), and what are the capabilities of various global institutions for contributing to the pursuit of global justice? Neither of these questions can be answered satisfactorily at present, in part because GGIs are so new and

in part because people have only recently begun to think seriously about achieving justice on a global scale. So the difficulty is not just that there is considerable moral disagreement about the proper goals of GGIs and about the role these institutions should play in the pursuit of global justice; there is also moral *uncertainty*.¹² A plausible standard of legitimacy for GGIs must somehow accommodate *the facts of moral disagreement and uncertainty*.

Three substantive criteria

We begin with a set of institutional attributes that have considerable intuitive appeal: minimal moral acceptability, comparative benefit, and institutional integrity.

Minimal moral acceptability

GGIs, like institutions generally, must not persist in committing serious injustices. If they do so, they are not entitled to our support. On our view, the primary instance of a serious injustice is the violation of human rights.

There is disagreement as to exactly what the list of human rights includes and how the content of particular rights is to be filled out. There is agreement, however, that the list includes the rights to physical security, to liberty (understood as at least encompassing freedom from slavery, servitude, and forced occupations), and the right to subsistence. So, we can at least say this much: GGIs (like institutions generally) are legitimate only if they do not persist in violations of the least controversial human rights. This is a rather minimal moral requirement for legitimacy, but in view of the normative disagreement and uncertainty that characterise our attitudes towards these institutions, it would be hard at present to reach agreement on a more extensive set of rights that they are bound to respect. Yet it would certainly be desirable to develop a more meaningful consensus on stronger human rights standards. What this suggests is that we should require GGIs to respect minimal human rights, but also expect them to meet higher standards as we gain greater clarity about the scope of human rights.

¹² For a valuable discussion that employs a different conception of normative uncertainty, see M. Hlavac, 'A Developmental Approach to the Legitimacy of Global Governance Institutions', in D. A. Reidy and W. J. Riker (eds.), *Coercion and the State* (Dordrecht: Springer Netherlands, 2008).

For many global governance institutions, it is proper to expect that they should *respect* human rights, but not that they should play a major role in *promoting* human rights. Nonetheless, a theory of legitimacy cannot ignore the fact that in some cases the dispute over whether a GGI is legitimate is in large part a disagreement over whether it is worthy of support if it does not actively promote human rights. A proposal for a standard of legitimacy must take into account the fact that some of these institutions play a more direct and substantial role in securing human rights than others.

We seem to be in a quandary. Contemporary GGIs have to operate in an environment of moral disagreement and uncertainty, which limits the demands we can reasonably place on them to respect or protect particular human rights. Furthermore, to be sufficiently general, an account of legitimacy must avoid moral requirements that only apply to some GGIs. These considerations suggest the appropriateness of something like the minimal moral acceptability requirement, understood as refraining from violations of the least controversial human rights. On the other hand, the standard of legitimacy should reflect the fact that part of what is at issue in disputes over the legitimacy of some of these institutions is whether they should satisfy more robust demands of justice; it should acknowledge the fact that where the issue of legitimacy is most urgent, there is likely to be deep moral disagreement and uncertainty.

The way out of this impasse is to build the conditions needed for principled, informed deliberation about moral issues *into the standard of legitimacy itself*. That standard should require minimal moral acceptability, but should also accommodate and even encourage the possibility of developing more determinate and demanding requirements of justice for at least some of these institutions, as a principled basis for an institutional division of labour regarding justice emerges.

Comparative benefit

This second substantive condition for legitimacy is relatively straightforward. The justification for having GGIs is primarily if not exclusively instrumental. The basic reason for states or other addressees of institutional rules to take them as binding and for individuals generally to support or at least to not interfere with the operation of these institutions is that they provide benefits that cannot otherwise be obtained. If an institution cannot effectively perform the functions invoked to justify its existence, then this insufficiency undermines its claim to the right to rule.

'Benefit' here is comparative. The legitimacy of an institution is called into question if there is an institutional alternative, providing significantly greater benefits, that is feasible, accessible without excessive transition costs and meets the minimal moral acceptability criterion. The most difficult issues, as discussed below, concern trade-offs between comparative benefit and our other criteria. Legitimacy is not to be confused with *optimal* efficacy and efficiency. The other values that we discuss are also important in their own right; and in any case, institutional stability is a virtue. Nevertheless, if an institution steadfastly remains instrumentally suboptimal when it could take steps to become significantly more efficient or effective, this could impugn its legitimacy in an indirect way: it would indicate that those in charge of the institution were either grossly incompetent or not seriously committed to providing the benefits that were invoked to justify the creation of the institution in the first place. For instance, as of the beginning of 2006 the United Nations faced the issue of reconstituting a Human Rights Commission that had been discredited by the membership of states that notoriously abuse human rights, with Libya serving as chair in 2003.¹³

Institutional integrity

If an institution exhibits a pattern of egregious disparity between its actual performance, on the one hand, and its self-proclaimed procedures or major goals, on the other, its legitimacy is seriously called into question. The United Nations Oil-for-Food scandal is a case in point. The Oil-for-Food Program was devised to enable Iraqi oil to be sold, under strict controls, to pay for food imports under the UN-mandated sanctions of the 1990s. More than half of the companies involved paid illegal surcharges or kickbacks to Saddam Hussein and his cronies, resulting in large profits for corporations and pecuniary benefits for some programme administrators, including at least one high-level UN official.¹⁴ The most damning charge is that neither the Security Council oversight bodies nor the Office of the Secretary-General followed the UN's prescribed procedures for accountability. At least when viewed in the light

¹³ In March 2005, Secretary-General Kofi Annan called for the replacement of the Commission on Human Rights (fifty-three members elected from slates put forward by regional groups) with a smaller Human Rights Council elected by a two-thirds vote of members of the General Assembly (see his report 'In Larger Freedom', A/59/2005, para. 183).

