

Is Democratic Legitimacy Possible for International Institutions?

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

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

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

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

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

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

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

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

To get at the peculiar situation political philosophy is in with regard to these institutions I lay out a puzzle about how legitimacy is possible for international institutions in a world where states are the main players and the main vehicles of accountability of political power to persons. According to the traditional legal doctrine, international institutions and international law seem to get their legitimacy from the consent of the states that create these institutions. The traditional account makes no reference to persons and eschews cosmopolitanism. But such an account of legitimacy can be grounded in cosmopolitan principles to the extent that the process of consent results from fair negotiation among states that represent the persons in their societies as equal citizens. Such a process of consent enables all persons to have a kind of say in a process of fair voluntary association among societies.

Immediately two problems arise: one, fair negotiation implies that parties do not take unfair advantage of other parties in the process of negotiation. And, two, the states must all be highly democratic. As I understand it, taking unfair advantage involves two components. The terms give disproportionate advantages to one party over the other and this disproportion arises from the much greater bargaining power of the favoured party.

Something like this may be at work in domestic society. The domestic legal systems of modern liberal democratic states attempt to limit unfair advantage taking by providing a social minimum for each person, regulating pricing as well as contracts and their courts tend to reject highly disproportionate agreements. The problem in international society is that these mitigating circumstances have no counterparts in the international sphere. Extremes of poverty are not mitigated thereby enabling some to take unfair advantage of others and there is constant complaint about the disproportionate advantages drawn by powerful and wealthy states relative to developing societies, the negotiations among states in the WTO in the 90's being a prime example of this.³

The other difficulty is that not all states are democratic and certainly most states are not highly democratic. Democracy is a widespread ideal at the moment and the international community seems committed to its diffusion throughout the globe. Still, the question for an account of legitimacy based on fair voluntary association is what to do with societies that are not democratic? They do not represent their peoples very well so it would seem that their participation in the making of international law and institutions cannot satisfy the cosmopolitan idea behind the process of fair voluntary association. And yet their peoples are less well represented if these states do not participate at all. Either they should be left out of the process or they should be made more democratic. Yet both of these are unsatisfying results because either a substantial portion of the world's population is left out of the process of decision-making or it commits us to a highly dubious process of forced democratization.

³ See (Steinberg 2002) for an account of this bargaining.

But these brief remarks suggest a deep puzzle. From the above considerations, it seems that powerful international institutions are needed to establish the background conditions for fair negotiations among states and to ensure that they are democratic. Only they can secure the background conditions for fair negotiation. Only they can resolve controversies about when benefits are not grossly disproportionately distributed and enforce their judgments. And only they can effectively promote democracy. But in order to do this successfully they must be able to hold powerful states in check. International institutions are either strong enough to hold the most powerful states in check or they are likely to be disproportionately controlled by powerful states.⁴ If international institutions have the kind of power to hold powerful states in check then the problem of legitimacy transfers to them and the ultimate standard by which they would be judged is a democratic standard. But the prospects for global democratic institutions are very low at the moment and for the medium term future. If they are too weak to hold powerful states in check and those states have disproportionate control over them, they lack legitimacy at least by any remotely democratic standard. Hence, the two central standards of legitimacy, fair voluntary association and democracy, seem to be unattainable for international institutions for the foreseeable future at least in the simple forms we know them. The realization of the first standard seems to depend on the realization of the second one but the second one is unattainable in part because the first one is unattainable on its own.

In the first part of the paper, I will critique the idea of global democracy. In the next part of the paper I will critique the voluntary association model of legitimacy. These

⁴ For some striking examples of this see (Steinberg, 2004) and (Doyle, 2009)

critical discussions suggest an impasse in our thinking about how international institutions and law can be made legitimate. I will then address some critical remarks to an alternative conception of global democracy that has been recently defended.

I have no solution to this impasse at the moment. It may be that the best we can do at the moment is to ensure that minimal standards of morality or human rights are respected and promoted by international law and institutions and to try to make sure that these institutions satisfy some minimal standards of accountability.⁵ I am not ready to adopt this conclusion as an account of legitimacy but I offer this paper as a challenge to the thought that the application of more ambitious principles of legitimacy can be reasonably applied to international institutions.

Problems Concerning the Ground of Transnational and Global Democracy

The reasoning with which I introduced this paper suggests that powerful global institutions are necessary to treat persons as equals in the process of collective decision-making about global issues. The main principle of legitimacy we have for centralized political decision-making is democracy. Democratic decision-making is a method of collective decision-making that publicly treats persons as equals when there is substantial disagreement and conflict of interest over matters of common concern. Though all the outcomes of democratic decision-making will inevitably be opposed by many and a large proportion will be unjust, the method confers legitimacy on the results by publicly

⁵ See (Buchanan and Keohane 2006) for this conception of legitimacy. The basic worry about this view is that though it does list some properties that it would be desirable for international institutions to have, it is hard to see how these properties can ground a right to rule for those institutions and associated content independent duties.

treating all the participants as equals, at least as long as the results satisfy some minimal standards of justice. Hence, many political theorists and philosophers have naturally turned to global democracy as a potential source of legitimacy for international institutions. By “global democracy” in this section, I mean a centralized democratic decision-making process for solving global problems. These processes would involve a global legislature directly elected by the world’s adult population.⁶ It would operate in a roughly majoritarian way within certain limits grounded in basic human rights. I want to suggest three serious difficulties for the thesis that collective decision-making ought to be done in this way at least for the near to medium term future.

