INTERNATIONAL POLITICAL LEGITIMACY AND PROCEDURAL JUSTICE

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ABSTRACT

In this project, I offer and defend an account of international political legitimacy of international actors with economic charters, such as the International Monetary Fund and World Trade Organization. With an emerging field of these and other international actors, many of which wield significant political and economic power over the domestic affairs of states, my project attempts to extend the familiar concept of legitimacy to non-state actors. My dissertation begins by offering a broader definition of legitimacy as the evaluative property of international actors or rules consisting of certain conditions the satisfaction of which justifies the possession or exercise of political power among a set of actors or within a system of rules. My account of legitimacy specifically provides that an international actor is legitimate if and only if (a) the international actor is in substantial compliance with a just international normative structure (JINS), and (b) the international actor satisfies the requirement of good standing. My account of legitimacy features procedural justice, specifically due process and formal equality, as the theoretical resources for generating rules and mechanisms for implementation and enforcement. While there is no shortage of substantive norms, such as those found in international human rights documents, the problem today is that there are few effective mechanisms for making those norms a reality. The chapters of my dissertation explain and defend my applied justice-based account of legitimacy and its specific conditions.
This dissertation is dedicated to my parents, Kwang Sim Choe (Han) and Sok Hu Choe, who instilled in me a strong sense of justice and whose lives as Korean-American immigrants made me sensitive to the struggles of those who are the most vulnerable among us and who often do not have a voice in this world.

With my deepest love and gratitude,
CHONG UN CHOE-SMITH
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1. Introduction

It has been about ten short years since Thomas Nagel compared domestic political theory with theories in global justice and observed that the latter were in the early stages of formation, noting in particular that “it is not clear what the main questions are, let alone the main possible answers” (Nagel, 2005, p. 113). Since then there has been a flood of new ideas in international political theory, often involving traditional ideas modified for application to the international context. What has emerged as some of the most fundamental and urgent questions are the ones concerning legitimacy in an increasingly globalized and politically and economically interdependent setting.¹ The questions include: what is legitimacy, what is required for a state or other international actor to be legitimate, and how does legitimacy or our theories of legitimacy operate to solve real problems (see Buchanan and Keohane, 2010(2), p. 106). While many of our traditional concepts having to do with legitimacy are relevant, the evolving international context also demands a theory that is tailored to accommodate the current political realities and attempts to address foreseeable future problems that might arise under conditions of persistent noncompliance and deep disagreements with different conceptions of justice and the good.

In addressing the subject of legitimacy, my project does not offer a comprehensive theory of justice or a theory of the good, in other words, it does not offer an ideal theory with norms that a domestic or global community can aspire to in realizing justice and satisfying the conditions necessary for human flourishing. A comprehensive theory of global justice should include such norms as, without them, the theory would be rather anemic and fail to capture in many ways

¹ Joseph Stiglitz offers the following description of globalization, which also should suffice for our purposes: “The idea of globalization is very simple. The decrease of communication costs, transportation costs, and artificial barriers to goods and factors of production has led to a closer integration of the economies of the world. Globalization implies mobility not only of goods and services but also of capital and knowledge—and to a lesser extent of people. Globalization entails not only the integration of markets but also the emergence of global civil society.” (Stiglitz, 2003, p. 51.)
what it means to be human and to live in community. But that is not this project. The project here concerns legitimacy, which generally is understood as a minimum normative threshold that involves justice but does not require full-blown justice. Furthermore, in addressing the subject of legitimacy, I will not discuss a standard that can be applied to every context, for example, the legitimacy of a particular state or set of domestic laws, as each state, depending on its own public political culture and values, may require something more or specific from its governing laws and institutions (see Copp, 1999). I also must leave for another day many specific questions regarding legitimacy, for instance, the question of the nature and extent of the powers or privileges that come with legitimacy. My focus here is powerful global governance institutions and what are known as ‘arms of the state’ in the domestic case, namely, other international institutions and organizations and the rules promulgated by these institutions and organizations that wield significant power in governing or regulating international political and economic transactions. The concept of legitimacy has long been applied to states, but with an expanding field of international actors, including non-state actors, one important question is what conditions must be satisfied for a non-state actor to qualify as legitimate. The narrow yet nonetheless ambitious project here is to provide an account of international political legitimacy for powerful global governance institutions and other similar international actors.

2 I also will not defend any particular kind of global governance model, although my account assumes and works well with a pluralist model of sovereignty and legitimacy, i.e., legitimacy can be held by a plurality of actors at multiple levels (see, e.g., Kuper, 2000; an der Vossen, 2011).

3 What I would suggest and what may be helpful in thinking about promulgating rules and enforcement, is to consider the terms ‘arms of the state’ and ‘public function’ in the domestic case. In the domestic case, the executive branch includes administrative agencies that are authorized to promulgate rules and regulations to implement laws passed by the legislature. Other public entities also are considered arms of the state. In addition to these, when private actors engage in activity previously or traditionally performed by the state, such as providing public services, these actors are extended authority to engage in the activity in question and, as a result, must comply with some of the same limitations imposed upon the state (e.g., due process of law). Such quasi-governmental actors are treated like the state both in wielding power and in being held accountable for the just exercise of that power. In the international case, international institutions and corporations wield power in a way that sometimes outstrips the power exercised by some states, but the problem is, they do so without similar limitations.
The account of legitimacy that I offer and defend is similar to that of Allen Buchanan’s account of legitimacy for international law-making institutions, but differs from Buchanan’s in two important respects, as will be discussed in greater detail below. First, my account of legitimacy is not strictly conditioned on satisfying a requirement of justice, but on two related conditions, namely, substantial compliance with what I call a ‘just international normative structure,’ which is a kind of constitutional structure, and a procedural check through what I call a requirement of ‘good standing.’ Second, my requirement of justice not only identifies a set of basic human rights, but also features procedural justice and the need for procedural mechanisms. While most theories of global justice assume and often underemphasize procedural justice, my approach recognizes procedural justice as indispensable to the normative structure of any law-governed system. The attempt in defining the requirement of justice is to abstract the essential components of a law-governed or constitutional system and apply it to the international context. The heart of my contribution, then, is an account of international political legitimacy that features procedural justice and the idea of a ‘just international normative structure’ or ‘JINS.’ An international normative structure is a set of laws and institutions that governs the operations and transactions of an international institution or organization and a just international normative structure is a set of just laws and institutions, i.e., one that respects basic norms of substantive and procedural justice.

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I think it is fair to say that Buchanan now offers two different accounts of legitimacy, one account that provides the minimum threshold for qualifying as legitimate (Buchanan, 2010) and a second account, developed with Robert O. Keohane, with criteria, substantive and epistemic, for assessing an institution as more or less legitimate (Buchanan and Keohane, 2006). This brings into question whether legitimacy is a bivalent concept or one that lends itself to degrees (see Dworkin, 2011, p. 322). For the purposes of this project, I take legitimacy as a bivalent concept and would argue that Buchanan’s second account is better characterized as one that assesses a legitimate institution as more or less just. I will discuss both accounts below, but will focus on the minimum threshold account, considering the other only to the extent relevant.
As mentioned above, my account of legitimacy includes a requirement of good standing that recognizes the pluralism and diverse perspectives of the international context and affords an effective way to confirm or disconfirm an international actor’s compliance with the requirement of justice. This second condition takes into account comments from those affected by an international actor’s decision and actions, including those from different political or cultural contexts, to confirm that any determination of compliance with the requirement of justice is indeed based on relevant factors rather than other interests or inappropriate considerations. The second condition is based on the assumption of a common morality with respect to a minimal standard of justice. There may be disagreement as to what constitutes a human rights violation based on a political community’s conception of justice or conceptions of the good, but every reasonable political community can agree on what constitutes a violation of the most basic human rights.

As this project concerns an evolving field with international actors, whose role and functions are not fully settled and are not likely to be settled anytime soon, the goal is not to provide a definitive account, but to offer critiques and insights that may move the dialogue forward. I offer and defend my own account of international political legitimacy in large part to express the need for greater emphasis on procedural justice as a source of norms to protect against the abuses of authority and a theoretical basis for developing rules and mechanisms for implementation and enforcement in a diverse international context. Legitimacy indeed presents urgent questions for us in international political theory, but among the most urgent challenges in addressing questions of legitimacy today is the challenge of finding ways to make our theories of global justice work in practice. In this introductory chapter, my objectives are to provide some
background on the global context, give some examples of the sorts of problems arising in that context, and introduce my proposal for an account of international political legitimacy.

1.1. The Global Context

My project presumes as accurate a cosmopolitan description of world order that includes both domestic and international sources of political power or authority. Although my project is a normative one and focuses on the question of what account of legitimacy or global justice is normatively preferable, it may be helpful for framing purposes to consider how some have answered the empirical question of what account of global political order is descriptively accurate. I agree with Jean Cohen that a cosmopolitan description of world order with dual, domestic and international, sources of power, each of which has its own constitution or charters, is descriptively accurate.

My account of legitimacy presumes a kind of cosmopolitanism, as opposed to statism. One of the main tenets of statism is that states alone are the primary agents who make decisions and bear responsibility in the international context. Cosmopolitanism can be characterized in one of two ways. Cosmopolitanism can be characterized in the negative as rejecting the view that states alone are the primary agents who make decisions and bear responsibility in the international context (i.e., ‘weak cosmopolitanism’). Cosmopolitanism also can be characterized in the affirmative as also advancing the view that individuals, alone or collectively, are the

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5 When I use the phrase ‘global justice,’ I intend to refer to a subject that pertains to the global context and questions of justice, broadly construed. “Justice” here does not refer only to full-blown justice, but any reasonable conception of justice. This subject includes, then, questions concerning the legitimacy of international actors where legitimacy includes some reasonable conception of justice.

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primary agents who make decisions and bear responsibility in the international context (i.e., ‘strong cosmopolitanism’). My account of international political legitimacy is committed only to weak cosmopolitanism: states no longer are the only primary agents or actors in the international context as there is an emerging field of non-state actors, some of which wield considerable power, affecting the domestic policies within states and even outstripping the power of many developing states on matters of trade, development, and economic security.

Among political and legal theorists, there is a growing trend toward a weak cosmopolitan view of world order, with such proponents as Jean Cohen (2008, 2010) and Andrew Kuper (2000), who offer cosmopolitan alternatives to pure statist approaches. Cohen, for example, argues for dual sovereignty, with both domestic and international sources of power, and Kuper suggests a plural nesting of political units, dispersed both vertically and horizontally. Jean Cohen defends a particular description of world order that involves what she calls “dual sovereignty” with sovereignty resting in both states and other international actors. Under dual sovereignty, one can be sovereign—i.e., be an autonomous governing entity over persons or territory with authority to adopt and enforce rules—without being absolutely sovereign—i.e., having exclusive and supreme authority over persons or territory (see, e.g., Cohen, 2010; Pogge, 1992). States are sovereign, but they no longer have exclusive authority and arguably no longer have supreme authority over the development of international rules and policies.

Cohen and others observe a changing global environment with an emerging field of new international institutions and organizations and, as a result, a restructuring of the sources of decision-making authority into a new complex and multilayered network of states, institutions, multinational organizations, and other international actors. The players in this new global community now include many non-state actors. Some of these specifically are in the business of
governance, such as the United Nations and the World Trade Organization, while others are simply powerful international actors who also determine the shape of international norms and practices, such as the World Bank Group and the International Monetary Fund. In addition to the new players, states also find themselves having to reform their behavior to accommodate this changing environment. “Today it is increasingly the case that for states to realize their sovereignty (as international law makers, as exercisers of international political influence, and as having a say in decisions that affect their citizens) they need the status of member with the right to participate in the decision-making processes of the various international organizations and networks that regulate the international system, on fair terms” (Cohen, 2008, p. 596).

Both states and international sources of authority are engaged in one way or another in international law-making or decision-making more broadly. The international context is governed by a growing body of law. These rules include the customary rules of just war, treaties between states on matters of defense and security, new conventions on political and civil rights and social and economic rights, new conventions on genocide and crimes against humanity, a growing body of case law from new international and multinational courts and tribunals, new agreements on environmental reform, and many other multinational and multilateral arrangements concerning trade, borrowing, development, and foreign aid. A large part of international law is established and, to a lesser extent, enforced by international institutions and organizations. One may wonder if, ultimately, in cases of conflict between domestic and international law, states have precedence because international judgments and agreements rely for their enforcement on states’ voluntary compliance or assistance. But, setting aside such conflicts, it is fair to say that international actors also participate in the development of international law and practice.
Another observation, in addition to the existence of dual sources of sovereignty, domestic and international, is the increasing interaction and interdependence globally on certain functions or issues and, as a result, a division of labor with sovereignty resting in those with the requisite expertise and power. This division is based not on territorial boundaries and nationality, but on functions and areas of expertise, such as trade with the World Trade Organization and security with the North Atlantic Treaty Organization. This is consistent with what Andrew Kuper suggests in his description of world order. Kuper’s approach includes vertically and horizontally dispersed political units, which are divided by different functions or areas of expertise and are governed according to some form of representative democracy. While it remains an open question as to whether democracy is the only just form of governance, I do agree with Kuper and others that a cosmopolitan view of world order best describes the emerging field of international actors and their interactions with each other.

Kuper specifically criticizes Rawls’s statist assumptions that locate sovereignty at a single level of the state and draw boundaries between people based on their citizenship or nationality. Instead of a single level of sovereignty vested in traditional states, Kuper expands on Thomas Pogge’s proposal of a multilayered institutional scheme with vertically dispersed sources of authority. Pogge, who defends strong cosmopolitanism, writes:

From the standpoint of cosmopolitan morality—which centers around the fundamental needs and interests of individual human beings, and of all human beings—this concentration of sovereignty at one level is no longer defensible. What I am proposing instead is not the idea of a world state, which is really a variant of the preeminent state idea. Rather, the proposal is that governmental authority—or sovereignty—be widely dispersed in the vertical dimension. What we need is both centralization and decentralization, a kind of second-order decentralization away from the now dominant level of the state. Thus, persons should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant and thus occupying the traditional role of state… (Pogge, 1992, p. 58).
Pogge envisions a political restructuring away from states and into new political units formed by majoritarian or supermajoritarian procedures (Pogge, 1992, p. 69-70). The units may be divided based on relevant commonalities, chosen or unchosen, including ethnic, religious, or cultural identity. Pogge’s vertically dispersed political units with newly drawn territorial borders provide an alternative to the state dominated system with borders based solely on political identity.

Kuper contends that Pogge does not go far enough, however, because he assumes that sovereignty should still be dispersed vertically over territorially defined units (Kuper, 2004, p. 31). Kuper argues for “a conception of political agencies that appropriately regulate different spheres of human action, and since not all spheres of action are primarily territorially based, neither need those authorities always be” (Kuper, 2004, p. 32). He also proposes a horizontal dispersion of sovereignty based on different functions such as addressing human rights violations, environmental issues, or interstate crime. Kuper seems to be right in suggesting a plural organizational model of world order based on different functions, rather than one organized over territorially defined units. As we move toward an expanding field of international actors, it seems hard to deny that there are multiple potential sources of sovereignty and that these differences sources of power are often organized into various functions and areas of expertise. Horizontal dispersion is not new, as we already see this phenomenon in regional organizations, such as with the member states and the European Community of the European Union (Treaty Establishing the European Community, art. 5). We also now have other international actors with charters focused on specific functions or areas of expertise, such as

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6More charitably, Pogge may have assumed horizontal dispersion and suggested an improvement on it by replacing the modern state with different vertically dispersed units.
trade, development, security, environmental issues, and the protection of human rights. For example, with regard to economic security and development, we have the World Bank Group (World Bank), the International Monetary Fund (IMF, also sometimes referred to by others as the “Fund”), the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD), the General Agreement on Trade and Services (GATS), the Group of Twenty (G-20), and other United Nations councils and commissions, including the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Development Programme (UNDP) (see Scholte, 2002 and 2011).

While it may be premature to underestimate the state as a major source of power or authority (as some cosmopolitans tend to do with their post-statist conceptions of world order), it also would be inaccurate to view the state as the only source of power and intellectual and material resources. States now share power with major international institutions, such as the IMF and the United Nations Security Council, and also share the world’s resources with powerful corporations and other international actors. Because my project is normative and theoretical, I leave for others to resolve the debate over which view of world order is descriptively accurate, but I assume for purposes of this project, and there is good reason for this assumption based on the foregoing, that the view that recognizes both domestic and international sources of power and authority is a fair and plausible assessment of the international situation.

As mentioned above, the more interesting question for my purposes is, given this dual or plural organizational structure, what normative standard should apply to determine whether these emerging sources of authority are legitimate? My approach, similar to the one suggested by Cohen, is a constitutional pluralist approach that requires for legitimacy compliance with certain features of a constitutional or rule-governed system (Cohen, 2010). A constitutional pluralist...
approach can be defined as one in which there are plural sources of power or authority and these sources of power or authority are legitimate by virtue of adopting and implementing a certain constitutional structure. Cohen does not spell out exactly the required features of a constitutional structure and, so, I take up this task and argue for compliance with JINS, a system of laws and institutions that protects basic substantive and procedural rights.

I think we find ourselves at an important juncture, as legitimacy in the past has been an evaluative standard applied to states, and not other quasi-public or private institutions. But, as we deal with an emerging field of international actors, many of which are non-state actors, it seems morally irresponsible to permit these actors to act however they want or leave them alone to regulate themselves. As the field is large and it is impossible to address the variety of problems that may be relevant to some actors and not others, I focus here on international actors with economic charters because they play an increasingly significant role in international relations and their policies often interfere with the domestic policies of states, sometimes affecting the lives of people in ways that amount to harm and injustice. I also focus specifically on powerful international actors with economic charters, such as the IMF, World Bank, and the WTO, sometimes referred to as global governance institutions, because the demands of legitimacy may be unnecessary and unduly burdensome for smaller organizations and institutions. The target of my project then is powerful international actors who are engaged in global governance or similar activities in which their decisions and actions significantly affect the domestic policies of states.

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7 My view is consistent with those who argue for constitutionalization in the ongoing debate over the constitutionalization of the WTO and other international organizations (see, e.g., Petersmann, 1997, 2002; Alston, 2002; Howse, 2002; Howse and Nicolaidis, 2001; Cass, 2005; Gerhart, 2003).
and whose activities are not already subject to an adequate regional or state constitution and laws.

1.2. The Problem

As mentioned at the outset, some of the most urgent questions of global justice today include questions concerning legitimacy in an increasingly globalized and politically and economically interdependent setting, including questions concerning the standard of legitimacy and the role legitimacy or our theories of legitimacy play in addressing real problems. My project focuses on the legitimacy of certain global governance institutions, particularly those with charters concerned with global economic functions such as poverty relief or securing economic stability, specifically, institutions and organizations including the World Bank, the IMF, and the WTO. As international action by these and other actors become increasingly common, the worry is whether they are legitimate or whether their governing laws and institutions are sufficient to ensure that they are not using their power and influence in ways that are unfair or unjust. While free market advocates may reject the need for additional rules and regulation, the events of the past few decades have cast doubt on the legitimacy of these actors and their ability to regulate themselves or take into account other important interests, such as national interests, environmental interests, and other considerations of justice (see Mason, 2005, pp. 121-139, 124-125). As globalization has given rise to problems (see Stiglitz, 2002 and 2003), these problems give occasion not only for internal reform, but also for external evaluation of the activities of international actors and for the consideration of the appropriate theories and, in particular, any relevant standards of international legitimacy.
Currently these international actors are not under the same standards found in the
domestic case. They are not created and maintained through any democratic process or other
processes involving substantial public participation, there is a lack of accountability,
transparency, and review of their rule- or decision-making activity, and there is little in terms of
enforceable norms to ensure fairness and the protection of human rights. International actors
operate much like private businesses beholden only to their stakeholders, despite their enormous
impact on domestic and international affairs. What is lacking and different in the international
context, in contrast to the domestic one, is an appropriate normative structure necessary to ensure
justice and the protection of human rights.8

The difference can be brought out by comparing the transactions of an international actor
such as the World Bank or the IMF when it makes a loan to a developing country and the
transactions of a local bank in the United States when it makes a loan to a client from a
disadvantaged socio-economic group. With the local bank, there are state anti-predatory laws,
federal laws such as the Truth and Lending Act (15 U.S.C. §1601 et seq.), and state and federal
constitutions to protect the client from unfair lending practices and discrimination. The World
Bank and IMF’s transactions, however, despite their own bylaws and conventions when they
make a loan to a poor developing country and impose conditions on that loan, are not constrained
by the same or similar normative structure necessary to ensure justice and fair practices. The
difference also can be demonstrated by comparing the rule-making process of an international
actor such as the WTO and the rule-making process of a local governmental body. The local

8 Thomas Donaldson, speaking of multinational corporations, writes, “The usual reliable backdrop of national law,
the local legal order which tends to ensure a minimum level of compliance for domestic corporations in domestic
markets, is missing in the international scene” (Donaldson, 1989, p. 31). Speaking of the IMF and the World Bank,
Donaldson adds, “Since the most successful multinationals are based in countries that shape the voting of the IMF
and World Bank, those companies are in the position of having their interests reflected in the very mechanism of the
organizational voting process” (ibid., p. 33).
government may hold public meetings with elected officials, draft a proposed rule, allow for public comment and criticism, amend the rule accordingly, and then adopt a final version of the rule through some voting process, either by popular election or through elected officials. In stark contrast, the WTO’s rule-making process has been criticized as being conducted mostly through closed meetings with non-elected officials of mostly wealthy developed states. Global governance institutions and organizations, such as the World Bank, the IMF, and the WTO, have gained significant power and influence over political and economic policies which affect the lives of people all over the world, but their power and influence have gone largely unchecked by protections similar to the ones taken for granted in domestic contexts.

The Allied powers established the IMF, along with the World Bank, after the Second World War in 1944, in order to rebuild the economies of those states devastated by war and stabilize the global economic system. The IMF is not a democratic institution. It is largely controlled by wealthy developed states, including the United States and the member states of the now European Union. The World Bank President typically is a US national and the IMF President is a European national. Despite their charters to address economic instability and global poverty, the World Bank and the IMF’s efforts in certain countries have not only failed to stabilize the global economic system, but also have acted in ways that have intruded on the sovereignty of client states, forced upon them foreign economic policies, and arguably contributed to greater instability and civil unrest.

Joseph Stiglitz, in particular, criticized the IMF for imposing “one-size-fits-all” economic policies upon client states, including fiscal austerity, liberalization, and privatization, according to its own timeline and agenda, without adequate consideration of a client state’s individualized considerations and interests. The IMF accomplishes its agenda by loaning money to deeply
indebted states and imposing with the loan certain conditionalities. For example, in Argentina, before the IMF’s involvement, Argentina faced an economic crisis with labor unrest and inflation. Beginning in the late 1950s, the IMF loaned Argentina billions of dollars conditioned on the implementation of austerity measures and other stabilization programs. The following is a list of conditionalities from 1959:

1. Wage controls
2. Government deficit reduction
3. Restriction of money supply
4. Lifting of price controls and elimination of subsidies
5. Elimination of direct foreign exchange controls and the establishment of a unified free exchange market for most trade transactions
6. Devaluation of the peso
7. Quantitative ceiling on Central Bank loans
8. No access to Central Bank credit by the government-owned Industrial and Mortgage Banks
9. Increase of taxes, duties, and rates
10. Legal reserve requirements of commercial banks to be raised from 20 percent to 30 percent. (Conklin and Davidson, 1986, pp. 230-231.)

What may have been intended to stabilize Argentina’s economy seemed to have had, unsurprisingly, the opposite effect. Wages decreased by 26%, inflation rose to 111%, and Gross Domestic Product (GDP) declined by eight percent (Conklin and Davidson, 1986, p. 231).

Although the wealthy developed states that controlled the IMF would not institute such drastic policies in their own states, at least not without some democratic or other deliberative process, the IMF continued to impose such policies on Argentina and other countries. The conditionalities for Argentina in 1976 included the following:

1. Wages were to be controlled by government decree and not by collective bargaining
2. Devaluation of the peso
3. Reduced government spending and cutbacks in civil service employment
4. Higher taxes
5. Lifting of price controls
6. Maintaining credit limits
7. Freeing of interest rates
8. Investment incentives for foreign oil companies

In 1976, although some indicators moved in a positive direction, such as a reduction in the inflation rate from 443% to 176%, which nonetheless remained the highest in the world, other economic conditions were unrelenting in their spiral downward. Wages fell in 1976 by 30% of their 1975 level and in 1977 to 44% of their 1975 level. All strikes were banned and all unions were placed under military control. The wage and credit controls reduced consumer demand so drastically that domestic industries went into a deep recession. Riots by workers and arrests were common. Around this time, Amnesty International reported about 15,000 “disappearances,” with a conservative estimate that one out of four were workers (Conklin and Davidson, 1986, pp. 238-239). After decades of international aid though IMF loans, by 1984, labor unrest persisted, inflation rose to 690%, and Argentina’s debt was $45 billion dollars and rising (ibid, pp. 242-243).

Stiglitz, who observed that the same policies were indiscriminately imposed on other client states, explains:

The picture in Argentina, of course, is only the most dramatic. Throughout Latin America and throughout much of the world the prevalent view is that globalization and reform have failed. In countries like Bolivia people ask the question, ‘We have done everything that you told us to do. You were right that there would be a large amount of pain. We felt that pain, but when do we get the benefits?’ And they are waiting. Not only do those in the developing countries see the policies that were imposed on them as ineffective. They also see an unfair agenda.” (Stiglitz, 2003, p. 50.)

There may be many questions as to the IMF’s liberal agenda, its one-size-fits-all economic policies, the use of conditionalities, and any one of its specific conditions, but a more fundamental question has to do with its legitimacy. What gives the IMF the right to exercise
power in such a way as to dictate the economic policies of a state, particularly policies that were not deliberated or agreed upon by those within the state or their representatives? The IMF is not responsible for a client state’s initial economic crisis, but the IMF’s decisions and policies are not immune from evaluation and criticism. They should be evaluated against an appropriate standard of legitimacy and, to the extent they fall short of the standard, the IMF should bear responsibility for its decisions and policies.

In addition to criticisms of the World Bank and the IMF, many also have challenged the legitimacy of other international institutions and organizations, such as the WTO. The WTO provides the basic structure and terms of cooperation with respect to international trade. The WTO, the successor to the General Agreement on Tariffs and Trade (GATT), was established during the Uruguay Round of GATT negotiations between 1986 and 1994. The main agreements of the WTO now include GATT, which now primarily concerns goods, the General Agreement on Trade in Services (GATS), and the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs). There are two main kinds of criticisms leveled against the WTO, one of which concerns the participation of developing countries (sometimes referred to as the “the South” because of their geographic location) and the other the adequacy of the WTO’s rule-making and dispute resolution procedures. The criticisms concerning the participation of developing countries are twofold. One part, which is related to the “democratic critique” discussed below, concerns the participation of developing countries in trade negotiations to determine the terms of cooperation with respect to international trade. Many countries and their interests are not represented or under represented, in that, even if present during negotiations, they lack the power and resources to have their voices heard in a way that would affect outcomes. The other part of the criticism concerns the terms of cooperation themselves, whether
the terms of cooperation distribute benefits and burdens in a way that is fair to developing countries (Dunoff, 2003, p. 154). Although some developing countries may have been excluded from bilateral and multilateral trade negotiations long before the WTO, the WTO, as a permanent forum for international trade negotiations over goods, services, and intellectual property, now presides over most of the world’s trade and investment and now must address questions of fairness and justice (Kapoor, 2004, p. 522).

The other kind of criticism concerns the adequacy of the WTO’s procedures. Jeffrey Dunoff has categorized the criticisms concerning the WTO’s procedures as those involving questions of democracy, legitimacy, or accountability.

….The democracy critique targets the relatively closed nature of WTO decision-making and the relative marginalization of developing states in WTO processes. The legitimacy critique questions whether the WTO exceeds its mandate and competence when it addresses ‘trade and’ issues; it asks whether the WTO addresses the proper issues, and if it does so in an evenhanded way. The accountability critique (which has sovereignty resonance) decries the shift in decision-making authority from the national to the international level; it is often directed at panel reports. [¶] These critiques are, in effect, demands for fairness in the processes through which WTO rules are made, interpreted, and applied. They highlight several dimensions of fairness as ‘right process.’ The democracy critique demands that the ‘right voices’ be heard. The legitimacy critique demands that the WTO address the ‘right issues.’ The accountability critique demands that the ‘right decision-makers’ have authority. (Dunoff, 2003, pp. 154-155.)

Others, including Elizabeth Smythe and Peter Smith, have characterized such critiques as falling under the umbrella of legitimacy: “A number of analysts agree that the WTO has a legitimacy problem…” (Smythe and Smith, 2006, p. 33 and fn. 5, and the sources cited therein). Smythe and Smith assume that an international organization’s legitimacy depends on the consent of its sovereign state members. The problem of legitimacy, then, consists of engaging in decision-making processes that are not open to member states and making decisions that interfere with state sovereignty. Drawing a distinction between input legitimacy, which they
define as being tied to the decision-making procedures, and output legitimacy, which concern the results and effectiveness of the decisions, Smyth and Smith observe the WTO’s input and output legitimacy has been eroding. They specifically note that, “[w]ith the successful removal of barriers to cross-border movements of goods has come a widening scope of trade rules and agendas that reach much more deeply into domestic regulatory practices” (Smythe and Smith, 2006, p. 34). Smythe and Smith also point to Susan Esserman and Robert Howse’s criticism about the WTO’s dispute resolution process:

The rulings of WTO judges affect the public interest in the broadest sense, as is especially evident in cases related to health and the environment. Yet the WTO’s hearings and submissions remain secret, an unacceptable vestige of the old days of cloak-and-dagger diplomacy. Conducting hearings and appeals in secret undermines the legitimacy of the WTO and gives rise to unwarranted suspicions. (Smythe and Smith, 2006, p. 35, quoting Esserman and Howse, 2003, p. 138.)

Public criticisms, such as these, have prompted the WTO and other global governance institutions and organizations to reform their laws and practices to allow for greater accountability and conformity with human rights norms. Global governance institutions and organizations have become more sensitive to the voices and interests of developing countries (e.g., WTO’s ongoing efforts with special and differential treatment status for developing countries) and have become more transparent and accountable to those affected by their decisions and actions (e.g., WTO’s reforms to its dispute settlement process). Ongoing reforms, however, do not obviate the need to develop a solution to address current and possible future situations in a principled and consistent way. As international actors are evolving and responding to criticisms, the role of the political or legal theorist is to evaluate the situation against existing norms, and when these norms are inadequate, to offer new solutions to address the needs of our changing global environment.
1.3. Outline of a Solution: Applied Justice-Based Legitimacy

With an emerging field of global governance institutions and organizations that wield considerable power, affecting the domestic policies within states and even outstripping the power of many developing states on matters of trade, development, and economic security, the question I consider is what constraints of justice should apply to these powerful non-state actors. I take the familiar concept of legitimacy as applied to states and offer and defend a justice-based account of legitimacy for powerful non-state actors conditioned on the fulfillment of certain requirements, including a requirement of justice and a requirement of good standing. My proposal is that, just as states are regulated by their constitutions and other laws, these powerful non-state actors also should be regulated by a constitutional framework with rules to respect basic substantive and procedural rights and checks and balances that takes into account the perspectives of those affected by an international actor’s decisions or actions.

In the next chapter, I begin by defining international political legitimacy and presenting and defending a set of criteria for evaluating different accounts of legitimacy. Under my account, international political legitimacy is the evaluative property of international rules or actors consisting of certain conditions the satisfaction of which justifies the possession or exercise of political authority among a set of actors or within a system of rules. The criteria for international political legitimacy are universalizability, consistency, sufficient moral justification, practicality, and effectiveness. I apply the criteria to evaluate three distinctive accounts of legitimacy, including Allen Buchanan’s account of legitimacy for international law-making institutions (2004 and 2010(2)), Allen Buchanan and Robert Keohane’s account of legitimacy for global governance institutions (2006), and Chris Naticchia’s pragmatic account of state legitimacy (2005). After explaining how these accounts fall short of meeting one or more of the specified
criteria, I present and defend my own account and explain how it best meets the criteria for international political legitimacy.

My account, which I call ‘Applied Justice-Based Legitimacy’ or ‘Applied Legitimacy’, provides, as follows:

An international actor (IA) is legitimate if and only if (1) the IA is in substantial compliance with a just international normative structure (JINS), and (2) the IA satisfies the requirement of good standing. JINS consists of laws and institutions that satisfy the requirement of justice.

The first condition requires substantial compliance with JINS, which is a set of laws and institutions that satisfies the requirement of justice. The requirement of justice refers to a minimum standard of justice involving both procedural and substantive components. Substantive rights refer to basic human rights, including security rights, subsistence rights, and certain basic liberties. Procedural rights refer to the rights of due process and formal equality. While there is much discussion in the literature on global justice on substantive justice and substantive rights, such as security and subsistence rights, not enough is said about procedural justice. The failure to recognize procedural justice, including and especially due process, as foundational to any law-governed system and to develop it fully as a theoretical basis for rules and mechanisms signals a critical flaw in international jurisprudence. Due process is the basis for our rules of order and procedure, judgment and review, impartiality, fair dealing, publicity, transparency, and

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9 This new formulation involves an added layer of complexity. But it allows me to maintain that JINS complies with the requirement of justice, while legitimacy requires only substantial compliance with the requirement of justice. So my account provides both the gold standard and the accommodation. I use the word “laws” here to refer to any formal set of rules, which would include internal regulations in the case of non-governmental organizations.
accountability. Without due process, an international system of justice may involve all the right substantive norms, but have no effective and just mechanism for achieving compliance with those norms.

JINS, then, refers to a qualifying set of rules and institutions designed to respect for basic substantive and procedural rights. My approach is a constitutionalist approach and JINS is a type of constitutional framework that can be adopted and implemented by existing and new international actors and tailored to accommodate the needs of those actors and the contexts in which they operate. An international actor is JINS-compliant if it has a qualifying set of rules and the mechanisms to effectuate those rules. An international actor, such as the UN General Assembly, may already be JINS-compliant. Other international actors that are not already JINS-compliant can adopt and implement a set of qualifying rules and mechanisms. My objective is not only to identify the requirements, but also to provide a set of model rules and sample mechanisms. Some legal theorists have called for the constitutionalization of certain international actors, including the WTO. When faced with an expanding field of international actors, Jean Cohen, for example, argues for dual sovereignty with domestic and international sources of authority and for further constitutionalization with the different sources of authority adopting and enforcing constitutional principles (Cohen 2010, pp. 277, 278). While Cohen does not spell out the different components of a constitutionalist approach, this is part of the work that I undertake here in offering a type of constitutional framework and identifying the basic components of that framework.

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10 Many theorists offer a list of what is included in procedural justice (see, e.g., Hayek, 2007, p. 112; Mason, 2005, p. 125; Tasioulas, 2010, p. 115).
Chapter 3 further explains and defends the requirement of justice as necessary for international political legitimacy. I identify the essential components of justice, substantive and procedural justice, and explain how respect for both substantive and procedural rights is necessary for legitimacy. Chapter 3 is divided into four sections. In chapter 3, section 1, I defend the requirement of justice generally. In chapter 3, section 2, I argue for a minimal account of justice and identify a set of essential substantive and procedural rights. In chapter 3, section 3, I provide some conceptual analysis of the term ‘due process’ and defend the right to due process as an essential component of the minimal justice necessary for legitimacy. In chapter 3, section 4, I defend my requirement of minimal justice and the protection of the most basic substantive and procedural rights against a prominent alternative, namely, global democracy.