¹⁴ For the report of the Independent Inquiry Committee into the United Nations Oil-for-Food Program (the Volcker Committee), dated 27 October 2005, see www.iic-offp.org/story27oct05.htm.

of the historical record of other failures of accountability in the use of resources on the part of the UN, these findings raise questions about the legitimacy of the Security Council and the Secretariat.

An institution should also be presumed to be illegitimate if its practices or procedures predictably undermine the pursuit of the very goals in terms of which it justifies its existence. If the fundamental character of the Security Council's decision-making process renders that institution incapable of successfully pursuing what it now acknowledges as one of its chief goals – stopping large-scale violations of basic human rights – this impugns its legitimacy. To take another example, Randall Stone has shown that the IMF during the 1990s inconsistently applied its own standards with respect to its lending, systematically relaxing enforcement on countries that had rich and powerful patrons.¹⁵ Similarly, if the WTO claims to provide the benefits of trade liberalisation to *all* of its members, but consistently develops policies that exclude its weaker members from the benefits of liberalisation, this undermines its claim to legitimacy. If an institution fails to satisfy the integrity criterion, we have reason to believe that key institutional agents are either untrustworthy or grossly incompetent, that it lacks correctives for these deficiencies, and that it is therefore unlikely to be effective.

Epistemic aspects of legitimacy

Minimal moral acceptability, comparative benefit, and institutional integrity are plausible presumptive substantive requirements for the legitimacy of GGIs. It would be excessive to claim that they are necessary conditions *simpliciter*, because there may be extraordinary circumstances in which an institution would fail to satisfy one or two of them, yet still reasonably be regarded as legitimate. This might be the case if there were no feasible and accessible alternative institutional arrangement, if the non-institutional alternative were sufficiently grim, and if there was reason to believe that the institution had the resources and the political will to correct the deficiency. How much we expect of an institution should depend, *inter alia*, upon how valuable the benefits it provides are and whether there are acceptable, feasible alternatives to it.

¹⁵ R. W. Stone, 'The Political Economy of IMF Lending in Africa', *American Political Science Review*, 98 (2004), 577–91. See also R. W. Stone, *Lending Credibility: The International Monetary Fund and the Post-Communist Transition* (Princeton University Press, 2002).

For example, we might be warranted in regarding an institution as legitimate even though it lacked integrity, if it were nonetheless providing important protections for basic human rights and the alternatives to relying on it were even less acceptable. In contrast, the fact that an institution is effective in incrementally liberalising trade would not be sufficient to rebut the presumption that it is illegitimate because it abuses human rights.¹⁶

There are two limitations on the applicability of these three criteria, however. The first is *the problem of factual knowledge*: being able to make reasonable judgments about whether an institution satisfies any of the three substantive conditions requires considerable information about the workings of the institution and their effects in a number of domains and the likely effects of feasible alternatives. Some institutions may not only fail to supply the needed information; they may, whether deliberately or otherwise, make such information either impossible for outsiders to obtain or prohibitively costly.

The second difficulty with taking the three substantive conditions as jointly sufficient for legitimacy is *the problem of moral disagreement and uncertainty* noted earlier. Even if there is sufficient agreement on what counts as the violation of basic human rights, there are ongoing disputes about whether some global governance institutions should meet higher moral standards. As emphasised above, there is not only disagreement but also uncertainty as to the role that some of these institutions should play in the pursuit of global justice.

Further, merely requiring that GGIs not violate basic human rights is unresponsive to the familiar complaint that rich countries unfairly dominate them, and that even if they provide benefits to all, the richer members receive unjustifiably greater benefits. Although all parties may agree that fairness in the internal operations of the institution matters, there are likely to be disagreements about what fairness would consist of, disputes about whether fairness would suffice or whether equality is required, and about what is to be made equal (welfare, opportunities, resources, and so on). There is also likely to be disagreement about *how* unfair an institution must be to lack legitimacy. A proposal for a public global standard of legitimacy must not gloss over these disagreements.

In the following sections we argue that the proper response to both the problem of factual knowledge and the problem of moral disagreement

¹⁶ We are indebted to Andrew Hurrell for this example.

and uncertainty is to focus on what might be called the *epistemic-deliberative* quality of the institution, the extent to which the institution provides reliable information needed for grappling with moral disagreement and uncertainty concerning its proper functions. To lay the groundwork for that argument, we begin by considering two items often assumed to be obvious requirements for the legitimacy of GGIs: accountability and transparency.

Accountability

Critics of GGIs often complain that they lack accountability. Accountability includes three elements: first, standards that those who are held accountable are expected to meet; second, information available to accountability holders, who can then apply the standards in question to the performance of those who are held to account; and third, the capacity to impose sanctions: to attach costs to the failure to meet the standards.