The Problem of Stakes

It is often argued that global democracy or transnational democracy can be grounded in the fact that people’s activities all around the world have effects on people in other parts of the globe. Since people’s activities in different parts of the globe have effects on those in other parts, each should have a say in the overall organization of the globe. Each should have a say in what affects him or her. This argument has been put in different ways. Some have noted that actions of persons in one part of the world affect peoples in other parts of the world and so they all ought to have an equal say. This might be called the “all affected” principle. Others note that actions of persons in one part of the world engage and direct the actions of persons elsewhere. Another criterion is that actions of

⁶ See (Marchetti 2010) for a discussion of this model and for references to the large literature on it.

persons in one part of the world affect at least some of the fundamental interests of those in other parts of the world.⁷

But these arguments fail to take into account one of the basic requirements for the desirability of democratic decision making. I have argued elsewhere that for democracy genuinely to treat people as equals, the combination of issues on which democracy decides must be one in which individuals have roughly equal stakes overall.⁸ It is not enough that people are affected, or that some of their fundamental interests are affected, it must be that their fates are somehow mostly equally bound up with the package of issues they are dealing with. If two people have an equal say in a matter that affects one person's interests much more than the other's interests and there are no other issues wherein the other's interests are more implicated, then it appears that there is some unfairness in them having an equal say. And the same holds for combinations of issues. If two people have fundamental interests in collective decisions over some combination of issues but the interests of one are much more bound up with that set of issues than the other's are, it does not seem fair to give each an equal voice. Indeed, it would seem that this would amount to not treating the people in question as equals. Normally in those contexts in which people are likely to have very different stakes in issues to be decided, some kind of right of veto or exit is accorded each person, with which they can protect

⁷ See (Gould 2004:176-180) for a review and critique of some different approaches and a defence of the approach that makes human rights central to determination of who ought to have a say in collective decisions. See also (Pogge, 2002).

⁸ See (Christiano 2008).

their interests. The matters are not decided by majority rule unless they are parts of larger combinations of issues in which the person's have equal stakes overall.

This is why democracy is particularly desirable at the modern state level in the modern world. At least in the normal case, individuals inhabit a world in common with others in which the fundamental interests of all are implicated. In such a political community there is a rough equality of stake for all the individuals. As a consequence, giving each person an equal voice is a fair way of distributing power among them.

But this cannot be said of individuals in different states. First, though their lives are mutually affected in a variety of ways they are not mutually affected to the same deep extent as the lives of members of a single modern state are. Overall, my interests are far more bound up with the interests of other persons in the United States than they are with persons in China or even in Canada even though there are clear ways in which we of different political societies influence each others lives. We do not inhabit common worlds with these other people. This is at least in part the implication of current institutionalist approaches to development economics, which assert that the main determinant of the economic well-being of a country is the set of domestic institutions that country has.⁹

But, second and more important, it is not clear that we have equal stakes in the decisions or the combinations of decisions that are made by transnational and global institutions. As a general rule there are inequalities of stakes in larger transnational institutions. For instance, in the World Trade Organization some member states have far

⁹ See (Rodrik 2007:184) 'There is now widespread agreement among economists studying economic growth that institutional quality holds the key to prevailing patterns of prosperity around the world.'

greater stakes in external trade than other states, as can be seen from their very different export to GDP ratios. But a democratic principle would appear to give them all equal voices. And thus the necessary condition for the intrinsic fairness of democratic decision-making seems not to hold in the case of transnational institutions or global ones. The legitimacy of such institutions must always be called into question since it is unclear that equality of stakes is present.

These difficulties are magnified by the requirement that I have defended, which is that democracy publicly realize equality among citizens. This demands that the equality be one that everyone can see to be in effect among them. I have argued that this is a key element in the argument for the intrinsic desirability of democracy. But if we have good reason to think that transnational institutions are unlikely to involve equality of stakes in the sets of decisions they make, there is a very strong reason for thinking that these collective decision making areas cannot be egalitarian in a publicly clear way to all the members. Many will have good reasons for complaining that their interests are being given less than equal consideration on the grounds that others are given an equal say in matters that affect their interests more deeply than the interests of the others. Even if these complaints are not always justified, the appearance of inequity will not go away in these contexts. So we have here a general normative worry about the appropriateness of democratic decision-making in the context of global collective decision-making.

The Problem of Persistent Minorities on a Global Scale

The second problem I want to discuss here is the problem of persistent minorities. In my view, the presence of persistent minorities in the modern democratic state undercuts the

authority of the state with respect to those minorities. This is a significant problem in modern states as they are.¹⁰ But it would appear to be an even greater problem in global and transnational institutions if they were fully democratized. The larger the constituency, the larger the chances are that particular minorities would simply get lost in the democratic decision-making.