Applied Justice-Based Legitimacy also includes a requirement of good standing. This second condition takes into account the relationships between the international actor and those affected by its decisions and actions. An international actor obtains good standing if and only if no one who is substantially affected by its exercise of political power comes forward with reasonable and sufficient evidence to reject its being JINS-compliant. The requirement of justice evaluates an actor’s charter, rules, policies, and practices, to determine whether they respect basic substantive and procedural rights. The requirement of good standing provides a procedural check on the initial finding under the requirement of justice by considering the perspectives of those affected that they indeed are being treated in a way that respects their basic substantive and procedural rights. The perceptions are not unsubstantiated impressions or biased opinions, but perceptions justified by relevant factors such as an actor’s historical identity, record of human rights abuses, reputation, and relationships. In chapter 4, I explain and defend the requirement of good standing as a necessary condition for international political legitimacy. I explain that good
standing is necessary both because substantial compliance with JINS is insufficient alone and because good standing addresses certain pragmatic considerations relevant to the international context and provides a kind of circumstantial evidence of compliance with the requirements of minimal justice.

Finally, in chapter 5, I consider some practical challenges to implementation and explain how my account of international political legitimacy addresses these challenges. Without a world state and without effective enforcement mechanisms, my account depends on the view that morally-minded members of the international community could adopt JINS, or something similar, voluntarily for reasons of justice or legitimacy. In chapter 5, section 1, I defend the plausibility of legitimacy as a motivating factor in the establishment and enforcement of international human rights law by considering a contrary view, as presented by Jack Goldsmith and Eric Posner (2005). Relying in part on Ian Hurd (1999), I argue that legitimacy can provide effective motivation for establishing and enforcing international human rights law. In chapter 5, section 2, I support the claim that my account of international political legitimacy affords sufficient action guidance by offering model JINS or sets of model rules and mechanisms that can be adopted and implemented by new and existing institutions and organizations. The application of my approach would involve an ongoing interdisciplinary project. What I offer in this section is a skeletal set of model rules and mechanisms with further directions and recommendations for future development.

The vision for my project is for powerful international actors, who are not already adequately subject to a domestic constitution and laws and thereby constrained by at least a minimal conception of justice, to adopt JINS or something similar and respect the substantive and procedural rights of those substantially affected by its decisions and actions. International
actors, such as the World Bank, the IMF, and the WTO, could adopt a constitutional structure with rules that govern all of its activities. When making a loan to a developing country, the actor would be constrained by principles of fair dealing and formal equality and be required to provide, for example, notice to the developing country when its interests are affected, an opportunity to be heard and participate in any proceedings that concern the country and its people, and an opportunity for internal or external review of its decisions and policies. The actor also would be required to take seriously formal equality and to give developing countries equal concern and respect as it would any other country and thereby not favoring developed countries over developing countries in its policies and practices. The actor also would be constrained by justice to consider whether its decisions and policies would negatively affect the substantive rights of those within the developing country, including their rights to adequate food, clean water, and shelter. Operating within the constraints of minimal justice arguably would drastically change the interactions between these powerful international actors and their client states.

This vision may not happen overnight, but I believe we are heading in this direction and that it is feasible when one offers a reasonable account of legitimacy and there is voluntary compliance by most morally-minded members of the international community. What I assume is that when most morally-minded members of the international community recognize this or a similar justice-based account of legitimacy as compelling and as offering sufficient guidance for its own implementation, they would voluntarily comply with its provisions, particularly when influenced by public demand or criticism. When most morally-minded members of the international community implement this approach to legitimacy and structure their activities accordingly, including requiring JINS compliance by other international actors who wish to interact with them, this would have the effect of influencing others to become JINS-compliant.
When most members of the international community are JINS-compliant, this majority also would have the power to force compliance on the rest with the threat of disengagement or sanctions for those who are noncompliant. It is important to recall that JINS compliance is not onerous, but demands respect only for the most basic substantive and procedural rights. JINS compliance also is not designed to produce a monolithic international culture, but rather a law-governed system or network of systems with multiple sources of authority within a variety of cultural contexts. This still may seem unattainable, but I believe that with globalization and greater demand by the international community for accountability and justice, we are seeing increasing interaction and, through custom or the development of international law, establishing norms for these interactions. My proposal is simply to develop a systematic and principled approach that allows for multiple sources of authority but each in compliance with at least the basic constraints of justice.

This project is primarily theoretical, but the objective of my project goes beyond offering merely a theoretical defense of my account of legitimacy. The reason for discussing legitimacy in the first place is to tackle the problems of global justice and the violations of human rights. It is not merely for the purpose of arriving at a perfect conception of legitimacy, as if there was such a thing, but the project is aimed more at contributing to the conversation on global justice by examining the underlying institutional structures that perpetuate injustice, identifying points of weakness, offering insights and solutions, and hoping to influence the reform of existing structures, so that ultimately the effect would be a greater degree of global justice.
2. International Political Legitimacy

In this chapter, my objective is to offer an alternative account of international political legitimacy. I start with a definition of ‘legitimacy’ and, specifically, ‘international political legitimacy.’ I then consider and defend a set of criteria for evaluating different accounts of international political legitimacy. The criteria are then applied to evaluate the following three accounts of legitimacy, Allen Buchanan’s justice-based account of legitimacy for international law-making institutions, Allen Buchanan and Robert Keohane’s account of legitimacy for global governance institutions, and Chris Naticchia’s pragmatic account of state recognition, with the objective of showing that these accounts fail to meet one or more of the specified criteria. I close the chapter by offering my own account, explaining its components, which I do in greater detail in the subsequent chapters, and showing how it best meets the criteria for international political legitimacy.

The reason for starting with legitimacy is because it already has currency in our international political discourse and practice and is better than the alternatives. It already is the evaluative standard by which states and other international actors make decisions to engage with other states and international actors in political and economic transactions and to disengage, impose sanctions, or even use physical force when necessary (see Clark, 2003, Simmons, 2001(1), Hurd, 1999). As mentioned in the introduction, we can conceive of a different approach to global justice that focuses instead on full-blown justice or some comprehensive theory of the good, but it would not gain wide acceptance given cultural pluralism and our different moral and religious starting points and commitments. A different evaluative standard also may involve more than is necessary for the sorts of transactions that typically occur internationally. If our purpose is to identify what is necessary to justify engagement in certain cooperative enterprises
and disengagement or the use of force, then we need only a minimum normative standard and this standard is what we commonly refer to as ‘legitimacy.’

The questions to be asked and answered in this chapter specifically are, what definition of ‘legitimacy’ applies in the international context, what criteria apply in identifying the appropriate standard of international political legitimacy, and, among the prominent views on offer, which account best satisfies the relevant criteria. After providing a definition and a set of criteria, I evaluate Buchanan’s ‘Strict Justice-Based Legitimacy,’ Buchanan and Robert Keohane’s ‘Multiple-Criteria Legitimacy,’ and Chris Naticchia’s ‘Pragmatic Legitimacy,’ and argue that each of these accounts fails to satisfy one or more of the specified criteria. I then offer my own account, ‘Applied Justice-Based Legitimacy,’ and explain how it satisfies the criteria and provides the appropriate minimal standard of justice for the international context.

2.1. A Definition of ‘International Political Legitimacy’

The word ‘legitimacy’ is often used in our political discourse, both domestically and internationally, but there is great confusion concerning the relevant understanding of the term. ‘Legitimacy’ is commonly applied to states and, in that application, is commonly understood as referring to an evaluative property of states, whereby a legitimate state has the moral right to rule and the citizens of that state have a correlative duty to obey (Morris, 2008, 17; Simmons, 2001(2), p. 155). ‘Legitimacy’ also is commonly applied to laws and, in that application, is understood as referring to an evaluative property of laws, whereby a legitimate law is established by a regime that is itself legitimate and through processes that satisfy certain legal or moral requirements (Simmons, 2001, p. 960; Simmons, 2001 (2), p. 130; Buchanan, 2010(1), pp. 134-
The word seems to refer to a certain type or subcategory of legality or authority. Because of these different applications, we may question whether these applications are referring to the same phenomena in political practice or concept in political discourse. My project assumes that we indeed have a shared concept of legitimacy, at least of political legitimacy, and that this concept has a common core. What I attempt to do in this section is identify the common core of our understanding of legitimacy and then provide a working definition of the concept that could be extended and applied to evaluate actors in the international domain.

The legitimate exercise of political power can be distinguished from other putative sources of political power. A putative source of political power can be either legitimate or illegitimate. A putative source of political power that exercises its power by brute force has at most \textit{de facto} authority. Power or ability by itself does not entail right. Right also requires the satisfaction of a certain set of normative or evaluative criteria. A source of political power that also satisfies an appropriate set of normative criteria has \textit{de jure} authority. This distinction is consistent with our experience, which leads us to believe that there are putative sources of political power that exercise power in fact but are not legitimate. Some authoritarian or totalitarian rulers, even if they claim legitimacy, effectively rule over their people and demand their obedience by force, fear, or deception, but such rulers have at most \textit{de facto} authority. There are many examples of possibly illegitimate regimes today, including North Korea under Kim Jung Un, formerly Kim Jung-II, Iran under Ali Khamenei, formerly, Mahmoud Ahmadinejad, Cuba under Raúl Castro, formerly Fidel Castro, and Madagascar under Andry Rajoelina. These leaders exercise power at least over a large segment of their population, but we would not say that they are legitimate. Legitimacy requires something more, and maybe we can
describe this something more in terms of having a right or moral justification to exercise political power.

What makes a putative source of political power a legitimate authority may involve both the criteria for authority and the criteria for political legitimacy. The precise question that concerns us here is, what exactly qualifies a putative source of political power as legitimate? As applied to states, this evaluative feature is generally understood as obtained through certain historical or political processes in establishing the state’s authority or in maintaining its authority over time. If certain processes, such as consent or democracy, provide the means for achieving legitimacy, we might ask what about these processes satisfy the requirements for legitimacy and what exactly are the required elements? The assumption here is that it is not these processes themselves, but the values underlying these processes or certain features about them that satisfy what is required for legitimacy. From what follows, it should become clear that I think legitimacy has to do with and is satisfied by justice and good standing (i.e., the right kinds of relationships between the source of authority and those affected by authority). My view is that legitimacy is a normative feature obtained, in general terms, (1) when the source of authority uses its authority with some level of justice, which will be specified below, and (2) as an extension or application of (1), when the source of authority stands in the right kinds of relationships with those affected by its authority. This is entirely compatible with recognizing that certain processes, at least theoretically, may be ways to achieve legitimacy. These requirements may be satisfied by consent which can be described by the following features: there is some level of justice in respecting individuals as free and equal participants and extending to them the right to participate in the process; and there is also a right relationship between willing subjects and the resulting government as some individual liberty is voluntarily relinquished and
power is transferred to the appointed government. It is presence of these features and not consent in particular that qualify a state as legitimate. We can say that the common core concept of political legitimacy is an evaluative property of some sources of political power obtained through the satisfaction of certain normative requirements. We can say further that those who are legitimate may or may not have a certain status within a particular domain or political community that entitles them to the benefits of engagement (inclusion and participation) and protects them from the burdens of disengagement (exclusion, sanctions, and the use of force).

With this common core concept of political legitimacy in mind, we can see how state legitimacy is just one application of the general concept. State legitimacy is an evaluative property of states obtained through the satisfaction of certain normative requirements. Obtaining the status as a legitimate state entitles the state to certain benefits of engagement and to be free from the burdens of disengagement. The benefits of engagement in this application may include the state’s right to self-determination and the correlative duty of noninterference of other states and the right to rule over its citizens and the correlative duty of its citizens to obey (i.e., a general duty to obey). The burdens of disengagement may include a kind of vulnerability to large-scale rebellion by its citizens, exclusion in political and economic transactions with other international actors, and sanctions or the use of force by other states. When we describe legitimacy in this way, we can see that state legitimacy is not identical to the right to rule, but that, more accurately, it is an evaluative property of states that may come with certain benefits, including the right to rule. Moreover, when we describe legitimacy in this way, we can see how it easily can be tailored to apply to non-state actors. The above conception of legitimacy is sufficiently broad and general such that, when we determine the political context, the relevant normative
requirements, and the different benefits and burdens associated with legitimacy, we can easily apply it to other sources of political power.

When we speak of political legitimacy, we often are speaking about states, but with an ever expanding field of international actors including many non-state actors, what is needed is a broader conception of legitimacy to accommodate this evolving situation. As mentioned above, ‘legitimacy’ often refers to an evaluative property of states, whereby a legitimate state has the right to rule and the subjects of that state have a correlative duty to obey. When we are speaking of an international context with a plurality of international actors, including global governance institutions, nongovernmental organizations, and other non-state actors, this definition of ‘legitimacy’ seems inapt. Saying of states that they have the right to rule makes sense; saying of an international institution that it has the right to rule and, possibly, that other international actors have a corresponding duty to obey seems questionable and may infringe upon the right of self-determination of the other international actors. Furthermore, when we are speaking of international laws, without a world state or any adequate system of global governance or enforcement, there is no existing source of laws or set of legal procedures to underwrite the legitimacy of new sources or new provisions of international law.

If we begin with a standard definition of state legitimacy and make a few alterations, keeping in mind the common core concept of legitimacy above, we may be able to define political legitimacy more generally and in a way that could easily apply beyond states and their laws. In the remainder of this section, I begin with a common definition of legitimacy as applied to states, generalize it by omitting any unnecessarily qualifications or specifications, and then modify the definition for its application to the international context.

We can begin with the following definition of legitimacy as applied to states.
(L1) Legitimacy is the evaluative property of states involving certain conditions the satisfaction of which justifies the exercise of coercive political power. (See Simmons, 2001(2); Morris, 2008)

This is a standard definition of state legitimacy, except that I have intentionally left out the qualification of exclusive coercive political power, which is unnecessarily restrictive for reasons already stated by others. As demonstrated by the European Union and its member states, states do not have exclusive authority over a particular territory, but often share authority with regional or international sources of authority (Cohen, 2010; Buchanan, 2010(2)).

‘Legitimate’ generally connotes an evaluative property of states, but, recognizing that there may be other potential sources of political power, we can remove this specification so as to extend its application to include other potential sources, including laws (or, even more broadly, ‘rules’).

(L2) Legitimacy is the evaluative property of international actors or rules consisting of certain conditions the satisfaction of which justifies having a certain status among a set of actors or within a system of rules.

(L2) accommodates both states and laws, but now the danger is that it may be insufficiently specific and, therefore, overly inclusive. This definition could be applied to a rule in World Cup Soccer as to a provision in the United Nations Universal Declaration of Human Rights. When we are speaking of political legitimacy, however, the concept we have in mind must have something to do with the exercise of political power. We need something like the phrase in (L1) ‘the right to exercise coercive political power,’ but in terms that are not restricted to states or other traditional political institutions.

The specific phrase ‘coercive political power,’ however, may be problematic in light of our aim of application in the international context for two reasons. First, some may question
whether international institutions and multinational corporations are *political* in nature or, more importantly, whether their actions can be characterized as an exercise of ‘political power.’ It may be helpful at this point to consider what is meant by the word ‘political.’ Aristotle, for example, used the word ‘politics’ to refer broadly to the science of the good of man, particularly the common good of man in the polis or the city-state (*Nicomachean Ethics*, Bk.1, §2). It does not necessarily follow from this, however, that the term applies only to states or state action. For Aristotle and others, the term refers to a particular domain of human activity, as compared to the domain of the individual, family, community or village. The polis is the self-sufficient domain where individuals are able not only to supply their basic needs, but also cooperate to allow the pursuit of the common good.\(^{11}\) ‘Political,’ then, refers to the domain characterized by social cooperation within a political community aimed at the common good. Based on this definition, political activity is not the exclusive province of states or governments. For example, the protection of human rights is a political activity, one that can be attempted not only by states but other nongovernmental organizations such as Amnesty International and Human Rights Watch. If Amnesty International exerts influence against certain human rights violations, it would be entirely appropriate to describe the organization’s activity as ‘political.’

Some may argue that what falls within the category ‘political’ does not matter when we are concerned specifically with political *power* as it is states and only states that exercise political power. I would respond, however, that this is neither true in the domestic case nor does it have to be true internationally. Domestically, other non-state actors exert political power, such as political parties and nongovernmental organizations. Other individual and collective non-state

\(^{11}\) ‘Political’ may be a success term as is ‘ethical’ for an Aristotelian or Kantian, but we can apply it broadly to activity that is apparently political, even if not actually or successfully political.
actors also assert political power through different political processes, including the legislative process, the courts, and arguably even more directly through initiatives and referendums. For example, in the United States, what is not expressly authorized by the Constitution as a power of the federal government is reserved by the states, and what is not expressly authorized in the Constitution and laws as a power of the states, is reserved by the people. The people, therefore, in addition to being the ultimate source of political power, also retain political power that is not otherwise delegated to the federal or state governments.

Internationally, without a world state, power is dispersed through various international actors, including non-state actors, who wield power in roles that parallel that of administrative agencies within a state (e.g., a treasury department) or even outstrips the power of many small developing states. These international actors, such as the World Bank Group, the IMF, and the WTO, exercise power in governing and regulating global political and economic transactions. How we characterize an international actor should be based not on how the actor describes itself, but on the nature of an international actor’s activity and its effect internationally and on the domestic affairs of states. Political, as stated above, refers to social cooperation within a political community aimed at the common good, but an international actor may be engaged in cooperative enterprises on an international or multinational scale that affect the common good, positively or negatively. The World Bank or the IMF may impose conditions on its loans to poor developing states, thereby affecting the economic policies within those states. The WTO may establish trade agreements among states that advantage some states and disadvantage others. Although these organizations are non-state actors, I think it is fair to include such activities under the general concept ‘political.’
Second, another reason that the phrase ‘coercive political power’ may be problematic is that some may question whether political power must be coercive. This involves the further question of what is intended by the word ‘coercive’ or ‘coercion.’ We may associate force with coercion, but this seems too narrow, as other acts of persuasion and influence may amount to coercion under certain circumstances (Buchanan, 2010(2), pp. 79-96, 83). Indeed, external circumstances may be more relevant to determining whether an act is coercive than intrinsic qualities of the act itself. A poor developing country may feel that it has no choice but to accept the terms of aid from the World Bank Group or the IMF because of its dire economic circumstances and the lack of bargaining power. The international organization has not put a gun to the head, so to speak, of the poor developing country, but it may feel coerced nonetheless. It seems reasonable to take into account the salient features of the circumstances and not restrict ourselves to situations that involve only literal force.

We may be able to set aside this particular worry by asking whether legitimacy must be defined in terms of coercion. A state may exercise political power in ways that are not necessarily coercive. A state may engage in a great deal of social engineering through its policies and allocation of resources. Funding a certain environmental policy agenda through incentives, for example, has far-reaching domestic and international effects and is an exercise of political power, but may not constitute an exercise of coercive political power under any narrow definition. Subsidies on certain goods, as another example, may affect consumer choices, both domestically and internationally, but also may not constitute an exercise of coercive political power. By considering these and other examples, it does not seem particularly useful to retain ‘coercive’ in our definition of legitimacy because political power is exercised in a variety of ways that are not necessarily coercive.
When defining legitimacy, what seems crucial is not the use of coercion, but the justified exercise of political power more broadly. Authority refers to a normative power to change the subject’s normative situation, for example, by putting them under certain duties. As normativity is key to any conception of authority, normativity is also key to legitimacy. It is not merely the exercise of political power or authority, but the implied claim of right in exercising political power or authority. The international actors that concern us here, even if they would not describe their activities in this way, are asserting a claim right to exercise political power with the expectation that their clients conform to their rules and conditions. Their activities may include establishing international rules, establishing trade policies, setting terms of international agreements, rendering judgments, and imposing conditions on loans. In performing these activities, international actors are effectively claiming a right to engage in these activities and exercise power or authority over their clients, such that others are expected to follow the rules and policies, abide by the terms of agreements, execute judgments, and change domestic policy to comply with conditions. Such activities are not performed with force, but under the color of legitimate power or authority.

With this in mind, we can move forward with a new definition without the seemingly unnecessary qualification that the exercise of political power be coercive.

(L3) International political legitimacy is the evaluative property of international rules or actors consisting of certain conditions the satisfaction of which justifies the possession or exercise of political power among a set of actors or within a system of rules.

This, I think, captures the intention of ‘international political legitimacy.’ The definition is specific enough to refer to a particular concept in international discourse and practice and also general enough to include additional non-state actors, such as the World Bank Group, the IMF,
and the WTO. This is the definition of international political legitimacy that will be used throughout this project. I may sometimes refer to ‘legitimacy’ alone, but by this I mean international political legitimacy.

2.2. Criteria for International Political Legitimacy

Before considering competing accounts of international political legitimacy, we first should identify the criteria for evaluating these accounts. One way to identify criteria is to consider reasonable, relevant, and important objections and select criteria that address and meet these objections. This is the approach that I take and so I offer a set of criteria for evaluating theories of international political legitimacy that directly correspond to certain common objections, such that the satisfaction of the proposed criteria would address and dispense with these objections.

The objections that could be raised against accounts of international political legitimacy include the following: the objection that the account fails to apply universally and assumes or relies on certain features of a particular political community (‘the parochialism objection’) (see Buchanan, 2010(1), pp. 71-102; Tasioulas, 2010, pp. 105-112); the objection that the account would lead to splintered and divisive sources of authority or political power producing results that lack uniformity, consistency, and predictability (‘the fragmentation objection’); the objection that the accounts lacks moral weight or moral justification sufficient to garner wide acceptance by the international moral community (‘the moral justification objection’) (see Nagel, 1999, pp. 302-303), the objection that the account fails to address the political realities in the actual world (‘the realist objection’), and, finally, the objection that the account fails to include any theoretical
resources to make possible its implementation and enforcement (‘the enforcement objection’) (see Blake, 2008; Tesón, 1998, p. 16).

First, the parochialism objection can be raised by the cultural relativist—the person who takes values not to be objective, but as dependent on the particularities of a society’s cultural context—or the person concerned about respect for cultural diversity. As discussed in subsequent chapters, in contrast to the domestic context, the global context is complicated by the diversity of cultures with drastically different social and political institutions,\(^\text{12}\) which are sometimes grounded on comprehensive religious, ideological, or philosophical views about the world and about human nature (Rawls, 2005, pp. 58-59; Rawls, 1999(1), p. 131). The challenge of global justice or legitimacy involves two competing aims of global justice. On the one hand we should give equal concern and respect to different cultures and defer to each society’s right of self-determination and autonomy (‘respect for cultural diversity’). On the other hand, we should respect individuals regardless of which society they happen to be born in and extend to them equal concern and respect qua individuals (‘respect for persons’). The parochialism objection raises the worry that in our liberal western societies, in which we take as universal the need for each person to be afforded the widest array of equal liberties, we may advance the aim of respect for persons at the cost of respect for cultural diversity. The objection is that our account may be parochial and tied to the beliefs and values within particular political communities and thus may not apply universally to every reasonable political community. The account that overcomes the parochialism objection need not establish the existence of objective moral values. We can achieve universal, even if not objective, moral values by some kind of agreement. But the

\(^{12}\) Charles Beitz frames the question in this way: “It concerns the degree of deference that a public doctrine of human rights should show towards the moral beliefs and practices embodied in existing cultures” (Beitz, 2008, p. 187).
account must apply across borders and in various cultural contexts—even if this requires using different words to capture our common concepts—without doing violence to reasonable differences in beliefs and values.

The fact that an account of international political legitimacy must meet the parochialism objection may be obvious and thus need no further justification, but this requirement basically depends on a certain description of the current political realities. The description, one that I think is accurate, includes the following features: there are many different reasonable conceptions of justice and the good; that reasonable people, those who subscribe to these different reasonable conceptions of justice and the good, may disagree on fundamental metaphysical and moral starting points; and that each actor comes to the table with his or her own biases and commitments. While it is tempting, especially for a Kantian, to develop a ‘universal’ conception of justice that ought to apply to everyone regardless of one’s contingent geographical and political circumstances, this objection should keep our efforts in constant check to ensure that what we deem ‘reasonable’ or ‘universal’ indeed is based on some universal feature of human nature or our common human condition, rather than somehow tied to our context-specific beliefs and values. Our beliefs and values are shaped by our different histories, our different languages, religions, social customs and practices, and our different political structures, laws, and institutions. Even within each political community there is increasing diversity as a result of globalization, displacement, and migration. What reasons apply to members of a community based on their beliefs and values may vary from one community to another and from one group within a community to another. Finding common ground on what is reasonable under these conditions greatly constrains the substantive content of our international norms: we will have to leave room for general norms to be specified with details to accommodate reasonable differences.
in our different cultural contexts. Therefore, to satisfy the objection, the goal is to be specific enough to provide meaningful constraints and yet general enough to respect the cultural diversity of our local communities.

Second, the objectivist or legal theorist can raise the opposite worry that we go too far in accommodating our differences and that there is no consistency, uniformity, and predictability in our laws and judgments. This is the heart of the fragmentation objection. Lawyers, judges, and legal theorists are concerned about consistency, uniformity, and predictability because, if a certain set of facts and issues arise in one jurisdiction and the laws and courts require a certain result there, it seems if the same or similar set of facts and issues arise in another jurisdiction, the laws and courts should require the same or similar result. This not only seems fair, but also allows people to predict outcomes and order their conduct accordingly. The result should be the right result, satisfying other conditions including the condition of moral justification, and the result should be applied fairly or equally. The fragmentation objection is concerned primarily with the latter. The lack of consistency and uniformity itself can be an injustice, i.e., an instance of unequal treatment despite the same or similar sets of facts. The lack of consistency and uniformity also opens the door for forum shopping, in which those who are interested in the least restrictive rules and standards can find willing hosts or partners, and the proliferation of loose rules and poor standards that undermine efforts at establishing a rule-governed system.

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13 The application of a different set of rules in different jurisdictions may cause the unwanted results of forum shopping and the inequitable administration of law, which the courts in the United States guard against in adjudicating conflict of laws issues in cases brought in federal court with diversity jurisdiction (i.e., jurisdiction over citizens of different states). See, e.g., Semtek International Incorp. v. Lockheed Martin Corp. (2001) 531 U.S. 497, 509-510, citing Hanna v. Plumer (1965), 380 U.S. 460, 468, and Erie Railroad Co. v. Tompkins (1938) 306 U.S. 64. “The Erie rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.” (Hanna, supra, at p. 467.)
Some may question whether such consistency and uniformity is needed or wanted in the international context. In the domestic case, while we would want general basic rules that apply consistently to similarly situated persons in similar circumstances, there is real question over whether we need or want such general rules in the international case. Should the same rules apply to different global governance institutions and to the different types of interactions, from security treaties to trade and criminal law to economic enterprises? Also, should there be consistency and uniformity when dealing with different jurisdictions, each with their own governing structures, norms, and values? These questions raise important concerns, but concerns that are less apt when the general rules that we have in mind are the minimal conditions of justice necessary for international political legitimacy. The fact that these rules protect basic human rights norms and provide a minimum threshold, having to do with legitimacy rather than full-blown justice, renders irrelevant or less relevant the concern for different normative standards to govern different jurisdictions and types of conduct. The general rules in any theory of international political legitimacy should answer the objection of whether the rules ensure results that are consistent, uniform, and predictable as to certain minimum constraints of justice.

The third objection can come from different perspectives, including that of the human rights activist, and is the main objection to claims of legitimacy and accounts of legitimacy assumed by those claims. What differentiates a putative source of political power or authority from a legitimate one is the satisfaction of certain conditions or normative requirements. This objection is directed at the sufficiency of those conditions or normative requirements. The status as a legitimate actor is achieved by satisfying certain normative requirements such as fairness and regularity in its formation, the absence of foul play in its relationships with those affected by its authority or political power, and that its rules and institutions conform to certain basic norms.
of justice. Generally, as stated above, my view is that the status of legitimacy is achieved (1) when the international actor uses its authority with some level of justice and (2), as an extension or application of (1), when the actor stands in the right kinds of relationships with those affected by its authority or political power in its inception and continued existence. Sufficient moral or normative justification, so understood, should provide the basis for defining the scope of legitimacy so as to exclude merely putative sources of power and include only legitimate sources of power. As part of the very concept, sufficient moral justification is an obvious criterion for legitimacy and insufficient moral justification an obvious objection.

What constitutes sufficient moral justification, I think, depends on at least three factors: the subjects, the reason, and, most importantly, that the reason is morally sufficient. Sufficient moral justification with respect to the exercise of political power is a reason to allow the international actor to exercise political power. It is a reason that justifies continued inclusion and interaction. The reason is directed at certain subjects, who are morally-minded members of the international community. The reason cannot be compelling only to a member of a particular political community, but to reasonable members of all reasonable political communities. The reason therefore cannot be based on any culturally distinct features, but on some feature common to all political communities. There must be wide-acceptance by morally-minded members of the international community. The reason must morally sufficient, in that, it provides the right normative basis for inclusion. The reason is not merely a reason for action, but one that is a morally sufficient reason for action.

To satisfy this criterion, the only qualifying reasons, I think, are right reasons, i.e., reasons based on justice that transcend cultural boundaries. To see why this may be the case we can consider the Kantian argument that lasting political and economic stability is achieved when
it is based on the right reasons. This argument can be found in the work of John Rawls (1999(2)) and Fernando Tesón (1998), albeit both arguing for a particular conception of justice. For example, Tesón argues that peace is better secured when states are self-governed and freely act for the right reasons. Tesón offers a few reasons for this. First, it is in state’s own interest to be self-governed because it saves them from bearing the consequences of war, including endangering troops and the potential destruction of lives and communities. “[Kant’s] central argument is that if the people are self-governed then citizens on both sides on any dispute will be very cautious in bringing about a war whose consequences they themselves must bear” (Tesón, 1998, p. 10). Second, being self-governed and implementing and acting for the right reasons can be self-perpetuating. The citizens of a liberal democracy can be educated in the principles of justice and, through moral education and learning, can develop the habit of acting for the right reasons. Tesón explains, “Because this kind of moral education emphasizes rationality as a universal trait of persons, it will induce citizens in a liberal democracy to see individuals in other nations as deserving of equal respect and thus treat them as ends in themselves, not as mere objects for the satisfaction of local preferences” (Tesón, 1998, p. 11). Third and finally, stability is more likely because it fosters free trade and a generous system of international movement or interaction. “There is no question that free trade is a strong, if not dispositive, influence over external behavior. Free trade inclines diplomacy toward peace because international business transactions require stability and predictability to be successful” (Tesón, 1998, p. 11).

The Kantian argument is an argument specifically for a constitutional democracy, but the same reasoning applies here. The appropriate conception of justice for the international context may not be a liberal or full-blown conception of justice, but nonetheless morally sufficient to gain wide acceptance by the morally-minded members of the international community. In the
international context, without adequate enforcement mechanisms, any account of legitimacy that can gain wide acceptance must be one that is both intrinsically compelling such that many morally-minded members of the international community would voluntarily endorse it and persuade others to conform to its requirements and also self-sustaining, i.e., it must be capable of being sustained on its own. These qualifications can be best satisfied by an account of legitimacy based on the right reasons, i.e., reasons based on justice. Right reasons can motivate compliance and promote a culture of compliance. Justice-based approaches, are approaches that rely on right reasons, in that, those who comply with the rules comply because the rules are just and not simply because they are advantageous under the circumstances. Under a justice-based approach, the rules also can be reinforced with just social and political institutions to cultivate a community that learns to recognize justice as a sufficient reason for action. Because the moral reasons are intrinsically compelling and capable of being reinforced in this way, a justice-based approach allows for lasting peace and political and economic stability, which, presumably, is exactly what we also need and want in an account of international political legitimacy. The moral justification condition therefore requires that the account be intrinsically compelling in the way described above, in that, it offers sufficient reason for action and that these reasons are right reasons, i.e., reasons based on justice.

The next objection is the realist objection that the account is unfit for real-world application. Always lurking in the background as we attempt to develop an account of international political legitimacy is the realist view that the very notion of global justice is an illusion because ultimately states and other international actors will act in their own interests and
do what they have the power to do. This goes not only for authoritarian regimes that for one reason or another disregard human rights, but also for democratic regimes and institutions whose activities around the world often are perceived as reminiscent of the old colonial age of imperialism in using their greater intellectual and material resources for purposes of military expansion and economic domination. Democratic regimes and institutions may have an interest in following the rules, but they also may ultimately act to maximize their own advantage at the cost of leaving others at a disadvantage. Against the realist critique, any account of international legitimacy must be pragmatic enough to be implemented in the real world under conditions of deep disagreement on religious, philosophical, and ideological grounds and persistent noncompliance. Deep disagreement makes consensus on the rules difficult and, even when there is common ground, there is the threat of persistent noncompliance.

What I would add to the list of common objections, and what goes hand-in-hand with the realist objection, is the enforcement objection that the account fails to include sufficient theoretical resources to facilitate its implementation and enforcement (Blake, 2008, pp. 721-726; Tesón, 1998, p. 16). Because whether a person acts on a sufficient moral justification for action usually depends on other factors, we also must consider other factors or conditions that would make compliance more likely. Moral justification to act (e.g., recycling is good for the environment) may provide sufficient reason for action, but there is nothing in the justification itself that compels a person to reform his or her habits. The moral justification to act may be accepted and approved by a person as one among many reasons for action. The person’s

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14 “[T]he standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.” Thucydides, History of the Peloponnesian War, Bk. 5.89 (London: Penguin Books, 1954) (“The Melian Dialogue”).

15 As Malcom Fraser observes, “[t]he rule of law, if it is to mean anything, must apply to the powerful as well as the weak—to democracies as well as dictatorships” (Fraser, 2005, p. 174).
compliance usually involves other factors that propels the reason that is included in a person’s deliberation to a reason that the person acts or intends to act upon. There are many factors or structural or background conditions that may cause a person to act, for example, giving specific directions under the right circumstances, providing incentives, attaching costs, promulgating rules to establish procedures and mechanisms to ensure compliance. What theories often neglect are these additional factors or structural conditions, in that, they contain neither resources nor practical guidance for developing the structural conditions necessary for shaping or reforming the international structure.

The enforcement objection is critical if our concern is with practical application in the international context. Domestically, when a new law is passed or enacted, most states have mechanisms already in place to implement the law and give it its full force and effect. Internationally, when a new law or rule is proposed, unless it is parasitic on existing state mechanisms, there usually are no adequate international mechanisms to secure its force and effect. While the enforcement objection may not be as relevant in the domestic context, any solution offered to address global injustices succeeds or fails on the basis of whether it comes readily-equipped with resources for implementation and enforcement. As a result, such proposal must at least include norms of procedure and the theoretical resources for generating mechanisms for implementation and enforcement.

The five objections above correspond to the five criteria for an account of international political legitimacy: (1) universalizability, the solution must be general enough to be widely accepted by morally-minded members of the international community; (2) consistency, the

\[16\] Directions generally must be easy to understand and feasible to perform.
norms or standards must be able to produce consistent, uniform, and predictable results; (3) sufficient moral justification, that the solution provides moral justification and moral justification that is sufficient to achieve wide acceptance by the international community without further justification,\(^\text{17}\) (4) practicality, that the solution addresses the political realities and is flexible enough to be realized in the real world, and (5) effectiveness, that the solution includes at least the theoretical resources and practical guidance to make implementation and enforcement possible. My project would be successful if, along with presenting a coherent solution that is distinctive to the alternatives available in the literature and adequately defended against other foreseeable objections, it satisfies these five criteria and adequately responds to the above objections.