It is misleading to say that GGIs are illegitimate because they lack accountability and to suggest that the key to making them legitimate is to make them accountable. Most GGIs, including those whose legitimacy is most strenuously denied, include mechanisms for accountability.¹⁷ The problem is that the accountability is morally inadequate. For example, the World Bank has traditionally exhibited a high degree of accountability, but it has been accountability to the biggest donor countries, and the Bank therefore has to act in conformity with their interests, at least insofar as they agree. Such accountability does not ensure meaningful participation by those affected by rules or due consideration of their legitimate interests.¹⁸

So accountability must be of the right sort. At the very least, this means that there must be effective provisions in the structure of the institution to hold institutional agents accountable for acting in ways that ensure satisfaction of the minimal moral acceptability and comparative benefit conditions. But accountability understood in this narrow way is not sufficiently *dynamic* to serve as an assurance of the legitimacy of GGIs, given that in some cases there is serious disagreement about what the goals of the institution should be and, more specifically, about what role if any the institution should play in the pursuit of global justice.

¹⁷ R. W. Grant and R. O. Keohane, 'Accountability and Abuses of Power in World Politics', *American Political Science Review*, 99 (2005), 29–44.

¹⁸ For a discussion, see N. Woods, 'Holding Intergovernmental Institutions to Account', *Ethics & International Affairs*, 17 (2003), 69–80.

The point is that what the *terms of accountability* ought to be – what standards of accountability ought to be employed, who the accountability holders should be, and whose interests the accountability holders should represent – cannot be definitively ascertained without knowing what role, if any, the institution should play in the pursuit of global justice.

Therefore, what might be called narrow accountability – accountability without provision for contestation of the terms of accountability – is insufficient for legitimacy, given the facts of moral disagreement and uncertainty. Because what constitutes appropriate accountability is itself subject to reasonable dispute, the legitimacy of GGIs depends in part upon whether they operate in such a way as to facilitate principled, factually informed deliberation about the terms of accountability. There must be provisions for critically revising existing terms of accountability.

Transparency

Achieving transparency is often touted as the proper response to worries about the legitimacy of global governance institutions.¹⁹ But transparency by itself is inadequate. First, if transparency means merely the *availability* of accurate information about how the institution works, it is insufficient even for narrow accountability – that is, for ensuring that the institution is accurately evaluated in accordance with the current terms of accountability. Information must be (a) accessible at reasonable cost, (b) properly integrated and interpreted, and (c) directed to the accountability holders. Furthermore (d) the accountability holders must be adequately motivated to use it properly in evaluating the performance of the relevant institutional agents. Second, if, as we have argued, the capacity for critically revising the terms of accountability is necessary for legitimacy, information about how the institution works must be available not only to those who are presently designated as accountability holders, but also to those who may contest the terms of accountability.

Broad transparency is needed for critical revisability of the terms of accountability. Both institutional practices and the moral principles that shape the terms of accountability must be revisable in the light of critical reflection and discussion. Under conditions of broad transparency, information produced initially to enable institutionally designated accountability holders to assess officials' performance can be appropriated

¹⁹ A. Florini, *The Coming Democracy* (Washington, DC: Island Press, 2003).

by agents *external* to the institution, such as non-governmental organisations (NGOs), and used to support more fundamental criticisms, not only of the institution's processes and structures, but even of its most fundamental goals and its role in the pursuit of global justice.

One especially important dimension of broad transparency is *responsibility for public justification*.²⁰ Institutional actors must offer public justifications of at least the more controversial and consequential institutional policies and must facilitate timely critical responses to them. Potential critics must be in a position to determine whether the public justifications are cogent, whether they are consistent with the current terms of accountability, and whether, if taken seriously, these justifications call for revision of the current terms of responsibility.

Broad transparency can sometimes serve as a proxy for satisfaction of the minimal moral acceptability, comparative benefit, and integrity criteria. For example, it may be easier for outsiders to discover that an institution is not responding to demands for information relevant to determining whether it is violating its own prescribed procedures, than to determine whether in fact it is violating them. Similarly, it may be very difficult to determine whether an institution is comparatively effective in solving certain global problems, but much easier to tell whether it generates – or systematically restricts access to – the information outsiders would need to evaluate its effectiveness. If an institution persistently fails to cooperate in making available to outsiders the information that would be needed to determine whether the three presumptive necessary conditions are satisfied, that by itself creates a presumption that it is illegitimate.

Epistemic virtues

Legitimate GGIs should possess three epistemic virtues. First, because their chief function is to achieve coordination, they must generate and properly direct reliable information about coordination points; otherwise they will not satisfy the condition of comparative benefit. Second, because accountability is required to determine whether they are in fact performing their current coordinating functions efficiently and effectively requires narrow transparency, they must at least be transparent

²⁰ For an illuminating account of the legitimacy of healthcare institutions that emphasises responsibility for justifications, see N. Daniels and J. Sabin, 'Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers', *Philosophy & Public Affairs*, 26 (1997), 303–50.

in the narrow sense: they must also have effective provisions for integrating and interpreting the information current accountability holders need and for directing it to them. Third, they must have the capacity for *revising the terms of accountability*, and this requires broad transparency: there must be provision for ongoing, inclusive deliberation about what global justice requires and how the institution in question fits into a division of institutional responsibilities for achieving it.