To be sure, not all minorities would be lost since some of them could make common cause with others on the larger global scale. And presumably global democratic institutions would have to be ruled by coalitions of different groups each of which is a minority on its own. Still in a world as diverse as the one we live in, it seems hard to imagine that there will not be large portions of humanity that will find themselves not part of any winning coalition for significant periods of time. We see this already in modern states where the level of diversity is generally considerably smaller than the world overall.

But as I have argued elsewhere, the presence of persistent minorities undercuts the authority of the democratic assembly at least with regard to the persistent minority and it weakens the authority secondarily with regard to the rest of the population. The consequence of this is that we can infer that the authority of global democratic institutions will be severely weakened by this problem.

The way these problems are sometimes resolved in modern states is through the devices of political autonomy and consensual institutions. In the case of political autonomy, the most extreme measure available is secession but less extreme methods are also available such as partial political autonomy for a particular region and a federal

¹⁰ I argue this in some detail in chapter 7 of (Christiano 2008).

structure of governance. In these two kinds of institutional structures the problem of the persistent minority is partly resolved by allowing the minority to make decisions for itself either as an independent political unit or at least to make some broad class of decisions for itself.

Alternatively, these problems have sometimes been solved by methods of consensus politics including supermajority rules on some or all issues or some kind of consociational decision-making process. These kinds of rules ensure that the minority has some say by requiring that the supermajority be large enough so that it has to include the minority group in the final decisions.

As I see it, both of these kinds of devices are somewhat non democratic. They involve departures from egalitarian ways of making decisions. The establishment of political autonomy involves cutting out a piece of the common world so that only a small group has a say over it even though many persons' interests are deeply implicated. Over some issues only some of those whose fundamental interests are implicated in the decision have a say over those issues when political autonomy is established within a common world.

In the case of consensus decision-making rules, the rules are not democratic to the extent that they give minorities a kind of veto over the decisions. Instead of each having an equal say, a minority has a kind of veto power though it may not be the minority whose interests we are trying to protect. The reason for majority rule is that it is the one rule for decision-making that seems to treat each person as an equal in a variety of different ways. The more we move towards supermajority rule, the more we endanger the equality in the decision-making. Of course, it may be necessary to do this under

certain circumstances, circumstances that the underlying principle of equality seems to pick out. But we should not be deceived into thinking that the consequent institutional structure is entirely democratic.

In addition, to the extent that we are talking about global governance institutions, it is not clear what the possibility of secession amounts to. It would appear that secession would simply imply that the institutions are not global after all. If we were to insist on global institutions, the possibility of secession would be ruled out. And thus one possible remedy for the problem of persistent minorities would be ruled out by global institutions even though the problem itself is likely to be far greater than it is at the national level.

The problem of persistent minorities, I have argued, cuts right at the heart of the legitimacy of democratic institutions and so democratic global institutions would start life with a very serious obstacle to establishing their genuine legitimacy. Thus we seem to be able to anticipate a very significant problem of persistent minorities on the global scale without some main devices, such as secession, that can be used to remedy this problem. Alternatively, the use of political autonomy and consociational decision-making move us more in the direction of fair voluntary association among equals.

The Problem of Citizenship at the Global Level

There is one more difficulty that I want to raise for prospects of global or even transnational democracy. One difficulty concerning citizenship in large states is that citizens have little incentive to become informed about matters of politics because they have so little impact on the outcomes of decision-making. Economists defend the idea that citizens are rationally ignorant on the grounds that a citizen cannot advance his or her

interests through the political process.¹¹ But one need not agree with economists that citizens are exclusively concerned with narrow self-interest to think that there is a genuine problem here. First, it is well observed that citizens are not very well informed about politics in modern democratic states. Second, the sense of responsibility that is often necessary to engage the moral capacities is highly attenuated in the case of voting in large-scale democracies. Where one has little sense of responsibility for outcomes and the complexity of issues is very hard to grasp, it is hard to become interested in the moral issues that are involved in the decisions even if one is a moral person overall.

This problem is likely to be increased when it comes to decision-making in transnational or global institutions. Here the greater size of the constituencies combined with the even greater complexity of the issues at stake suggest that citizens are even less likely to vote in an informed way about matters connected to global institutions than they are in national democratic decisions. This worry is confirmed by the widespread observation that citizens of various countries tend to be far less informed about the foreign policies of their states than they are about the domestic policies.¹²

To some degree, citizens do seem to solve some of the problems relating to low levels of information in politics. They make decisions that help them advance their interests. But the way they solve them in part is by taking short cuts to information that are made available to them by established and settled political institutions such as interest groups and political parties. For instance, particular citizens tend to follow certain

¹¹ See (Downs 1957) for an account of this problem and for its implications for equality.

¹² See (Dahl 1999) for a detailed discussion of this problem and the difficulties relating to citizens' knowledge of foreign policy. I agree in large part with his main conclusions.

opinion leaders' judgments and the positions of their political parties.¹³ The main point I wish to make here is that citizens overcome some of the problem of information in decision making with the help of settled institutions in civil society. These institutions are essential to making democracy possible even to the imperfect extent that it is in modern states.¹⁴ And it is important that these are long established and settled institutions precisely because it is only under these conditions that citizens can rationally come to trust these institutions so as to use them as shortcuts for important information. These institutional devices, imperfect as they are, are what stave off complete elite control of government.