2.3. Alternative 1: Strict Justice-Based Legitimacy

Allen Buchanan, one defender of a justice-based approach to legitimacy, seems to offer two different accounts of international legitimacy, one for international law-making institutions that includes necessary and sufficient conditions (hereafter ‘Strict Justice-Based Legitimacy’) and another, which he developed with Robert Keohane, specifically for global governance

\(^{17}\) This criterion can be cashed out in various ways, this description by Ian Hurd may be helpful: “When an actor believes a rule is legitimate, compliance is no longer motivated by the simple fear of retribution, or by calculation of self-interest, but instead by an internal sense of moral obligation: control is legitimate to the extent that it is approved or regarded as ‘right.’” (Hurd, 1999). Hurd’s account of legitimacy may be mistakenly construed as merely sociological, but he intends a normative account that includes social recognition, i.e., something that invokes an internal sense of moral obligation. This raises the issue of whether sufficient moral justification also diffuses the fifth objection as reasonable actors may readily accept and enforce a theory with sufficient moral justification, without further special provision for enforcement. But I would argue that, what Kant understands as sufficient moral justification includes both substantive and procedural components. Because these two components are often pulled apart in our modern discourse (e.g., requiring compliance with only substantive human rights norms), I think it is not enough to speak of moral justification without also providing for enforcement.
institutions that does not provide necessary and sufficient conditions, but instead proposes a set of substantive and epistemic criteria (hereafter ‘Multiple-Criteria Legitimacy’). Both Strict Justice-Based Legitimacy and Multiple-Criteria Legitimacy take ‘legitimacy’ to mean that international actors are morally justified in making rules and attempting to secure compliance with them and that those affected by the rules have substantial content-independent moral reasons to support the international actor’s efforts or at least not interfere with them (Buchanan, 2010(1), p. 110). The question is, what condition or conditions must be satisfied for an actor to be morally justified in exercising political power in this way. Both Strict Justice-Based Legitimacy and Multiple Criteria Legitimacy are justice-based, in that, at least one condition for legitimacy is a requirement that the international actor is just, in other words, that it respects the basic human rights of those affected by the rules.

Under Strict-Justice Based Legitimacy, “An actor has political legitimacy if and only if it is morally justified in exercising political power” (Buchanan, 2004, p. 233). Buchanan further explains that an entity is morally justified in exercising political power at the state, regional, or international level (i.e., attempting to achieve supremacy in making, applying, and enforcing laws) only if it meets a minimum standard of justice. Buchanan’s standard of justice involves the following two necessary and sufficient conditions: (1) the entity must protect at least the most basic human rights of those involved, and (2) the entity must provide this protection through processes, policies, and actions that themselves respect the most basic human rights (2004, p. 247; 1999(1)). Buchanan similarly offers a justice-based account of recognition legitimacy (i.e., the determination as to whether to recognize a state as legitimate) that includes as conditions minimum internal and external standards of justice and a requirement of nonusurpation (2004, p. 266).
Although a promising way to clearly distinguish between legitimate and illegitimate actors, Strict Justice-Based Legitimacy could be amended in a couple of ways to better address the criteria for international political legitimacy. One possible criticism that a realist may level against Strict Justice-Based Legitimacy is that it may be too restrictive and incompatible with the current political realities. There is nothing in the account itself to accommodate situations involving human rights violations that do not rise to the level of grounds for disengagement or intervention and, consequently, a strict requirement of justice as a condition for legitimacy may prematurely exclude too many as illegitimate. The account seems to require strict compliance with the above-mentioned requirement of justice. Even with a relatively low threshold for minimum justice, many actors may fail for some reason or another to protect even the most basic human rights. For example, under Strict Justice-Based Legitimacy, the international community may have grounds to disengage with a developed state that fails in some significant way to protect human rights to its citizens or noncitizens, despite having an otherwise strong human rights record and a long history of cooperation with other legitimate international actors. This may include the United States, which is the recent target of criticism for human rights violations in the treatment of prisoners at Guantanamo Bay and the use of unmanned aerial vehicles in Pakistan and Yemen (United Nations News Centre, 2008; Human Rights Watch, 2014; Amnesty International, 2013). For a different example, under Strict Justice-Based Legitimacy, the international community may not extend the status as legitimate to a developing state that lacks the resources or institutional structures to protect its citizens’ human rights in some significant way, but has made substantial progress in its efforts to comply with human rights norms and otherwise has strong economic and political ties with other legitimate international actors. Whether the violations are the result of an actor’s intentional law or policy or the result of a
burdened society’s incapacity to enforce the law, it would be difficult to identify even a single state or international actor that does not violate human rights in some way so as not to be disqualified as legitimate under this account (Amnesty International, 2012).

While Buchanan may intend something like substantial compliance, there is no such language or accommodation in the account. Buchanan describes his account of legitimacy as requiring only “reasonable approximation of minimal standards of justice, again understood as the protection of basic human rights” (Buchanan, 2010(1), p. 5). But “reasonable approximation” refers to the reasonable approximation of justice by requiring respect for only the most basic human rights, rather than full-blown justice, as may be required domestically under a constitutional democracy with the protection of a more extensive array of human rights (Buchanan 1999(2), p. 260). “Reasonable approximation” does not refer to the degree of compliance with the requirement of minimal justice and the protection of the most basic human rights. Buchanan’s account itself does not include any language that would suggest that an international actor would qualify as legitimate with anything less than strict compliance with minimal justice.

One could defend Buchanan’s account as one that applies not directly to international actors but to systems of law. The account, unlike the one offered jointly with Robert Keohane, is designed to apply to international law-making institutions. Buchanan intends “international law-making institutions” broadly, but he seems to have in mind certain systems of law, including customary international law, judicial and regulatory regimes, and the charters of various organizations such as the United Nations. For such systems of law, it makes sense to require that

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18 In the synopsis to his 2004 volume, Buchanan describes his account of legitimacy as requiring only “reasonable approximation of minimal standards of justice, again understood as the protection of basic human rights” (p. 5).
they include provisions for the protection of the most basic human rights, and such requirement
is not an onerous one. The problem with Buchanan’s view is that “international law-making
institutions” also include the law-making bodies themselves who, despite their written
constitutions and laws, may act inconsistently with them. Egypt, for example, prior to its
revolution in 2011, under President Hosni Mubarak, had a constitution that protected a wide
array of political and civil liberties, but as the January 25th uprising in Tahrir Square
demonstrated, the constitutional protections were in word only and not in fact. The system of law
may be in strict compliance with a minimal standard of justice, but the source of authority or
political power responsible for establishing and enforcing the law may be far from it. The
evaluation of a law-making institution should take into account the relevant laws, policies, and
behavior of the entity in question and, when such evaluation is made, it may be hard to find even
a single institution in strict compliance.

To address the realist criticism, Strict Justice-Based Legitimacy can be amended to
include a “substantial compliance” clause in its requirement of justice to better accommodate the
political realities of the international context. Buchanan may have intended something to this
effect, but the lack of clear language in the account allows for an interpretation that is too
restrictive and, therefore, may exclude too many international actors prematurely. The realist
criticism here implies a presumption in favor of inclusion or at least a presumption against
exclusion. Some theorists may question, if an account of legitimacy is too restrictive and
excludes many as illegitimate, so what, as long as the account and the result are accurate. What is
accurate here may be what is right with respect to justice. There is no reason to think, however,
that a presumption against exclusion is at odds with what is right with respect to justice. The
motivation behind the presumption is that exclusion is bad both for development of a law-
governed system and for the international community. Inclusion and engagement, on the other hand, is a precondition for deliberation on the rules and for healthy and stable political and economic relationships. Inclusion and engagement therefore is necessary for the international community to establish and enforce the terms of cooperation. While it is possible to make too many compromises for the sake of inclusion, the objective is to find the right balance and address the realist concerns without neglecting the others, including the need to respect at least basic substantive and procedural rights.

The second way that Strict Justice-Based Legitimacy can be amended to address the criteria for international political legitimacy is to make greater provision for implementation. Buchanan’s account of legitimacy may offer the right substantive norms for states and an international system, but the theory does not provide adequate guidance for reforming the current system into one that conforms to those substantive norms. Michael Blake also criticizes Buchanan’s approach as incomplete and suggests what is needed is more guidance for modern states in implementing Buchanan’s norms (Blake, 2008). Blake says,

My worry here is that we cannot regard the rules identified by Buchanan as acceptable to states right now; we thus cannot—in seeking to move to make these rules more acceptable—act as if the rules were already in place. Buchanan’s theory identifies an extremely attractive set of legal norms. I am arguing here only that we need something more than Buchanan’s theory to tell us how to act so as to bring those norms into existence” (Blake, 2008, p. 724).

I agree with Blake’s worry and think the problem can be generalized for other international actors as pointing to a lack of meaningful guidance and mechanisms for effective implementation.

Buchanan’s justice-based view can be strengthened by doing more of the theoretical work to explain what international actors need to do in order to establish a law-governed system.
Buchanan offers criteria to evaluate an actor’s legitimacy or illegitimacy, in particular, the requirement that an entity protects the most basic human rights and provides this protection through processes, policies, and actions that respect the most basic human rights. With Buchanan’s criteria, we can assess whether an entity is legitimate or illegitimate. The problem is that Buchanan does not explain how an international actor can become a legitimate one or how an international system can develop mechanisms to comply with his criteria. Buchanan’s theory, as do many others, assumes the existence of an entire backdrop of enforcement mechanisms that simply do not currently exist at the international level. Blake observes that, “we need a theoretical engine that tells us what we may do to bring such institutions about, under conditions in which they do not exist” (Blake, 2008, p. 724).

What Blake is getting at lies at the intersection of theory and practice. Buchanan demonstrates great insight into the political realities of the international context, but he does not do enough to integrate this insight in the design of his account of legitimacy. Buchanan’s account may offer the right norms, but they are norms that, if not followed already, provide no way forward. Buchanan’s account, as Blake says, assumes the existence of an entire backdrop of enforcement mechanisms. This assumption is entirely unjustified, however, because there currently are no adequate enforcement mechanisms. Unlike in the domestic context, when a rule is pronounced in the international context, there are no agencies to administer the rule and no procedures to give the rule any force and effect. If the account does not provide additional resources, then it has fundamentally miscalculated what is needed to be effective for the context in question.

As discussed below and in other chapters, I attempt to fill in some of the gaps in Buchanan’s account by featuring procedural justice and applying the norms of procedural justice
fully to develop the mechanisms necessary to make implementation possible. This is why my account aims at establishing a structure or network of just international normative structures to provide the necessary backdrop of enforcement mechanisms. The way forward, under my account, is for an entity to adopt JINS or something similar and implement a set of rules and mechanisms consistent with model JINS. My approach relies on voluntary compliance, but it includes the steps necessary to achieve compliance.

For the reasons stated above, Strict Justice-Based Legitimacy is vulnerable to the realism and enforcement objections. Strict Justice-Based Legitimacy therefore can be amended to better address the political realities of the international context and better address the need for procedural rules and mechanisms for the protection of the most basic human rights.

2.4. Alternative 2: Multiple-Criteria Legitimacy

Buchanan together with Keohane offer a second account of legitimacy for global governance institutions, which I am calling ‘Multiple-Criteria Legitimacy.’ Buchanan and Keohane, explain: “Because both standards and institutions are subject to change as a result of further reflection and action, we do not claim to discover timeless necessary and sufficient conditions for legitimacy. Instead, we offer a principled proposal for how the legitimacy of these institutions ought to be assessed” (Buchanan & Keohane, 2006, p. 106). Addressing a specific list of desiderata for a standard of legitimacy, including the feature of providing a reasonable public basis for supporting an institution on the grounds of publically accessible moral reasons in spite of the problems of moral disagreement and uncertainty, Buchanan and Keohane offer three substantive criteria: minimum moral acceptability, which requires compliance with the least
controversial human rights; comparative benefit, which concerns the actor’s ability to effectively perform its function; and institutional integrity, which involves whether the institution’s performance is consistent with its values and commitments. In addition to these substantive requirements, Buchanan and Keohane identify three epistemic conditions for legitimacy necessary for satisfying the requirements of accountability and transparency with respect to the three substantive norms.

“Legitimate global governance institutions 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 in the narrow sense [i.e., the information “must be (a) accessible at reasonable cost, (b) properly integrated and interpreted, and (c) directed to the accountability holders”]. They must also have effective provisions for integrating and interpreting the information current accountability holders need and for directing it to them. Third, and most demanding, they must have the capacity for revising the terms of accountability, and this requires broad transparency: institutions must facilitate positive information externalities to permit inclusive, informed contestation of their current terms of accountability. There must be provision for ongoing deliberation about what global justice requires and how the institution in question fits into a division of institutional responsibilities for achieving it.” (Buchanan & Keohane, 2006, pp. 123-124.)

Multiple-Criteria Legitimacy succeeds in addressing certain weaknesses in Strict Justice-Based Legitimacy. Because the above conditions are, using Rawls’s term, “counting principles” (Buchanan & Keohane, 2006, p. 120), such that the more of them the institution satisfies, the greater its claim to legitimacy, the approach is not strict approach, but rather leaves room for flexibility and special circumstances. Also, in adding to minimal moral acceptability other
substantive and “epistemic” criteria, Buchanan and Keohane seem to address the need for norms of what I call ‘procedural justice,’ particularly broad transparency and accountability.

Multiple-Criteria Legitimacy, however, attempts to do too much and too little in setting standards for international political legitimacy. For instance, while Buchanan and Keohane take their account as identifying criteria for legitimacy, one question is whether they have moved beyond legitimacy to providing something that looks more like an account of good governance with conditions such as comparative benefit and institutional integrity. While a well-governed institution that conforms to Buchanan and Keohane’s criteria may more likely be legitimate than not and may be sufficient for legitimacy, good governance involves more than is necessary for legitimacy (e.g., for justifying economic and political interaction, nonintervention, and restraint in the use of force). The lack of good governance, including a lack of comparative benefit and institutional integrity, may provide grounds for those affected to seek other alternatives, but it does not provide grounds for exclusion or disengagement. Consider, for example, creameries that are allowed to sell their products at grocery stores. One creamery may claim to use “only the freshest ingredients” but occasionally uses frozen ingredients when fresh ingredients are not easily available and, therefore, the creamery may lack institutional integrity. When discovered by retailers and consumers, this may provide grounds to buy a different product, but it does not rise to the level of providing grounds for labeling the offending creamery as illegitimate or excluding it from selling its products at grocery stores. Disqualification and exclusion require something more, such as intentional or fraudulent misrepresentation. Even if a particular retailer later decides to work with a different creamery, as businesses should aim to work with the most

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19 I think Buchanan and Keohane’s account is more accurately described not as a standard for legitimacy but a standard for determining whether a legitimate actor is more or less just or well-governed.
competent and honest partners, the reason would be that it found a better creamery, not that it found a legitimate one. Legitimacy is a binary concept, but conditions of good governance are degreed conditions that, albeit could be failed in such a way as to fall below a minimum threshold for legitimacy, but nonetheless usually concern matters that are beyond that which is required for legitimacy. If our aim is to focus on legitimacy and identify criteria for determining whether an international actor is or is not legitimate, Buchanan and Keohane’s criteria may not be helpful in making such judgments. It is not clear when the specified conditions, such as institutional integrity, are failed so as to disqualify an actor as legitimate. It also is not clear whether it is these conditions that are the right ones, as opposed to others. An account of legitimacy should identify criteria that make clear what qualifies an actor as legitimate or not, and Multiple-Criteria Legitimacy offers relevant considerations, but leaves us without a clear standard for assessing whether an international actor is above or below the threshold of legitimacy.

Buchanan and Keohane’s inclusion of comparative benefit and institutional integrity in their account of legitimacy also suggests that what they have in mind is not specifically legitimacy, but authority. They describe legitimacy, as follows: “Legitimacy requires not only that the institutional agents are justified in carrying out their roles, but also that those to whom institutional rules are addressed have content-independent reasons to comply with them…. Legitimacy disputes concern not merely what institutional agents are morally permitted to do but

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20 It is not clear whether Buchanan and Keohane agree that legitimacy is a binary concept. Buchanan’s Strict Justice-Based Legitimacy suggests that he takes legitimacy to be a threshold and binary concept in which one succeeds or fails to be legitimate. Buchanan and Keohane also write, “[t]o say that an institution is legitimate in the normative sense is to assert that it has the right to rule...,” which also suggests a binary concept in which one succeeds or fails to have the right to rule (2006, p. 105). They also refer to the function of legitimacy judgments as supplying a “minimal moral standard by which to determine whether institutions are worthy of support” (2006, p. 110, emphasis omitted.)
also whether those to whom the institution addresses its rules should regard it as having 
authority” (2006, p. 109). Buchanan and Keohane’s conditions are relevant to giving those 
subject to or interacting with a global governance institution content-independent reasons to 
comply with the institution’s rules or directives. Their efforts, then, more accurately concern the 
criteria for what makes a global governance institution an authority in global governance in the 
first place so that those under authority would have reason to comply with them and other 
international actors would have reason not to interfere with their operations. Although Buchanan 
and Keohane evaluate other standards of political legitimacy, including consent and democracy, 
before presenting their own standard, their discussion of authority and the conditions included in 
their standard suggest that their project more accurately concerns the criteria for authority or 
legitimate authority. Their account is too thick for evaluating legitimacy alone.

Multiple-Criteria Legitimacy, in other respects, is too thin for legitimacy. In addressing 
what they identify as the problem of factual knowledge—the problem associated with having 
sufficient data to determine whether an institution satisfies the three substantive criteria—and the 
problems of moral disagreement and uncertainty, Buchanan and Keohane offer the two 
additional epistemic criteria of accountability and transparency. These are essential components 
of procedural justice, but not the only ones. For example, there is nothing in their account that 
directly requires fair dealing or impartiality,21 such as requirements of fairness in an international 
actor’s negotiations with a client state or procedures for impartial review of an international 
actor’s exercise of its decision-making authority.

21 Buchanan and Keohane may intend to include impartiality in their conception of accountability, but the concept 

itself does not entail this additional normative requirement. It also is worth noting that the World Bank and other 

international actors have made their reports and other information available to the public for review, but publicity, 

transparency, and accountability alone do not establish norms for fair dealing or guarantee that these actors will act 

fairly in their interactions with developing states.
Transparency and accountability are inadequate particularly under circumstances where there is great disparity in material and intellectual resources, as there inevitably is internationally. Buchanan and Keohane recognize the problem of factual knowledge, including the accessibility of relevant information, but their conditions are inadequate to address this problem. Fairness is not achieved simply by making information publically available. There is now an abundance of information from various international organizations and institutions, including the World Bank Group, the IMF, and the WTO, with documents and reports publically available to everyone. But not everyone has the material and intellectual resources to take advantage of this information and to use it effectively. For example, an international institution or organization may provide information in certain languages but not others. Making the information available in French and English, however, does not help a person who speaks a different language. Even if the person is able to afford translation, the person still may lack the requisite legal or professional expertise to decipher what is often very complex information. One needs a staff of lawyers, economists, and other experts to make sense of the information and use it effectively. While disparities in material and intellectual resources are an unavoidable part of life, an account of legitimacy that focuses only on transparency has gone some distance, helping those who are well-situated materially and intellectually, but has not gone far enough to do even minimal justice.

Transparency with accountability also is not enough. Buchanan and Keohane explain that accountability includes three elements: “first, the standard that those who are held accountable are expected to meet; second, information available to accountability holders, who can then apply the standard in question to the performance of those who are held to account; and third, the ability of these accountability holders to impose sanctions—to attach costs to the failure to meet the standards” (2006, p. 121). Buchanan and Keohane do not specify the standard that those who
are held accountable are expected to meet. They instead leave this open to be determined based on additional factors such as the goals of the institution and its role in the pursuit of global justice. The problem of moral disagreement may justify some discretion here, but it seems unnecessary and even dangerous to leave this open. What is missing here are other norms of procedural justice, such as formal equality and other aspects of due process. Formal equality can provide a standard that those who are held accountable are expected to meet, i.e., that institutional officers should treat like cases alike. There may be moral disagreement on substantive conceptions of equality, but formal equality is less susceptible to reasonable objections. Treating like cases alike would require that global governance institutions, for example, provide the same access to information to both developed and developing states. Treating like cases alike also would address problems of participation and exclusion, so that wealthy countries do not determine the rules for the rest of the world, which may result in tyranny and oppression. Although Buchanan and Keohane intend their substantive criteria to inform the application of their epistemic criteria, there is nothing in their account to protect from discrimination and oppression. Buchanan and Keohane recognize the disparities in material and intellectual resources and that existing rules of accountability fail to ensure meaningful participation by those who are disadvantaged, but accountability and transparency alone do not provide the means to address such problems.

Accountability and transparency also are inadequate to address the enforcement objection. Transparency and accountability provide some guidance, such as making information available to make legitimacy assessments and attaching costs to those who fail to meet the terms of accountability. But transparency and accountability are in many ways impotent without formal equality, as described above, and other aspects of due process. Buchanan and Keohane explain
their criteria of transparency involves certain important dimensions, including the accessibility of 
information to those outside the institution and the responsibility of public justification.

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. To help 
ensure this dimension of broad transparency, it may be worthwhile to draw on, 
while adapting, the notice and comment procedures of administrative law at the 
domestic level. (2006, p. 123, fn. omitted.)

This description of what Buchanan and Keohane envision in the adaptation or implementation of 
broad transparency (i.e., transparency of both the institutional practices and the moral principles 
that shape the terms of accountability) assumes certain norms of due process, including notice, 
the opportunity to be heard, and review. As shown by existing global governance institutions 
such as the WTO and the IMF, however, these due process rules and mechanisms cannot be 
assumed as part of the operations of global governance institutions. There also is nothing in 
Buchanan and Keohane’s account to provide the basis for such mechanisms. Transparency itself 
does not entail these additional procedures. To be fair, their account offers criteria for evaluating 
and criticizing global governance institutions, but even as such, to the extent that their standards 
require the existence of other mechanisms, it is a weakness in their account not to provide the 
theoretical resources for such mechanisms.

It may be argued that implementation is a separate matter and a proposal for the 
international context does not need to come readily-equipped with the practical resources for its 
own implementation. As mentioned above, however, the international context is different from 
the domestic context when it concerns implementation. One cannot assume the existence of 
adequate enforcement mechanisms. Rules enacted in a domestic context typically are put into
effect against a backdrop of existing rules and mechanisms. The rule usually authorizes an existing agency to enforce the rule as well as appropriates other resources. The international context does not have the luxury of adequate existing enforcement mechanisms. Just as domestic political communities, in their early stages of development, adopted and implemented structural and procedural norms (e.g., constitutional democracy with due process of law), along with substantive norms, the international political community similarly in its early stages of development also require norms to establish the backdrop of rules and mechanisms now taken for granted in the domestic context. An account of legitimacy for the international context today with substantive standards and without adequate procedural mechanisms can speak of accountability, but lacks the resources to put its norms of accountability into effect. Buchanan and Keohane’s standards for the legitimacy of global governance institutions, as with other proposals for international standards or rules, do not offer enough in terms of procedural norms and practical guidance for implementation and enforcement.

Buchanan and Keohane have diagnosed certain problems in the international context and offered some good solutions, but Multiple-Criteria Legitimacy is still too thin in terms of practical guidance in solving these and other problems. As quoted above, Buchanan and Keohane describe their efforts as a proposal, and indeed, their proposal offers important considerations in evaluating global governance institutions. But there is, as they would acknowledge, more work to be done.
2.5. Alternative 3: Pragmatic Legitimacy

Before offering my own account, it may be helpful to consider a pragmatic alternative. Buchanan and Keohane’s accounts of international political legitimacy (as well as mine) are principled in contrast to being purely pragmatic. Their accounts are justice-based, in that, they include as a necessary condition for legitimacy a requirement that the international actor respects the basic human rights of those affected by the international actor’s power or authority. Chris Naticchia offers a purely pragmatic account of international political legitimacy that does not include a requirement of justice as a necessary condition for legitimacy. Specifically targeting Buchanan’s account of recognitional legitimacy, Naticchia claims that justice-based accounts of legitimacy are implausible because a requirement of minimal justice for the international context ultimately would be determined by pragmatic considerations and, moreover, that pragmatic accounts are preferable to justice-based accounts.

Naticchia’s account of legitimacy is, more precisely, a pragmatic account of recognitional legitimacy for states. Although Naticchia focuses on states rather than non-state actors, his account could, possibly with some modification, have application to a broader field of international actors. Despite his particular focus, Naticchia offers an important alternative account as well presents some serious criticisms against justice-based accounts of international political legitimacy that are worth our consideration. Recognitional legitimacy are accounts of legitimacy that identify the conditions for recognizing an entity as legitimate, and, in particular, recognizing an entity as a legitimate state. Under pragmatic accounts of recognitional legitimacy, an entity should be recognized as states if and only if cooperating with it and giving it international support would be the best means of achieving international peace and justice. There is no further condition that the entity must satisfy a requirement of minimal justice (Naticchia,
Naticchia’s main strategy in defending a pragmatic account is negative; he attempts to identify weaknesses in Buchanan’s justice-based account. He then explains how a pragmatic account has the comparative advantage.

Naticchia specifically compares his account to a version of what I have called Buchanan’s Strict Justice-Based Legitimacy (Naticchia, 2005, p. 35, p.39, n. 16, and p. 51, n. 40). Naticchia first identifies four claims that are common to both justice-based and pragmatic accounts: first, that peace and justice are appropriate, realistic, and intrinsically valuable goals for the international legal system; second, accounts of recognitional legitimacy are parts of nonideal, as opposed to ideal, theory and provide limits (what is permitted, required, or prohibited) rather than aspirations; third, the criteria for recognitional legitimacy must be realistic; and, fourth and finally, recognition as legitimate confers not only the rights and powers of statehood, but also the right to participate in the process of formulating, adjudicating, and implementing international law (Naticchia, 2005, p. 36). With these common claims in mind, Naticchia specifically argues that the problem with justice-based accounts is that they allow pragmatic considerations rather than the best theory of justice to determine the standard of minimal justice.

The reasoning goes like this. If the best theory of justice sets a standard of minimal justice that is high enough, then on the justice-based account, where minimal justice is required for recognition, only a few entities may qualify for recognition as states. If only a few entities qualify for recognition as states, though, then only a few entities will be entitled to participate in the processes for formulating, adjudicating, and implementing international law. But if only a few entities are entitled to participate in these processes, that may make the pursuit of global peace and justice inefficacious. If so, then the requirement that our criteria for recognition be realistic dictates lowering our standard of minimal justice so

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22 I rely here on Naticchia 2005 article in the Canadian Journal of Philosophy, rather than his 1999 article in Philosophy and Public Affairs, because he offers more developed arguments. As far as I can tell, Buchanan only responded to Naticchia’s 1999 article.
that enough entities qualify for recognition as states to make the realization of peace and justice a genuine possibility. That suggests that pragmatic considerations - not the best theory of justice - drive the level of the minimum. Alternatively, even if enough entities do qualify under the higher standard to make the pursuit of peace and justice efficacious, the requirement that our criteria for recognition be realistic still implies that, hypothetically, if too few did qualify, we would have to lower the minimum. That again suggests that pragmatic considerations drive the minimum. Since the justice-based account allows its minimum to be adjusted to whatever level is necessary for enough entities to qualify - since its standard for state-recognition must be adjusted to satisfy that pragmatic need - it seems like the justice-based account is really a pragmatic theory in disguise (Naticchia, 2005, pp. 36-37).

Naticchia’s reasoning suggests that pragmatic considerations, either through a motivation to achieve peace and justice or a need to offer realistic criteria for recognition, ultimately determine the standard of justice, which, in turn, qualifies or disqualifies an entity from being recognized as a legitimate state. Naticchia’s contends that pragmatic accounts are at least more straightforward in admitting that pragmatic considerations determine which entities are recognized as states.

Naticchia’s criticisms of justice-based accounts are misplaced for a few reasons; the main reasons are that he begins with inaccurate understandings of justice for the international context and what determines the standard of minimal justice. According to Naticchia, justice-based accounts apply their best theory of justice in setting the standard of minimal justice for recognitional legitimacy. The problem lies with his phrase “best theory of justice” as if there was one best theory of justice. Those who require compliance with at least a standard of minimal justice for legitimacy or for inclusion in the society of well-ordered peoples, as do Rawls and Buchanan who often follows Rawls, do not assume that there is one best theory of justice. What justice requires depends on the context in question. Even if Rawls and Buchanan accept a certain theory of justice for their own domestic contexts, moral or epistemic humility compels them to acknowledge the possibility that a different but reasonable theory of justice may be the best
theory for other domestic contexts and that a different but reasonable theory may be the most appropriate theory for the international context. There is no one “best theory of justice.”

Rawls and Buchanan may accept a liberal conception of justice or constitutional democracy as their preferred theory of justice, but neither Rawls nor Buchanan is suggesting that such theory of justice should set the standard for the international context. This is demonstrated clearly by Rawls’s use of a second original position to determine the basic principles of justice for the international context (Rawls, 1999(2), pp. 32-35; Reidy, 2004, 301-302). The result of deliberation under the second original position is a minimal set of rules, the law of peoples, the compliance to which warrants inclusion in the society of well-ordered peoples. He specifically includes both liberal peoples who have a liberal conception of justice and a constitutional democracy and decent peoples who have what he calls a common good conception of justice (they advance the common good and impose bona fide moral duties and obligations, but do not recognize individuals as citizens entitled to equal basic rights) and a decent consultation hierarchy (groups of citizens are consulted and have the right to dissent, but individual citizens do not have the right to vote or the right to have their grievances actually addressed) (Rawls, 1999(2), pp. 61, 62-70, 71-78). While it is true that Rawls begins with certain liberal assumptions when he derives the law of peoples, it is nonetheless inaccurate to say that he is applying his preferred theory of justice to set the standard of justice for legitimacy in the international context. Similarly, Buchanan recognizes the virtues of a constitutional democracy, but he requires only respect for basic human rights as a condition for international legitimacy (Buchanan, 2010(2)). Buchanan explains that it is not inconsistent to have different principles of justice for different contexts:

Once the distinctive character of the enterprise of theorizing about recognitional legitimacy is appreciated, the charge of arbitrariness will be seen to be unfounded.
So far as wide accessibility is concerned, the reason I stated in favor of this criterion focuses on a peculiarity of the international legal system as distinct from domestic legal systems; the international system must span great cultural gulfs and must rely primarily on voluntary compliance. (Buchanan, 1999(2), p. 269)

For Buchanan and Rawls, the standard of minimal justice is not set by their preferred or best theory of justice nor is it the result of a pragmatic concession, but determined by other factors relevant to justice. In his response to Naticchia’s critique, Buchanan also explains:

The justice-based theory is ‘pragmatic’ in this sense, if one construes ‘pragmatic’ considerations very broadly to include the sorts of reasons I offer for using a minimal rather than a full justice standard of recognition—in particular the need for moral humility in proposing criteria for recognition to be employed in a world of great cultural diversity, and the need for criteria of recognition that enjoy widespread moral support in a system of rules in which it is necessary to rely largely on voluntary compliance. (Buchanan, 1999(2), p. 260).

Justice-based accounts are pragmatic in the sense that they take into account certain practical considerations; they are not pragmatic in the consequentialist sense that they condition legitimacy purely on the achievement of certain goals. As discussed in Chapter 3, justice itself is not insensitive to the circumstances, but rather, what justice requires often depends on morally salient factors, such as the subjects involved and the context in question. What Naticchia fails to adequately take into account in his view is that to determine what justice requires for the international context requires considering the circumstances, such as reasonable pluralism, and the relevant goals, such as respect for cultural diversity. This leads to a different set of principles, such as the principle of toleration, and that the goals and principles are part of a theory of justice that then is used to set the standard of minimal justice for international legitimacy. These goals and principles are not external to justice or simply arise from pragmatic considerations, they are instead part and parcel of what justice requires for the context in question. Defenders of a justice-based account need not be blind to the circumstances to maintain a justice-based view.
To avoid the suspicion that pragmatic considerations determine the standard of minimal justice, a defender of a justice-based account, says Naticchia, “must reply that the minimum requirements are independently well-supported” (Naticchia, 1999, p. 249). A defender of a justice-based account does not set a standard of minimal justice simply to ensure greater inclusion or participation on the development of international law. Rather, the independent basis for the standard is some principle of toleration. Buchanan specifically refers to moral humility and wide moral accessibility. Rawls specifically refers to an idea of toleration, which he describes, as follows:

(1) Reasonable persons do not all affirm the same comprehensive doctrine. This is said to be a consequence of the ‘burdens of judgment.’ (2) Many reasonable doctrines are affirmed, not all of which can be true or right as judged within any one comprehensive doctrine. (3) It is not unreasonable to affirm any one of the reasonable comprehensive doctrines. (4) Others who affirm reasonable doctrines different from ours are reasonable also. (5) In affirming our belief in a doctrine we recognize as reasonable, we are not being unreasonable. (5) Reasonable persons think it unreasonable to use political power, should they possess it, to repress other doctrines that are reasonable yet different from their own. (Rawls, 1999(1), p. 16)

For Rawls, reasonableness concerns the public arena and reasonable persons’ desire for its own sake a social world in which they, as free and equals, can cooperate with others on terms all can accept (Rawls, 2005, pp. 48-54). The idea of toleration is part of Rawls’s conception of justice and presumed in his theory of justice as fairness. This or some similar conception of toleration is what guides the determination of minimal justice for the international context.

The term ‘minimal justice’ may suggest something less than justice and, indeed, it is often compared with ‘full-blown justice.’ It is not a complete conception of justice as may be appropriate for a domestic context to address the particularities within that context. But, given reasonable pluralism and some principle of toleration, it may be the “best theory of justice” for the international context. It attempts to capture what is affirmed in every reasonable political
community despite a variety of different cultural contexts each with a different set of beliefs and values. What is affirmed usually are basic human rights because it is these rights that capture something common to human nature or the human condition. Other rights may be debatable and concern factual circumstances unique to a particular cultural context or theoretical questions upon which reasonable people may disagree. A standard of minimal justice, however, is what all reasonable people can accept. Setting a standard of minimal justice in this way is not a pragmatic concession, but an application of a principle of toleration, as required by justice.

Naticchia’s rationale above is based on fundamentally misunderstanding justice-based accounts and their way of setting a standard of minimal justice. With a more accurate understanding of justice-based accounts, as described above, a defender of a justice-based account, applying her theory of justice for the international context, determines the standard of minimal justice by considering the context in question and a principle of toleration. The result is a standard of minimal justice for the international context (SI). Naticchia, however, assumes that a defender of a justice-based account, applying some universal theory of justice, would first arrive at a standard of justice (SU). He argues that SU may exclude too many from participation in the development of international law, thereby undermining efforts at global peace and justice. This is when pragmatic considerations would enter in and require lowering the standard to a compromised standard of justice (CSU). He alternatively argues that even if SU does not exclude too many from participation, the goal of providing a realistic standard still would apply and require lowering SU to CSU. Both prongs of Naticchia’s rationale involves pragmatic concessions and, therefore, he concludes that it is not the best theory of justice, but pragmatic considerations that ultimately determine the standard of justice. Naticchia is mistaken, however, in assuming that justice-based accounts would arrive at the standard SU and that pragmatic
considerations would require lowering the standard to CSU. The defender of a justice-based account, rather, in designing a theory of justice for the international context in a principled way, would arrive at something like SI. SI may look very similar to CSU, both requiring respect for only the most basic human rights, but the standard is nonetheless determined in a principled way based on some principle of toleration as required by justice, rather than as a pragmatic concession to ensure greater participation in the international law-making process.

Furthermore, as to the criterion that the account be realistic, this criterion is neutral with respect to whether many or few actors qualify as legitimate. It may be better for the cause of global peace and justice if many were included in the process of developing international law, but it may not necessarily be more or less realistic. Indeed, it may be more realistic to recognize that most international actors are not in fact legitimate (i.e., not in compliance with some reasonable standard of justice) and therefore do not deserve recognition as such. The theorist who offers a justice-based account nonetheless would not be failing to offer a realistic account. Nothing in the claim that an account should be realistic and have certain aims also suggests that those aims have to be achieved at all costs.