Overcoming informational asymmetries

A fundamental problem of institutional accountability is that insiders generally have better information about the institution than outsiders. Outsiders can determine whether institutions enjoy the consent of states, and whether states are democratic; but it may be very difficult for them to reach well-informed conclusions about the minimal moral acceptability, comparative benefit, and integrity conditions. Our emphasis on epistemic virtues is well suited to illuminate these problems of asymmetrical information.

First, if institutional agents persist in failing to provide public justifications for their policies and withhold other information critical to the evaluation of institutional performance, we have good reason to believe the institution is not satisfying the substantive criteria for legitimacy.²¹ Second, there may be an asymmetry of knowledge in the other direction as well, and this can have beneficial consequences for institutional accountability. Consider issue areas such as human rights and the environment, which are richly populated with independent NGOs that seek to monitor and criticise national governments and GGIs and to suggest policy alternatives. Suppose that in such domains there is a division of labour among external epistemic actors. Some individuals and groups seek information about certain types of issues, while others focus on other aspects, each drawing on distinct but in some cases overlapping groups of experts. Still others specialise in integrating and interpreting information gathered by other external epistemic actors.

²¹ The analogy in the economics of information is to the market for used cars. A potential buyer of a used car would be justified in inferring poor quality if the seller were unwilling to let him have the car thoroughly examined by a competent mechanic. See G. A. Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism', *Quarterly Journal of Economics*, 84 (1970), 488–500.

The fact that the information held by external epistemic actors is dispersed will make it difficult for institutional agents to know what is known about their behaviour or to predict when potentially damaging information may be integrated and interpreted in ways that make it politically potent. Their awareness of this asymmetry will provide institutional agents incentives for avoiding behaviour for which they may be criticised. A condition of *productive uncertainty* will exist. Although institutional agents will know that external epistemic actors do not possess the full range of knowledge that they do, they will know that there are many individuals and organisations gathering information about the institution. Further, they will know that some of the information that external epistemic actors have access to can serve as a reliable proxy for information they cannot access. Finally, they will also know that potentially damaging information that is currently harmless because it is dispersed among many external epistemic agents may at any time be integrated and interpreted in such a way as to make it politically effective, but they will not be able to predict when this will occur. Under these conditions, institutional agents will have significant incentives to refrain from behaviour that will attract damning criticism, despite the fundamental asymmetry of knowledge between insiders and outsiders.

This is not to say that the effects of transparency will always be benign. Indeed, under some circumstances transparency can have malign effects. As David Stasavage points out, ‘open-door bargaining ... encourages representatives to posture by adopting overly aggressive bargaining positions that increase the risks of breakdown in negotiations’.²² Our claim is not that outcomes are better the more transparent institutions are. Rather, it is that the dispersal of information among a plurality of external epistemic actors provides some counterbalance to informational asymmetries favouring insiders. There should be a very strong but rebuttable presumption of transparency, because the ills of too much transparency can be corrected by deeper, more sophisticated public discussion, whereas there can be no democratic response to secret action by bureaucracies not accountable to the public.

Furthermore, if national legislatures are to retain their relevance – if what we have called the democratic accountability channel is to be effective – they must be able to review the operations of GGIs. To do

²² D. Stasavage, ‘Open-Door or Closed-Door? Transparency in Domestic and International Bargaining’, *International Organization*, 58 (2004), 667–704.

this, they need a flow of information from transnational civil society. Monitoring is best done pluralistically by transnational civil society, whereas the sanctions aspects of accountability are more effectively carried out by legislatures. With respect both to the monitoring and sanctioning functions, broad transparency is conducive to the principled revisability of institutions and to their improvement through increasingly inclusive criticism and more deeply probing discussion over time.

Institutional agents generally have incentives to prevent outsiders from getting information that may eventually be interpreted and integrated in damaging ways and to deprive outsiders of information that can serve as a reliable proxy to assess institutional legitimacy. The very reasons that make the epistemic virtues valuable from the standpoint of assessing institutional legitimacy may therefore tempt institutional agents to ensure that their institutions do not exemplify these virtues. But institutional agents are also aware that it is important for their institutions to be widely regarded as legitimate. Outsiders deprived of access to information are likely to react in the same way as the prospective buyer of a used car who is prevented from taking it to an independent mechanic. They will discount the claims of the insiders and may conclude that the institution is illegitimate. So if there is a broad consensus among outsiders that institutions are not legitimate unless they exemplify the epistemic virtues, institutional agents will have reason to ensure that their institutions do so.

Contestation and revisability: links to external actors and institutions

We have argued that the legitimacy of GGIs depends upon whether there is ongoing, informed, principled contestation of their goals and terms of accountability. This process of contestation and revision depends upon activities of actors outside the institution. It is not enough for the institutions to make information available. Other agents, whose interests and commitments do not coincide too closely with those of the institution, must provide a check on the reliability of the information, integrate it, and make it available in understandable, usable form to all who have a legitimate interest in the operations of the institution. Such activities can produce positive feedback, in which appeal to standards of legitimacy by the external epistemic actors not only increases compliance with existing standards but also leads to improvements in the quality of the standards themselves. For these reasons, in the absence of global

democracy and given the limitations of the democratic channel described earlier, legitimacy depends crucially upon not only the epistemic virtues of the institution itself but also on the activities of *external epistemic actors*. Effective linkage between the institution and external epistemic actors constitutes what might be called the *transnational civil society channel of accountability*.