The worry I wish to suggest here is that the danger of complete elite control of governmental institutions becomes very alarming when we consider global or transnational institutions, in the light of the problem of citizen information briefly sketched above. In addition, in the absence of established and settled institutions for debate and discussion like political parties and interest groups that are connected to citizens it is hard to see how the problem of information can be mitigated on the global scale. This is admittedly a problem that need not last forever but it is one that is likely to last for a very long time. This is because it is hard to see how non-governmental

¹³ See generally (Popkin 1990) for an excellent review of many cognitive shortcuts citizens take in making decisions about who to vote for in elections.

¹⁴ See (Christiano 1996), especially chapters 5-8, for discussion of the question of what citizens ought to know if they are to participate as equals in a democratic process and of the institutional devices by which the problem of citizen information can be at least partly overcome.

institutions of global reach such as political parties can establish the kind of trust that is necessary for citizens to be able to rely on them in the process of participation. Even in the case of the European Union, which has had European decision making institutions for many years, strong European wide institutions like political parties and interest groups have yet to arise. Therefore, the prospects for real democracy on the global level are not likely to be very good for a very long time.

It seems to me that the consequent dangers of elite control of transnational and global democratic institutions are likely to be with us for a long time. These dangers undercut the claim of such institutions to be in accord with the ideals that underpin democracy. And so we must be very sceptical about arguments that attempt to apply ideas of democracy on a global or transnational scale.

Fair Voluntary Association among Democratic States

I have argued against global democracy as a way of addressing collective action problems in the world as a whole. Now I want to consider the problem of legitimacy from the standpoint of fair voluntary association. This is the natural alternative to global democracy as a way of thinking about the legitimacy of international institutions. It is one that I have defended elsewhere, but which I now worry about.¹⁵ I will proceed by briefly describing this conception and its rationale. I will then discuss an issue which is normally at the root of this conception of legitimacy: conceiving of international law as composed of treaties that are thought of on the model of contracts among states. The

¹⁵ See (Christiano 2010).

contract model is highly problematic as a way of understanding treaties and it misrepresents the role treaties can play in the international arena.

First I will briefly set out the idea of fair voluntary association among democratic states. The idea is rooted in the traditional doctrine of state consent as the basis of the legitimacy of international law and institutions. The traditional idea is that international law and institutions are made legitimate and have binding force as a result of the consent states give in the process of making treaties. The fundamental principle is “*pacta sunt servanda*.” There is something like a doctrine of tacit consent to customary international law. When a practice becomes regularized and a state does not state objections to participation in the practice, the state is then often thought of as bound to customary international law. For the most part the consent must be voluntary. The idea is that because states are bound to act in accordance with international law they must consent to it. There are some exceptions to the requirement of voluntary consent. *Jus cogens* norms bind states whether they consent or not and states may not abridge these norms in the making of treaties. These norms include norms against aggressive war, genocide, torture, piracy and slavery. And states may be coerced into accepting peace treaties if they have been the aggressors.

The traditional doctrine is based on the idea that states are the entities that are directed to act in international law. Individuals are not so directed in traditional international law. But as international law begins to intrude on national legal systems through requirements on the domestic economic system in trade law and environmental

law as well as in human rights law, it is beginning to direct the actions of individuals. Hence the traditional reason for state consent is being undermined to some extent.¹⁶

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

In addition to the requirement of democracy, the state consent model needs to be supplemented with an account of fair negotiation of treaties, so that the consent of a state is not given under duress or other conditions that defeat the voluntariness of the agreements. Furthermore, since we are concerned here with the consent of states binding the equal individuals in the states, we must have a conception of fair negotiation that does not allow inequalities among states to play a large role in determining the distribution of advantages among persons in the different states. To be sure, the conception of equality required here does not require equality in welfare or material wealth, it requires something analogous to the equality in democratic decision-making. The idea is that broadly speaking we can say that persons have an equal say in the determination of the

¹⁶ See (Bodansky, 1999) for a discussion of this issue.

treaties than bind them. Partly that is provided by the fact that the states are democratic, but partly we must develop principles that discern when states are taking unfair advantage of others. This conception of fair negotiation is the least well worked out part of the whole picture I am hoping to elaborate.

The hope with this conception of legitimacy is that it can build on something that is already in part in place in the modern international system. We have reasonably democratic states that accord significant protections to minorities and which make some effort to make the process of treaty making democratic, though not enough. Of course, the conception is quite demanding as well since it requires that all states be democratic and it requires that there be some mechanism for assessing when states take unfair advantage of others and how to rectify this kind of exploitation.

It is worth noting here how conceiving of the legitimacy of international law and institutions as based in state consent provides some relief from the problems we noted with global democracy. First, to the extent that it is liberal democratic states that engage in contract making for their advantage, the problem of citizenship that looms so large in the case of global democracy is diminished somewhat. Citizens can use all the devices of civil society within their own societies to inform themselves of the activities of their governments (assuming the foreign policy establishments are more democratic than they currently are). Second, the problem of persistent minorities is diminished because states can refuse to enter into negotiations and agreements. The system of fair voluntary association implements a standard way of solving the problem of persistent minorities. Third, to the extent that the peoples in states have different stakes in decisions, they can regulate their interactions with others to reflect that fact. States with high stakes in an

agreement can invest a lot of time and energy in it, while states with lesser stakes presumably will invest less time and energy.