It also is worth noting that while legitimacy confers certain benefits or rights, such as the right to participate as a full member in certain organizations that aim to secure global peace and justice and to form agreements and treaties with other members, this does not necessarily have the consequence of hamstringing efforts at global peace and justice. Those who fail to qualify as legitimate may not have the right to participate as a full member with a right to vote or enter certain agreements, but the organization itself is not somehow prevented from extending to such illegitimate entities the privilege of qualified participation for limited purposes, for example, voicing their opinions and offering suggestions in particular situations that involve them. The
organization would have the benefit of this information in addressing those situations and pursuing its aims of global peace and justice. Such limited involvement does not in any way amount to full recognition as a legitimate member.\textsuperscript{23} Naticchia acknowledges that there are different levels of involvement, but he would extend recognition to even unjust states and then limit their involvement. As discussed below, it is not clear what these entities are being recognized as, but if recognized as legitimate, it seems incoherent to identify unjust entities as legitimate states. The justice-based account, however, could accurately distinguish between legitimate and illegitimate entities and, through qualified participation or other means, continue to promote its aims of global peace and justice.

As mentioned above, Naticchia attempts not only to point out weaknesses in a justice-based account, but also to argue that a pragmatic account is preferable to a justice-based account with respect to the goals of promoting peace and justice. He specifically argues that, given the extraordinarily high stakes involved in securing long-term global peace and justice, conferring recognition should be based on achieving those goals, not any additional requirements such as a requirement of minimal justice. He also argues that pragmatic considerations should enter our judgments about recognition but not our judgments about justice, and that we should keep our standards of recognition separate from our standards of justice. I think we have good reasons to doubt Naticchia’s first argument that a pragmatic account, rather than a justice-based one, is the

\textsuperscript{23} Referring to states, Naticchia argues that allowing illegitimate states to act in a way that would promote peace and justice effectively would be to allow them to act as legitimate states: “…the relations that best promote peace and justice are the ones that it would have if it were recognized as a state with the rights and powers of statehood and an entitlement to participate in the processes of formulating, adjudicating, and implementing international law” (2005, p. 43). Not necessarily. One can be allowed limited participation that falls far short of having the rights and powers of statehood, for example, one can voice opinions without having the right to vote (i.e., having a recognized stake that is formally factored into the decision-making processes).
best way to achieve long-term international peace and justice. I also think we have good reasons
to question Naticchia’s reasoning about separating recognition and justice.

Although Naticchia’s strategy is mostly negative, he proposes his own view that, because
pragmatic considerations inevitably and appropriately enter into judgments about recognition,
but not judgments about justice, we should keep our standards of recognition separate from our
standards of justice. Naticchia explains, “[W]e could be more candid and sever the connection
between the recognition of an entity and its legitimacy as accounts of political obligation use that
term. That would permit us to grant recognition to entities that are illegitimate according to the
best theory of political obligation (entities which may, after all, be just)” (2005, p. 256). The
pragmatic approach, according to Naticchia, “frees us to imagine and defend the best theories of
legitimacy and justice that we can devise for an ideal world while leaving the messiness of the

There are several ways to respond to Naticchia’s view, but one response that concerns the
heart of Naticchia’s proposal, is that Naticchia seems to be speaking of something different than
what Buchanan speaks of when referring to recognitional legitimacy or is confused about
recognition altogether. Naticchia’s view is that we should sever the concepts of recognition on
the one hand and legitimacy and justice on the other. But then the question is, what does he mean
by “recognition.” Typically, discourse concerning the recognition of states is concerned about
what Buchanan is concerned about, namely, “the judgment that a particular entity should or
should not be recognized as a member in good standing of the system of states, with all the
rights, powers, liberties, and immunities that go with that status” (Buchanan, 2004, p. 261). The
recognition of a state is the recognition of an entity as a legitimate state or a state in good
standing usually with other legitimate states or an international community of legitimate states.
Recognition, in this sense, is synonymous with recognitional legitimacy. In practice, when the United Nations recognizes an entity, such as South Sudan, as a member state in the community of nations, it is based on the judgment that the entity is “peace-loving” and willing to accept the obligations of the UN Charter (UN Charter, Ch. 2, art. 4).

Naticchia seems to be speaking of something else. He is speaking of recognition in some other sense and not recognitional legitimacy. According to Naticchia, under a pragmatic approach, an entity should be recognized as a state if and only if cooperating with it and giving it international support would be the best means of achieving international peace and justice. In defending a pragmatic approach, Naticchia, says, “if we want to make moral progress, unfortunately, we must recognize some unjust countries” (2005, p. 66). An unjust or illegitimate state is not one that would have good standing in a community of nations or a society of well-ordered peoples. Naticchia therefore is not offering the conditions for good standing in a community of nations. And, if this is the case, then Buchanan and Naticchia are not speaking of the same concept and are not offering alternative conditions for qualifying under the same concept.

If Naticchia is speaking of something else, what is this something else? It seems he is speaking of recognition of an entity as a state or a member state. But, if the recognition is some acknowledgement that an entity is a state, it is not entirely clear whether Naticchia is referring to the existence of a state, the sovereignty of the state, or some other aspect of legitimacy. Recognition comes with certain benefits including participation in the process of formulating, adjudicating, and implementing international law (Naticchia, 1999, p. 253). The level of
participation may vary depending on other considerations, including considerations of justice. It seems existence alone is insufficient for recognition, particularly if recognition comes with the benefits of membership and participation. It also seems that Naticchia is not referring to sovereignty, which usually comes with additional benefits of self-determination and the right against interference. Even if it has no aggressive aims, an entity that violates human rights would forfeit to some extent its right against interference. By recognizing an entity as a state, if not existence or sovereignty, what about some other aspect of legitimacy? Naticchia, however, specifically rejects recognition in terms of legitimacy. It is, therefore, unclear what he means by recognition: recognition as what?

Naticchia may be referring to a status less than legitimacy or good standing. There is no requirement that the entity is peace-loving or peace-and-justice-promoting, but only that the entity’s participation in the process somehow advances global peace and justice. This may be referred to as recognition merely as a participating member.

On the pragmatic account, the judgment that an entity ought to be granted recognition by the international community does not imply that the entity is just or legitimate (not even in a minimal sense). It only implies a strategic calculation that cooperating with it and giving it international support are the best means of achieving international peace and justice (Naticchia, 1999, p. 242).

This concept of recognition, recognition as a participating member, is different from what theorists and practitioners refer to when speaking of state recognition. It is indeed a pragmatic

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24 Naticchia’s pragmatic account assumes a best theory of justice when making judgments about states and their level of participation in international law-making. He writes, “As a strategic matter, we may decide that entities that are not too unjust should be permitted to engage in some of these processes but be barred from others...” (1999, p. 253). Under his pragmatic account, Naticchia makes judgments such as “unjust” and “not too unjust” based on the best theory of justice, which assumes that such a theory applies to the international context. Others have relied on a different theory of justice for the international context, instead of assuming that a theory of justice for the domestic context applies everywhere. Naticchia does not do this, however. He assumes a best theory of justice with the protection of a full array of human rights. It is not clear, however, what rights would be included in this full array of human rights and whether cultural diversity has any impact on what is the best theory of justice.
account, but one that assumes an entirely different concept of recognition. It should be clear that, when Naticchia offers criteria, it is criteria for this other concept of recognition, rather than alternative criteria for recognitional legitimacy.

This may be Naticchia’s objective, but there are, of course, difficulties with such a pragmatic concept of recognition. It seems improbable that the pragmatic account would provide the conditions for either peace or justice. The pragmatic account may include some requirement of justice as a criterion for legitimacy, but it does not have to. As Naticchia admits, pragmatic accounts, because they do not require justice, could recognize as legitimate those entities that are unjust, including those who violate or tolerate the violation of human rights. Naticchia repeatedly points out the advantage of having as many involved in the international law-making process to advance the goals of global peace and justice. Many states in the Middle East and Africa would not qualify if we include a requirement of minimal justice, Naticchia says. But it is not clear why he thinks this, whether it is because these states do not have a constitution and laws that protects human rights, because they lack the power or resources to enforce their laws, because they are actively engaged in depriving citizens of their basic rights, or because there are competing non-state actors who operate in these states to deprive citizens of their basic rights. These are different situations and not all of them would disqualify the state from being

25 Naticchia addresses the main objection to his pragmatic account, namely, that recognizing unjust entities make us accomplices in their injustice, injustices that may occur within those states (he seems to underestimate the injustices that may occur between states). His responses to the objection are essentially that, those who advance the pragmatic account are no more guilty than those who advance the justice-based accounts, based on his description of them, because both in the end must recognize unjust entities as legitimate, and that those who advance the pragmatic account are doing the best they can to achieve peace and justice and are not guilty of self-deception, negligence, or malice. These responses, however, are inadequate. If an entity is responsible for committing human rights violations, and we by our standards recognize them as legitimate and, thereby enable or empower them to continue with these violations, then we also are complicit in their actions. If they act maliciously, then we are complicit in their malice even if we do not harbor malice ourselves. Also, as discussed in the text, justice-based accounts generally do not recognize those who fail to respect basic human rights as legitimate.
recognized as legitimate.\textsuperscript{26} Naticchia also points out that, if we exclude many states, then these states would not have the right to territorial integrity and noninterference and, therefore, cannot claim that another state acts wrongly when it aids rebels or takes its territory (Naticchia, 2005, pp. 42-50). But this point fails to recognize that the rules of recognitional legitimacy is not the only game in town.\textsuperscript{27} There are many rules that apply in the international domain including international treaties and conventions, international common law of just war, standards established by international tribunals, domestic law and foreign policy, and other moral principles of justice. It is nonsense to say that a justice-based account of legitimacy would somehow tie the hands of a state and prevent it from claiming foul when the state has recourse under other existing moral or legal frameworks. But, when we are defining the appropriate standard for legitimacy, there is good reason to be more discriminating. If we allow unjust states to participate in the international law-making process, we might wonder what sort of international laws and norms we might have to accept for the sake of their participation.

It is also important to mention again the distinction between a fleeting peace that results from a tenuous balance of power and a lasting peace that results from a largely law-governed system with rules that meet the demands of justice and members who learn to follow the rules and perpetuate a culture of justice (Rawls, 1999\(2\); Tesón, 1998). A consequentialist approach may find a law-governed system attractive for its ability to promote global peace and justice. But the Kantian approach recognizes the intrinsic value of justice and its natural fecundity in producing and reproducing a culture of justice. There is something about the recognition of

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\textsuperscript{26} Naticchia’s example of a state besieged by rebel forces suggest that the granting of recognition may be nuanced, but there is no reason why this is not also the case for the justice-based accounts of recognitional legitimacy (Naticchia, 2005, p. 63.)
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\textsuperscript{27} Naticchia seems to understand this—the applicability of other moral and legal rules—when he discusses the advantages of the pragmatic account and, specifically, the example of how to respond to a request by the Columbian government for international assistance in an ongoing conflict (Naticchia, 2005, p. 62).
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justice as intrinsically valuable and the internalization of this understanding that is central to Kant’s peace hypothesis. It is this internalization that produces a culture of justice. Even if we do not fully accept Kant’s peace hypothesis, we can still appreciate its insights. Peace of the lasting sort is better obtained when it is upheld by justice, or institutions committed to principles of justice and designed to perpetuate these principles indefinitely through moral education. It is not clear whether you can have a lasting peace and justice without this recognition of justice as valuable in itself. If justice is merely instrumentally valuable, it can be replaced with something else that happens to bring about the same results and yet this something else may not be stable in the long run.

Pragmatic, consequentialist accounts would not be preferable to justice-based accounts with respect to setting the right normative standards and thereby perpetuating a culture of justice. A justice-based approach holds up justice as the standard without qualification while the consequentialist approach also may hold up justice as the standard, but always defeasibly and with the qualification that it is valuable so long as it produces the best results. The latter allows the actor to decide whether it should act for reasons of justice and opens the door for the making of exceptions. What is needed in the international context, however, are clear and firm rules that can establish normative standards for states and other international actors.

As noted by David Luban, one of the most promising purposes of international courts and international law is norm projection. Speaking specifically of international criminal trials for

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28 Consider a simple example of teaching a child to help others. The justice-based approach would be to teach the child to help others in need because helping others is intrinsically valuable. The consequentialist approach would be to teach the child to help others because he would be better off if he does, for example, others would be more inclined to return the favor when he is in need of help. The consequentialist approach implicitly allows the child to decide the matter. It places a condition on the value of helping others and therefore allows the value to be overridden if the condition is not satisfied. Perhaps the child finds that others are not inclined to return the favor.
crimes against humanity, Luban explains that international criminal trials are expressive acts that assert moral truth:

Carl Schmitt famously defined ‘the concept of the political as the friend/enemy relation, with the strong implication that political violence against the enemy defines the human condition and lies beyond good and evil. The moral truth that international tribunals express is, quite simply, the negation of this familiar political amoralism. International criminal law stands for the proposition that crime is crime regardless of its political trappings (Luban, 2010, p. 577).

Also, James Nickel, who supports a more robust list of international human rights, argues that the purpose of human rights norms is not only to justify intervention or sanctions, but also to “deal with human rights violations through gentler means, such as consciousness raising, persuasion, norm-promotion, criticism, shaming, defining conditions for full acceptance, mediation, and negotiation” (Nickel, 2006, p. 273). Both Luban and Nickel stress the importance of setting the right normative standards at early and crucial stages of developing international laws and institutions. While Naticchia’s pragmatic approach has no necessary condition pertaining to justice—the criteria for legitimacy may include justice, but also may not—justice-based accounts are not weak in this sense. They require justice and respect for basic human rights not only because it is effective in achieving global peace and security, but also because it has the potential to set the right normative standards and thereby move the international community forward in establishing a more law-abiding system of international relations.

For these reasons, I think Naticchia is wrong in saying that justice-based accounts ultimately set standards of justice based on pragmatic considerations. Naticchia is also wrong in saying that pragmatic accounts of legitimacy are best for the international context. Justice-based accounts of legitimacy, like that of Buchanan, hold greater promise both in achieving justice and
peace and in setting the right normative standard for the development of a law-governed international system.

2.6. Applied Justice-Based Legitimacy

In continuing the work started by Buchanan and Keohane, my solution addresses weaknesses in Strict Justice-Based Legitimacy and Multiple-Criteria Legitimacy and offers an alternative justice-based account of legitimacy. My account differs from Strict Justice-Based Legitimacy in two important ways: by providing a more nuanced definition of legitimacy to account for pragmatic considerations and by expanding on the requirement of justice to feature procedural justice. This section introduces my alternative, Applied Justice-Based Legitimacy, and begins to defend my claim, which is continued in the subsequent chapters, that Applied Justice-Based Legitimacy better meets the criteria for international political legitimacy.

As mentioned above, my definition of international political legitimacy is, as follows:

International political legitimacy is the evaluative property of international rules or actors consisting of certain conditions the satisfaction of which justifies the possession or exercise of political power among a set of actors or within a system of rules.

My account of international political legitimacy (or criterion of international political legitimacy) with its necessary and sufficient conditions can be formulated, as follows:

An international actor (IA) is legitimate if only if (a) the IA is in substantial compliance with a just international normative structure (JINS), and (b) the IA satisfies the requirement of good standing. JINS consists of rules and mechanisms that satisfy the requirement of justice.
As to condition (a), the IA satisfies (a) only if it is in substantial compliance with the requirement of justice. An IA substantially complies with JINS by adopting and implementing a set of rules and mechanisms that satisfy the requirement of justice. The requirement of justice refers to a minimum standard of justice involving both procedural and substantive rights.

Requirement of justice: an IA satisfies the requirement of justice if and only if it substantially respects the basic procedural and substantive rights of those affected by its decisions or actions.

As discussed in chapter 3, substantive rights refer to substantive human rights, such as the right to life, physical liberty, bodily integrity, and the other conditions of a minimally decent life. Procedural rights refer to the rights of due process and formal equality. While some legal theorists have discussed due process and equality either as a part of natural justice or as included in a list of basic human rights (see Rawls, 1999(2)), the failure to recognize procedural justice as foundational to any law-governed system and to develop it effectively as a theoretical basis for rules and mechanisms is not only a missed opportunity, but the source of a critical flaw in international jurisprudence. Due process is the basis for our rules of order and procedure, judgment and review, impartiality, fair dealing, transparency and accountability, and other instruments for implementing justice. Due process is also the basis for mechanisms of fair proceedings and negotiations, internal and independent review, and fair procedures and penalties for accountability. Without due process, an international system of justice may involve all the right substantive norms, but no effective and just mechanisms for achieving compliance with those norms.

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29 This new formulation involves an added layer of complexity. But it allows me to maintain that JINS complies with the requirement of justice, while legitimacy requires only substantial compliance with the requirement of justice. So my account provides both the gold standard and the accommodation.
As stated above, my account of legitimacy differs from Strict Justice-Based Legitimacy by addressing the realist objection and accommodating the political realities of the international context, including persistent noncompliance and deep disagreements on beliefs and values. One way that I do this is in the requirement of justice by taking a more nuanced approach and requiring only substantial compliance. To adequately address the problem of persistent noncompliance, we need a way to distinguish between what is an act of disqualifying noncompliance and what is not an act of disqualifying noncompliance. Noncompliance with respect to human rights norms is unacceptable in all forms and would justify criticisms and calls for recourse, but not every instance of noncompliance justifies exclusion and interference by sanctions or force. Moreover, when distinguishing between what is and what is not an instance of disqualifying noncompliance, an account of legitimacy, needs to identify both the standard of minimal justice and the degree of compliance. It is not enough simply to begin with a minimal conception of justice that can be applied across cultures (i.e., that justice requires respect for only the most basic rights such as the right to bodily integrity). What is also needed is some accommodation for imperfect compliance with even the most basic norms (e.g., that justice requires respect for the right to bodily integrity to a certain measure). My solution attempts to address both by including a minimal conception of justice, JINS, and requiring only substantial compliance to JINS. As also explained in chapter 3, noncompliance can come in different forms depending on the degree of harm (minor or significant), the duration of harm (isolated, repeated, or permanent), the extent of harm (local or widespread), and other features that make it particularly egregious (e.g., genocide or other factors to indicate an extreme disregard for human life). Substantial compliance is respect for basic substantive and procedural rights that does not result in significant and widespread or repeated instances of harm. My account would not strip an
actor of legitimacy for minor, isolated instances of harm, but also does not allow for significant and widespread or repeated instances of harm or other egregious violations of human rights, such as genocide. It is *substantial* compliance because the international actor complies with JINS by respecting basic substantive and procedural rights in substantial part, even if it falls short of strict or full compliance, so long as any part left outstanding does not amount to a significant and widespread or repeated violation of human rights. This approach allows for some flexibility to address the realities of the international situation, for example, the ones mentioned above involving a developed state that temporarily lapses into violating some basic human right or a developing state that may be limited in resources and yet is making strides in providing its citizens with the basic rights necessary for a minimal standard of justice. The requirement allows for flexibility, but at the same time makes no concession for great or egregious human rights violations.

The requirement of good standing is another way by which my account accommodates the political realities without permitting any great injustice.

**Requirement of good standing:** an IA obtains good standing if and only if no one who is substantially affected by its exercise of political power comes forward with reasonable and sufficient evidence to reject its being JINS-compliant.

As stated in chapter 4, this second condition of legitimacy requires that an international actor is perceived as JINS-compliant and that the perception is justified. The second condition is deliberately second because it depends in part on the first condition. The first condition defines the requirement of justice. The second condition of good standing specifically concerns an international actor’s standing as just or not unjust with respect to legitimacy. The second condition of good standing involves subjective and objective components. As to the subjective component, from the perspective of those affected by
the international actor’s decisions and actions, the international actor must be perceived as not unjust, in that, it is perceived as not violating basic substantive and procedural rights. As to the objective component, the perception of compliance with the requirement of justice must be objectively justified. A justified perception is not merely a subjective opinion, but a perception supported by objective criteria and sufficient relevant evidence.

The evidence that would be relevant to a finding pursuant to this condition includes evidence of an international actor’s present and historical identity, present and historical record, national and international reputation, and past and present relationships. These factors are relevant because and insofar as they help to provide evidence of an international actor’s compliance or noncompliance with the first condition. Whether an international actor has good standing depends on whether its historical identity, record, reputation, and relationships show it to be JINS-compliant or as acting consistently with the requirement of justice. Good standing depends in part on the international actor’s identity as determined by its present circumstances and its factual and procedural history, including whether it was established by another long-standing legitimate international actor and established through consent or some other appropriate procedural mechanism to ensure the consideration of the interests of those affected. Good standing also depends on the international actor’s present and historical records, particularly its human rights record or record of human rights violations. What is relevant here is not only the presence of human rights violations, but also the record of how any violations were addressed and remedied, if at all. Depending on the particular international actor involved and the scope of its authority, good standing also involves the consideration of an international actor’s reputation among those affected by its authority and by other members of the international community.
These and other factors help to determine the quality of the international actor’s vertical and horizontal relationships.

The requirement of good standing also addresses the realist objection by taking into account factors that may be more important in other cultural contexts than evidence of compliance based on an international actor’s charter, rules, policies, and practices, and by taking into account perspectives from different cultural contexts of those affected by the international actor’s activities. The realist may point to the problem of deep disagreement on beliefs and values, which may make it impossible to establish a set of universal norms. My account addresses the realist objection by not only beginning with a minimal set of basic rights, but also providing a meaningful way to respect different yet reasonable perspectives. My approach accommodates the political realities of the international context, including reasonable pluralism and the reality that different cultures have different beliefs and values and, as result, different perspectives of global justice. Even after establishing a shared standard of minimal justice for international political legitimacy (e.g., respect for basic human rights), an assessment of whether the conditions are satisfied also may be complicated by cultural differences. What constitutes a violation of the conditions for legitimacy sometimes varies depending on one’s perspective. Part of the variation may be due to fundamentally different political, ethical, and cultural perspectives. The requirement of good standing takes into account the reasonable perspectives of all those affected, whether in person or through representatives such as human rights organizations and citizens’ groups. Because the requirement of good standing takes into account the perspectives of all those affected, it protects minority perspectives from being ignored. The requirement of good standing functions as a procedural check to confirm that those who are
affected by the international actor’s decisions and activities are indeed consistent with the requirement of justice, in other words, consistent with respect for basic human rights.

Maybe more importantly, in addition to addressing the realist objections, my account specifically addresses the enforcement objection by introducing JINS. A just international normative structure refers to rules and mechanisms that comply with the requirement of justice, namely, comply with norms of both substantive and procedural justice. My focus here is on procedural justice, which provides the basis for both (i) specific norms of procedural justice and (ii) mechanisms for implementation and enforcement. While some theories recognize the importance of certain norms of procedural justice, such as impartial review and accountability, such norms, just as with the substantive norms, are not self-efficacious. They require mechanisms consisting of structural designs and directions to bring those norms into practice. An international actor is legitimate if it is in substantial compliance with a just international normative structure, which I refer to as “JINS compliance.” The idea is not that there are or has to be external international enforcement mechanisms for JINS compliance, but that an international actor has to adopt a constitutional framework and implement internally the mechanisms for its enforcement, to the extent appropriate for the actor in question.

The first aspect (i) specific norms of procedural justice refers to the norms of due process and formal equality. Due process norms usually include requirements for order and procedure, notice, hearing, review, impartiality, fair dealing, transparency, and accountability. Formal equality requires that similar cases be treated alike, which can be construed as requiring that each case be afforded neutrality in the negative sense and equality before the law in the positive sense. As applied to the example provided in the introduction, when the World Bank makes a loan to a developing country, the norms of due process and formal equality together would have the
practical effect of affording the developing country fair consideration of its interests, meaningful participation in the deliberations and decision-making process that affect its citizens, and the opportunity to have decisions impartially reviewed. Equal consideration of the developing country’s interest also would include neutrality in selecting the appropriate economic policies and equality in hearing and taking into account the developing country’s interests, thereby respecting the citizens of that country in the same way as it would respect the citizens of the world’s most affluent countries. The disparities in power between the parties may be significant, but due process and formal equality at least provides the procedural safeguards necessary to establish a more level playing field.

The second aspect (ii) of procedural justice involves mechanisms for implementation and enforcement. My requirement of justice is distinctive in that it requires not only norms, but also certain basic procedural mechanisms. The required mechanisms are derived from the norms of procedural justice. The norms of procedural justice provide the theoretical resources for mechanisms or systems for their implementation and enforcement. The norms of procedural justice, such as an opportunity to be heard or a right to a hearing, are rights that entail duties that include not only the duty not to deprive, but also duties to establish mechanisms consistent with content of the right in question. The right to bodily integrity can be respected simply by not violating a person’s bodily integrity. Political communities of course establish many other safeguards to prevent violations and address violations, but these are not necessarily required by the right itself. The right to a hearing, however, cannot be respected simply by not depriving a person of an opportunity to be heard. For example, if an international actor makes a decision that may substantially and adversely affect a certain client state, that client state, under my account, would have an opportunity to be heard. The right to be heard cannot be respected simply by not
depriving a person of an opportunity to be heard. It is not enough for the international actor not to prevent the client state’s representatives from protesting the decision on the steps of its headquarters. If the international actor proceeds with its decision without any provision for the right to a hearing, the international actor has, under my account, violated the right. Respecting the right requires more, such as establishing a hearing or comment procedure to provide the client state with an opportunity to be heard. Likewise with other norms of procedural justice. The norms of procedural justice, therefore, are norms that demand certain institutional mechanism with additional rules and procedures.

As discussed above, in the domestic case, when a local bank makes a loan to a client from a disadvantaged socio-economic group, there are layers of rules intended to ensure fair dealing. But, for each rule, there also are mechanisms for its adoption, execution or implementation through various administrative agencies, and enforcement through internal procedures and external review. While the same normative structure does not currently exist internationally, as the international structure develops, what is needed in addition to identifying the right norms are solutions that provide practical guidance in implementing those norms. Part of my solution is to offer model rules and mechanism that different international actors could adopt and implement consisting of structural designs and directions with the different procedures necessary to ensure justice. The structural designs and directions would include procedural steps for ensuring due process and formal equality such as the steps necessary for the adoption of rules, the public availability of rules and records, the appointment or election of officers, fair negotiations with clients, impartial decision-making, and internal and external review.

Any proposal for an account of legitimacy can include due process norms and employ a system of model rules; these are not novel concepts. What is novel in my account is my
recognition of the need to provide some normative structure for implementation and enforcement in the early stages of development of an international political community and then bringing these theoretical resources to bear to address this need in the international context. Due process, in particular, is not merely a means to implement a theory that can be added to any theory, it is part of the theory itself as an integral part of the minimal justice necessary for legitimacy.

Although a system of model rules is a means to implement a theory and can be added on, my account of legitimacy is novel in offering it as a way forward in the application section. My account is aptly called Applied Justice-Based Legitimacy because it includes the theoretical resources, such as due process norms, necessary for application and because it offers practical guidance for its own implementation and enforcement.

While I leave for future chapters further justification and explanation of the components of my account, I will end this chapter by briefly summarizing how my account satisfies the criteria described above for international political legitimacy. Like Strict Justice-Based Legitimacy, as a justice-based account of legitimacy conditioned in part on a minimal requirement of justice, it satisfies the sufficient moral justification condition. My account requires JINS compliance or substantial compliance with a just international normative structure, which is a system of laws and institutions that satisfy the requirement of justice. The requirement of justice is a minimal requirement of justice that includes respect for basic substantive and procedural rights. It does not require full-blown justice as may be required within a domestic context, but it includes a standard of minimal justice necessary for engagement within the international context. Because of its respect for basic human rights, my account is intrinsically compelling and at least has the potential for gaining wide acceptance among morally-minded members of the international community.
Applied Justice-Based Legitimacy also satisfies the universalizability condition because it can be tailored to accommodate a variety of different cultural contexts with their different conceptions of justice and different conceptions of the good. It is able to accommodate different cultural contexts because its requirement of justice is minimal in nature and because it attempts to incorporate values that apply across cultures, such as the consideration of one’s historical record and relationships with other legitimate actors. Although its initial implementation would require significant reform on the part of those who are not already in compliance, its requirements are not unduly burdensome. The burdens, in terms of costs and acceptability, would be the same or similar to implement structural reforms that require at least minimal justice and the burdens would be greater, particular with respect to acceptability, to implement structural reforms that require a constitutional democracy or some other conception of full-blown justice. Because Applied Justice-Based Legitimacy can be tailored to suit different cultural and political contexts, it more easily satisfies the universalizability condition. The requirement of justice protects the very basic human rights that are recognized across cultures including basic security rights, basic subsistence rights, some basic liberties, the right to fair processes, and the right to equal treatment. There may be different specifications of these rights, but they are not tied to any local set of beliefs and values. Applied Justice-Based Legitimacy also recognizes the importance of cultural diversity and takes into account what may be considered non-Western values and methodologies. The account of legitimacy is designed to be applied universally.

Despite the ability to accommodate different cultural contexts, Applied Justice-Based Legitimacy also satisfies the consistency condition because it provides a set of substantial constraints that are consistent across cultures. My approach does not involve a world state or a world constitution, but rather, models of standard rules and mechanisms that comply with the
requirements of substantive and procedural justice that can be adopted and implemented by new and existing international actors. Because the models each require respect for basic substantive and procedural rights, there would be wide and general consistency of outcomes. The account allows for different specifications, but it does not allow for the adoption of rules inconsistent with respect for basic substantive and procedural rights. What is crucial is not that every international actor would arrive at exactly the same outcome, but as to the basic requirements, every actor would satisfy those requirements. The requirement of respect for substantive rights, for example, includes the protection of bodily integrity, and therefore every actor cannot allow those under its authority to murder, torture, rape, or mutilate another human being. How exactly these offending acts are defined and the appropriate penalty for them may vary to some extent (and of course there will be disputes as to whether these definitions and punishments are consistent with justice), but this account as well as any other at least provides a set of real substantive constraints that can be applied across cultures.

Applied Justice-Based Legitimacy satisfies the practicality condition for two main reasons. As alluded to above and discussed earlier, it recognizes the great cultural diversity of the international context and accommodates this diversity by requiring only a minimal requirement of justice. It also recognizes the persistent problem of noncompliance. Noncompliance can be the result of intentional action or the result of a lack of resources or the necessary social or political institutions. Noncompliance also can come in different forms depending on the degree of harm (minor or significant), the duration of the harm (isolated or permanent or repeated), the extent of the harm (local or widespread), and other features that make it particularly egregious (e.g., genocide or other extreme disregard for human life). Applied Justice-Based Legitimacy includes the pragmatic accommodation of “substantial compliance” which does not strip an actor of
legitimacy for minor, isolated instances of harm (and unfortunately maybe much worse), but also does not allow for significant and widespread or repeated instances of harm or other egregious violations of human rights. Injustices are far too common, but Applied Justice-Based Legitimacy takes into account the prevalence of noncompliance along with the importance of inclusion and participation for the purposes of reforming the international context toward peace and a greater degree of justice.

Maybe most importantly, Applied Justice-Based Legitimacy, which features procedural justice, satisfies the condition of effectiveness, that the solution includes at least the theoretical resources and practical guidance to make implementation and enforcement possible. The norms of procedural justice are ones that cannot be realized without also establishing an institutional system of rules and mechanisms, as discussed above with the norm of impartial review. Also, with regard to the procedural norm of impartial review of decisions by international actors, legal theorists could evaluate current review procedures, develop standards for impartiality (e.g., rules to protect against bias and conflicts of interest), and offer models of internal review procedures and, where necessary, external review procedures. External review may include proposals of models for additional institutions or forums for international judicial review or dispute resolution.\textsuperscript{30} Other accounts of international political legitimacy can be improved with similar practical guidance, but my view points out what is missing and attempts to fill in the gaps. My

\textsuperscript{30} Kiobel v. Royal Dutch Petroleum, 569 U.S. __; 133 S.Ct. 1659 (2013), the case recently decided by the United States Supreme Court under the Alien Tort Statute (28 U.S.C. § 1350), which involved a foreign corporation and a cause of action for egregious human rights violations occurring on foreign soil, presents an interesting dilemma: on the one hand, the court could provide a forum for redressing such egregious human rights violations despite the lack of direct connection with the parties or the events; and, on the other hand, the court could exercise restraint with our limited judicial resources despite knowing that the victims may have to go without justice. The court held that the presumption against extraterritoriality applied to cases under the Alien Tort Statute, thereby barring the cause of action. Such cases and the court’s ruling in this particular case present a challenge for legal theorists to develop other alternatives and collaborative models of international judicial review that would not involve overreaching by any particular state and could provide a forum for remedying such injustices in the future.
account not only offers improved criteria for making legitimacy assessments, it also offers practical guidance by including as a condition the adoption of JINS, specifying the mechanism required for JINS compliance, and providing model mechanisms as a method of implementation. By filling in the gaps, Applied Justice-Based Legitimacy is equipped for the global context in question, namely, a context with international actors who are not already legitimate and without the enforcement mechanisms to bring about a greater degree of compliance with standards of legitimacy.

The realist or skeptic may not be convinced, however, of the feasibility of widespread application of Applied Justice-Based Legitimacy and the adoption and implementation of JINS, but my response is this. We live in a different world today than we did before the great wars of the 20th Century. We live in a world that has effectively abandoned the Westphalian conception of the state of the colonial era for the more multilateral conception of sovereignty and authority of the 21st Century. Under current conditions and globalization, we cannot avoid learning about poverty and human rights violations in remote parts of the world, and we cannot avoid recognizing our economic and ecological interdependence. The question is not whether we will develop a global basic structure, but what the nature and quality of this global basic structure will be. We are now part of an international moral community that demands justice. Granted, there are competing conceptions of justice, just as there are competing conceptions of the good, but the requirement of justice for international political legitimacy, I think, reflects the basic core of all reasonable conceptions of justice that is suitable for universal application and that can be modified to afford greater protection as needed in different political and cultural contexts. There will always be dictators and lawbreakers, but it is more realistic to expect progress toward a
more rule-governed international system than to envision a reversion to an unregulated era where the strong do whatever they can and weak must accept whatever they must accept.
3. The Requirement of Justice

In this chapter I defend the claim that justice is a necessary condition for international political legitimacy. Pragmatic accounts of legitimacy as discussed in an earlier chapter do not require justice as a necessary condition for legitimacy. Under pragmatic or consequentialist accounts of legitimacy, it may be the case that international actors have as one of their primary objectives the promotion of global justice and the protection of human rights, but the critical point is that these accounts do not require justice as a necessary condition. My account of international political legitimacy, Applied Justice-Based Legitimacy, by contrast, requires justice and, as a realistic account concerned with effective application, specifically features procedural justice. My claim in this chapter is that justice is a necessary condition for international political legitimacy and that justice at minimum demands respect for basic substantive and procedural rights, including due process and formal equality, which together provide the theoretical resources to generate rules and mechanisms for implementation and enforcement. This chapter is divided into three main sections: in section 3.1, I defend the claim that the requirement of justice is necessary for international legitimacy; in section 3.2, I identify the basic substantive and procedural rights that are essential to the minimal justice necessary for legitimacy; in section 3.3, I defend the right to due process, in particular, as essential to any law-governed system and explain how respect for due process is able to generate rules and mechanisms for international justice; and, in section 3.4., I defend the requirement of justice against its main alternative, global democracy, arguing that democracy is neither sufficient nor necessary for international political legitimacy.
3.1. Minimal Justice as Necessary for International Political Legitimacy

Political legitimacy is an evaluative property of international rules or actors consisting of certain conditions the satisfaction of which justifies the possession or exercise of political power among a set of actors or within a system of rules. The first condition of Applied Justice-Based Legitimacy is substantial compliance with JINS. An IA substantially complies with JINS by adopting and implementing a set of rules and mechanisms that satisfy the requirement of justice. The requirement of justice refers to a minimum standard of justice involving both procedural and substantive rights. My claim is that this requirement of justice is one of the necessary conditions for political legitimacy. I defend this claim by returning to the criteria for legitimacy and arguing that a minimal standard of justice not only helps satisfy the criteria, but also, an account of legitimacy without justice would be fatally deficient. I also defend this claim by responding to some common objections.