The needed external epistemic actors, if they are effective, will themselves be institutionally organised.²³ Institutional legitimacy, then, is not simply a function of the institution's characteristics; it also depends upon the broader institutional environment in which the particular institution exists. To borrow a biological metaphor, ours is an ecological conception of legitimacy.

All three elements of our Complex Standard of legitimacy are now in place. First, global governance institutions should enjoy the ongoing consent of democratic states. That is, the democratic accountability channel must function reasonably well. Second, these institutions should satisfy the substantive criteria of minimal moral acceptability, comparative benefit, and institutional integrity. Third, they should possess the epistemic virtues needed to make credible judgments about whether the three substantive criteria are satisfied and to achieve the ongoing contestation and critical revision of their goals, their terms of accountability, and ultimately their role in a division of labour for the pursuit of global justice, through their interaction with effective external epistemic agents.

A place for democratic values in the absence of global democracy

Earlier we argued that it is a mistake to hold GGIs to the standard of democratic legitimacy that is now widely applied to states. We now want to suggest that when the Complex Standard of legitimacy we propose is satisfied, important democratic values will be served. To do this, we will assume, rather than argue, that among the most important democratic values are the following: equal regard for the fundamental interests of all persons; decision-making about the public order through principled,

²³ We use the term 'external epistemic actor' here broadly, to include individuals and groups outside the institution in question who gain knowledge about the institution, interpret and integrate such knowledge, and exchange it with others, in ways that are intended to influence institutional behaviour, whether directly or indirectly (through the mediation of the activities of other individuals and groups).

collective deliberation; and mutual respect for persons as beings who are guided by reasons.

If the Complex Standard of legitimacy we propose is satisfied, all three of these values will be served. To the extent that connections between the institutions and external epistemic actors provide access to information that is not restricted to certain groups but available globally, it becomes harder for institutions to continue to exclude consideration of the interests of certain groups, and we move closer towards the ideal of equal regard for the fundamental interests of all. Furthermore, by making information available globally, networks of external epistemic actors are in effect addressing all people as individuals for whom moral reasons, not just the threat of coercion, determine whether they regard an institution's rules as authoritative. Finally, if the Complex Standard of legitimacy is satisfied, every feature of the institution becomes a potential object of principled, informed, collective deliberation, and eligibility for participation in deliberation will not be determined by institutional interests.²⁴

Consistency with democratic sovereignty

One source of doubts about the legitimacy of GGIs is the worry that they are incompatible with democratic sovereignty. Our analysis shows why and how global governance *should* constrain democratic sovereignty. The standard of legitimacy we propose is designed inter alia to help GGIs correct for the tendency of democratic governments to disregard the interests of those outside their own publics. It does this chiefly in two ways. First, the emphasis on the role of external institutional epistemic actors in achieving broad accountability helps to ensure more inclusive representation of interests over time. Second, the requirement of minimal moral acceptability, understood as non-violation of basic human rights, provides protection for the most vulnerable: if this condition is met, democratic publics cannot ignore the most serious 'negative externalities' of the policies they pursue through GGIs. So GGIs that satisfy our standard of legitimacy should not be viewed

²⁴ On our view, the legitimacy of global governance institutions, at present at least, does not require participation in the critical evaluation of institutional goals and policies by all who are affected by them; but if the standard of legitimacy we recommend were accepted, opportunities for participation would expand.

as undermining democratic sovereignty, but rather as enabling democracies to function justly.

Having articulated the Complex Standard, and indicated how it reflects several key democratic values, we can now show, briefly, how it satisfies the desiderata for a standard of legitimacy we set out earlier.

- (1) The Complex Standard provides a reasonable basis for coordinated support of institutions that meet the standard, support based on moral reasons that are widely accessible in the circumstances under which legitimacy is an issue. To serve the social function of legitimacy assessments, the Complex Standard only requires a consensus on the importance of not violating the most widely recognised human rights, broad agreement that comparative benefit and integrity are also presumptive necessary conditions of legitimacy, and a commitment to inclusive, informed deliberation directed towards resolving or at least reducing the moral disagreement and uncertainty that characterise our practical attitudes towards these institutions. Thus the Complex Standard steers a middle course between requiring more moral agreement than is available in the circumstances of legitimacy and abandoning the attempt to construct a more robust, shared moral perspective from which to evaluate GGIs. In particular, the Complex Standard acknowledges that the role that these institutions ought to play in a more just world order is both deeply contested and probably not knowable at present.
- (2) In requiring only minimal moral acceptability at present, the Complex Standard acknowledges that legitimacy does not require justice, but at the same time affirms the intuition that extreme injustice, understood as violation of the most widely recognised human rights, robs an institution of legitimacy.
- (3) The Complex Standard takes the ongoing consent of democratic states to be a presumptive necessity, though not a sufficient condition for legitimacy.
- (4) The Complex Standard rejects the assumption that GGIs cannot be legitimate unless there is global democracy, but at the same time promotes some of the key democratic values, including informed, public deliberation conducted on the assumption that every individual has standing to participate, and the requirement that key institutional policies must be publicly justified.
- (5) The Complex Standard reflects a proper appreciation of the dynamic, experimental character of GGIs and of the fact that not only the

means they employ but even the goals they pursue may and probably should change over time.