A natural way of thinking about the agreements states make with each other is to model interstate agreements on contracts. This gives us a way of thinking about the nature of interstate agreements and the conditions of their validity. But I will reject this model in what follows. The state consent model need not be essentially tied to contracts, though it usually is. Obviously consent can be based on things aside from the advantage of the consenting party and it can have its purpose in something other than mutual advantage. But once we separate state consent from the model of contract, we need to have a new way to think about state consent and its implications, as we will see.

The Contract Model of International Treaties

The contract model thinks of treaties as if they were contracts between states. In doing this they suggest that the norms that govern the making of contracts ought to hold over the making of treaties as well. This fundamental idea is at the basis of many modern conceptions of the legitimacy of international law and institutions. The basic principle being that state consent is a necessary and sufficient condition of the legitimacy of international law and institutions.

One important qualification on the usual contract model is necessary if we are to take a cosmopolitan standpoint on the problem of the legitimacy of international institutions. From a cosmopolitan standpoint, the legitimacy of international institutions must ultimately be grounded in the interests of individuals not of states. So for the contract model to serve as a model of legitimate institutions, it must be assumed that the

state parties adequately represent the individuals who are members of the states. It seems to me that the only way that this can be done is if the states are democratic in a robust way. Not only do they have liberal democratic institutions for decision making, they adequately represent minorities and their foreign policy establishments are significantly more democratic than they have been in the past.

Here I want to discuss some considerations that have seemed to make the contract model plausible. First the point of treaties has often been thought to be the mutual advantage of the state parties in the sense that they advance the interests of the states or their peoples understood in a non-moral sense. The thought is that states engage in an exchange with each other of rights. Once the state has made the treaty it is required to perform by right of the other state. Hence, we have the principle of “*pacta sunt servanda.*”

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

The substantive conditions on the fairness of the exchange can include some notion of equality in the exchange between the participants. This notion is very hard to

define clearly. But it is often invoked in the context of unconscionable contracts where both procedural and substantive elements combine to render contracts invalid. The standard philosophical description of such contracts involves taking unfair advantage of a person. The idea is that as long as neither of the parties thinks of the exchange as essentially one of gift giving, if one of the parties is highly vulnerable to failure to make the contract and the exchange is highly disproportionate in favour of the non-vulnerable party, then it is thought that the non-vulnerable party is taking unfair advantage of the vulnerable one.

The equality involved is not a distributive equality. It is equality in the things exchanged. An exchange is fair when what is received is equivalent in value to what is given. The usual way of measuring the value of the things involved is in terms of competitive market price for the goods involved. Here is a fairly straightforward application of this idea. Suppose p is the usual price a hospital charges for administering a kind of life saving first aid to a person. Now someone finds himself not far from a hospital bleeding to death but he is far enough that he cannot get there before death sets in and a doctor comes upon him with the means to save him by standard first aid. The doctor demands a promise of payment that is ten times p and so massively greater than the standard price. And let us suppose that the doctor does not have any unusual costs of her own at stake. The contract between the bleeding person and the doctor for first aid in exchange for ten times p will not normally be thought to be a valid one. Most have thought that this would constitute an exploitative offer and that the doctor was taking unfair advantage of the vulnerable person. Though there are some straightforward cases such as the above one, the evaluation of agreements in terms of whether each gives and

receives in accordance with the competitive price is often going to be quite difficult. This will depend on the proper characterization of the circumstances in which the pricing takes place. How exactly to specify the conditions that are at least normally necessary and sufficient is quite difficult. To my knowledge courts have tended to invalidate only the most seriously disproportionate contracts.

So the standard conditions under which contracts are thought to be problematic are some kind of absence of voluntariness and exploitation. And these considerations have dominated discussions of the legitimacy of international treaties. So it looks as if the contract model is a good fit with international treaty making.

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

Treaties and Justice

Both Grotius and Vattel observe that many international treaties are concerned with establishing in treaty what the parties and individuals involved already have obligations to do.¹⁷ This is perhaps most obvious in the case of the modern law of human rights. But it is also evident in the case of peace treaties, treaties not to interfere with each other's commerce and other kinds of treaties. In this respect, treaty making resembles the normal activities of law making in a political society. Political societies legislate against murder, theft and rape not in order to create obligations where there were none before but in order more clearly to lay out the exact expectations that people are to have of one another so that the possibilities of misunderstanding are greatly diminished. And in the modern

¹⁷ See (Grotius 2005 Book II: 821) and (Vattel 2008: 345).

system of treaties some institutions of arbitration, deliberation and judgment usually accompany the treaties, such as the Committees on Human Rights established by the two major international covenants. And in some cases enforcement mechanisms are set in place to rectify wrong doing by states. This is still relatively rare. But one can see that treaties and the institutions that they establish play some of the roles that the political and legal institutions of domestic political societies play. Their object is to establish by known and settled law the terms of justice by which states are to interact with each other and with individuals.

This is distinct from the usual function of contracts, which are usually made against the background of purportedly just institutions. Contracts create obligations against a background of law. But treaties create law.