The five criteria for a set of standards for international political legitimacy are: (1) universalizability, the solution must be general enough to be applied across borders and cultures (see Buchanan, 2010(1), pp. 71-102; Tasioulas, 2010, pp. 105-112); (2) consistency, the norms or standards must be able to produce consistent, uniform, and predictable results; (3) sufficient moral justification, the solution provides moral justification and moral justification that is sufficient to achieve wide acceptance by the international community without further justification, (4) practicality, the solution addresses the political realities and is flexible enough to be implemented in the real world, and (5), effectiveness, the solution includes at least the theoretical resources and practical guidance to make implementation and enforcement possible (see Blake, 2008; Tesón, 1998, p. 16). The requirement of justice in my account of international political legitimacy does its part to satisfy all five criteria and, moreover, as a conception of
minimal justice that requires respect for procedural rights, my requirement of justice or something similar is crucial for the satisfaction of the sufficient moral justification and effectiveness criteria. Without a requirement of at least minimal justice, an account of legitimacy would fail the sufficient moral justification criterion. Also, without the rules and mechanisms of procedural justice, an account would fail the effectiveness criteria. What follows is an explanation of these points as I discuss each criterion in the order listed above.

First, universalizability refers to applicability across borders and cultures. The requirement of justice that I defend is universalizable because it includes only a minimum set of basic values that is or should be shared across cultures and, by virtue of being a minimum set of values, can be tailored and supplemented to accommodate different cultural and political contexts. My approach begins with the assumption that most cultural and political contexts have different yet reasonable conceptions of justice or different yet reasonable conceptions of the good. The requirement of justice is able to accommodate these different cultural contexts because it is minimal in nature and includes only what is essential for international peace and security, leaving the rest to be determined in concrete political communities consistently with the histories, traditions, beliefs, and values within those communities. The requirement of justice includes respect for basic substantive and procedural rights. Basic substantive rights include what is necessary for a minimally decent life, namely, security, subsistence, and certain basic liberties. Security rights include the right to life and bodily integrity. The right to subsistence includes the right to food, water, and shelter. Liberty rights include freedom of movement and freedom of conscience. Basic procedural rights include due process and formal equality. Even if different cultural contexts do not use the same concepts or terms, I submit that these basic rights reflect basic values that can be applied across cultures. There may be different reasons for this,
but wide acceptance of international and regional human rights documents with these rights provide prima facie evidence of their universalizability.\textsuperscript{31}

Some may object to the minimal nature of the requirement of justice as being inadequate and therefore inconsistent with the values of their political community. My claim, however, is not that the minimal justice necessary for legitimacy is sufficient to satisfy the demands of any particular reasonable conception of justice. Rather, my claim is that respect for basic substantive and procedural rights is necessary for justice. In fact, satisfying the requirement of justice alone in certain communities may be viewed as an injustice. For example, a community that views justice as requiring democracy would find the lack of democracy unjust, but unjust not because of an incompatibility, but because of a deficiency. My account of legitimacy with its requirement of justice, however, sets only a minimum standard that can be supplemented in concrete political communities consistently with the histories, traditions, beliefs, and values within those communities. There is nothing in my account that prevents those communities that require democracy for full-blown justice to provide for such requirement in their rules and institutions.

Some may still object that the requirement of justice is inadequate even as a standard of minimal justice. As mentioned, the requirement of justice includes respect for basic substantive and procedural rights. Substantive rights include what is necessary for a minimally decent life.

\textsuperscript{31} See Universal Declaration of Human Rights (1948); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Charter of Fundamental Rights of the European Union (2000); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); African Charter on Human and People’s Rights (1981); American Convention on Human Rights (1969); ASEAN Human Rights Declaration (2012); Asian Human Rights Charter (1998). The Asian Human Rights Charter provides, for example, in paragraph 2.2: “We endorse the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and other international instruments for the protection of rights and freedoms. We believe that rights are universal, every person being entitled to them by virtue of being a human being. Cultural traditions affect the way in which a society organizes relationships within itself, but they do not detract from the universalism of rights which are primarily concerned with the relationship of citizens with the state and the inherent dignity of persons and groups.”
The minimal requirement corresponds to the minimal standard of international legitimacy. We are concerned here with legitimacy for the purposes of political and economic interaction. The status of illegitimate would warrant disengagement and even intervention, if necessary, by force or sanctions. The objector may want something more robust in even a minimal standard of justice for legitimacy, but, if so, the same objector must also be willing to follow through on imposing the burdens of disengagement. If actors were labeled as illegitimate, but did not suffer the burdens of disengagement, the standard would be one in word only and not action. The standard would be aspirational at best and meaningless at worst. It is not enough simply to offer an alternative in the abstract, the alternative must be an alternative standard for legitimacy, in that, it sets the standard for engagement and disengagement.

Moreover, the objector who wants a more robust minimal standard of justice for legitimacy also must itself satisfy the universalizability criterion. The objector may not be satisfied with my minimal standard because he has in mind some other conception of minimal decency. There may be a sliding scale between survival and human flourishing with my conception of minimal decency somewhere along the scales, closer to survival. The objector’s conception of decency or the minimal standard necessary for legitimacy may be closer to flourishing. My conception of minimal decency includes adequate food, water, and shelter. The objector, for example, may also include employment and leisure, but maybe not necessarily paid holidays. The question is, whether any additional requirements could or should be universally accepted as necessary for legitimacy. Stated differently, if an international actor respects the right to food, water, and shelter, but does not also make provision for employment and leisure, should the actor be subject to censure or sanction? It seems plausible to me that some states, as a matter of foreign policy, may limit their interaction with the offending international actor; the
actor may not be legitimate according to the state’s standards. But the specific question here is, as a universal standard of international legitimacy, should the international community subject the offending actor to censure or sanction for this reason? This seems an insufficient reason for imposing the burdens associated with illegitimacy. Such standards would not be accepted universally as a standard for legitimacy. My requirement of justice, on the other hand, does provide sufficient reason for imposing the burdens associated with illegitimacy for the international community. Those who fail to satisfy the requirement of justice would be excluded as illegitimate. States and other international actors can set their own standards based on their own conceptions of decency and justice as a matter of foreign policy. They may exclude or sanction not only the international actors who fail under my account, but also those who fail under their own standards. Different states and non-state actors may arrive at different judgments. Those who are considered illegitimate by some may be considered legitimate by others. Different standards, however, even if appropriate under a particular cultural or political context as a matter of foreign policy, are not universalizable as a standard of international legitimacy. Under my account, those who are considered illegitimate because they fail the requirement of justice would be considered illegitimate by everyone else with a reasonable conception of justice.

It is not the more demanding standards of justice that present problems for my account with respect to the universalizability criterion, but those that are less demanding. There may be a few communities that reject one or more of the basic values included in the requirement of justice. A problem may arise if my requirement of justice is incompatible or in direct conflict with the rules of a particular community. However, even if a particular community seems to reject one of the basic values, we would need to determine whether there is a direct conflict—a
rejection of the value or merely the absence of a provision protecting the value in its rules and institutions. There is no direct conflict in one of two ways: first, as described above, when the requirement of justice includes less than what is required for justice within a particular community (e.g., not requiring democracy) and, second, when the requirement of justice includes more than what is required for justice within a particular community (e.g., requiring formal equality). Either way, the requirement of justice and the particular conception of justice within the particular community are compatible. There is a direct conflict only if the particular community rejects one of the basic values. And, if so, we would need to determine further whether the community itself subscribes to a reasonable conception of justice. An account of international legitimacy must accommodate the reasonable pluralism of the international context and communities within that context that have a reasonable conception of justice. There is no need, however, to accommodate communities that do not subscribe to a reasonable conception of justice. The particular community, for example, may reject the right to be treated as equals before the law and instead may have rules or institutions that treat certain human beings such as minorities as inferior. This is where I would submit that such communities simply do not subscribe to a reasonable conception of justice. I think it would be rare to find a community that rejects the values underlying the basic substantive and procedural rights and yet subscribes to a reasonable conception of justice. Of course, this depends on what is meant by a “reasonable conception of justice” and different communities will have different interpretations of what justice requires. But these interpretations have to be within the bounds of reason or consistent with the very concept of justice itself. There may be different conceptions of justice, but when the conception strays so far afield of what justice is, so that the conception either captures some entirely different concept or even includes decisions or actions that are contrary to justice, it no
longer counts as a reasonable conception of justice. A conception of justice that treats certain
human beings as inferior on the basis of race, ethnicity, or religion is not a reasonable conception
of justice. For these reasons and because of the minimum standard set by the requirement of
justice, I think it would be fair to say that the basic values included in the requirement are at least
presumptively universalizable and it is for those who would suggest otherwise to show that it is
direct conflict with a reasonable conception of justice.

As to the next criterion, my requirement of justice satisfies the consistency criterion
because it provides a set of substantial constraints that are consistent across cultures. My
approach does not involve a world state or a world constitution, but rather, models of standard
rules and mechanisms that comply with the requirements of substantive and procedural justice
that can be adopted and implemented by various international actors. Because the models each
require respect for basic substantive and procedural rights, there would be wide and general
consistency of outcomes. The account allows for different specifications in concrete political
communities, as mentioned above, but it does not allow for the adoption of rules inconsistent
with respect for basic substantive and procedural rights. What is crucial is not that every
international actor arrives at exactly the same outcome, but that every actor satisfies the basic
requirements. The requirement of respect for security rights, for example, includes the right of
bodily integrity. International actors cannot themselves nor can they allow those under their
authority to torture, rape, mutilate, or commit any other violation of bodily integrity. How
exactly these offending acts are defined and the appropriate penalty for them may vary from
community to community (and of course there will be disputes as to whether these definitions
and punishments are consistent with justice). But the account at least provides a set of
substantive constraints that can be applied across cultures.
As to the third criterion, a justice-based account of legitimacy conditioned in part on at least a minimal requirement of justice satisfies the sufficient moral justification criterion. Sufficient moral justification refers to reasons that are intrinsically compelling, in that, they are compelling not because of what might be obtained, but in and of themselves. Reasons based on justice or, specifically, reasons that require compliance with human rights norms, are intrinsically compelling. They are compelling in and of themselves. As such, they should enjoy wide acceptance among reasonable or morally-minded members of the international community. Because my account includes a condition that requires respect for basic human rights, it satisfies this criterion of sufficient moral justification. My account, in particular, requires substantial compliance with a just international normative structure, which is a set of laws and mechanisms that satisfies the requirement of justice. The requirement of justice, again, requires respect for basic substantive and procedural rights. Because my account requires respect for the most basic human rights, it has potential for wide acceptance among the morally-minded members of the international community.

An account of legitimacy without a similar requirement of justice would not satisfy the sufficient moral justification criterion for international political legitimacy for two reasons. First, political legitimacy is an evaluative standard that concerns the relationship between the source of power and those possibly affected by its decisions or actions, including those under its power and also other international actors. Legitimacy obtains when these vertical and horizontal relationships are in some way well-ordered. The vertical relationship between an international actor and those subject to its decisions or actions are well-ordered when the international actor respects the basic human rights of its subjects (i.e., respecting substantive rights) and when the international actor is not in some other way abusing its power or authority (i.e., respecting
procedural rights). The horizontal relationships between an international actor and other international actors are well-ordered primarily when there is fair dealing and the actor is not in some other way acting beyond the scope of its power or authority (i.e., respecting procedural rights). The specific qualifications of a well-ordered relationship may be contested, but the qualifications usually include these or similar features. These features of a well-ordered relationship are essentially aspects of justice. Legitimacy is in its very conception an evaluative standard that concerns the objective determination that the source of authority is in well-ordered vertical and horizontal relationships, wherein being well-ordered entails aspects of justice. Legitimacy, therefore, in its very conception requires justice.

Second, if I am right about what constitutes sufficient moral justification for the international context, then those accounts of legitimacy that are not based on justice or respect for human rights would not satisfy the criterion. As I understand it, sufficient moral justification for the international context concerns that which should gain wide acceptance by morally-minded members of the international community. Also, as I understand it, only reasons based on justice or reasons that require compliance with human rights norms should gain wide acceptance by morally-minded members of the international community. The reason for this is that, as growing convergence on the concept of human rights indicates, respect for human rights captures our basic values across cultures and there is no other adequate justification that does not rely in some way on justice or respect for human rights. When speaking of the international community, we cannot but recognize the reasonable pluralism of the international community with different cultural and political contexts with different reasonable conceptions of justice. It may be convenient to assume that a particular normative framework with a set of substantive commitments and norms may gain acceptance internationally, but there is no justification for this
that would be sufficiently compelling within every cultural and political community with a reasonable conception of justice. An account of international political legitimacy that accommodates the pluralism of the international context should provide moral justification to morally-minded members that would constitute sufficient justification under their own reasonable conceptions of justice. A Razian account of legitimacy, for example, offers moral justification for authority, but that justification while constituting sufficient justification in certain liberal contexts would not constitute sufficient justification in other contexts. Other accounts of legitimacy committed to a particular conception of justice would encounter similar difficulties.

There may be growing support for other accounts of international political legitimacy, but these too are based on justice or respect for human rights. For example, there may be an account of legitimacy that requires respect for the rule of law. The phrase ‘rule of law’ generally is used in contrast to the ‘rule of man.’ The general idea is that a political community is governed by law, as opposed to by one man or a group of men. The rule of law is not uncontroversial and, among theorists, there are different conceptions of the rule of law. But, as commonly understood, the rule of law involves certain limitations on the exercise of power, in that, any exercise of power must be according to law and that the law applies equally to everyone, including those in power. Under one common conception of the rule of law, the rule of law also requires respect for other substantive rights. An exercise of power cannot infringe upon certain human rights of those under authority. The rule of law is therefore commonly associated with

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32 Simon Chesterman mentions a few different conceptions of the rule of law: Ronald Dworkin’s “rule-book” and “rights” models; Judith Shklar’s model of institutional restraint and the rule of reason; and David Dyzenhaus democratic positivist and liberal antipositivist conceptions. Chesterman nevertheless explains that the core definition of the rule of law has three elements: power cannot be exercised arbitrarily; the law must apply also to the state and instruments of the state; and the law must apply to all persons equally (Chesterman, 2008, p. 342). He also explains how the rule of law functions as a tool for promoting human rights generally.
human rights (see O’Scannlain, 2014, p. 1399; Zheng, 1999, p. 32). Whether conceived in this way or not, the concept generally involves justice. The rule of law imposes limits on the exercise of power consistently with at least procedural justice. As discussed in section 2 of this chapter, the concept of due process of law refers to the procedural rights that protect subjects from the arbitrary and oppressive uses of power. To be governed by the rule of law can be construed as synonymous to being afforded certain procedural rights that protect subjects from the rule of men. The rule of law may be promising and gaining support, but it too is a kind of justice-based approach. This further shows that only accounts of legitimacy that rely in some way on justice or respect for human rights have potential for wide acceptance by morally-minded members of the international community.

As for the next criterion, my justice-based account of international political legitimacy also offers a pragmatic solution for two main reasons. First, as discussed earlier, it recognizes the pluralism and cultural diversity of the international context and accommodates this diversity by requiring only a minimal requirement of justice. Second, it also recognizes the persistent problem of noncompliance. Noncompliance can be the result of intentional action or the result of a lack of resources or the lack of the necessary social or political institutions. To adequately address the problem of persistent noncompliance, we need a way to distinguish between what is a disqualifying noncompliance and what is not a disqualifying noncompliance. Noncompliance with respect to human rights norms is unacceptable in all forms and would justify criticisms and calls for recourse, but not every instance of noncompliance justifies exclusion and interference by sanctions or force. Noncompliance can come in different forms depending on the degree of harm (minor or significant), the duration of harm (isolated, repeated, or permanent), the extent of harm (local or widespread), and other features that make it particularly egregious (e.g., genocide.
or other factors to indicate an extreme disregard for human life). Substantial compliance is respect for basic substantive and procedural rights that does not amount to an egregious or similar violation of human rights. What is similar to an egregious violation is a violation that is significant in degree and either at least repeated in duration or widespread in extent. Such egregious or similar violation of human rights would justify exclusion or interference. My account would not strip an actor of legitimacy for minor, isolated instances of harm, but also does not allow for significant and widespread or repeated instances of harm or other egregious violations of human rights, such as genocide. It is substantial compliance because the international actor complies with JINS by respecting basic substantive and procedural rights in substantial part, even if it falls short of strict or full compliance, so long as any part left outstanding does not amount to a significant and widespread or repeated violation of human rights. This approach allows for some flexibility to address the realities of the international situation, for example, the ones mentioned above involving a developed state that temporarily lapses into violating some basic human right or a developing state that may be limited in resources and yet is making strides in providing its citizens with the basic rights necessary for a minimum standard of justice. The requirement allows for flexibility, but at the same time makes no concession for great or egregious human rights violations. Injustices are far too common, but Applied Justice-Based Legitimacy takes into account the prevalence of noncompliance along with the importance of inclusion and participation for the purposes of reforming the international context toward peace and a greater degree of justice.

Maybe most importantly, my account satisfies the last and final criterion of effectiveness, that the solution includes at least the theoretical resources and practical guidance to make implementation and enforcement possible. As mentioned above, the international context lacks
adequate enforcement mechanisms and, so, relies largely on voluntary compliance by at least the morally-minded members of the international community. Voluntary compliance occurs when the cause is sufficiently compelling in the sense of being supported by sufficient moral justification and when the cause is sufficiently compelling to prompt action. Because my account features procedural justice, it also is sufficiently compelling in the latter sense, in that, it offers the theoretical basis for other necessary procedural rules and mechanisms for its own implementation and enforcement. The norms of procedural justice are ones that cannot be realized without also establishing an institutional system of rules and mechanisms. The additional rules and mechanisms would provide the institutional structure necessary to prompt action. These rules and mechanisms would include, but not be limited to, instructions for voluntary compliance, a schedule of sanctions or punishments for noncompliance, a schedule of benefits and incentives, a mechanism for negotiation, and a mechanism for impartial review. These rules and mechanisms are the sorts of things that compel compliance in the domestic context. For example, members of a community begin to obey a new law such as the ‘move over law’ once the members are informed of the rule and when they realize through some mechanism such as random enforcement the penalties involved. Implementation of a new domestic law requires these common, yet effective rules and mechanisms. Similar rules and mechanisms are needed internationally.

An account of legitimacy that does not include procedural justice would fail the effectiveness criterion. Some accounts of legitimacy fail the effectiveness criterion for lack of trying. They do not offer anything by way of theoretical resources for their own implementation and enforcement. Others fail the effectiveness criterion because, while they offer the theoretical resources for adopting some norms of procedural justice, they neither offer a complete set of
procedural norms nor provide other resources for effective implementation and enforcement. For example, as mentioned in an earlier chapter, Buchanan and Keohane’s account of legitimacy provides some procedural norms for accountability and transparency, but do not provide enough to address the enforcement objection.

Even if there is wide acceptance that justice is a necessary condition for the legitimate exercise of political power, there may be some additional objections to the particular standard of minimal justice with the emphasis on procedural justice advanced here. It is worth reiterating that the five criteria for international political legitimacy correspond to common objections, such as the parochialism objection. The reasons given to explain that the requirement of justice satisfies the five criteria, including universalizability, therefore also serve to answer these common objections. There may, however, be additional objections. For instance, some may argue that the requirement of justice as a standard of minimal justice is insufficiently robust to achieve the aims of respect for persons or the broader aims of peace and security for the international context. Others may argue that the requirement of minimal justice even with procedural justice would not be effective in a context where there is no world state or adequate enforcement mechanisms.

A liberal theorist particularly one who advances the cause of global democracy may argue that the rights of due process and formal equality are insufficiently robust to secure the procedural rights necessary for justice. It should be clarified that some theorists argue for the more modest claim that a constitutional democracy is one way of satisfying the demands of justice (e.g., Christiano, 2010), while others seem to make the stronger claim that every state should adopt a constitutional democracy (e.g., Kuper, 2004 and Tesón, 1998). I address this objection in greater detail in section 3.4. My response here is to restate the objective of my
project, which is to provide an account of political legitimacy for the international context. The 
objective concerns legitimacy and includes only a requirement of minimal justice rather than 
full-blown justice. Standards of legitimacy establish a threshold whereby international actors can 
make decisions regarding engagement and disengagement, including decisions as to the 
appropriateness of sanctions or the use of force. It is the province of local communities to 
supplement the requirement of justice with more stringent laws and institutions consistent with 
their own reasonable conceptions of justice. An international theory, however, must be neutral 
with respect to different reasonable conceptions of justice and cannot include within the theory a 
requirement such as a requirement of democracy that may be consistent with some but not all 
reasonable conceptions of justice. The two aims of global justice include not only respect for 
persons, but also respect for cultural diversity. My approach attempts to draw the right balance 
between these two aims by including what is necessary for minimal justice and the protection of 
basic human rights, but leaving room for application in different political and cultural contexts.

As to the second objection, despite my efforts to address implementation and 
enforcement directly, there may be a lingering worry as to the feasibility of widespread 
application of an account of legitimacy with its requirement of justice. My claim is not that my 
account will be successful, but that it has the potential to be effective because it has the 
theoretical resources to generate norms and mechanisms for its own implementation and 
enforcement. Chapter 5 is devoted to addressing this objection more fully. Without a world state 
or adequate enforcement mechanisms, the account must come equipped with its own theoretical 
resources for implementation and enforcement. My account of legitimacy does this by featuring 
the procedural justice and the rights of due process and formal equality. Due process and formal 
equality together when specified with the relevant details provide the specific rules of order and
procedure, judgment and review, impartiality, transparency, accountability, and fair dealing. Due process and formal equality also provides the theoretical resources to generate a set of procedures and mechanisms to implement these rules. These procedural rules and mechanisms provide the structure or backbone of a law-governed system. No one can predict whether Applied Justice-Based Legitimacy or a similar account of legitimacy with procedural justice will ever take hold internationally, but the account at least includes the necessary resources for its own implementation and enforcement. As a necessary condition of Applied Justice-Based Legitimacy, the requirement of justice featuring procedural justice is critical for effectiveness and the satisfaction of the other criteria.

3.2. Basic Substantive and Procedural Rights

Justice, in its most general sense, refers to a relation between at least two individuals in which each individual is given what is deserved or due. The word justice comes from the Greek dikaios and the Latin ius, both of which are translated in English as right or just. What is right or just refers to what is due. The content of what is due depends on the subjects involved and the objects in a given context. What is due between two adult orangutans and what is due between two adult humans may vary depending on their needs or interests. What is due between two individuals also may vary depending on the context. For example, with two humans in an employment contract after services have been rendered, what is due is compensation for services. For another example, with two humans, one who cannot swim and is drowning in a shallow pond

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33 This conception of justice can be found in classical theories (Aristotle, Nicomachean Ethics, bk. V, ch. 1, 1130a3-4, 1130a15-16; Aquinas, Summa Theologicae, II-II, Q. 56, art. 1 and Q. 58, art. 2; Kant, The Metaphysics of Morals, 6:230) and more modern theories of justice (Rawls, 1971; Hart, 1961; Dworkin, 1977).

34 This conception of distributive justice as a four-part relation among subjects and objects also can be found in Aristotle (Nicomachean Ethics, bk. V, ch. 1, 1131a)
and another individual who happens to know how to swim and is standing nearby, what is due is an attempt at rescue. What is due may not be clear and undisputed in every context, but the point is, the subjects involved and the context matter. The context and the subjects involved frame the question as to the right standard of justice for international political legitimacy. My approach is to offer a kind of criteriological argument, using the features of the context in question as criteria to determine the right standard of justice.

The context here is the international domain. As nonideal theorists, we take into account the political realities of the actual international domain. This does not mean, however, that the approach has to perpetuate aspects of the present situation far into the future. It is important not only to account for the evolving situation with globalization and other features of the present international domain, but also to suggest realistic and plausible reforms and visualize how the world could be if those reforms were adopted and implemented. There are many features of the international domain that may be important to consider here, but I will focus on a few that are most relevant to our conception of justice for legitimacy: pluralism, the fragmentation of laws, and the problems with implementation and enforcement. These features exist to some extent in the domestic context, but they are more problematic for the international context. There is pluralism in the domestic context with different groups, each with different comprehensive doctrines or different conceptions of the good, but whatever diversity we find in the domestic context is multiplied by the number of different cultural contexts to give us the complex pluralism of the international context. This complex pluralism makes the task of establishing one set of norms that can be applied to each cultural context extraordinarily difficult. The challenge is to establish a set of norms that accomplishes the twin aims of respecting the rights of individuals or members of each group and respecting cultural diversity or the rights of the groups
themselves. These aims are often at odds with each other. The objective is to find the right balance between these two aims and not compromise too much for the sake of one at the expense of the other, such as compromising too much for the sake of respecting cultural diversity so as to fail in respecting basic human rights.

Another feature is the fragmentation of laws. There is some horizontal dispersion of power within states or organizations, but this too is more problematic at the international level. There are rules and mechanisms in place to provide order within the domestic context, for example, in the United States, the state supreme courts are the final arbiters of a question purely under a state statutory law or constitution and the United States Supreme Court is the final arbiter of a question under the federal law or constitution. There are many more competing sources of authority at different levels in the international domain, but no similar organization of authority. There are multilateral and international treaties and conventions, regional and international tribunals, and other international conferences, each contributing to a growing body of international law, but there are no rules or mechanisms to ensure uniformity and consistency. This is the fragmentation problem. It may not be possible to achieve perfect consistency or prevent forum shopping entirely, but another challenge for global governance is to minimize the fragmentation of laws—to ensure greater uniformity and consistency and thereby make the application of law fairer and more just.

The last problem has to do with effective application, namely, the problems of implementation and enforcement. There are challenges with implementation domestically as well, but there are also institutional structures in place to ensure the implementation of law. Statutes usually explicitly delegate authority to an officer or an agency or create an office or an agency to implement the law, establish the rules and order for the law’s implementation, and
allocate the funds necessary to bring this all about. The law then comes built-in with the rules and mechanisms for its own implementation. There are very few institutional structures in place internationally to ensure the implementation of international law. Some organizations have mechanisms internal to those organizations for the implementation of their rules, some treaties and conventions spell out for the parties to those treaties and conventions the requirements for compliance and the steps for their own implementation, and some laws require for their implementation state cooperation. There are, however, no adequate international rules or mechanisms already in place for the implementation and enforcement of new law. To some extent, even domestically, as described above, the law must include the rules and mechanisms for its own implementation, but to a far greater extent, internationally, because of the lack of existing enforcement mechanisms, whether a law succeeds or fails often depends critically on its power to provide for its own implementation. Failing to account for this is to grossly underestimate the needs of the context, namely, the international domain. As nonideal theorists, we take our contexts as we find them and this is one fact about the international domain that is critically important to take into account when constructing any theory for this context. A theory of legitimacy, therefore, must provide at least the theoretical resources to generate the rules and mechanisms for its own implementation. A theory that does not take effective application seriously fails in this regard; it is dead upon arrival. The problem with most international theorizing is that it fails in this way.

As nonideal theorists, we also take our subjects as we find them. What is due also depends on the subjects involved.35 The subjects here are human beings. What are humans due in

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35 The content of what is due may vary depending on one’s approach to justice. A natural lawyer’s list of basic needs will include the human goods, other welfarists may include the conditions necessary for exercising essential human
the international context? We are not talking here about what humans are due generally or in other contexts, for example, within a family or a local community, but rather, what humans are owed within and from the members of the international community. This narrow question focuses on international actors, recognizing that international actors neither have the authority nor the resources to give humans everything they need for life or the good life. This narrow question also concerns the justice necessary for legitimacy and not justice in some full-blown sense or any particular conception of the good life. What does justice demand of international actors to qualify as legitimate? When an actor is legitimate, it enjoys the benefits of legitimacy such as participation in the international community and is protected from the burdens of illegitimacy such as being subject to censure or intervention by sanctions or force. The question is a threshold question of what standard of justice must be violated such that the violation would warrant censure or intervention by sanctions or force. The aim is to establish the right standard, wherein “right” refers to maintaining a level of justice necessary for a peaceful and secure association of international actors and a peaceful and secure domain for political and economic activities. If the standard were set too high, then very few would qualify for participation, thereby undermining the development of a law-governed system. If the standard were set too low, then many would qualify but the resulting system may be unjust and therefore ultimately undermine international peace and security. Inclusiveness is important for greater participation, but it alone cannot be decisive in establishing the right standard. The right standard is the standard that also would promote peace and security.

capabilities, and the rights theorist may include those needs long established by social norms or practice (Finnis, 1980; Nussbaum, 2000; Hart, 1961).
As between a minimal standard of justice and a full-blown standard of justice, the right standard is a minimal standard of justice. What may disrupt international peace and security are instances of serious injustice or oppression. Also, there may be many ways in which an international actor falls short of a full-blown standard of justice and yet retains the benefits of participation in the international community. There are many reasons for this, including the importance of greater participation, the actor’s own interests, and the interests of those affected by the actor’s services. The justification for denying legitimacy must be weighty enough to set aside these interests. A violation of a particular conception of full-blown justice is not enough. The harms to the interests involved may exceed the harms caused by any violation of justice. Moreover, what may count as an instance of injustice under one’s conception of full-blown justice may not count as an instance of injustice under a different conception of full-blown justice. Instead, the right standard must be based on the values that are shared across cultures. The values that are shared across cultures are not the particularities of a full-blown conception of justice, but rather, are the values that apply to humans or the human condition regardless of their particular cultural or political contexts. The right standard more specifically must protect against serious violations of the most basic values that are shared across cultures. A minimal conception of justice is a conception of justice that includes only these basic values. Therefore, the right standard is a minimal standard of justice.

What are the very basic values that apply to humans or the human condition regardless of their particular cultural or political contexts? What are humans due in this minimal sense? Basic values can provide the basis for a set of basic rights. My approach is to speak in terms of rights, because there is increasing acceptance of the language of rights and, maybe as a result of this, because the concept is understood as having normative force in our political discourse and
practice. There is a range or spectrum of different rights theories, some of which provide a very minimal list (Rawls, 1999(2); Shue, 1996) and others of which provide a more expansive list (Nussbaum, 2000). Also, some theorists take success to be the actual enjoyment of the content of the right while others consider success as the provision of the conditions necessary for the enjoyment of the right. There also may be a relationship between how demanding the right is and what is required for its fulfillment. While it is impractical here to consider all the different normative theories or even just the theories of human rights, what is more manageable is to consider two representative theories, a minimalist one and a more expansive one, to determine which is more appropriate in establishing a set of basic human rights for the minimal justice necessary for legitimacy.

The capabilities approach, as offered by Nussbaum and Amartya Sen, is one example of a more expansive theory. Nussbaum, as an Aristotelian, has in mind human flourishing and offers a comprehensive list of human capabilities, including the following: biological life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; ability to live with concern for and in relation to other species; play; and control over one’s environment (Nussbaum, 2000, pp. 77-80). Nussbaum considers success to be making possible the exercise of the capabilities—albeit not so much because it would be too demanding otherwise, but because of the room she allows for the exercise of practical reason. One need not actually exercise the capacity or enjoy the right, so long as he or she is provided the conditions necessary to exercise the capacity if he or she so chooses. Nussbaum’s capabilities approach is based on the essential functions of the subject in question and attempts to provide for the exercise of these functions. It is not an extravagant account of rights, but a modest one. It is nonetheless, true to Aristotle, concerned with a flourishing life. Nussbaum’s approach may be a
good contender for measuring how well humans are living, but not necessarily a good contender for determining the criterion for minimal justice as necessary for legitimacy.

The capabilities approach answers the question of what is due human beings and not the narrower question of what is due human beings from international actors within an international context for the purpose of determining the minimum qualifications for engagement and disengagement. Legitimacy, as I have defined it, is a threshold concept, namely, an evaluative criterion for determining an international actor’s qualification for engagement or disengagement in a political or economic enterprise. Because an international actor’s participation in political and economic enterprises is usually of such critical importance, disqualification is no small matter. Disqualification also implies a certain cutoff point. The cutoff point for legitimacy, i.e., the point at which an international actor is disqualified from participation in some political or economic enterprise, requires sufficient justification, such as significant, repeated, and/or widespread instances of harm or other egregious violations of human rights. My point here is that the capabilities approach does not limit the scope of human rights to the most basic ones, thereby providing sufficient justification for disqualification.

Amartya Sen, who also defends a capabilities approach, offers a powerful framework for measuring well-being within a domestic community and comparing social disparities between communities. The capabilities approach, however, offers above and beyond what is necessary for legitimacy. The approach can point to useful markers of basic human functioning, such as education, adequate food and clothing, and shelter, but it also points to capabilities beyond basic human functioning. Sen himself explains this.

A second issue to emphasize is that the capability perspective is inescapably concerned with a plurality of different features of our lives and concerns. The
various attainments in human functioning that we may value are very diverse, varying from being well-nourished or avoiding premature mortality to taking part in the life of the community and developing the skills to pursue one’s work-related plans and ambitions. (Sen, 2009, p. 233.)

Granted, it is possible to apply Nussbaum’s or Sen’s capabilities approach, as requiring certain conditions necessary for the exercise of the basic human capabilities, and to include as a criterion for legitimacy a certain degree of success in the implementation of such conditions from 100% for certain capabilities such as life and possibly nothing or nearly 0% for other capabilities such as emotional expression. But this in effect is no different from an approach that begins with a minimal conception of justice and clearly identifies what is strictly necessary for a minimally decent human life.

It is important to emphasize that we are concerned here with the political power or authority of international actors and not with the exercise of power or authority more generally or with other aspects of human life. There are many aspects of human life that are governed by other norms and authorities independent of the state and other political actors. It is not always the role or responsibility of the state or other political actors to make possible or maintain the exercise of certain human capabilities. Sometimes it is the role of parents, teachers, religious leaders, or the even the individual human being himself or herself to ensure and maintain the exercise of certain human capabilities. While it may be argued that political actors should not interfere with the exercise of emotional expression or any other important human capability, it is questionable whether such interference is even possible or whether there are significant threats sufficient to warrant inclusion of the right of emotional expression in a set of minimal rights necessary for legitimacy such that the deprivation of such rights would provide sufficient grounds for disqualification. Because international political legitimacy is concerned with
political actors and the most urgent rights, the capabilities approach, while a good contender for measuring how well humans are living, may not be a good contender for determining the criterion for the minimal justice necessary for legitimacy.

Henry Shue, in contrast to Nussbaum, has in mind our basic needs and considers success to be the actual exercise of the right or enjoyment of the content of the right (Shue, 1996). For Shue, something is a moral right only if it “provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats” (Shue, 1996, p. 13). A moral right is basic, for Shue, “only if the enjoyment of [it] is essential to the enjoyment of all other rights” (Shue, 1996, p. 19). Shue is well-known for defending subsistence rights as equally basic as security rights or, more precisely, arguing against the perception that security rights are negative, that subsistence rights are positive, and that this justifies giving precedence to security rights over subsistence rights. He argues that the distinction between positive and negative rights is not as helpful as most people assume and that every basic right, both security and subsistence rights included, involve three correlative duties: the duty to avoid depriving; the duty to protect from deprivation; and the duties to aid the deprived (Shue, 1996, p. 52).