- (6) The Complex Standard's requirement of a functioning transnational civil society channel of accountability – an array of overlapping networks of external epistemic actors – helps to compensate for the limitations of accountability through democratic state consent.

The central argument of this chapter can now be summarised. The Complex Standard provides a reasonable basis for agreement in legitimacy assessments of global governance institutions, given their distinctive characteristics. When the Comparative Benefit condition is satisfied, the institution provides goods that are not readily obtainable without it; but these goods can be reliably provided only if coordination is achieved, and achieving coordination without excessive costs requires that the relevant agents take the fact that the rule is issued by the institution as a content-independent reason for compliance. Satisfaction of the Minimal Moral Acceptability condition rules out the more serious moral objections that might otherwise undercut the instrumental reasons for supporting the institution. Satisfaction of the other conditions of the Complex Standard, taken together, provides moral reasons to support or at least not interfere with the institution, among the most important of which is that the institution has epistemic virtues that contribute to its on-going improvement and to the broader task of forging agreement on what justice requires and on the institutional division of labour needed to attain it. Thus, when a global governance institution meets the demands of the Complex Standard, there is justification for saying that it has the right to rule, not merely that it is beneficial.

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Institutionalising global *demos*-cracy

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Introduction

Over the last few years, international institutional reform has become a major concern among international lawyers.¹ They are not alone in addressing the issue, however. Global justice theorists have also started focusing on the crucial institutional dimension of global justice. So doing, they have gradually developed normative criteria to guide reform of international institutions. Interestingly, some of them have also emphasised the need to pay heed to existing institutional structures and to factor those into any valuable normative reflection on the design of future global institutions. It is such a dynamic and reflexive approach to institutionalising global² institutions which I would like to adopt in this chapter, starting from normative requirements, confronting them to institutional reality and, finally, returning to our normative starting

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¹ The term 'institutions' is used here in a broad sense to refer to all official bodies in charge of law-making in a globalised legal order, whether at the international, supranational, transnational or national level.

² In what follows, the term 'global' has been chosen to include all institutions and processes implicated in the production of the law that applies in national cases, whether supranational, international or transnational, but also national institutions and processes which remain at the core of the former either for implementation or further legislative purposes. See S. Besson, 'Theorizing the Sources of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, in press (2010)).

point to rethink it through and produce a normative proposal that is both critical and feasible.

That method will be used in the chapter to discuss a specific issue underlying and somehow conditioning all current projects of international institutional reform: *global democracy*. Although the theorising of democracy beyond the state has been at work for quite some time now, first in the context of the European Union and more recently at the international level, most publicised projects fall short of an institutional proposal, i.e. of an account of how to turn their normative proposal into a plausible institutional structure. Moreover, in the few cases where these projects do provide institutional proposals, they often fail to accommodate current international institutional circumstances both in the theoretical model and in their suggestions for further institutionalisation. And this shortcoming is one of the reasons for their failure to convince as they should. This chapter's principled proposal for a model of global democracy should serve as a focal point for provisional support of existing institutions, while at the same time providing guidance for improvement and stimulating institutional reform.³

A three-pronged argument will enable us to identify a more institution-sensitive model of global democracy which can match the pluralism that characterises current law-making processes in a globalised world. The first section will explain why the legality of international law can no longer be thought of separately from its legitimacy and how international law should be produced so as to be able to claim legitimacy.⁴ More precisely, I will argue that global democracy is one of the most important dimensions of the legitimacy of international institutions and respectively of international law, and hence a necessary requirement of international law-making processes. Given the current state of international institutions, however, the objection pertaining to the lack of feasibility of global democracy needs to be met adequately. The second step will be to argue for a theoretical model of global democracy that does not aim at imitating existing institutional models of national democracy in a world state. Rather, mirroring international institutional and legal evolution, global democracy should be conceived of as pluralistic, deterritorialised and

³ See A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2004), 324.

⁴ 'International law' is used here in a broad sense to refer not only to intergovernmental law, but also to the outcome of any post-national law-making processes, i.e. processes which take place beyond the national state, whether they are supranational, international *stricto sensu* or transnational.

deliberative, i.e. in a nutshell as deliberative *demoi*-cracy. The final step in the argument will be to suggest ways in which this institution-sensitive normative argument can translate into further institutional requirements, both in terms of the adequate fora for global *demoi*-cratic deliberation and in terms of participatory and representative modalities of that deliberation.

International law, legitimacy and democracy

In a nutshell, the legitimacy of law amounts to its ability to provide peremptory or exclusionary reasons for action. The law's (legitimate) authority is distinct from that of its moral content and relies on content-independent reasons. A given legal norm may only be said to be authoritative in this sense, when it matches pre-existing individual reasons in such a way that the person is in a better position to comply with the latter if it complies with the former.⁵ As a result, there is no general prima facie obligation to obey the law qua law and legality alone is not enough for legitimacy. Legitimacy is an essential part of legality, however, in the sense that the law should be such that it can claim to be legitimate and hence to bind those to whom it applies. In circumstances of pervasive and persistent disagreement about substantive moral issues, the democratic nature of the law-making process is often regarded as the best justification for that claim.⁶

The question that needs to be addressed in this section is whether the principles underlying national law's legitimacy apply to the (legitimate) authority of international law and in particular to its authority both over states and individuals. A second question pertains to the type of

⁵ See J. Raz, *The Authority of Law* (Oxford University Press, 1979); J. Raz, *Ethics in the Public Domain* (Oxford University Press, 1995); S. Besson, *The Morality of Conflict. Reasonable Disagreement and the Law* (Oxford: Hart Publishing, 2005), ch. 13. Note that the Razian conception of authority may be borrowed separately from the remainder of Raz's legal theory. See for a revised democratic conception of Razian authority, J. Waldron, 'Authority for Officials', in L. H. Meyer, S. L. Paulson and T. W. Pogge (eds.), *Rights, Culture, and the Law. Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford University Press, 2003), 45; S. Besson, 'Democracy, Law and Authority' (Review of Lukas Meyer, Stanley Paulson and Thomas Pogge (eds.), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*), *Journal of Moral Philosophy*, 2 (2005), 89.