Another way in which treaties are connected with justice is in the structures of the agreements. Some treaties do not purport to establish justice between the parties; they purport to be mutually advantageous agreements between the parties. But even these are often structured in such a way as to acknowledge the importance of justice and fairness in the body of the treaty. They express commitments to fair terms among the parties. For example the treaties making up the WTO make the principle of non-discrimination the centrepiece of the agreements. Partly this is to create more efficient treaties but partly it is to realize fairness in the treaties. But the treaties creating the WTO and those that have been agreed upon within the structure of the WTO also are designed with an eye to fairness. Developing societies are given special trade preferences in many such treaties and the principles underlying these trade preferences have affected the structures of the treaties ever since. The idea is that developing countries are to be allowed special

exemptions on grounds of their vulnerability to changing prices in international trade. All of this is accompanied by the language of fairness in the negotiations and outcomes.¹⁸ To be sure, there is still much unfairness in the outcomes and the protestations of fairness are often window dressing but the point is that these are seen as necessary to a proper treaty. The same holds of international environmental treaties. They give special exemptions to developing countries so as not to retard their development. Again these are normally defended in terms of fairness to the developing countries. Again such a concern for fairness and justice in the terms of contracts is not a usual feature of contracts.

Voluntariness

Another feature of treaties that seems quite distinctive is that voluntariness is not required for some of them. The Vienna Convention on Treaties states that treaties may not result from non-lawful coercion. But it seems to leave open that treaties may result from lawful coercion. And presumably this is the case with treaties that impose peace on an unjust aggressor. These are often coercive but they are valid nevertheless. This is quite distinct from contracts where lack of voluntariness, as long as it is not due to negligence, standardly defeats the validity of a contract. In the case of coercively imposed peace treaties we are not looking at a standard case of mutual advantage in the sense that both parties regard the treaty as in their mutual advantage.

Here again, it seems that the basic reason why some peace treaties can be coercively imposed is that they tend to promote and preserve international peace and

¹⁸ See (Franck 1996) for a discussion of trade preferences and (Albin 2001) for a general discussion of fairness considerations in international negotiation.

justice. To be sure they do this in a way that is quite different from the way states do this. They allow individual parties to realize justice through coercion in a way that is quite alien to political societies.

Equality

The principle of equality in exchange is fairly central to contract law and the doctrine of unconscionable contracts.¹⁹ Here the thought is that once we determine a reasonably competitive market price the value of a thing or service can be equated with that price. Exchanges that depart too far from that competitive market price are ruled invalid in many cases where no gift is intended. That the departure must be great is usually thought to be the result of the courts unwillingness to micromanage exchanges and a humility in its ability to estimate the prices of goods.

But this principle of contract law does not seem to be generally accepted in a lot of contemporary treaty making. It is usually accepted, for example, that developing societies may benefit from special exemptions to treaty provisions or they may receive special treatment or “preferences” in international trade treaties and environmental treaties. To be sure, these special treatments are granted only grudgingly and are often quite minimal, but they are there and they say something about treaties. Treaties are not expected to obey the principle of equality in exchange, which suggests that they may not be merely exchanges. They are not gifts either, which are the usual exceptions to equality in contract law.

¹⁹ See (Gordley 2001) for a defence of this principle.

What are these special treatment provisions gesturing towards? One natural interpretation is that they are gesturing towards a concern for distributive justice and fairness among peoples in the world.

In the case of contracts, the usual theory essentially involves setting the level of advantage of each party at zero for all the parties before the exchange. There is no concern for the differential starting points of the different parties. Distributive justice concerns are bracketed. Only equality between the things exchanged seems to matter.

But treaties do not attempt to abstract fully from the background distributive concerns. They seem to adjust for background disparities. They do not attempt to rectify the injustice of unequal distribution but unequal starting points in terms of distribution of advantages are taken into account so that many treaties are decidedly asymmetrical. In this respect, they are quite different from equal contracts.

Important Differences between Treaties and Contracts

So far I have noted that treaty making is much more concerned with issues of justice than we should expect if we conceive of treaties on the model of contract. This argument has been an interpretative argument concerning contemporary practices in making treaties. But I think that there are good substantive reasons for the differences between treaties and contracts that we see.

First, there is a much greater difference between macro justice considerations and micro justice considerations in the case of contract law. In the case of contracts it often seems unfair to impose the main burdens of redistribution on individual agents. They are usually only one of many millions of contributors to the actual distribution of advantages.

The problems of distributive justice require many persons to chip in their fair share. Requiring redistribution through contract would seem to be excessively and unfairly demanding on particular persons. They are only one among many contributors to distributive inequity, but solving the problems through contracts would seem to impose the burden on them alone. To be clear here, I am referring to redistribution in the content of the contract. Many modern democratic states shape the law of contract so as to have some beneficial effect on the distribution of goods. Minimum wage legislation is an example. But this is not what I am referring to here. I am referring to the fact that the contracting parties do not use contracts to achieve distributive justice. They are usually concerned with more partial interests even though the state may attempt to effect the distribution of advantages by shaping the law of contracts. Second, attempting to achieve redistribution through contracts seems to be an inefficient way of doing it because it is a highly uncoordinated way of doing this and because it would seem to dampen the incentives to trade. The way distributive justice is best achieved in a political society is through some kind of unified tax and transfer system and through some kind of overall external regulation of markets.