Maybe less known is Shue’s defense of at least three different types of basic substantive rights—security, subsistence, and liberty. Shue makes clear that he is not attempting to identify every liberty right or even every basic liberty right. Shue’s modus operandi is to argue for the inclusion of a right as basic that may not otherwise be considered basic by others. Shue argues that, just as freedom of physical movement is a basic right, liberty of effective participation is a basic right. For Shue, participation involves having influence over “the fundamental choices among the social institutions and the social policies that control security and subsistence and,
where the person is directly affected, the operation of institutions and the implementation of policy” (Shue, 1996, p. 71). Shue argues that the right to effective participation is basic in the relevant sense: the enjoyment of it is essential to the enjoyment of all other rights. There is even a codependence among subsistence, security, and liberty rights, in that, the right to influence choices on the institutions and policies that control security and subsistence would indeed be necessary to enjoy subsistence and security, particularly because of the susceptibility of these rights to standard threats.

Shue anticipates the obvious objection that liberty rights may not be necessary if there was a benevolent dictator who amply supplied the subsistence and security needs of his or her citizens without their input or influence. Shue responds to this objection, as follows:

“…[T]o enjoy something only at the discretion of someone else, especially someone powerful enough to deprive you of it at will, is precisely not to enjoy a right to it. In the absence of participatory institutions that allow for the forceful raising of protest against the depredations of the authorities and allow for the at least sometimes successful requesting of assistance in resisting the authorities, the authorities become the authoritative judge of which rights there are and what it means to fulfill them, which is to say that there are no rights to anything, only benevolent or malevolent discretion, including the discretion to decide what counts as benevolent.” (Shue, 1996, p. 78.)

Although his argument relies on a practical or political, as opposed to a traditional, conception of rights, Shue seems correct in that, given the standard threats of the abuses of authority and the lack of any other meaningful constraints, certain basic liberties, such as the right to effective participation, is necessary for an individual to protect and enjoy his other rights. Included in Shue’s list of basic rights are security, subsistence, and certain basic liberties.

My approach is in some ways closer to Shue’s in that it includes only the most basic rights. My list also includes security, subsistence, and basic liberties. My approach, however, is
not committed to a practical conception of rights and an instrumental definition of basic rights as
effects that are necessary for the enjoyment of all other rights. My approach is in other ways
closer to Nussbaum’s in that it considers the subjects involved to determine the set of basic
human rights. The content of the rights is not determined because it is instrumentally necessary
for the enjoyment of other rights, but because it is part of the right standard of justice for
international political legitimacy. This qualification is what differentiates my approach from that
of Nussbaum and others who offer a more expansive list of human rights. My objective is not to
offer a full-blown account of justice, particularly because I recognize the possibility of
competing reasonable conceptions of justice, but to offer an account of minimal justice
subsumed in all reasonable conceptions of justice, thereby focusing on only the most basic
human rights.

There is a cutoff to what is included as a basic human right that corresponds to the cutoff
to what qualifies as legitimate. Respect for certain rights, such as the rights to life, bodily
integrity, food, water, and shelter, is what is minimally necessary for legitimacy. Significant,
repeated, and/or widespread violations of these rights would constitute sufficient justification for
disqualification. The cutoff is not arbitrary, where what is arbitrary is without reason or
justification. There is good reason for the cutoff because of the consequences of disqualification
and because we are concerned here with legitimacy in the international context.³⁶ The
justification based on the relevant standard of legitimacy can be illustrated by considering two

³⁶ Another way to explain the cutoff is to think in terms of having a particular focus. The focus here is what is
minimally necessary for legitimacy in the international context. For example, in writing about the fundamentality of
all basic values within a natural law framework, John Finnis writes, “But one can shift one’s focus. If one is
drowning, or, again, if one is thinking about one’s child who died soon after birth, one is inclined to shift one’s focus
to the value of life simply as such.” (Finnis, 1980, p. 92). Although Finnis takes this shifting of one’s focus as a
subjective view of the basic values, the idea here is to take a certain focus and identify the most urgent values under
those circumstances. The reason why this is objective, rather than subjective, is because the circumstances of the
international context are shared by us all.
concentric circles: an inner circle including a list of rights and an outer circle fully subsuming the inner circle but also including additional rights (see figure 1). The boundary of the inner circle is the threshold for legitimacy and the boundary of the outer circle is the threshold for justice. This illustration may be duplicated for different conceptions of justice.

The reason for a cutoff is because the minimal justice necessary for legitimacy is less than the full-blown justice intended in any reasonable conception of justice. The cutoff also includes what is shared among different reasonable conceptions of justice. Included in the inner circle is the right to political participation; included in an outer circle reflecting a conception of justice in a liberal constitutional democracy is the right to democracy or a right to a democratic form of governance. The cutoff is not only practically necessary, but also it is what justice requires under conditions of reasonable pluralism. It is consistent with the principle of toleration discussed in Chapter 4. Respect for certain basic human rights, for example, freedom of conscience, requires accommodation for different beliefs and values and the different reasonable conceptions of
justice based on those beliefs and values. As also discussed in chapter 4, this accommodation for different reasonable conceptions of justice is inconsistent with imposing a dominant conception of justice on others.

Which rights are basic human rights, i.e., those rights included in the inner circle described above? I would include three general types of basic substantive human rights, namely, security rights, subsistence rights, and certain liberty rights. It is important to note that rights are basic, in that, each captures some provision of justice or what human beings are due that cannot be fulfilled by some other provision of justice. When we are speaking of legitimacy, security includes biological life and bodily integrity. Subsistence includes clean water, adequate food, and adequate shelter as necessary given one’s circumstances. Liberty includes freedom of conscience, political freedom, and economic freedom. By freedom of conscience, I mean the freedom to choose and, to some extent, pursue some conception of the good. By political freedom, I mean the freedom to participate, to some extent, in one’s political community. By economic freedom, I mean a basic right to property, including the freedom to own property and, to some extent, enjoy the benefits of one’s labor and improvements to property. “To some extent” cannot be specified here in great detail, but what is necessary for legitimacy is the provision of these basic freedoms to some meaningful extent, but not to the extent such that it would undermine the norms and values of other reasonable conceptions of the good.

As mentioned above, my approach also is not committed to a practical or instrumental conception of basic right. I also would include effective participation in influencing political and economic decisions, but the reason for this is not because this right is merely instrumental for the

37 Respect for basic right to life and bodily integrity is common not only in international documents, but also in regional human rights documents (see, e.g., the Cairo Declaration on Human Rights in Islam (1990) and the Bangkok Declaration of Human Right (1993)).
enjoyment of all other rights. Rather, the reason is because this is what humans are due as rational members of a political and economic community responsible for making choices that may affect them. Humans are rational beings and, as such, should be allowed to exercise practical reason in decisions that touch or concern them. It is therefore a matter of what is due (i.e., a provision of justice), rather than what is instrumental to the enjoyment of all other rights.

My approach may invite objections from defenders on both sides of the rights spectrum. The liberal rights theorist, for example, may object that the freedom to participate to some extent is too vague and inadequate to provide sufficient protection against standard threats. What is needed, according to the liberal rights theorist, is democracy or something close to it with the right to vote and the right to public protest. But my project here is not to identify the liberties necessary for a liberal democracy, but to identify the liberties necessary for minimal justice as required for international political legitimacy. We are concerned here with the threshold at which, if an international actor falls below the threshold, then the international community would have justification for disengagement or intervention through force or sanctions. Without also doing a comprehensive study of different cultures or political systems, it is impossible to predict prospectively what level of participation exactly would be necessary to allow individuals to influence their communities and yet maintain the values inherent in different cultures with their different reasonable conceptions of the good. A benevolent dictator who withholds from his or her citizens the freedom to participate in political and economic decision-making would violate the requirement of justice with respect to this right, but a constitutional monarchy with constitutional protections that affords citizens the right to influence law and policy in some meaningful and effective way would not. Liberalism is one reasonable conception of justice, but not necessarily the only one.
The Aristotelian rights theorist, on the other hand, may object to my exclusion of other rights. Most rights theorists would include the rights in the short list above, but the point of contention concerns whether the list is adequate. I would repeat that my project here is not a theory of global justice or a comprehensive theory of the good, but rather to identify what is essential for minimal justice as required for international political legitimacy. Consider, for example, in 2013, the international community’s contemplated intervention into Syria for alleged use of chemical weapons by the Syrian government. The use of chemical weapons, which are considered to be weapons of mass destruction, in warfare is banned by the Geneva Convention of 1925 and Chemical Weapons Convention (effective 1997). Even if the evidence found by different states, or by the UN inspectors, showed that President Bashar al-Assad’s government used chemical weapons against rebel forces and civilians around Damascus, there still was doubt at the time as to whether this provided sufficient justification for military intervention (see, e.g., British Parliament’s vote against military intervention). When there is doubt even as to whether this sort of behavior rises to the level of falling below minimal justice so as to jeopardize one’s legitimacy and require action, then it puts the Aristotelian objection in perspective. We are not concerned here with the elements of the good life, but what is minimally required for international peace and security.

Moreover, a minimal standard of justice does not in any way prevent particular communities from pursuing their own full-blown conceptions of justice or conceptions of the good. Just as a federal law in the United States or a directive in the European Union may specify a general minimum rule, states are able to go beyond the minimum and adopt legislation that requires more and is more consistent with their own local laws and cultural norms. There may be a worry that the minimum standard would establish too low a bar, particularly considering that
international law also serves the function of norm projection. This worry is a serious one, but I think we can safeguard against it by making clear that the minimal standard is sufficient for the purpose of qualifying as legitimate only and that it falls short of full-blown justice. The worry also is mitigated by the fact that particular communities have adopted much more demanding standards and are in the practice of promoting their conception of justice and that certain provisions of international law, such as the Universal Declaration of Human Rights, also sometimes include more demanding standards.

What I would add to the three basic types of substantive rights is two types of basic procedural rights. What many rights theorists do not address, at least not as much, are basic procedural human rights. The minimal justice necessary for legitimacy, however, has both procedural and substantive aspects, also known as formal and material aspects. The substantive aspect refers to the content of what is due, sometimes consisting of an individual’s essential or basic needs. The procedural aspect concerns how we are treated in our social, political, and economic interactions. Generally speaking, what is due is respect for humanity within ourselves and others and respect is shown by fairness and equality or, as these concepts have been developed in the law, by due process and equal protection under the law. As defined below, due process is any procedure or set of procedures necessary for justice, where justice refers to a relation of right order or equality between two individuals or groups. Formal equality or equal protection under the law requires treating similarly situated individuals equally.

Global justice often is concerned with distributive justice and the most urgent problems of the day, such as poverty and humanitarian crises. As a result, theorists who work in global justice often provide piecemeal solutions to the most urgent problems. Even theorists who provide a more comprehensive theory usually neglect to give pride of place to procedural rights.
But, as I explain below, these procedural rights are an absolutely essential component of any rule-governed system. It is even impossible to secure the provision of basic substantive rights without the tools made available through these elements of procedural justice. Unless procedural rights are recognized as essential and are developed alongside substantive rights, the system is bound to be deficient not only in its effectiveness, but also in its realization of justice. As discussed below, procedural rights are not included as basic human rights only because they are instrumental to the enjoyment of substantive rights, but because they guarantee some element of justice that cannot be realized without them.

The next two sections will define and defend the procedural rights more specifically, but it may be helpful here to anticipate the objection that these procedural protections are not essential for the minimal justice required for legitimacy. This may be clearer below, but, for now, consider the following example. Five individuals, A, B, C, D, and E, are each entitled to an equal share of a plot of land. Three of the five individuals, A, B, and C, meet and deliberate together to decide on the proper division of land. They decide to subdivide the property into five equal subplots and to give each individual one of the subplots of land. Even though the two individuals, D and E, who were left out of the deliberations received an equal share of land, under my account, there was injustice in the way they were treated. The deliberations and decision affected their interests and, yet, they were left out of that process. They were, therefore, not treated with respect as free and equal human beings, but rather were treated beneath their dignity. The additional danger is that, in such negotiations, the group of three may reach a decision that is more protective of or favorable to their own interests. They could have left D and E out of the distribution altogether and, even if they divided the land into five subplots, the subplots of land may not have been equal in every way (e.g., the land distributed to the two
nonparticipants may be less fertile for agricultural purposes, less rich in natural resources, or less desirable in location for foreign investors). By excluding D and E from participation, they are susceptible not only to being deprived of property that is rightfully theirs, but also of these dangers and to being deprived of the position and information necessary to protect their interests.

Some may view procedural rights as mere luxuries and not necessary for international political legitimacy. The example above shows the potential violation of rights that result from exclusion. Apart from the deprivation of property, there is a separate violation of right when a human being is excluded from deliberations that concern his or her interests and deprived of the position and information necessary to protect his or her interests. If the subjects of our concern were merely children, then participation may not matter. Children under a certain age lack the capacity to participate meaningfully in making decision concerning their interests. Parents or the state usually are responsible for protecting a child’s best interest. But, if the subjects are adult human beings, then exclusion from deliberations that concern their interests alone—apart any deprivation of property that may result—is failing to give the subjects involved what is their due.

Poor, developing states and the citizens within those states and minorities in different contexts are often left out of deliberations. Even if wealthy, developed states meet together and participate in conversations that include protecting the interests of citizens of poor, developing states, such exclusion alone would still constitute a violation of human dignity in a way that is equally serious to a deprivation of some element of security or subsistence. This is because an adult human being is not a child and a group of adult human beings are not chattel, human beings are human beings and justice demands that they be treated with fairness and equality. A denial of due process or equality itself is a serious injustice and cause of oppression. The denial of due
process also may result in the deprivation or risk of erroneous deprivation of the content of other rights, but the point here is that the denial of due process itself is an affront to human dignity.

My approach is distinctive in featuring procedural justice as an essential component of the requirement of justice. The minimal justice required for legitimacy demands respect for both substantive and procedural rights. My account of international political legitimacy does this, and states specifically:

An international actor (IA) is legitimate if only if (a) the IA is in substantial compliance with a just international normative structure (JINS), and (b) the IA satisfies the requirement of good standing. JINS consists of rules and mechanisms that satisfy the requirement of justice.

As to condition (a), the IA satisfies (a) only if it is in substantial compliance with the requirement of justice. The requirement of justice refers to a minimum standard of justice involving both procedural and substantive rights.

Requirement of justice: an IA satisfies the requirement of justice if and only if it substantially respects the basic procedural and substantive rights of those affected by its decisions or actions.

Substantive rights refer to basic substantive human rights, including the rights to subsistence, security, and liberty. Procedural rights refer to the rights of due process and formal equality. My project depends crucially on defining and defending norms of procedural justice, which provides the theoretical basis for grounding rules and mechanisms for implementation and enforcement. The next section provides a more detailed defense of due process.
3.3. The Right to Due Process

Justice as required for legitimacy includes basic rights to procedural justice and this includes the right to due process. In this section, I begin with some conceptual analysis of the term ‘due process’ and then argue that the right to due process is a human right that is necessary for any law-governed political community, including an international political community, and then explain how respect for the right to due process could generate rules and mechanisms for the implementation and enforcement of other human rights norms.

Legal scholars are familiar with the concept of ‘due process,’ as guaranteed under the Fifth and Fourteenth Amendments of the United States Constitution, but it is underexplored in the international context as a separate and distinct human right that is necessary either in and of itself or for the realization of any other procedural or substantive right. Its omission is evident in a couple of notable places. For example, in the law of peoples, John Rawls includes the standard minimum substantive rights of life, liberty, and property, and the minimum formal right to equality, but neglects to mention the right to due process (Rawls, 1999(2)). While others have found fault with Rawls’s minimalist approach to human rights on other grounds (see, e.g., Ingram 2003; Brock, 2010), my criticism here is that, even for a skeletal list of human rights, Rawls’s list is missing this important and indispensable element.\(^{38}\) It is also worth noting that, in the United Nations Declaration of Human Rights, while there are allusions to due process in a

\[^{38}\text{As I have given this more thought, the omission of due process from Rawls’s short list of human rights reflects a more fundamental problem with Rawls’s conception of international justice. As noted by Philip Pettit, Rawls’s conception is unlike that of Robert Nozick’s conception of justice grounded in humanity or T.M. Scanlon’s conception of justice grounded on principles of reasonable cooperation (see e.g., Pettit, 2006(1)). Rawls’s conception of justice is derived from assuming only rationality in our cooperative ventures, rather than reasonableness or rightness, and, hence, the eight principles of his law of peoples concern only minimal equality, the keeping of promises, and protection against foul play or egregious wrongs. The fundamental problem here is that the absence of foul play does not give us the presence of fair play or justice. What is essential domestically and internationally are rules to guarantee fair play.}\]
number of its provisions, the document nowhere identifies due process as a separate and distinct human right as it does the formal right to equality in Article 7.39

We currently have multiple competing theories on international human rights, but what is missing internationally is the structural framework with international laws and institutions for the implementation and enforcement of human rights norms. What has been crucial in establishing a framework for substantive rights in the domestic context is procedural justice or the recognition of a right to due process. My specific objective here is to begin to clarify what due process is and explain its crucial role in the establishment of a law-governed political community, indeed, as a necessary component of the justice required for legitimacy and for the development and reform of international laws and institutions.40

3.3.1. A Definition of ‘Due Process’

In this first subsection, I briefly consider the phrase ‘due process’ and how it arose and has been used in Anglo-American legal writings, and then offer a tentative definition that will be used in the remainder of this project. Legal philosophers have recognized the crucial role of due process in the establishment of domestic systems of law, which also provides insight on how it might apply internationally.

The word ‘due’ has many possible connotations, of which one common connotation is that which one person renders to another to bring both persons into a relation of equality or

39 This is also the approach in the European Convention on Human Rights.
40 I argue for a right to due process, because I agree with rights theorists like Joel Feinberg and James Griffin when they say that rights (or claim-rights) have normative force in our political communities and involve correlative duties or official obligations. (See, e.g., Griffin, 2010, p. 746; Feinberg, 1980).
justice. The word itself may be synonymous with what is owed, but it has been used more specifically to refer to what is owed as a matter of justice. Maybe most notably, Thomas Aquinas defined justice as “the habit whereby one with a constant and perpetual will renders to others what is due them” (Regan, 2002, p. 106, quoting Aquinas, *Summa Theologiae*, II-II, Q. 58, art. 1). Aquinas explained that, because justice by nature denotes equality, it concerns our relations to one another (Aquinas, *Summa Theologiae*, II-II, Q. 56, art. 1 and Q. 58, art. 2; Aristotle, *The Nicomachean Ethics*, 1130a3-4, 1130a15-16). Similarly, Immanuel Kant explained that justice or what is right refers to the relation between one person and another (*The Metaphysics of Morals*, 6:230). While natural law and deontological theories may supply additional content to determine what specifically is due, we can abstract from these traditional theories that the word ‘due’ itself can refer to what one person owes another in order to restore both to a relation of justice.

The word ‘process’ simply and uncontroversially denotes a series of actions directed at some end. When ‘process’ is coupled with ‘due,’ the resulting phrase ‘due process’ can mean a series of actions or procedures required by justice, in that, the series of actions or procedures is/are what is necessary to restore a relation of justice. ‘Due process’ alone, however, does not identify the substance of what justice requires, which may be determined by the circumstances and other fundamental principles provided by some moral or legal theory. Nonetheless the phrase ‘due process’ generally has this plain meaning, namely, a procedure or set of procedures required by justice.

The phrase ‘due process’ has been thought of as a legal term with its historical antecedent in the Magna Carta. Although the phrases ‘due process’ or ‘due process of law’ does not appear

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41 I use the phrases ‘due process’ and ‘due process of law’ interchangeably.
in the original charter, it was equated with the phrase, “by the law of the land,” which does appear in chapter 39 of the charter, as drafted in 1215 (See, e.g., Wasserman, 2004, pp. 1-2; Mott, 1793, pp. 30-45, 69-70). Chapter 39 was later amended in 1352, substituting “by the law of the land” with “due process of the law,” to read: “That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law” (Mott, 1973, p. 37, fn. 29).

Both phrases, ‘law of the land’ and ‘due process of law,’ were understood synonymously as referring to legality or justice, or that commitments were made according to law rather than by mere human will.

The words, ‘due process of law’ were undoubtedly intended to convey the same meaning as the words ‘by the law of the land,’ in Magna Charta….The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process ‘due process of law,’ by its mere will. (Murray’s Lessee v. Hoboken Land & Improvement Co. (1956) 59 U.S. 272, 276, citing Lord Edward Coke).

In his famous commentaries to the Magna Carta, English Jurist Lord Edward Coke explained that the purpose of ‘due process of law’ was to protect subjects from the oppressive uses of authority, which was most commonly applied to justify the specific procedures used to protect defendants in criminal trials (Mott, 1973, p. 77; Bingham, 2010, p. 29). Despite this common application, the phrase ‘due process of law’ generally referred to the fundamental law of the land and the procedural protections afforded subjects against the exercise of unjust or arbitrary power (Mott, 1973, pp. 85, 90, 161). The phrase ‘due process,’ then, consistently with the meaning of its words, signified a fundamental principle of procedural justice.

While the phrase appears in specific provisions in early charters and constitutions, it also relates back to some primitive notion of legality or natural justice. John Rawls, in his discussion
of the rule of law, identifies several precepts of natural justice, including equal protection of the law (i.e., treating similarly situated person equally) and due process of law. Although Rawls includes both equal protection and due process in his discussion of natural justice in *The Theory of Justice*, he lists only ‘formal equality’ as a basic human right in *The Law of Peoples*. This is not uncommon: legal theorists begin with some general concept of procedural justice and end with some specific conception of justice as fairness, where fairness is reduced to equality, namely, treating similarly situated persons alike (see, e.g., Dworkin, 1977, pp. 272-273). More charitably, we can conclude that Rawls implied that human rights would be administered according to due process or that every well-ordered society with a constitutional democracy as its basic structure would operate consistently with due process. In any event, I think there is a misstep in failing to include due process as a basic human right and recognize the fundamental role played by due process in the establishment of laws and institutions and the protection citizens from the abuses of power.

This is not a novel observation, but one noted by other legal theorists, including English jurist Sir William Blackstone:

In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. (Blackstone, 1765; see also May, 2011, p. 108, citing Blackstone).

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42 Rawls writes: “While there are variations in these procedures, the rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances.” (Rawls, 1971, p. 210 (page numbers to 1999 revised edition).)
What is necessary for the actual enjoyment of any basic rights are other rights, which have come to be known as due process rights, to protect individuals from the avoidable deprivation of their rights and the abuses of power.\footnote{Some may associate procedural due process with bureaucratic red tape. The modern state with its many layers of procedural justice is susceptible to criticism for unnecessary procedures and inefficiency at best and the mistreatment of individuals and the mishandling of individual cases at worst. What I would suggest, however, is that the target of the criticism here is not due process—i.e., what justice requires to maintain or restore a relation of justice between a source of power and those subject to the source of power—but excesses or abuses of process. While due process may have a tendency to such vices, due process is the very thing that is needed to protect individuals as well as groups from abuses of power.}

Consistently with this background, I would define the phrase ‘due process’ as follows: any procedure or set of procedures necessary for justice, where justice refers to a relation of equality or right order between two parties. A relation of equality or justice is intended as the opposite of a relation of inequality or injustice, such as when one party abuses its power over another. More precisely:

Due process: in a situation between an individual or group s and a source of power p, (1) any procedure or set of procedures necessary in the treatment of s by p, such that the deprivation of the procedure or set of procedures would amount to an injustice; and (2) if there is an injustice between s and p, any procedure or set of procedures necessary to bring s and p into a relation of justice R, such that Rps entails that p has no outstanding moral or legal obligations to s and s has no outstanding moral or legal obligations to p.\footnote{“Necessary” here is not logical or metaphysical necessity or some other strong sense of necessity, but merely practical necessity: what is required to bring about some end. The requirement of justice requires respect due process, as stated above.}

The first part of the definition (1) is a statement of procedural justice in the affirmative and the second part (2) is a statement of corrective procedural justice. Although I originally thought to include only the second part, is important also to include a prospective or affirmative definition of due process. If a source of power treats groups and individuals justly and, specifically, performs its duties with the procedures required by justice, then it is acting consistently with due process. Due process is involved when the relationship between the source of power and those
affected by the source of power is well-ordered with the procedures in place to ensure just
treatment (e.g., notice, hearing, transparency, etc.) and not only when there is an injustice and a
need for corrective procedural justice (e.g., notice, appeal, impartial review, etc.). Due process
can set the norms of justice and it can set the norms for correcting injustice. It is usually a failure
in the former than results in a need for the latter. The norms of procedural justice usually are
triggered by an occasion of injustice calling for a procedure to restore the parties to a relation of
justice.

Due process is one part of the requirement of justice. As stated in section 3.1, what
justice requires depends on the context and the subjects involved. The subjects involved are the
source of power and those affected by the source of power. Those affected by the source of
power may include individual human beings or groups of human beings. As also stated
previously, with respect to justice generally, what is due is respect for humanity and this respect
is shown by fairness and equality or, as these concepts have been developed in the law, by due
process and equal protection under the law. As a part of the requirement of justice, due process
implies respect for humanity or respect for persons. This is what justice requires generally. With
respect to due process, what is due or what process is due is respect for humanity within
ourselves and others through certain procedural protections appropriate for the subjects in
question. What processes are due are those procedural protections necessary to maintain
legitimacy in the international context in the treatment of individual human beings and groups of
human beings. The procedural protections should be designed to bring the source of power and
those affected by the source of power into a relation of justice.

A relation of justice is a relation without any outstanding moral or legal obligations.
“Outstanding moral or legal obligations” refers to anything that may be owed by one party to
another, which may include obligations as promised in an agreement or rights and duties as determined by law. There are various ways in which a source of power may abuse its power, resulting in an outstanding moral or legal obligation. The source of power may exceed the scope of its power, make arbitrary or capricious decisions, act with bias or other improper motive, or otherwise infringe upon the rights of others. To bring a source of power and those affected by the source of power into a relation of justice, due process provides the procedural protections to address such potential abuses of power. Due process includes notice and a hearing to ensure that decisions are made in the interests of those affected. Due process includes publicity, transparency, and accountability to prevent the source of power from exceeding the scope of its power or acting with bias or other improper motive. Due process also includes review and impartiality to address violations of right after the fact to allow for remedies or penalties to restore the subjects to a relation of justice. Due process in the affirmative maintains a relation of justice and corrective due process restores the subjects to a relation of justice.

3.3.2. Due Process as a Human Right

In this section, I argue that due process, as defined above, is a human right. My argument assumes that a human right is a right that humans have in virtue of their humanity (by this, I mean only that if x and y are humans, then x and y have human rights) and the content of human rights are based on universal human needs. The claim is that due process is a universal human right because it also is a universal human need in any political community.

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45 My argument assumes a traditional conception of human rights (see Griffin, 2008; Gewirth, 1982) as opposed to a functional conception of human rights (see Beitz, 2009; Raz, 2010). My argument, particularly the major premise and other related premises, would have to be revised to accommodate other conceptions of human rights.
The argument also begins with the assumption that the universal human condition includes living in non-ideal political communities and that injustices invariably occur in every non-ideal political community. For those who may not accept that injustices are an invariable part of human life, it may be helpful to clarify that this is merely a descriptive claim, an observation about the human condition. There may be various reasons that this condition obtains, for example, the fact that human beings by nature pursue their own survival and interests and, when interacting with one another, these interactions often result in conflicts (not always, but when we count repeated interactions and all members of a certain political community, conflicts invariably result). There is also the problem of persistent noncompliance; there are those who fail to comply with social norms and rules and, as a result, our communities are plagued with crimes and our world is plagued with wars and threats of war. Whatever the reason, for those of us who are non-ideal theorists and who take the world as it is rather than as it should be, this assumption is rather easy to accept. As for the ideal theorists, they should at least be able to accept this as a plausible description.

The major premise of the argument is that, if there is something $\phi$ that humans universally and urgently need for life (a minimally decent life) in every non-ideal political community, then the right to $\phi$ is a human right. As stated above, a human right is a right that humans have in virtue of their humanity and the content of human rights is based on universal human needs. Some may challenge this definition of human right as too broad and, therefore, may be interpreted as including a potentially unlimited set of items. One problem with human rights regimes today is that there is a tendency to be overly inclusive and thereby undermine the urgency of each right (i.e., “rights inflation”). But, in my argument, if we take the items that qualify as fitting within this set as types (e.g., what is necessary to sustain biological life), as
opposed to tokens (e.g., bread and water), the potentially unlimited nature of this description would be less problematic. Some also may challenge the definition on the basis that it derives an ‘ought’ from an ‘is.’ I would agree that we cannot infer from the fact that human beings simply need something φ that they have a right to φ. But this is not exactly the inference that I am drawing here. What I infer is that human beings have a right to something φ because (i) human beings need φ, (ii) the need is urgent, and (iii) the need is universal (i.e., something all human beings need). The additional grounds of urgency and universality provide sufficient justification for asserting a human right to φ, given that a right is a justified basis for a demand upon the duties of others and human rights specifically are what human beings have in virtue of their humanity.

My main contention is that due process is something that humans universally and urgently need in every political community. Let me explain. If injustices invariably occur in every political community, then humans in those political communities need some procedure to remedy the injustice (i.e., restore members of the social and political community to a relation of justice). For our purposes here, we can define injustices as human acts (or events caused by human acts) that violate basic human rights. If we accept that every human being is entitled to certain substantive rights such as the rights to security, subsistence, and basic liberties, then injustices may include violations of one or more of these substantive rights. It may be the case that many people in the world today in fact live with deprivations of their rights to security, subsistence, and basic liberties, and do so without any recourse or remedy, but such situations are not of people living minimally decent lives. Human beings cannot live minimally decent lives under conditions that frustrate or undermine their lives. They may not always have access to a remedy, but they nonetheless need one. Indeed, the requirement of justice even tolerates
substantial compliance, but it also should be noted that the requirement of justice specifies both a standard of minimal justice, namely, JINS, and the degree of compliance, namely, substantial compliance. In setting the standard through JINS, my account recognizes what is necessary for a minimally decent life, that is, the rights to security, subsistence, and basic liberties. When violations of these rights occur, it is consistent with my account to say that there is a need to restore justice. Recognizing that justice is not always restored does not diminish the fact that a remedy is needed.

Due process is such a remedy; it is a procedure to restore members of a political community to a relation of justice (or, more precisely, in a situation between an individual or group s and a source of power p, … if there is an injustice between s and p, due process is any procedure or set of procedures necessary to bring s and p into a relation of justice R, such that Rps entails that p has no outstanding moral or legal obligations to s and s has no outstanding moral or legal obligations to p). Due process may include notice, an opportunity to be heard, and review of one’s case before an impartial judge. The argument does not specify exactly what due process requires, but leaves this open to be determined in concrete political communities. Because due process is left unspecified, we can also say that there is no other procedure apart from due process to remedy injustices and, if there was some other procedure to remedy injustices, that procedure would be or include due process. Due process therefore is one remedy that humans universally and urgently need.

If this is right, that humans universally and urgently need due process for life in every non-ideal political community, then due process is a human right. The main objection to the argument is with the inclusion of due process in the set of human needs or human rights. Some may argue that, while due process is instrumentally necessary for human life in our political
communities, it is not in and of itself a human need or the proper content of a human right. As do others, I would include due process as a human right because it involves some basic and important aspect of justice or fairness that is not otherwise captured by other substantive rights.46

Consider, as an example, a case of wrongful eviction, where a homeowner is evicted from her home for being late in her mortgage payments. The bank who owns her mortgage discovers that the homeowner is late in her payments and, without prior notice or an opportunity to pay her arrears or renegotiate the terms of her mortgage contract, sends an agent to enter the property and demand that the homeowner vacates immediately. Again, it is true that due process is necessary to secure some other basic human need, such as the right to property, and certainly any procedures developed for such situations would be based in part on the protection of this other substantive right. But this example suggests that there is a separate and distinct right to due process, which in and of itself demands justice and fairness in the way that one is treated in society. While the homeowner, because of her arrears, may have no legitimate claim to the property, she still is entitled to be treated with fairness by the bank in demanding payment or in initiating the eviction process. There is a separate violation of her right to due process when the bank enters her home and orders that she and her family vacate immediately without notice and without any opportunity to offer a defense.

When the bank enters the homeowner’s home and orders that she and her family vacate immediately, the homeowner potentially suffers two separate violations of right: (1) the violation of her substantive right to property and the premature deprivation of possession and (2) the violation of her due process right to reasonable notice and other appropriate procedural protections. There may be a relation of injustice between the bank and the homeowner with

46 Others specifically include due process as a human right (see, e.g., Mandle, 2006, p. 52).
outstanding moral or legal obligations between them as a result of (1) and (2). For the sake of
argument, even if the homeowner has no legitimate claim for any moral or legal remedy because
of (1) or even if the bank cured all defects with respect to (1), this alone would not resolve the
separate violation of her due process rights. There would still be a relation of injustice between
the bank and the homeowner with outstanding moral or legal obligations between them as a
result of (2). Due process rights are not a part of justice simply as a means to restore other
substantive rights, such that, once the substantive right is restored, the need for due process
vanishes. Due process rights instead are a part of justice that concerns how a person is treated in
a political community, namely, that one is treated with fairness and respect as a human being.
Due process rights such as the right to reasonable notice ensure that a person is treated fairly.
The failure to provide reasonable notice is itself an injustice that demands a moral and legal
remedy.

Consider another example, one that also involves the right to formal equality. There are
two defendants in criminal cases who are charged with the same crime in the same jurisdiction,
one is brought before the court and a date is set for a future hearing before an impartial judge and
the other is brought before the court and summarily judged guilty. This would be considered
outrageous in most jurisdictions today. When we consider what exactly constitutes an injustice
worthy of outrage, we may find not one but three separate injustices: (1) the violation of the right
to life or liberty, (2) the violation of a right to a fair trial before an impartial judge, and (3) a
violation of the right to equal treatment before the law. The last two procedural rights are no less
human rights simply because procedures usually also involve some substantive matter. They are
themselves important rights that pertain to how human beings are treated in their political
communities, namely, with respect and dignity. It is the right of due process together with formal
equality that ground such procedural safeguards as notice, hearing, fair dealing, impartiality, review, transparency, and accountability. As these examples show, these rights stand on their own and also provide the theoretical resources for establishing just systems of laws and institutions.

3.3.3. Due Process as a Foundation for International Law

If due process is necessary in every social and political community, as argued in the previous part, then due process is necessary for the international community. While the international context is different from the domestic context, there are enough basic similarities to apply due process internationally. The international community has members who must interact with each other and, in their interactions, require some way for ensuring fairness, resolving conflicts, and remedying injustices.

Even if we grant that there are differences between a domestic community and an international or global community, including differences in the types of relationships and needs for social cooperation, it would be unrealistic to say that the differences entirely obviate the need for procedural justice at the international level. Returning to Rawls’s list of international human rights and, specifically, his notable omission of procedural due process, some, including Samuel Freeman, have defended Rawls’s short list as reflecting the fewer necessary conditions for social cooperation at the international level, in contrast to the additional requirements needed for social cooperation at the domestic level (Freeman, 2006, p. 37). For example, certain rights, such as an individual’s right to vote or participate in the political process, may be necessary to ensure fair
terms of cooperation at the domestic level. Freeman and others may argue that individuals do not have a similar right to vote or participate in the international political process.

While it may be true that the same exact substantive rights may not apply internationally for various reasons, the need for procedural justice, however, does not turn on whether we have the same types and levels of social cooperation internationally as in the domestic case. What is relevant, rather, is that there is an international community where members of that community engage in significant political and economic transactions with each other, which is undeniably the case today with treaties and conventions, complex trade agreements, and the increasing presence and activity of multinational corporations, international institutions, and other international actors. My concern here is not with all the requirements for a well-ordered society, but what is minimally required for members of an international community of such actors to share the same planet.

As a social and political community of sorts where injustices may and have occurred, there is a need, as in any other social and political community, for a procedure for maintaining justice and remedying injustices. Where there is such need for due process and a desire for a systematic approach to meeting this need, my proposal is to recognize the essential role of the right to due process as foundational for international systems of law and institutions.