⁶ See Besson, *Morality of Conflict*, chs. 13 and 14; T. Christiano, *The Rule of The Many: Fundamental Issues in Democratic Theory* (Boulder: Westview Press, 1996).

legitimacy claims that may be made adequately by international law and in particular whether they should and can be of a democratic nature.

International law and legitimacy

Until the 1990s, and but for a few exceptions,⁷ the legitimacy of international institutions and accordingly of international law was no real concern for international lawyers; legitimacy was a concern confined to the arena of national politics. In international affairs, the only relevant subjects were states and not individuals. As a consequence, in those rare cases where legitimacy was discussed in international law, it was in order to be linked back to state consent, just as the authority of a promise derives from the promisor's consent. This minimalist understanding of international legitimacy mirrored the traditional contractualist or consensualist approach to international law, according to which states are both the authors and the subjects of international norms and hence bind themselves by agreeing to them.⁸ Following Buchanan, one may coin this approach the *State Consent* model.⁹

From the 1980s onwards, international law itself started regulating issues of legitimacy, and democratic legitimacy more precisely, albeit at the national level. This had been the case quite early on, for instance, in the areas of the right to self-determination and democracy-conditioned state recognition, of free elections monitoring, and of democratic and more generally human rights conditionality clauses in trade agreements.¹⁰ Paradoxically, however, the gradual emergence and reinforcement of the

⁷ See, for example, T. Franck, 'Why a Quest for Legitimacy?', *UC Davis Law Review*, 21 (1987), 535; T. Franck, 'Legitimacy in the International System', *American Journal of International Law*, 82 (1988), 705; T. Franck, 'The Emerging Right to Democratic Governance', *American Journal of International Law*, 86 (1992), 46.

⁸ See most recently, J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), ch. 7. Contra: T. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', *American Journal of International Law*, 100 (2006), 88; A. Buchanan, 'Democracy and the Commitment to International Law', *University of Georgia Journal of International and Transnational Law*, 34 (2006), 305.

⁹ See A. Buchanan and O. Keohane, 'The Legitimacy of Global Governance Institutions', *Ethics and International Affairs*, 20 (2006), 405; A. Buchanan, 'Legitimacy of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, in press (2010)).

¹⁰ See G. Fox and B. Roth, 'Introduction: The Spread of Liberal Democracy and Its Implications for International Law', in G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), 1; C. Pippan, 'Right to Democracy

so-called international right to democracy¹¹ did not immediately lead to challenging international law-making processes themselves. This may seem quite surprising given the latter's prima facie dubious democratic quality; not only did these processes vest very little legitimacy onto the democratic standards developed for national political processes,¹² but the concentration of international competences in the executive and hence the 'deparlamentisation'¹³ of international matters at the national level had perverse effects on national democracies themselves.¹⁴ Of course, the legitimacy of international law necessarily increases with the democratisation of national law-making processes and in this sense the latter are a necessary element of international legitimacy. Following Buchanan, one may coin this approach the *Democratic State Consent* model.¹⁵ It remains, however, that the focus on national democracy in those international norms pertaining to the right to democracy confirms the traditionally indirect approach to international legitimacy based on national democracy and hence ultimately on state consent.¹⁶

It is only since the mid-1990s that attitudes relative to the legitimacy of international law itself started to shift.¹⁷ As a result, the legitimacy of

in International Law', *European Journal of International Law*, 15 (2004), 213; M. Beutz, 'Functional Democracy: Responding to Failures of Accountability', *Harvard Journal of International Law*, 44 (2003), 387; R. Rich, 'Bringing Democracy into International Law', *Journal of Democracy*, 12 (2001), 20; J. Crawford and S. Marks, 'The Global Democracy Deficit: An Essay in International Law and its Limits', in D. Archibugi, D. Held and M. Kohler (eds.), *Re-Imagining Political Community, Studies in Cosmopolitan Democracy* (Cambridge: Polity Press, 1998), 72; H. J. Steiner, 'Political Participation as a Human Right', *Harvard Human Rights Yearbook*, 1 (1988), 77.

¹¹ See Franck, 'Legitimacy in the International System'; T. Franck, *The Power of Legitimacy among Nations* (Oxford: Clarendon Press, 1990); Franck, 'Emerging Right'; J. Crawford, 'Democracy and International Law', *British Yearbook of International Law*, 44 (1993), 113; J. Crawford, 'Democracy and the Body of International Law', in G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), 91; J. Crawford, 'Democracy in International Law – A Reprise', in G. Fox and B. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), 114.

¹² See the critical essays in Fox and Roth, 'Introduction'.