Both of these points – the unfairness of imposing the burden of redistribution on contractors and the possibility of some general legal regulation and tax and transfer system -- are inapplicable at the international level. At the international level the state is by far the most important player and will remain so for a while. There is no state at the global level that can achieve justice through tax and transfer or through large-scale regulation. Furthermore there are not many states and not very many large and wealthy states.

These two points suggest that while transactions among individuals are not a suitable place for redistribution in domestic economies, transactions among states may be more suitable for redistribution in the global environment. First, given the smaller number of states and the very small number of very wealthy states, it is not so clear that the type of collective action or coordination problems we would see at the individual contractor level in domestic societies occurs at the level of states. Each individual wealthy state can make a significant dent in the distributive inequalities we see today. And the wealthy states could fairly easily coordinate with each other to achieve much more sizable redistribution. Though there is no global agency for creating redistribution, there is the possibility of coordinated redistribution.

Second, the idea of contracts as equal exchange can only have legitimacy against the background of a reasonably fair distribution of advantages. It makes little sense to require equal exchange between those who are impoverished and those who have a great deal. Equal exchange can only work justly when people at least have enough to participate. The idea in modern mixed economies is that markets can be legitimate to the extent to which everyone has enough to participate in them roughly as equals. And the state makes some attempt, however imperfectly, to achieve the wide distribution of wealth necessary for this.

At the global level the extent of poverty and inequality seem to me to vitiate the idea that all the peoples of the world ought to engage in equal exchange with each other even if they could. In addition, the extent of poverty and inequality also seem to me to imply that it is very difficult for many states to engage in equal exchange with other states. The poorest countries often are very vulnerable and are liable to be taken unfair

advantage of in the current circumstances. There is significant evidence of this taking unfair advantage in the case of the WTO in the last fifteen years. This again points to the fact that with such extremes of inequality and poverty, the background conditions that can ensure fair negotiations are not present.

One main way to express this substantive argument is via the idea of the moral division of labour between institutional and individual pursuits in society and its relative absence in international relations. That contract is normally used in a society to advance the partial concerns of the contractors within the limits set by fairness is a function of the importance of the moral division of labour. The idea here is that the central concerns of justice are primarily assured by institutional arrangements. These arrangements established by property and contract law, regulation, public ownership and tax and transfer assure distributive justice and the basic political and civil rights. The institutions are designed so as to ensure that when people act on their partial concerns, the aims of distributive justice are secured. In contracting and associating with others, individuals are not required to take justice as their aim at least most of the time. They are permitted to act partially, again within limits set by fairness and the background institutions of society (framed with the purpose of achieving justice). This division of labour is justified by three main considerations. One, individuals' actions have very small effects on justice and there is great difficulty in organizing coordination and cooperation without state institutions. Two, this permits a reasonably fair distribution of burdens and benefits. It is important for the aim of justice that each pursues his or her interests in his or her own way. Three, there may also be some room for persons to pursue their own projects without always focusing on the impartial good.

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

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

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

This reasoning applies initially to ideal theorizing but I think it also holds in non-ideal situations to some degree as well. The moral division of labour holds to some degree in the non-ideal context.

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

In a way all the points that I have been making about the centrality of justice to treaty-making can be confirmed by the fact that international treaties are thought to create international law. And law, it seems to me, has the function of establishing justice among persons.

To be sure, not every treaty need implement justice in all respects. Just as only the system of domestic law and policy is supposed to realize justice so the system of treaties ought to be devoted to realizing justice on a cosmopolitan scale.

External Effects

Another related worry is that the idea of legitimacy of treaties grounded in state consent may allow for large external effects on those states that do not consent.²⁰ This is an

²⁰ See (Bodansky, 1999) for this.

obvious worry for the contract model in which states agree to treaties based primarily on their interests. To the extent that the interests of non-participants are negatively affected and there is no larger set of institutions to rectify the illegitimate setbacks to interests, the scheme does not adequately take into account the interests of all affected.

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

Democracy

A final worry is that most states are not democratic to the extent necessary to make it possible that they can be said to represent their peoples. Most states now are at least formally democratic, but many of these are not democratic in a way that assures serious representation. Many elections are undertaken in an atmosphere of severe intimidation of the opposition. Many elections are fixed in ways that it is hard for election monitors to detect. So many states that are formally democratic in the sense that they abide by majority rule with universal suffrage and little or no legal barriers to competition do not represent their peoples well at all.

How are these peoples to be accommodated within a process of negotiation among states? When states that are not democratic negotiate with states that are

democratic with an eye towards creating international law that impinges on the domestic legal systems of the society, it seems that we may describe this as a kind of imposition of international law on the populations that are not participating in their political societies. They have little voice and their interests are only very partially registered by the elites in their society. It seems that the consent of these states can do very little by way of conferring legitimacy on the agreements in a cosmopolitan picture devoted to legitimacy grounded in persons.