Moreover, unlike the domestic context, the international context lacks a cohesive legal structure with adequate enforcement mechanisms. New theories may offer evaluative criteria for determining the legitimacy of new and existing actors, but what is also needed are the theoretical resources to make it possible to realize the norms advanced in one’s theory in the global context under existing conditions. Michael Blake, speaking primarily of the problem of moral
disagreement, expressed this in his criticism of Buchanan’s work: “Buchanan imagines a set of legal institutions that are both attractive and modest but which will still be controversial; we need a theoretical engine that tells us what we may do to bring such institutions about, under conditions in which they do not exist” (Blake, 2008, p. 724.) Part of the answer to this criticism lies in addressing the challenges of moral disagreement and pluralism. Part of the answer, I think, also lies in addressing the challenges of implementation and enforcement directly.

This second task calls for due process. What is necessary to address the challenges of implementation and enforcement is to recognize the importance of due process rights. Due process rights may be included with other rights, usually emphasizing the rights of criminal defendants in criminal proceedings. But, as noted by Blackstone, due process plays a greater role in political institutions; it the very method by which we secure the actual enjoyment of our most basic human rights (Blackstone, 1765). The concept ‘due process’ is the idea that we order our institutions according to law, rather than according to the mere will of men. ‘Due Process’ usually includes those protections which safeguard against potential abuses of authority. When we consider the different types of international interactions, such as political and economic transactions, we can identify the ways in which these transactions are susceptible to abuses of power and then determine what procedure or set of procedures are necessary to bring those involved into a relation of justice. The procedures would include basic rules of order, fair dealing, notice and hearings, impartial review, publicity, which would require transparency, and accountability. These procedures provide the methods for securing the actual enjoyment of basic human rights. It is respect for due process rights that lie at the heart of any law-governed system.

Just as in the domestic case, the development of a law-governed international system requires not only a set of basic human rights, but also the procedural mechanisms to make the
enjoyment of human rights possible. What we also need is to understand how procedural mechanisms are derived from due process rights. Due process rights are claim-rights that entail certain correlative duties. Due process are claim-rights in this sense because they are human rights, which demand respect by others, including state and non-state actors. For those in power, whether they are state or non-state actors, respect for due process rights involves certain duties, including the duty to avoid depriving, the duty to protect from deprivation, and the duty to remedy violations. Private individuals may be able to respect another’s due process rights by simply avoiding deprivations. But, for those in power, because they have a responsibility for the actions over which they have some control in addition to their own actions, they cannot respect an individual’s due process rights by simply avoiding deprivations, they also must take steps to prevent deprivations and, if deprivations occur, providing remedies. Performing such duties with respect to due process rights require certain procedures. It is impossible to perform such duties without establishing certain procedures such as notice procedures, hearings, and internal or external review procedures. This may require certain procedural mechanisms, such as impartial review, and the establishment of certain institutions, such as a court system.

Other substantive rights also entail certain correlative duties, including the duty to protect from deprivation and the duty to remedy violations. But what is exceptional about procedural rights is that the fulfillment of the correlative duties of procedural rights is sometimes a precondition for fulfilling certain correlative duties of substantive rights. For example, for a state to protect against the deprivation of bodily integrity such as rape, the state must have in place the

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47 This is similar to the duties identified by Henry Shue as the correlative duties of every basic right: the duty to avoid depriving, the duty to protect from deprivation, and the duty to aid the deprived (Shue, 1996, p. 52). Incidentally, due process would qualify as a basic right, as it is necessary for the enjoyment of all other basic rights. Under Shue’s analysis, due process rights also would entail certain correlative duties.
procedures required by due process. The procedures may include deterring rape through criminal prosecution of prior rapes, judicial review as to the continued dangerousness of sex offenders for subsequent civil commitment, and providing notice of sex offenders in one’s area. The protection of bodily integrity presumes respect for due process rights. A directive requiring respect the right to bodily integrity without due process would be inadequate to provide for the protection of bodily integrity or remedy violations of this right. It is due process and the mechanisms derived from due process that allows for the enjoyment of other rights and is the cornerstone of any law-governed system.48

Understanding this is the first step toward developing a law-governed system. The other steps involve putting this understanding into practice through instructions and practical guidance. My approach is to require not only respect for basic human rights, but that an international actor has a constitutional structure with rules and mechanisms that respect basic human rights. The first condition of Applied Justice-Based Legitimacy is substantial compliance with JINS, a just international normative structure, comprised of rules of mechanisms that respect basic substantive and procedural rights. The condition effectively requires the use or adoption of mechanisms of procedural justice. My approach also is to offer a set of model rules and sample mechanisms that includes the basic components of due process: order, fair dealing, notice, hearings, impartial review, transparency and accountability. There may seem to be an unbridgeable gap between the current conditions in the international context and what I am suggesting here, but my approach offers the steps to get from there to here. My approach focuses

48 The right to due process of law is not merely a statutory privilege to be conferred and applied at will. It is a fundamental right which serves as the cornerstone upon which the legitimacy of any administrative Tribunal must rest. As such, the Tribunal is bound to zealously safeguard it and consequently treat with any claimed infringement of it with the utmost concern. (UNAT Judgment No. 1146.)
on procedural justice and, specifically, due process because of its necessary role in the development of a law-governed system.

In the international context, as international and regional organizations establish systems of international law, the due process based approach can be used to determine what procedures in the form of laws or institutional mechanisms are necessary to safeguard human rights and ensure justice. While the international community concurrently would need to identify the basic substantive values and principles common to all political communities, a theory may include all the right substantive norms, but without due process, it would have no effective mechanism to make those norms a reality. My approach is to give due process its foundational role internationally to secure a greater degree of both procedural and substantive justice.

3.4. The Requirement of Justice and the Democratic Alternative

The proponent of global democracy may question why we should settle for substantial compliance with JINS and the protection of basic substantive and procedural rights when it falls short of ensuring the values of liberal democracy—values that should be accepted universally. By “global democracy,” I mean a view that advances democracy as a condition for international political legitimacy. In this final section on the requirement of justice, I argue that global democracy is neither sufficient nor necessary for legitimacy and that Applied Justice-Based Legitimacy with JINS compliance is better suited for the global context. Global democracy is not sufficient for legitimacy because it fails the twin aims of respect for cultural diversity and respect for persons. Even if proponents of global democracy augment democracy with a particular liberal conception of justice, the resulting conception of liberal democracy would still fail to satisfy the
aim of respect for cultural diversity. Global democracy also is not necessary for legitimacy, because it is possible to have a constitutional structure without democracy that is nonetheless legitimate. JINS offers such an alternative constitutional structure that is also neutral with respect to different forms of governance and different reasonable conceptions of justice.

When Rawls arrives at the Law of Peoples, a set of laws that must be complied with in order to qualify as a member of the society of well-ordered peoples, his minimal set of laws make it possible to include both liberal peoples and decent peoples. Liberal peoples have a liberal constitutional democracy and decent peoples have a decent consultation hierarchy, but decent peoples neither respect liberal values nor have a constitutional democracy. Many have criticized Rawls’s inclusion of decent peoples in the society of well-ordered peoples. But what Rawls tried to do with his attempt at a “realistic utopia” was to provide an approach that addressed mass human rights violations and other large-scale injustices while at the same time recognizing the present political realities, including wide disagreement and diversity among peoples on moral, religious, and political beliefs and values. Rawls was in essence attempting to balance the twin objectives of respect for persons and respect for cultural diversity. As I argue elsewhere, I do not believe that Rawls drew exactly the right balance, tolerating too much in terms of human rights violations, and thus not respecting persons enough. But I do believe he was on the right track.

Rawls was on the right track because he recognized the very real possibility that people outside the western liberal tradition may be able to protect human rights and avoid injustices even if they were not liberal and not democratic. This of course depends on what we mean by ‘liberal’ and what we mean by ‘democratic,’ but generally, as commonly understood by political philosophers today, ‘liberal’ refers to the principle that every individual is free and equal and
entitled to a wide array of equal liberties. The set of liberties usually includes certain civil and political freedoms such as freedom of speech and freedom of religion. ‘Democracy’ refers to a standard of governance in which political decision-making is the province of citizens, either directly or through representatives, and decisions are made through fair and regular elections in which each citizen has one vote and the winners are determined through majoritarian or super-majoritarian procedures. Different models of democracy vary, but democracy generally entails certain common substantive and procedural commitments. The substantive commitments include individual autonomy and, for liberal democracies, equality of representation. The procedural commitments include that each citizen has one vote, elections must be conducted fairly and regularly, and the winners are determined by majoritarian or super-majoritarian vote. There are different conceptions of democracy, but I think this is a fair description.

As described above, democracy itself is neither sufficient nor necessary for legitimacy. It bears repeating that our concern here is with legitimacy, not a full-blown conception of justice. Legitimacy is a minimal evaluative standard that provides a threshold in the affirmative for determining whether to interact politically or economically and a threshold in the negative for determining when to intervene with sanctions or force. We may disagree with an international actor’s governing structure and thin constitutional protections, but the question is, are the actor’s laws and practices so offensive as to have fallen below the threshold such that the international community has a right to intervene? When we are speaking of legitimacy, we are not speaking of what we envision a perfect world to be or how we would govern if given the power to do so. Instead, we are speaking of the minimal standard necessary for maintaining peace and security and the protection of basic human rights.
It also bears repeating once again that our concern here is with the international context. One important feature of the international context is pluralism or multiculturalism. There are many different cultures with different comprehensive doctrines. These different ways of looking at the world reflect fundamentally different beliefs and values that may pervade the ethical and political life. Another important feature of the current international context is noncompliance with human rights norms. These features suggest that there are twin aims for any normative structure for the international context: respect for cultural diversity and respect for persons and their human rights. Respect for cultural diversity does not require toleration of every political community, but it does require toleration of every political community with a reasonable comprehensive doctrine or reasonable conception of justice. Respect for persons or respect for human rights does not require perfect compliance, but it does require compliance with human rights norms so as to avoid significant, regular, and widespread violations of human rights. Democracy may be increasingly popular today, but it arguably fails both aims.

3.4.1. Democracy as Insufficient for Legitimacy

Democracy is insufficient for legitimacy because, in its general form, it fails to respect human rights. Democracy is insufficient for legitimacy also because, even when augmented with a liberal conception of justice, it fails to respect cultural diversity and, in particular, communitarian cultures with socialist or religious comprehensive doctrines. In this section, I evaluate Thomas Christiano’s arguments and the evidence provided in support of his arguments that democracies generally are reliable protectors of basic human rights and nondemocracies
generally fail to protect basic human rights, and also his suggestion that there probably are no decent consultation hierarchies.

Democracy is insufficient for legitimacy because it fails the aim of respect for persons, and, specifically, it fails to respect human rights. Democracy, like consent, refers to a method of governance. Both consent and democracy entail certain substantive commitments, such as valuing individual autonomy or freedom of choice (Held, 1995, p.146). But both are primarily concerned with procedure or the way in which individuals approve a particular government or a particular law or policy. Consent and democracy offer alternative approaches to legitimacy. They are insufficient for even minimal justice, however, because it is possible to satisfy the procedure and yet not have even a minimal level of justice. A particular set of terms or rules may be approved by consent, but this does not by itself provide for justice or the protection of human rights. For example, parties to an employment contract may agree to certain terms, but the terms may amount to slavery or involve services that are unconscionable (e.g., child labor or sex acts) or compensation that is so low as to violate a person’s right to subsistence. These are extreme examples, but they show that consent, without further regulation, can be used as an instrument of injustice. Similarly, a particular rule or policy may be approved by popular vote, but the rule or policy itself may offend justice. Democracy may have a tendency to protect human rights as a majority is unlikely to vote for a rule or policy that violates human rights, but this is not necessarily the case, particularly when the rule or policy concerns an underrepresented minority. A majority within a particular political community may approve by popular vote a rule or policy that violates the rights of political or religious minorities. Democracy may entail more substantive and procedural commitments than consent, but nothing in democracy’s substantive and procedural commitments can save it from such potentially tyrannical or oppressive results.
This is why many governments that are democratic also rely on counter-majoritarian procedures to ensure justice, such as judicial review by independent judges who are not appointed by popular vote. Democracy without additional regulations or constraints of justice, like consent, also can be used as an instrument of injustice (see Tesón, 1992, pp. 61-62). I suspect that those who argue for global democracy are usually arguing for democracy plus in which the “plus” is a particular liberal conception of justice (Christiano, 2011; Held, 1995). Democracy alone, however, is insufficient to provide for justice or the protection of human rights.

Granted, certain conceptions of liberal democracy are sufficient for justice or the protection of human rights. For example, Christiano, in arguing for a right to global democracy, offers what he calls a “minimally egalitarian democracy”:

By minimally egalitarian democracy, I mean a democracy that has a formal or informal constitutional structure which ensures that persons are able to participate as equals in the collective decision making of their political society. It can be more precisely characterized in terms of the following three conditions: (1) Persons have formally equal votes that are effective in the aggregate in determining who is in power, the normal result of which is a high level of participation of the populace in the electoral process. (2) Persons have equal opportunities to run for office, to determine the agenda of decision making, and to influence the processes of deliberation. Individuals are free to organize political parties and interest group associations without legal impediment or fear of serious violence, and they are free to abandon their previous political associations. They have freedom of expression at least regarding political matters. In such a society, there is normally robust competition among parties and a variety of political parties that have a significant presence in the legislature. (3) Such a society also acts in accordance with the rule of law and supports an independent judiciary that acts as a check on executive power. (Christiano, 2011, p. 146)

The conditions of Christiano’s minimally egalitarian democracy makes it a model of democracy that more than adequately satisfies the aim of respect for basic human rights. Christiano’s model of democracy, however, is more accurately a model of democracy plus: democracy as defined above plus other substantive commitments including liberalism and, particularly, Rawlsian
justice as fairness, and other procedural checks and balances, including competition among political parties, an independent judiciary, and limits on executive power. Certain conceptions of liberal democracy, like Christiano’s, amply satisfy the aim of respect for persons. The more relevant questions for such conceptions of democracy are, firstly, as to their sufficiency, whether they satisfy the other aim of respect for cultural diversity and, secondly, whether they are necessary for legitimacy.

I would argue that democracy, even when augmented with a liberal conception of justice, is insufficient for legitimacy because it fails the second aim of respect for cultural diversity. As mentioned above, respect for cultural diversity does not require respect for every culture or political community, but only respect for political communities with a reasonable conception of justice. If democracy entails certain substantive commitments such as individual autonomy and if there are political communities with a reasonable conception of justice that do not share the same substantive commitments, then an approach to global justice that requires democracy would reject these political communities. As mentioned above, democracy entails a commitment to individual autonomy and a model of governance of rule by the people. There are, however, many political communities that do not share this commitment to individual autonomy and instead have a commitment to communitarian or collectivist values. There are other political communities that would qualify under Rawls’ concept of a decent consultation hierarchy, which may include political communities based on a particular religious doctrine or ideological comprehensive doctrine such as communism. These political communities generally have other substantive commitments such as communitarian values. It may be an overgeneralization to assume that communitarian political communities entirely reject individual autonomy, so we would have to clarify that the relevant distinction here is between a commitment to prioritizing
individual autonomy and a commitment to prioritizing collective interests over individual interests.

In theory, there is no incompatibility between communitarianism and a reasonable conception of justice. It is entirely possible to have a political community that is not democratic and yet has a reasonable conception of justice. It is important not to conflate the concept of democracy with respect for basic human rights. There is a tendency in political discourse to use the term ‘democratic’ as synonymous for not only rule by the people, but also respect for the rights of the people. Democracy, however, does not have a monopoly on human rights (see, e.g., Bell, 1996; Twiss, 1998). A liberal conception of democracy may include respect for basic human rights, but so can other nondemocratic forms of governance. A communitarian political community, at least theoretically speaking, also can accommodate respect for basic human rights.

The distinction between liberal democratic and communitarian political communities is maybe most noticeable when considering how these two models of governance address an individual’s freedom of speech. A liberal democratic government may include the right to freedom of speech among its most fundamental rights. This right usually includes a bundle of other specific rights such as the right to peaceably protest without arrest and the right to freedom of the press. In the United States, for example, when there is a conflict between an individual’s right to speech and the state’s interest in protecting other interests, including property or privacy, the substantive commitment to individual autonomy and especially an individual’s right to speech prevails. This is true even if the results are offensive (see Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207 (2011) (hereafter the Westboro Baptist Church case), the Westboro Baptist Church picketing during a military funeral with signs targeting the US, the Catholic Church, and homosexuality).
A communitarian government also may include among its constitutionally protected rights the right to freedom of speech. A communitarian government, however, may prioritize public order and safety over an individual’s right to speech or peaceably assemble. China, for example, includes in the list of enumerated fundamental rights and duties of citizens in its constitution the following right: “Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration” (Article 35). China, however, is a socialist state and also protects the state from attacks against its socialist system (Article 1) and also specifically provides: “The exercise by citizens of the People's Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens” (Article 51). Although I am unfamiliar with Chinese judiciary and its caselaw, I think it would be safe to say that if the facts presented in the Westboro Baptist Church case came before a Chinese court, it would have a very different outcome. The Chinese courts would have prioritized state or collective interests over individual rights. China has been the target of criticisms by nongovernmental human rights organizations and democratic states because of those cases in which individual rights seem to be trampled so as to undermine the very guarantee of any constitutional protection. Some of these criticisms are probably well-deserved. It is important, however, to be impartial in drawing comparisons. We have to be careful not to be selective in considering only extreme cases in Chinese history such as the Great Leap Forward, the Cultural Revolution, and the Tiananmen Square Massacre in 1989 and assume that the constitutional protections are on paper only, and not apply the same scrutiny to extreme events in, for example, American history such as the treatment of Indigenous Peoples, African slavery and segregation, Japanese internment during World War II, and more recently Guantanamo Bay
and the use of drones in Pakistan and Yemen. Those on the outside may interpret China’s history as involving cases where there is no real respect for individual rights. It is, however, more impartial to interpret China’s history as involving deep and difficult conflicts between genuine individual rights and collective interests and, because of China’s commitment to socialism, many decisions ultimately prioritizing collective interests and the Confucian values of social order and harmony. This involves a more nuanced evaluation of political decision-making which does not merely consider the outcome, but also the competing interests involved and the underlying cultural commitments. This contextual approach suggests more similarity between the American and Chinese views of human rights and pinpoints the difference in their balancing of the competing interests and prioritization of individual interests over collective interests or collective interests over individual interests (see Angle, 2008; Bell, 1996; Twiss, 1998; Nie, 2011). This contextual approach also may characterize the extreme cases of arbitrary and egregious violations of human rights not as the norm but as exceptions (i.e., when the prioritization of collective interests went too far).

The point is, theoretically, there is no incompatibility between communitarian values and respect for human rights. There could be political communities that would qualify under Rawls’ concept of a decent consultation hierarchy, which may include political communities based on a particular religious doctrine or ideological comprehensive doctrine such as communism that also conform to the Law of Peoples, including the requirement to respect basic human rights. Because global democracies would exclude these political communities, it fails the aim of respect for cultural diversity.

The possibility of decent consultation hierarchies is not undermined by any empirical evidence to the contrary. Proponents of global democracy may point to statistical evidence of

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human rights violations, but while this evidence may show some correlation between democracies and fewer human rights violations, it does not provide sufficient evidence of a necessary correlation between non-democracies and, particularly, in Rawls’s terms, decent consultation hierarchies and greater human rights violations. In his instrumental argument for democracy, Christiano uses empirical studies to defend the following two theses that democracies are normally reliable protectors of basic human rights and nondemocracies (or incomplete democracies) reliably fail to protect basic human rights (Christiano, 2011, p. 143).  

Christiano also comments that consultation hierarchies are not likely to be decent (Christiano, 2011, p. 158)

I agree with Christiano that mature democracies are reliable protectors of human rights. They tend to have the social and political mechanisms to respond to individual needs and to place constraints on political power. I also agree with Christiano that, in practice, many nondemocratic and authoritarian governments are repressive regimes that do not protect human rights. There are maybe many factors—political, historical, and economic—but the resulting lack of social and political mechanisms seems to be an important factor, if not the most important factor. In Christiano’s terms, they are not “minimally egalitarian”:

“[Such regimes are] not egalitarian for a variety of reasons. Citizens do not choose or throw out rulers at all or in any case through a competitive electoral process. Citizens need not choose their representatives in competitive elections. Their representatives do not have a vote in the decision making. Citizens do not have equal opportunities to run for office or to form political parties or associations. Religious or ideological qualifications may be necessary even to become a representative or a ruler.” (Christiano, 2011, p. 156)

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49 Christiano uses the Polity IV and the Vanhanen Index of Democratization datasets for empirical evidence of democracy or related factors (e.g., democratic institutions and percentage of political participation).
Where I disagree with Christiano, however, is with his comment that there probably are no nondemocratic decent consultation hierarchies. Nondemocratic regimes may not have fair and regular elections, but I think it would be too hasty to say that citizens do not have a way to voice their concerns and that their representatives are not involved in political decision-making.

As a preliminary matter, I think Rawls and Christiano have very different conceptions of decency. A decent consultation hierarchy qualifies as decent, according to Rawls, when it has no aggressive aims and satisfies the following three conditions: (1) it secures human rights (life, liberty, personal property, and formal equality); (2) it imposes upon its citizens moral duties and obligations; and (3) it is guided by a common good idea of justice, rather than a liberal conception of justice (Rawls, 1999(2), pp. 64-65). With respect to the human rights condition, Rawls explains: “Human rights, as thus understood, cannot be rejected as peculiarly liberal or special to the Western tradition. They are not politically parochial” (Rawls, 1999(2), p. 65).

Rawls distinguishes between decent peoples, who must be tolerated, and outlaw states that violate human rights. “An outlaw state that violates these rights is to be condemned and in grave cases may be subjected to forceful sanctions and even to intervention” (Rawls, 1999(2), p. 81).

Rawls also explains that decent peoples may not be sufficiently egalitarian, but they nonetheless would be tolerated and included in the society of well-ordered peoples.

“Critical objections, based either on political liberalism, or on comprehensive doctrines, both religious and nonreligious, will continue concerning this and other matters….In political liberalism we must distinguish between, first, the political case for intervention based on the public reason of the Law of Peoples and, second, the moral and religious case based on citizens’ comprehensive doctrines. In my estimation, the former must prevail if a stable peace is to be maintained among pluralistic societies” (1999, p. 84).

Unlike Rawls, Christiano would require decent peoples to be minimally egalitarian and respect a correspondingly broader set of human rights. With regard to establishing a standard of
legitimacy, I think Christiano’s conditions for decency may be too high a bar for maintaining peace and security. It may even justify greater intervention and therefore undermine peace and security.

Christiano’s arguments rely on certain empirical studies, including the Political Terror Scale. The Political Terror Scale is based on resource material taken from Amnesty International and the United States State Department. The Political Terror Scale gives a score in 2013 of 4 to China and India. A score of 4 indicates the following conditions: “Civil and political rights violations have expanded to large numbers of the population. Murders, disappearances, and torture are a common part of life. In spite of its generality, on this level terror affects those who interest themselves in politics or ideas” (Gibney, Cornett, Wood, and Haschke, 2013). For comparison, the United States has had a score of 3 since 2001. A score of 3 indicates the following conditions: “There is extensive political imprisonment, or a recent history of such imprisonment. Execution or other political murders and brutality may be common. Unlimited detention, with or without a trial, for political views is accepted” (Gibney et al., 2013). If the evidence is accurate, then China is not the best example of a decent consultation hierarchy and the United States is not the best example of a liberal democracy.

Most states may be far from ideal, but they nonetheless, both democratic and nondemocratic, may still qualify as decent for the purposes of maintaining its status as legitimate. Legitimacy is a threshold evaluative criterion, which if not satisfied would justify intervention by sanctions or force. It is important to note that humility is required here, as alluded to in Rawls’s comments and noted by many non-western scholars, as the resource material provided by the United States State Department and Amnesty International may reflect a certain western bias: judging others by liberal standards. Even if accurate, the Political Terror Score data
does not distinguish among different violations of personal integrity rights. If we isolate only
those very basic human rights necessary for legitimacy, we would need a different dataset to
draw any conclusions. In the end, the results may suggest, in terms of the Political Terror Scale,
that those states that score a 5 are clearly outlaw states and illegitimate (e.g., North Korea, Syria,
Iraq), but among those states that score a 4 (e.g., China, India, Iran, and Turkey), many may be
illegitimate, but not all. This would depend on the kinds of human rights abuses involved and
how regular and widespread the abuses are.\footnote{The Political Terror Scale also accounts for how widespread the human rights violations are, as indicated in the following instructions. “In determining the levels coders are provided with the following instructions: “Ignore Own Biases. Coders should make every attempt to keep their own biases out of their work. Thus, coders are instructed to ignore their perceptions of a country, and to limit their coding to the information provided in the country report. “Give Countries the Benefit of the Doubt. Coders also are instructed to give the benefit of the doubt in favor of the countries they are coding. Thus, if a coder thinks that a country could be scored as either a level 2 or a level 3, the country is to receive the lower score. Sometimes coders will not feel comfortable making a choice between two levels. In those instances, coders will oftentimes score a country using both numbers, such as 2/3. If the coder has either of these numbers, we use the level where there is agreement. “Read What the Report is Saying. Finally, coders are instructed to read what the report is trying to say. One of the keys is to look at the adjectives used in these reports. For example, ‘reports’ of torture is different in kind (and less serious) than ‘widespread’ torture, which also is different (and less serious) than ‘systematic’ torture.” (Gibney et al. 2013, emphasis added) }\footnote{An alternative dataset is offered by the CIRI Human Rights Data Project, which provides a separate score for different types of human rights violations, such as specific violations of physical integrity, political rights, and social and economic rights (Cingranelli, Richards, and Clay, 2014). The scores often are 0 for widespread violation, 1 for some violation, and 2 for none. A few human rights violations have a different range of scores, for example, a range of scores between 0 (worst) and 8 (best) for an additive index for personal integrity rights. CIRI data is helpful, but not entirely impartial and holistic. CIRI data is based primarily on resource material from the United States State Department. CIRI also includes categories such as electoral self-determination and an additive index for empowerment rights. CIRI may be useful for US foreign policy, but may not be sufficiently impartial for purposes of providing data for determining international legitimacy. Another worry with CIRI is that its scores are based on evidence including the number of violations. For example, as to extrajudicial killings, a score of 0 for 50 or more killings, 1 for 1-49 killings, and 2 for 0 killings. Of course one extrajudicial killing is too many and 50 may suggest a systematic problem, but this data does not take into account other factors including population size. A state with a population of under one million that commits 50 or more killings arguably is significantly worse than a state with a population of over one billion that commits 50 or more killings. This and other problems with CIRI have been noted by Reed Wood and Mark Gibney (2010). A better study also would consider for each case of a violation, such as each case of an extrajudicial killing, whether the state had offered any explanation for the killing at the time of the violation and whether there was any recourse or remedy, as well as allow states a present opportunity to respond to the allegations. }\footnote{Existing datasets are inconclusive and, therefore, insufficient for purposes of determining international legitimacy. }\footnote{50} Existing datasets are inconclusive and, therefore, insufficient for purposes of determining international legitimacy.\footnote{51}
There are nonetheless several contenders for present-day nondemocratic states with a reasonable conception of justice. It is a vexing task to identify present-day decent consultation hierarchies, as existing states may violate certain human rights, such as the right to speech or protest, but may nonetheless respect the most basic human rights necessary to maintain their status as legitimate. Jordan and Oman, for example, are constitutional and absolute monarchies, respectively, with legal systems based on Sharia law. Jordan and Oman share the same Political Terror Scale score as the United States. Political imprisonment and violence may be common, but such incidents are not as widespread and do not affect large numbers of the population. Vietnam and Laos, both socialist, also may qualify as decent consultation hierarchies. Vietnam has a Political Terror Scale of 3 and Laos has a score of 2. When speaking of legitimacy, the question is not whether there are instances of human rights violations, but whether there are significant, repeated, and widespread instances of human rights violations so as to justify stripping an international actor of its status as legitimate. The objective is not to identify each and every human rights abuse and demand justice (according to some liberal conception of justice), but to draw an outside boundary against those actors who systematically commit large-scale violations of human rights. Respect for cultural diversity requires toleration of any political community with a reasonable comprehensive doctrine or a reasonable conception of justice. The above political communities based on a particular religious or ideological comprehensive doctrine may not be ideal states, but they may nonetheless qualify as a political community with a reasonable conception of justice.

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52 CIRI gives Vietnam in 2011 a personal integrity score of 3 and Laos in 2011 a personal integrity score of 5. For comparison, CIRI gives United States a personal integrity score of 4 in 2004 through 2006, a score of 5 in 2007 and 2009, and a score of 6 in 2008, 2010, and 2011. Vietnam and Laos have a score of 0 (on a scale of 0-2) for certain democratic rights such as freedom of speech and electoral self-determination. (Cingranelli et al., 2014.)
It is also important to note that, just as nondemocratic political communities may be far from ideal, democratic political communities also may be far from ideal. Just as it is a vexing task to point to a nondemocratic state with a decent human rights record, it also would be a vexing task to identify a liberal democracy with a clean record of protecting human rights (e.g., one that did not engage in any present or past human rights violation) or one that under circumstances similar to those of nondemocratic political communities have or would have exercised political authority in a way that fully respects human rights (e.g., circumstances of colonization, post-colonization ethnic conflict, poverty, famine, widespread disease, resource depletion, etc.). Denmark and The Netherlands, for example, may have Political Terror Scale scores of 1, but possibly because they have never had to face the hard choices confronting leaders of the states they previously colonized. Cross-cultural evaluation of human rights violations is possible, but it requires more careful and impartial consideration of the facts and other historical and contextual factors. An approach to legitimacy that applies to the international context must consider evidence in a way that is impartial, thereby taking seriously the toleration of different cultures or respect for cultural diversity.

An approach to international political legitimacy that demands democracy would reject nondemocratic political communities such as Jordan and Laos as insufficiently just. Such rejection, however, may not be justified from an objective or impartial perspective. Because theories of global democracy, including those that require liberal democracy, fail to tolerate nondemocratic political communities with reasonable conceptions of justice, they fail the aim of respect for cultural diversity. Global democracy, for this reason, is not sufficient for legitimacy.
3.4.2. Democracy as Unnecessary for Legitimacy

Global democracy also is not necessary for legitimacy. It is important to clarify that, among the proponents of global democracy, many are not claiming that democracy is the only way to achieve global justice, but that it is one way. They argue for the more modest claim that a constitutional democracy is one way of satisfying the demands of justice (e.g., Christiano, 2010, although Christiano also argues for a human right to democracy (Christiano, 2011)). Others seem to make the stronger claim that every state should adopt a constitutional democracy (e.g., Tesón, 1998) or that every global governance institution should adopt a constitutional democracy (e.g., Kuper, 2004). My argument is directed only against the stronger claim. We can show that democracy is not necessary if there is at least one plausible alternative that is not democratic and yet also maintains legitimacy. As discussed above, there are nondemocratic states that are nonetheless legitimate. They may not be stellar examples of a just regime, but their human rights records would not justify their exclusion from membership in the international community for purposes of political and economic engagement. What may be more helpful, particularly as we broaden our discussion to include non-state actors, is to consider a possible model of governance that is not democratic and yet legitimate. To establish that democracy is not necessary for justice, I need only show that there can be nondemocratic actors who qualify as legitimate or sufficiently just under some other model of governance.

Allen Buchanan and Robert Keohane offer one such alternative. They argue that democracy is not necessary, but some of the underlying values of democracy should be preserved (Buchanan and Keohane, 2006). Buchanan and Keohane explain this view:

We argue that once the distinctive practical function of legitimacy assessments in achieving moral reason-based coordination is understood, it becomes clear that a
requirement of global democracy in the individual-majoritarian sense is an unreasonably strong necessary condition in the case of global governance institutions for the foreseeable future. In a nutshell, we argue that the demand for global democracy in this sense is unreasonably strong given two conditions: first, the benefits that global governance institutions provide are quite valuable and not likely to be reliably provided without them; second, the key values that underlie the demand for global democracy can be reasonable approximated if these institutions satisfy other more feasible conditions, including what we call Broad Accountability. By the latter we mean that these institutions must cooperate with external epistemic actors—individuals and groups outside the institution, in particular transnational civil society organizations—to create conditions under which the goals and processes of the institution as well as the current terms of institutional accountability, can be contested and critically revised over time, and in a manner that helps to ensure an increasingly inclusive consideration of legitimate interests, through largely transparent deliberative processes. (2006, pp. 146-147)

The second condition is what concerns us here. Democracy is not necessary, according to Buchanan and Keohane, because Broad Accountability is enough to reasonably approximate the key values that underlie the demand for democracy. If it is possible for there to be a nondemocratic actor who qualifies as legitimate or sufficiently just for membership in the international moral community, then democracy is not necessary for legitimacy. An actor who upholds the key values that underlie the demand for democracy would be such an actor who qualifies as legitimate or sufficiently just.

It may be helpful to attempt to spell out the key values that underlie the demand for democracy. The list of key values would include the value of publicity, accountability, opportunity for dissent and criticism, impartiality, fair representation of the interests of those affected, and non-arbitrariness in the use of authority. I would submit that it is not necessarily democracy we want, but these other values. Democracy just happens to be one way to realize or recognize these values. Moreover, liberal democracy with its additional commitments to egalitarianism more fully realizes or recognizes these values. These, in essence, are the values of procedural justice. Larry May describes due process of law as including two components,
equality and equity: equality in how law is administered and equity in what is due to people who are subject to law.

The difficult question is how to understand what process is due to the subjects or citizens of a particular State. Perhaps the simplest idea is that all subjects or citizens stand equally before the law, and the process that is due them is that process that treats them equally before the law, and perhaps that guarantees and safeguards their equal standing before the law. What else is due is that the process in question be one that involves at least a minimum amount of accountability for the officials who are supposed to administer the law. This is a matter of equity, which is different from equality before the law. As indicated above, one of the main reasons for accountability is to curtail or deter abuse by these officials. Mere threat of publicity may do quite a lot, but it is sometimes also necessary to have procedures in place to hold officials accountable in a more formal way, by having hearings to which individuals can appeal to bring the officials to answer and where the appeals process can result in penalties for gross misconduct on the part of officials who are supposed to be fairly administering the law. (May, 2011, p. 108.)

Liberal democracy offers a set of procedural mechanisms that helps to safeguard citizens’ equal standing before the law, thereby realizing the value of impartiality. Liberal democracy’s procedural mechanisms also help to hold actors accountable for their exercises of authority and provide citizens an opportunity to be heard, usually by voting to protect their interests, thereby realizing the values of publicity, accountability, non-arbitrariness, and fairness. Liberal democracy, in theory, satisfies the requirement of procedural justice because it offers procedural mechanisms that help secure these political values.

Liberal democracy is one way of securing these values, but not the only way. Once we realize that it is ultimately these values that we are after, we can see more clearly both why liberal democracy is normatively desirable and, at the same time, how it is not necessarily the only way to secure the values of procedural justice. If it is these values that we are after, then democracy is normatively desirable because it is one way of realizing or recognizing these values. If it is these values that we are after, then we can also see how it is possible for there to
be other ways to realize these values without necessarily being democratic so long as the alternative offers similar procedural mechanisms that adequately safeguard the values of procedural justice.

I agree with Buchanan and Keohane that it is possible to recognize these values without implementing democracy, but I disagree that their account of Broad Accountability adequately accomplishes this. Their account recognizes the values of publicity, accountability, and the opportunity for dissent and criticism, but it does not do enough for impartiality, fair representation and non-arbitrariness. Buchanan and Keohane focus on accountability and transparency, but as mentioned in the previous chapter, they leave out fairness and other aspects of procedural justice. For example, there is nothing in their account that directly requires fair dealing or impartiality, such as requirements of fairness in an international actor’s negotiations with a client state or procedures for impartial review of an international actor’s exercise of its decision-making authority.