¹³ E. Stein, 'International Integration and Democracy: No Love at First Sight', *American Journal of International Law*, 95 (2001), 493.

¹⁴ See Crawford, 'Body of International Law'; Crawford, 'Democracy, A Reprise'; Franck, 'Legitimacy in the International System'.

¹⁵ See Buchanan and Keohane, 'Global Governance Institutions'; Buchanan, 'Legitimacy of International Law'.

¹⁶ See Crawford and Marks, 'Global Democracy Deficit', 82–5.

¹⁷ See Franck, 'Quest for Legitimacy'; Franck, 'Legitimacy in the International System'; Crawford, 'Democracy and International Law'; J. Weiler and A. Paulus, 'The Structure of Change or Is there a Hierarchy of Norms in International Law?', *European Journal of*

international law can no longer be put at rest by reference to the two models mentioned before. The *State Consent* model cannot account for the legitimacy of all international law norms. The primary reason for this is double: not only are states no longer the only international law-making institutions, but they are no longer the only international legal subjects either. As such, their consent remains at the most a residual source of legal authority in the cases where they are both authors and subjects of international legal norms.¹⁸ Besides, even in those cases, the development of other sources of international law such as customary law makes it increasingly difficult to link normativity back to state consent. Finally, even when this link seems plausible, most legal philosophers actually doubt that consent can be a constitutive source of legal authority of its own.¹⁹ This becomes even more problematic when those protected by the respect for autonomy, and equal autonomy more precisely, are states, whereas those usually protected by consensual approaches to authority in political theory are individuals.²⁰

Nor can this renewed concern for international legitimacy be sidelined by reference to the *Democratic State Consent* model. This model amounts to a merely indirect form of global democracy, i.e. one that derives the legitimacy of international law from the electoral legitimacy of state representatives negotiating and consenting to those norms.²¹ Of course, democratic state consent is an important factor of global democracy,

International Law, 8 (1997), 545; D. Bodanksy, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', *American Journal of International Law*, 93 (1999), 596; Stein, 'International Integration'; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', *European Journal of International Law*, 15 (2004), 907; A. von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization and International Law', *European Journal of International Law*, 15 (2004), 885; J. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 64 (2004), 547; Buchanan, *Moral Foundations*, chs. 5 and 7; Buchanan, 'Democracy and Commitment'; Buchanan, 'Legitimacy of International Law'; Franck, 'Power of Legitimacy'; Besson, 'Theorizing the Sources'; J. Tasioulas, 'The Legitimacy of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, in press (2010)); S. Besson, 'The Authority of International Law – Lifting the State Veil', *Sydney Law Review* 31: 3 (2009).

¹⁸ See Buchanan, *Moral Foundations*, 317–19.

¹⁹ See Buchanan, *Moral Foundations*, ch. 7; J. Tasioulas, 'Review: Justice, Legitimacy and Self-Determination: Moral Foundations for International Law', *International and Comparative Law Quarterly*, 55 (2006), 238. Contra: T. Christiano, 'Democratic Legitimacy and International Institutions', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, in press (2010)).

²⁰ See, for example, Buchanan, *Moral Foundations*, 317–20, 325.

²¹ See, for example, A. Paulus, 'Comment: The Legitimacy of International Law and the Role of the State', *Michigan Journal of International Law*, 25 (2004), 1057.

provided of course that the states consenting are democratically organised, that state representatives are publicly accountable and that the ways in which decision-making among states is organised are adequately inclusive and egalitarian.²² It is not, however, sufficient in itself from an individual perspective. International law impacts directly on individual lives and private persons have become international legal subjects, both passively as bearers of international rights and duties and actively as direct claimants before international authorities. It is time, therefore, that they become international law-makers as well.²³ Moreover, international norms now cover areas traditionally left to national law, go well beyond the regulation of interstate relations and pertain to individuals' basic interests, and this without respecting national legitimating channels. Finally, not all individuals affected by international law are citizens of democratic states and hence have a say in national democratic processes pertaining to international issues or are represented by democratically elected representatives in international fora, thus creating an inequality in legitimacy.²⁴ In those new circumstances, the call for the legitimacy of international law comes closer to the one in national law; international legal norms should be able to be justified directly to those to whom they apply on grounds of global justice and cosmopolitan ethics.²⁵

International legitimacy and democracy

If legitimacy and its relationship to legality have now become front stage in international law scholarship, it comes as no surprise that global democracy be considered as one of the most important sources of legitimacy of international law. According to the *Global Democracy* model, international law may only be regarded as legitimate and binding upon its subjects, when all the individuals (directly or indirectly) affected have been included in the decision-making process.

If legality alone is not enough for the legitimacy of international law,²⁶ international law should be such that it can claim legitimacy. There are

²² See Christiano, 'Democratic Legitimacy'.

²³ See Besson, 'Theorizing the Sources'; R. McCorquodale, 'The Individual in International Law', in M. D. Evans (ed.), *International Law*, 2nd edition (Oxford University Press, 2006), 307.

²⁴ See S. Caney, Chapter 3, this volume.

²⁵ See P. Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', *European Journal of International Law*, 8 (1997), 447.

²⁶ Contra Kumm, 'Legitimacy'; Franck, 'Legitimacy in the International System'; Franck, 'Power of Legitimacy'. See Buchanan, 'Legitimacy of International Law'.