In some circumstances the international institutions created by democratic and non-democratic states may be legitimate for the democratic states but not for the non-democratic states. This may happen when the agreements require things of each state that are separable in the sense that one state's compliance does not require another state's compliance. Then members of the democratic state may be duty bound to comply by the agreement. But in those cases where there is no separability and what the democratic state is required to do impinges on the interests of the non-consenting members of the non-democratic state, then there is a threat to the legitimacy of the system overall. The duties of the citizens of the democracy must normally be defeated when what they are required to do constitute impositions on the subjects of the non-democratic states. They are in effect colluding with the elites of the non-democratic state to take advantage of the incapacities of the non-democratic subjects.²¹

In a way these last two problems of external effects and non-democratic states are analogs of the problems of persistent minorities and absence of civil society in the case of

²¹ This is a kind of general account of the danger Thomas Pogge points to in his discussion of the international resource and borrowing privileges. See (Pogge, 2002).

global democracy. In the first case there is a failure of inclusion and in the second there is a failure of representation of the people by their rulers.

The Puzzle of Legitimacy

If we think of international law in this way, there is a great deal of significance for how to think of fairness in the processes of making international law. The most obvious one is that the fairness of negotiations cannot be evaluated in terms of the traditional norms of contract such as equality and voluntariness. More generally, we should not think of international negotiation on the model of bargaining and the standards of bargaining theory. The norms of justice are really the principal norms that apply to the outcomes of treaty making. Treaties have the function of establishing justice in the world as a whole. As a consequence, the process of making international law must become a deliberative process in part where alternative conceptions of justice and the common good are debated and discussed among societies and where negotiation and compromise are used when disagreement cannot be resolved. Though a concern to advance the interests of the society represented by the state is legitimate, it must always be within the context of a larger shared concern for the common good and justice.

To be sure, if international treaties are to be made in a way that treats persons as equals the conditions under which agreements among states can be made legitimate must be constrained by certain procedural norms. These norms must give rise to fair processes of negotiation and deliberation among societies about the common good and justice. Obviously they will have to protect societies from having to negotiate from positions of

excessive vulnerability and they will have to ensure some kind of equality in the process of negotiation and deliberation among societies.

These points suggest that we need to develop a conception of fair deliberation and negotiation among groups that we currently don't have at least for the case of decentralized voluntary association. They also suggest that there is some need for background global institutions to rectify excessive inequalities and to ensure that the conditions of deliberation and negotiation are reasonably fair as well as inclusive. This seems to drive us in the direction of global institutions, which in turn must to be evaluated in terms of democratic principles.

But this leaves us at a kind of impasse. We find ourselves in the position, which usually calls for democratic deliberation and decision-making but without the possibility of global democratic institutions. We have individual states negotiating with each other but the usual standards of contract do not apply and there is little to ensure that the negotiations are fair or sufficiently inclusive. This means that the two central ways in which group decisions come to be legitimate in domestic societies are not in the offing in the case of international collective decision-making. Democracy and voluntary association are both problematic from the standpoint of justice and legitimacy when in the context of international decision making.

Clearly this menu of choices for grounds of legitimacy is too small but it is hard to know where to proceed to from here. One possible avenue for further exploration might be to examine some different varieties of multilateral institutions in which many states must agree together on certain policies.²² Some of the bargaining disadvantages of

²² (Moellendorf 2008) chapter 8.

developing societies could be partly offset in this context by the fact that there are many developing societies and that they can form powerful coalitions to counter the bargaining power of the developed societies. I do not have the time to explore this option here in sufficient detail but this method suffers from the usual defects of consensus based systems in which there is a very diverse set of parties who do not share common goals or values. When serious interests conflict, they fail to make decisions and tend to favour the status quo. And it tends to be the most powerful and wealthy states who benefit most from the status quo, so they have significant bargaining advantages in multilateral institutions, particularly if the wealthy and powerful states can make common cause. And we have clear records of very great disparities in bargaining power playing a large role in determining how these multilateral institutions develop. We need only look at the formation of the United Nations in the San Francisco conference and the formation of the WTO in the Uruguay round to see how powerful states, when they can form coalitions, can determine how these go.²³ Perhaps there is some way to limit this kind of unfair taking advantage but it is hard to see how given the distribution of wealth in the world as a whole.

The other approach that has been taken by a number of recent theorists is the idea of informal democracy. The idea here is that global society can be regulated in some way by a global civil society in which non-governmental organizations and other non-state groups, which are made accountable to people, engage in a decentralized global process of deliberation that is meant to exert pressure on states and corporations.²⁴ The study of

²³ See (Steinberg 2002) for the WTO. See (Schlesinger 2003:223) for a discussion of the hard bargaining behind the creation of the Security Council Great Power veto.

²⁴ See the contribution of (MacDonald 2010) in this volume for this approach.

global civil society and its potential contribution to a genuinely cosmopolitan approach to global decision-making is essential, but there are a number of difficulties with this approach. One is that there is no real way of publicly realizing equality in this highly complex and fluid process of deliberation. One suspects that power could well be wielded by elites in this process. The suspicion is increased when one notes that the non-governmental organizations that exist seem primarily to represent the standpoints of groups in wealthy western democracies. Two, while non-governmental organizations are clearly a very important part of global decision-making it is hard to see how they can be more than inputs into a more formal system of decision-making. This kind of view has not given us an adequate account of how power is exercised and decisions are made.²⁵

Conclusion

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

²⁵ See (Bohman 2007) for this insight.

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

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