Applied Justice-Based Legitimacy, on the other hand, with its requirement to substantially comply with JINS, offers an adequate alternative for securing the values of publicity, accountability, opportunity for dissent and criticism, impartiality, fair representation of the interests of those affected, and non-arbitrariness in the use of authority. JINS consists of a set of rules and mechanisms that respects both substantive and procedural rights. JINS, in particular, includes rules and mechanisms to secure the rights to due process and formal equality. Respect for the rights of due process and formal equality accommodates in very practical ways the values that underlie the demand for democracy or any other just normative structure. Unlike Broad Accountability, due process and formal equality subsumes the values of publicity, accountability, and the opportunity for criticism and reform, but also includes the values of impartiality, fair
representation and non-arbitrariness. Due process rules and mechanisms usually are established specifically to protect citizens against the arbitrary abuses of power. Due process and formal equality together also would demand fair representation of the interests of those affected by requiring such procedures as an opportunity to be heard and equal protection of those affected by any rule or decision unless there is some relevant justification for unequal treatment.

The proponent of democracy as the international standard may argue that fair and regular elections are also necessary to ensure fair representation. But, as stated above, if it is possible for there to be one nondemocratic actor who qualifies as legitimate or sufficiently just for membership in the international moral community, then democracy is not necessary for legitimacy. An international actor that is JINS compliant would be such an actor who is nondemocratic yet satisfies the values of fair representation. Voting is not the only way or arguably even the most effective way to determine people’s interests. Moreover, many democracies today are criticized for their low percentages of public participation and undue influence by special interests and large corporations. Other alternative forms of governance may resemble Rawls’s decent consultation hierarchy with individuals in groups and groups represented in decision-making processes.

The proponent of democracy may still doubt whether a decent consultation hierarchy can indeed realize the above political values. A consultation hierarchy that is JINS compliant would offer the procedural mechanisms to guarantee the political values of publicity, accountability, opportunity for dissent and criticism, impartiality, fair representation of the interests of those affected, and non-arbitrariness in the use of authority. It is important to clarify that a JINS compliant actor is not one who perfectly realizes the values of procedural justice or perfectly respects procedural rights, but rather one who is in substantial compliance. Substantial
compliance may overlook some violations, but does not allow for significant, regular, and widespread violations of basic human rights. Given this clarification, the task of identifying a qualifying decent consultation hierarchy becomes less difficult. Liberal democracies because they have internalized the checks and balances to secure human rights may do this better. The claim is not that consultation hierarchies satisfy the requirement of justice and liberal democracies do not or that consultation hierarchies are better than liberal democracies, but only that a liberal democracy are not the only form of governance that can satisfy the values of procedural justice. Any actor that is JINS compliant would satisfy the values of procedural justice.

It is possible that there are other values that underlie our demand for democracy that I have neglected to discuss here. But I submit, even if there are, Applied Justice-Based Legitimacy would nonetheless be sufficient as an international standard unless it is shown not only that there is some other potential value, but also that this potential value is not somehow accommodated by the substantive and/or procedural requirements of JINS. It is doubtful whether anyone could make this showing. This is because my objective has not been simply to address a problem in piecemeal fashion, but instead to consider the basic normative structure of any rule-governed system and include in my account all the necessary components of such basic normative structure. It is a constitutionalist approach, one that attempts to establish a system of rules both for the protection of citizens against the abuses of authority and for the functioning of the system in a way that accords with the standard of justice necessary for legitimacy.
3.4.3. The Requirement of Justice Revisited

My claim is that JINS compliance is not only one way of satisfying the minimal justice required for legitimacy, but that it is the only way. JINS compliance is the only necessary and sufficient standard of minimal justice for legitimacy. It is important to clarify that JINS compliance, i.e., my requirement of justice, is not sufficient alone for legitimacy, as my account includes both a requirement of justice and a requirement of good standing, but JINS compliance is sufficient for setting the standard of minimal justice. My claim that JINS compliance is the only necessary and sufficient standard of minimal justice for legitimacy is bold, but not as bold as it seems. If JINS involved a set of very specific rules or if JINS was unduly burdensome, then the claim would be stronger. JINS, however, involves a set of very general norms and it is not unduly burdensome; it requires what justice demands for any political community. Consider a ballgame and the norm that the game requires rules of play. Depending on the particular ballgame, there may be specific rules of play and specific regulations as to the ball—e.g., size of the ball, its constituent materials, weight of the ball, and pressure of the ball. But the norm that a ballgame requires rules of play is general and necessary for any sport. What I propose here is similarly unexceptional. The game is international political legitimacy. What is required for play is minimal justice. JINS offers a constitutional framework for minimal justice—no more and no less.

What is entailed by my claim that JINS is the only necessary and sufficient standard of minimal justice for legitimacy is that either (1) any alternative condition or set of conditions for minimal justice is neither both necessary and sufficient for legitimacy, or (2) if any other condition or set of conditions for legitimacy is necessary and sufficient for legitimacy, it is functionally equivalent to or, in all relevant respects, indistinguishable from JINS compliance. As
discussed in the previous section, global democracy is an instance of (1). Democracy is a standard of governance that is not necessary for legitimacy. An international actor that is governed according to a democratic form of governance, supplemented by other substantive and procedural commitments, may be legitimate, but it does not offer the only way to be a legitimate actor. Other forms of governance are similar. An international actor governed according to a decent consultation hierarchy with an official religion may uphold some reasonable conception of justice, but it, needless to say, does not offer the only way to be legitimate. Democracy also is not sufficient for legitimacy because it fails the aim of respect for cultural diversity.

It may be the case that some other condition or set of conditions may provide a necessary and sufficient standard of minimal justice for legitimacy, but, if so, that condition or set of conditions would be indistinguishable from JINS. As discussed above, JINS consists of a set of rules and mechanisms that respects both substantive and procedural rights. These substantive rights include the rights to subsistence, security, and certain liberties. The procedural rights are the rights to due process and formal equality. Both substantive and procedural rights, as argued earlier in this chapter, are necessary for the minimal justice required of legitimacy. The procedural rights, in particular, are necessary to provide the basis for developing mechanisms to secure the values of publicity, accountability, opportunity for dissent and criticism, impartiality, fair representation of the interests of those affected, and non-arbitrariness in the use of authority. For example, the right to an opportunity to be heard is the basis for a corresponding duty to establish procedures for public comment, hearings, and appeals of decisions. JINS embodies the minimal justice required of legitimacy.

If there is another condition or set of conditions that is necessary and sufficient for the minimal justice required for legitimacy, it is not an alternative to JINS, but rather, an instance of
JINS compliance. JINS offers a set of conditions, the satisfaction of which qualifies an international actor as legitimate. An international actor may be JINS-compliant by either having an institutional structure that satisfies the requirement of justice or by adopting an institutional structure consistent with JINS and its model rules and mechanisms. Some international actors, such as the United Nations General Assembly as an international organization, may already be JINS-compliant in the first way. The UN General Assembly has an institutional structure committed to the UN Declaration of Human Rights, UN Charter, and other human rights documents. The UN Declaration of Human Rights, and its more comprehensive Convention on Political and Civil Rights and Convention on Social and Economic Rights, subsumes the basic substantive and procedural rights included in the requirement of justice. Such international actors already maintain respect for basic substantive and procedural rights. Under my approach, then, the UN’s rules and mechanisms are not an alternative to JINS, but rather, the UN General Assembly would be JINS-compliant.

Other theoretical approaches also may seem to provide an alternative to JINS, but also similarly may be instances of JINS compliance. Some may say, for example, that republicanism, may be an alternative form of governance that is necessary and sufficient for legitimacy, in which case, JINS itself would not be the only necessary and sufficient standard of minimal justice for legitimacy. There are two ways to respond to this objection. First, if one defines republicanism as a version of liberal democracy, then because it entails the substantive and procedural commitments of liberal democracy, it also is not necessary for legitimacy; it is possible to have or adopt a just system that is legitimate but not democratic. Second, if one

53 The reference above to the UN General Assembly is a reference to the organization as a whole, rather than any particular member state or any other UN commissions or committees.
defines republicanism as an alternative to liberal democracy with its own distinctive norms of minimal justice, then it may be necessary for legitimacy, but it would be more accurate to characterize it as an instance of JINS compliance. Republicanism simply includes a version or specification of the general norms required by JINS.

Republicanism is sometimes referred to as a kind of democracy. Philip Pettit, a prominent proponent of Republicanism, characterizes his republicanism as a form of democracy that includes both electoral and contestatory aspects. In addition to the more commonly understood aspect of control by the people through regular elections, Pettit defends an equally important aspect of control through legitimate terms and channels of contestation, such as public protests, public comment procedures, initiatives and referendums, and individual or class action lawsuits (Pettit 2006(2)). Without the editorial contestatory aspect of democracy, the regime may be in danger of falling into certain errors, such as a tyranny of the majority or a tyranny of the elite (Pettit 2006(2), p. 304). Pettit explains that there are two preconditions for the contestatory aspect of democratic rule, namely, a stock of admissible reasons or considerations that are part of a common consciousness and relevant to the determination of public affairs and a corresponding public record of reasons used by a regime to support its decisions (Pettit 2006(2), p. 308). The first precondition is similar to Rawls’s concept of public reasons and the second precondition involves a norm of transparency.

Conceived in this way, republicanism, as a form of democracy, may be one way to realize certain values and to embody the minimal justice necessary for legitimacy, but it is not the only way. Because we are speaking of international political legitimacy, the standard cannot be one that favors only one reasonable conception of justice, but must accommodate all reasonable conceptions of justice. A republican conception of democracy is committed to a liberal and
democratic conception of justice with certain specific substantive and procedural commitments. For the reasons already discussed above, republicanism, as a form a democracy, is not necessary for legitimacy.

Conceived differently, in some abstract sense, republicanism or neo-republicanism can be understood not as a form of democracy, but as an idea based on non-domination. Pettit also writes, “The main focus in neo-republican theory is on the value of freedom as non-domination. Take a given choice between alternatives, A, B, and C. You will be dominated in that choice, and lose your freedom, to the extent that others exercise non-deliberative control over what you choose; you will be free to the extent that you avoid such control” (Pettit, 2010, p. 140). If we understand republicanism simply as freedom from non-domination, there are at least three possible interpretations and ramifications of these interpretations. The first is that non-domination is ambiguous and indeterminate. It is not clear from freedom as non-domination exactly what this freedom entails. The second is that non-domination means what Pettit says it means, which entails other requirements associated with a kind of democratic self-government. Pettit’s neo-republicanism is also a justice-based conception of legitimacy that conditions legitimacy on certain requirements of justice. Justice demands freedom as non-domination. Non-domination includes three specific requirements: (1) citizens should have sufficient resources not to be subject to personal domination by others; (2) citizens should have sufficient resources as a group not to be subject to collective domination by states, multinational corporations, or international organizations; and (3) agencies should not dominate people personally or collectively (Pettit, 2010, p. 142). Both domestic regimes and international actors are legitimate insofar as they exercise power in a non-dominating or non-arbitrary way, that is, that they operate “under the effective and equal control of its citizens or people” (Pettit, 2010, p. 145).
Pettit spells out what this involves for domestic and international contexts, namely, that regimes and actors must operate according to the people’s terms and be sensitive to the people’s influence. These specific conditions coincide with the authorial and editorial aspects of democracy. This brings us to the same problem discussed above, if republicanism is a form of democracy, then, for the same reasons that certain versions of democracy may be sufficient, but not necessary for legitimacy, republicanism may be sufficient, but not necessary for legitimacy.

The third and last interpretation of republicanism and its chief norm of non-domination, inspired by Pettit but not exactly his own interpretation, is that republicanism requires certain conditions for legitimacy that protect those under authority from arbitrary abuses of power. In this sense, non-domination may provide the basis for certain substantive and procedural norms, including due process rights, such as the right to be heard, the norm of transparency, and respect for formal equality. The two previous interpretations, for different reasons, are not necessary for legitimacy. This last interpretation seems to be a viable alternative to JINS.

The question is, whether it an alternative or simply an instance of JINS compliance. Both the concept of freedom as non-domination and JINS are based on the concept of justice itself. In particular, due process, is derived from the concept of justice itself—to give people their due. Pettit, in explaining the first two requirements of freedom as non-domination, writes: “Both prescribe that resources should be allocated according to a distributional ideal whereby individuals are given their due; their due, on the neo-republican conception, as potentially free, undominated subjects” (Pettit, 2010, p. 143). Pettit for some reason focuses on distributive justice only (and Pettit’s interpretation of non-domination includes a certain conception of distributive justice), but seems to have in mind the same or similar concept of justice. As also discussed earlier in chapter 3, due process norms in the Anglo-American tradition grew out of a
need to protect people from arbitrary abuses of power. Chapter 39 of the Magna Carta was amended to read: “That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law” (Mott, 1973, p. 37, fn. 29). The phrases, ‘law of the land’ and later ‘due process of law,’ were understood synonymously as referring to legality or justice, or that commitments or judgments were made according to law rather than by mere human will. ‘Due process of law’ or ‘due process’ for short refers to the proper treatment of people in a political community and, specifically, that the treatment was in accordance with law rather than the mere arbitrary or capricious will of men. The same seems to be the motivation behind freedom as non-domination, namely, the protection of those under authority from arbitrary abuses of power. Interpreted in this way, freedom as non-domination may be necessary for legitimacy, but it is essentially indistinguishable in relevant respects from the right to due process. There may be some differences in the specific norms of due process or requirements of non-domination, but the general idea is the same: the rules or mechanisms necessary to protect people from arbitrary abuses of power. Interpreted in this way, freedom as non-domination is not an alternative to JINS, but an instance of JINS compliance.

Some may offer other ways to satisfy the minimal justice required of legitimacy, but this does not detract from my claim that JINS is necessary and sufficient unless those who offer another condition or set of conditions also prove that it is indeed an alternative to JINS rather than an instance of JINS compliance. As with the third interpretation of freedom as non-domination, I think other conditions of justice similarly will be subsumed in JINS. This is

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54 This interpretation of freedom as non-domination views procedural mechanisms such as the procedural requirements during a criminal trial and judicial review as ways to prevent arbitrary abuses of power.
because JINS is not a set of specific norms or a set of norms that apply in a particular political context, but a general set of requirements that embodies what justice demands for international political legitimacy.
4. The Requirement of Good Standing

Under my account of international political legitimacy, an international actor is legitimate if and only if (a) the international actor is in substantial compliance with a just international normative structure (JINS), which is a requirement of justice, and (b) the international actor satisfies the requirement of good standing. The requirement of good standing serves as a necessary procedural check on the initial finding that the international actor satisfies the requirement of justice (i.e., JINS compliance). An international actor obtains good standing if and only if no one who is substantially affected by its exercise of political power comes forward with reasonable and sufficient evidence to reject its being JINS-compliant. A precondition for the requirement of good standing is some procedural mechanism, such as a public comment procedure, to allow evidence from perspectives of those substantially affected by the international actor’s exercise of political power that concerns whether its decisions and actions indeed have the effect of respecting substantive and procedural rights. The international actor satisfies the requirement of good standing by performing the procedural check and showing that the evidence does not provide grounds for rejecting its being JINS-compliant. Both an initial finding of JINS compliance and a corroborating finding of good standing are required as normative conditions of international political legitimacy.

During a public comment procedure or similar procedural mechanism, those who come forward can be the individuals or groups affected by the international actor’s exercise of political power, their representatives, or a human rights organization with relevant data. The last two may be particularly important in cases in which the individuals or groups are imprisoned, intimidated, no longer living, or otherwise silenced. The proffered evidence may be based on certain relevant factors including the actor’s present and historical identity, present and historical record, national and/or international reputation, and past and present relationships with states and other international actors. In this chapter, I
defend the requirement of good standing as a necessary condition for international political legitimacy. I argue that good standing is necessary both because substantial compliance with the requirement of justice is insufficient alone and because good standing is required by justice in accommodating the reasonable pluralism of the international context. Justice for the international context, as argued below, demands some principle of toleration of reasonable pluralism and such principle of toleration provides the basis for considering other perspectives from those affected by the international actor’s decisions and actions to confirm or disconfirm the international actor’s compliance with the requirement of justice. This chapter begins with a brief conceptual analysis of ‘good standing’ and an explanation of my specific use of the term in contrast to its use by others, including Rawls. I then defend the requirement of good standing as a necessary condition for legitimacy.

4.1. A Definition of ‘Good Standing’

‘Good standing’ is a phrase consisting of a positively weighted evaluative term and the word ‘standing.’ Standing, in its plain meaning, refers to one’s position, rank, or reputation within a particular social, political, or legal context. The position, rank, or reputation is based on certain criteria or qualification, which will vary depending on the particular context. In the courtroom, for example, the term ‘standing’ carries some of its plain and generic meaning, but also takes on a technical definition. It refers to the status of having a cognizable interest in the matter before the court, usually that the party claiming standing has an interest that has been adversely affected in some way and that can be remedied by the court. As in a court of law, the crux of most, if not all, conceptions of standing is the criteria or qualification for having a certain status.
Similarly, here, ‘good standing’ refers to having a certain status or position within the international community. Specifically, it refers to having the requisite status or position, which, along with satisfying the requirement of justice, qualifies an international actor as legitimate. The requirement of justice is satisfied if the actor substantially complies with JINS or, in other words, systematically respects basic procedural and substantive rights of those affected by its authority. The requirement of justice then provides a primary requirement, establishing an objective standard of justice, while the requirement of good standing provides a secondary requirement, recognizing the relevance of a kind of corroborating evidence, namely, a perceived compliance with the standards of justice. The requisite status or position concerns aspects of an international actor’s relationships with those under its authority and with whom the international actor engages in political or economic transactions. The secondary requirement of good standing depends on whether or not those in such vertical and horizontal relationships with the international actor justifiably perceive it to be JINS-complaint.

This second condition of legitimacy requires sufficient evidence to reject an international actor’s JINS compliance. It is important to stress the distinction between mere perception of noncompliance and justified perception based on sufficient evidence. The second condition is deliberately second because it depends in part on the first condition. The first condition defines the requirement of justice. The second condition of good standing specifically concerns an international actor’s standing as just with respect to legitimacy. The standard of justice is a minimal standard that includes respect for basic substantive and procedural rights. The second condition of good standing specifically concerns an international actor’s standing as just or not unjust with respect to legitimacy. The second condition of good standing involves subjective and objective components. As to the subjective component, from the perspective of those affected by
the international actor’s decisions and actions, the international actor must be perceived as not unjust, in that, it is perceived as not violating basic substantive and procedural rights. As to the objective component, the perception of compliance with the requirement of justice must be objectively justified. This component of justification is an objective requirement because a justified perception is not merely a subjective opinion, but a perception supported by objective criteria and sufficient relevant evidence.

Good standing depends on relevant evidence, namely, evidence of certain relevant factors, including an international actor’s present and historical identity, present and historical record, national and international reputation, and past and present relationships. These factors are relevant because and insofar as they help to provide evidence of an international actor’s compliance with the first condition. Whether an international actor has good standing depends on whether its historical identity, record, reputation, and relationships show it to be JINS-complaint or as acting consistently with the requirement of justice. Good standing depends in part on the international actor’s identity as determined by its present circumstances and its factual and procedural history, including whether it was established by another long-standing legitimate international actor and established through consent or some other appropriate procedural mechanism to ensure the consideration of the interests of those affected. Good standing also depends on the international actor’s present and historical records, particularly its human rights record or record of human rights violations. What is relevant here is not only the presence of human rights violations, but also the record of how any violations were addressed and remedied, if at all. Depending on the particular international actor involved and the scope of its power or authority, good standing also involves the consideration of an international actor’s reputation among those affected by its power or authority and by other members of the international
community. These and other factors help to determine the quality of the international actor’s vertical and horizontal relationships. Good standing is intentionally left broad and covers such findings as, for example, whether present-day Egyptians recognize Mohamed Morsi as a legitimate ruler, whether the United Nations General Assembly recognizes the state of South Sudan as a legitimate state, and whether the people of Argentina recognizes the IMF as a legitimate international institution.

The list of factors is not an exhaustive list, but is intended to provide guidance in identifying the factors that are relevant in most cases to a determination of an international actor’s good standing with those affected by its exercise of power or authority. The factors are not all necessary, in that, the absence of one does not necessarily preclude an international actor from qualifying as legitimate. In most cases, each of the factors will be present for consideration, but there may be nonstandard cases, for example, a case where an international actor is newly formed and consequently has little or no reputation. These factors—the actor’s present and historical identity, present and historical record, national and/or international reputation, and past and present relationships—generally are the relevant considerations in determining standing in most cases.

Before defending my claim that the requirement of good standing is necessary in conjunction with the requirement of justice for legitimacy, it may be helpful to distinguish between good standing as a requirement for legitimacy and good standing within an organization or community. ‘Good standing,’ as I am using the phrase, as a requirement of legitimacy involves a consideration of the above-mentioned factors. It is not, however, equivalent to legitimacy or the status of legitimate. An actor who satisfies the requirement of good standing is
not necessarily a legitimate actor. Good standing is one criterion for legitimacy, but not the only one.

By contrast, when Rawls uses the term ‘good standing’ in *The Law of Peoples*, he is referring to the latter, the achievement of legitimacy or membership in the society of well-ordered peoples. He writes:

To tolerate also means to recognize these nonliberal [but decent] societies as equal participating members in *good standing* of the Society of Peoples, with certain rights and obligations….Liberal societies are to cooperate with and assist all peoples in *good standing*. (Rawls, 1999(2), p. 57.)

Under Rawls’s law of peoples, a society has good standing if it is a liberal constitutional democracy or a decent consultation hierarchy that meets certain criteria, namely: (1) it does not have aggressive aims; (2a) its system of law secures the human rights of all of its members; (2b) the system of laws imposes bona fide moral duties and obligations on all persons within its territory; and (2c) those who administer the legal system sincerely believe that the law is guided by a common good idea of justice (seeking the common good of everyone, but not constrained by the reasonable) (Rawls, 1999(2), pp. 64-67). The satisfaction of these criteria leads to good standing within the society of well-ordered peoples. Good standing for Rawls is the achievement of a certain status.

Under my account of legitimacy, which has many parallels to Rawls’s view, good standing and minimal justice are separate requirements and both are necessary for legitimacy. My account separates minimal justice, which is similar to Rawls’s conditions (2a) and (2b) above, from further confirmation of minimal justice, which is similar to Rawls’s condition (2c). By including condition (2c), we can infer that Rawls also recognized the importance of circumstantial or corroborating evidence of compliance beyond what is codified in statutes or
adopted as official policies. Although Rawls focused on the opinions of judges and other officials who administer the law, my condition of good standing, as explained further below, takes into account the perceptions of all those affected, particularly their perceptions of the international actor’s compliance or noncompliance with the requirement of justice. Under my account, perceived compliance is a separate condition, but it is nonetheless also necessary for legitimacy. An international actor may have rules and policies that conform to the requirement of justice, but is not perceived to be JINS-compliant by those affected by its rules and policies, possibly because it unfair in the implementation its rules and policies, i.e., in a way that advantages some and disadvantages others. My claim is that good standing and minimal justice are jointly sufficient for legitimacy.

4.2. Good Standing as Necessary for International Political Legitimacy

When speaking specifically of international political legitimacy, we are speaking of the threshold conditions necessary for qualifying an international actor for inclusion in the international community for the purposes of interaction (political or economic) and protection against unwanted interference by force or coercion. Legitimacy in other contexts may require something different, but my claim is that legitimacy for the international context includes the requirement of justice and the requirement of good standing. The purpose of the requirement of good standing is to confirm or disconfirm an initial finding as to the requirement of justice with other relevant evidence of an international actor’s JINS compliance (what I refer to as ‘circumstantial evidence’ of JINS compliance). The evidence is ‘circumstantial’ in that it is not evidence of the activity (i.e., the international actor’s charter, law, policy, or practice), but rather
evidence of the effect of the activity on individuals, groups, states, and other international actors (i.e., how those affected are treated or perceive they are treated under the charter, law, policy or practice). Such circumstantial evidence is also necessary when direct evidence is inadequate.

Direct evidence is inadequate when direct evidence of an actor’s compliance with the requirement of justice is insufficient alone to prove or disprove an actor’s legitimacy or when corroborating circumstantial evidence of an actor’s just vertical and horizontal relationships is also necessary. One way that direct evidence of JINS compliance may be inadequate is by not having enough solid and credible evidence of an actor’s compliance or noncompliance with the requirement of justice to reach a final conclusion. I think this is often the case because of the lack of information or the lack of transparency, but this involves more of an empirical claim that is better left decided on a case-by-case basis. Another way in which direct evidence is inadequate does not depend on the empirical evidence in particular cases, but on the sort of evidence involved in general. This is a claim about the sufficiency of a certain kind of evidence: direct evidence is insufficient alone because corroborating circumstantial evidence of JINS compliance is also necessary.

My claim is that circumstantial evidence, as described above, is also necessary for two main reasons. First, direct evidence of JINS compliance needs to be supplemented or corroborated with evidence of how the rules and policies affect others, including individuals, groups, states, and other international actors. Second, circumstantial evidence of JINS compliance is necessary because it is required by the toleration of reasonable pluralism. As explained below, justice demands the toleration of reasonable pluralism and toleration specifically requires the consideration of different reasonable perspectives. The international community is comprised of different political communities with different conceptions of justice.
Different political communities, because of their different conceptions of justice and other beliefs and values, have different perspectives of international actors and their decisions and actions. My account of international political legitimacy recognizes a principle of toleration and the need for the consideration of different reasonable perspectives. It does this by requiring substantial compliance with basic substantive and procedural rights through JINS compliance that is consistent with different reasonable conceptions of justice. This is the requirement of justice. But, even with a minimal standard of legitimacy, the standard may privilege those with power and material and intellectual resources by allowing only those with power and resources to decide whether they or their friends are JINS-compliant. Having the right standard is not enough; what is also needed is a way to check whether the standard is satisfied that also is consistent with different reasonable conceptions of justice. The requirement of good standing is a procedural check to confirm that the rights of those substantially affected by the international actor’s decisions or actions are indeed being respected by considering the perspectives of those substantially affected by the actor’s decisions or actions. An international actor is legitimate if and only if it adopts and implements a set of rules and institutions that respect basic procedural and substantive rights and satisfies a procedural check that confirms its JINS compliance.

4.2.1. A Procedural Check of JINS Compliance

This section discusses the first reason above for the need for circumstantial evidence of JINS compliance, which is that direct evidence of JINS compliance, in general, needs to be supplemented or corroborated with evidence of how the rules and policies affect others, including individuals, groups, states, and other international actors. As mentioned above, my
conditions for legitimacy are similar to Rawls’s criteria for a decent law-governed system, namely, that (2a) the system secures the human rights of all of its members, (2b) the system imposes bona fide moral duties and obligations on all persons within its territory; and (2c) those who administer the system sincerely believe that the law is guided by a common good idea of justice (Rawls, 1999(2), pp. 64-67). The last condition is a requirement of good faith on the part of those administering the system that secures rights and imposes duties and obligations that they are doing these things in good faith. Direct evidence of JINS compliance is similar to evidence of (2a) and (2b). Circumstantial or corroborating evidence of JINS compliance is similar to, but not exactly like, evidence of (2c). Direct evidence of JINS compliance is evidence to satisfy the requirement of justice. It is evidence that an international actor has adopted and implemented an appropriate normative structure with rules and institutions to protect procedural and substantive rights. These rules and institutions impose certain duties and obligations upon those in authority and those under authority. Evidence relevant to show this includes the international actor’s official charter, laws, policies, and practices. This evidence is important to demonstrate JINS compliance, but this evidence alone is not enough for legitimacy.

What is also needed is solid and credible evidence of perceived compliance. With respect to a decent law-governed system, Rawls seems to agree with this, but, speaking of states or “peoples,” understandably focuses on the belief of judges and other officials of the state. Criterion (2c) requires “a sincere and not unreasonable belief on the part of judges and other officials who administer the legal system that the law is guided by a common good idea of justice” (Rawls, 1999(2), p. 66; Rawls, 1993, pp. 51-52). Rawls here relies on Philip Soper’s view, not for Soper’s definition of law, but for the conditions necessary for maintaining a system of law. Soper sets forth two necessary conditions for a system of law that establishes political
obligations. “Those features are (1) the fact that the enterprise of law in general—including the particular system, defective though it may be, that confronts an individual—is better than no law at all; and (2) a good faith effort by those in charge to govern in the interests of the entire community, including the dissenting individual” (Soper, 1984, p. 80). There are many objections to Soper’s theory (see Harvard Law Review, 1985; Burton, 1985), and neither Rawls nor I endorse it entirely, but what is valuable in his definitions of law and political obligation is the condition that there is a good faith belief that the law—not only pro forma, but also profecto—is being administered in the interests of the entire community or consistently with at least a common good idea of justice.

Like Rawls, my standard for the legitimacy of international actors also includes some way of confirming or disconfirming that the rules of global governance are being administered consistently with at least a minimal conception of justice. A system that conforms to justice cannot only declare rules, but also must provide some verification. For Rawls, this includes some procedure for those under authority to voice their dissent and, if challenged, some procedure for judges and officials to find that the law or policy is consistent or inconsistent with the common good idea of justice.

Unlike Rawls, my requirement of good standing is not limited to official good faith belief, but the beliefs or perceptions of all those affected by the law or policy. My requirement of good standing goes a step further than Rawls, requiring not only a kind of tested sincerity against an objective standard, but verification by open public comment by all those affected. The reason for this step is because my account, being more cosmopolitan than statist, focuses not on peoples or states, but various international actors, and recognizes that there may be those in power or authority, but none competent or having the capacity thus far to verify compliance.
Rawls offers a statist conception of legitimacy for the international context. One of the main tenets of statism is that states alone are the primary agents who make decisions and bear responsibility in the international context. My conception of legitimacy assumes a kind of cosmopolitanism. There are at least two versions of cosmopolitanism. Cosmopolitanism can be characterized in the negative as rejecting the view that states alone are the primary agents who make decisions and bear responsibility in the international context (i.e., “weak cosmopolitanism”). Cosmopolitanism also can be characterized in the affirmative as also advancing the view that individuals, alone or collectively, are the primary agents who make decisions and bear responsibility in the international context (i.e., “strong cosmopolitanism”). My account of international political legitimacy is committed only to weak cosmopolitanism. My account considers not only states and state law, but also non-state actors and their charters, rules, policies, and practices. If the rules in question were laws of a state, then it makes sense for judges and other officials, who are themselves part of the state, to offer opinions as to whether the laws are constitutional or consistent with the interests of those involved, namely, the citizens of the state. The officials and judges are themselves citizens of the state and are specifically charged with upholding the constitution and laws. The legislators, as part of their official duties, routinely determine whether new legislation is consistent with the constitution and judges, discharging the duty of judicial review, routinely determine the constitutionality of laws and policies.

By contrast, in an international context, there is no reason to expect a particular international actor’s agents to make determinations that are consistent with the international community’s interest or the interests of all those affected, including other individuals, groups, states, and international actors. We may expect the agents of an international actor to make
determinations consistently with the international actor’s own interests, but not necessarily the interests of those affected by the international actor’s rules or policies. Unlike officials and judges of a state, an international actor’s agents are not directly charged with upholding the interests of the international community. They are not public officials entrusted with the public good; they instead have their own interests and those interests may be inconsistent with the interests of the international community at large or an affected segment of that community.\(^5\)

Also, there may be those in power or authority and, specifically, there may be agents within an organization or institution responsible for review (e.g., dispute settlement officers for the World Trade Organization (WTO)), but there currently are no adequate international courts or procedures to consider dissenting views or the interests of all those affected by an international actor’s rules or policies. There is some movement toward greater consideration of the interests of the international community and particularly the interests of developing countries, which are often underrepresented. For example, there are measures for greater participation by developing countries in trade negotiations of the WTO with trade preferences through special and differential treatment, but this movement is slow and inadequate. Only a few developing countries participated in the Uruguay Round (1986-1994) or earlier rounds of WTO negotiations. Even with special and differential treatment as a high priority in the Doha Round (1995-present), only larger countries with resources, such as China and India, were able to take

\(^5\) Rendering admissible the perceptions of a broader segment of the international community also addresses a criticism of Soper’s view that official good faith belief may be insufficient to protect the common good or individual autonomy. Slaves in the antebellum South might have satisfied Soper’s conditions, being a system better than anarchy with slave owners ruling in good faith, but the system might not in fact protect even the basic human rights of the slaves (Harvard Law Review, 1985, 1349). The underlying motivation for the condition is consent or something like consent, that there is reciprocity between those in authority and those under authority that is preserved by official good faith belief (see Soper, 1984, p. 55-56). Illustrations from history, such as slaves in the antebellum South, however, provide good cause for doubt that official good faith belief alone is sufficient to protect the interest of the entire community.
advantage of any trade preferences, while others were largely left out of the process (see Hoekman, 2004). Therefore, whatever mechanisms are in place, such as dispute settlement procedures to resolve conflicts in negotiated agreements, are grossly inadequate to consider the interests of all those affected when some that are affected are not even part of the negotiations in the first place. Other international actors, such as the International Monetary Fund (IMF), in the past have imposed economic policies (commonly referred to as the policies of the “Washington Consensus”) on their client states without adequately considering input from those states. The IMF’s austerity policies may have been well-intentioned, but, in some countries, they had the effect of multiplying the country’s debt, devaluing the country’s currency, reducing consumer purchasing power, increasing the cost of public services, and consequently, causing or aggravating social unrest and instability (see Conklin and Davidson, 1986; Stiglitz, 2003). The IMF also is making efforts to consider perspectives from client states and take into account the individualized economic and political circumstances of each state, but the IMF, like the WTO, is neither ready nor equipped to adequately consider the interests of all those affected by its rules or policies.

When there is a need to ensure compliance and when there are no officials or judges tasked with this job, the responsibility remains with the international community. In the international context without adequate international officials to protect the interest of all those affected, we should allow for public comment to consider the perceptions of the affected individuals and groups, or those who represent them. This may include reports from nongovernmental organizations responsible for monitoring human rights violations, state representatives, domestic or international citizens’ groups, or other interested individuals or groups. Based on the ‘circumstantial evidence’ available from these sources, the requirement of
good standing operates to confirm or disconfirm an initial finding under the requirement of justice.

Although my requirement of good standing relies on the perceptions of those affected rather than official good faith belief, the need for evidence confirming compliance with the requirement of justice is the same. One justification for the requirement of good standing is to prevent a kind of enforcement gap between adopting a normative structure and its effectiveness. Adopting a qualifying normative structure is one thing; showing that one’s rules and policies affect those subject to them in a way that respects their basic procedural and substantive rights is another. The requirement of justice requires the adoption and implementation of a kind of constitutional structure consisting of a set of rules and institutions that respect basic procedural and substantive rights. An international actor may adopt and implement a qualifying normative structure. But its normative structure with its rules and institutions in the context in which it is adopted and implemented may not have its intended effect on all those who may be substantially affected. For example, it may protect a majority of those affected, but leave out significant minorities. It also may intentionally or unintentionally have an unfair or unequal effect on those in certain political or cultural contexts. Legitimacy requires not only the adoption and implementation of the right normative structure, but also some evidence confirming compliance or effectiveness.

When there is a need to confirm compliance, one way to do this is through challenges of human rights violations and official procedures with an impartial judge or hearing officer. Rawls seems to rely on this approach. Another way to verify compliance is through open public comment and consideration of the perceptions of those affected and, specifically, allegations of human rights violations. Although imperfect, in the international context without adequate
official procedures in place, such data would have a tendency to confirm or disconfirm compliance with the requirement of justice. It may be helpful to imagine a kind of feedback loop between an official rule or policy and perceptions of those affected by the rule or policy. The perceptions of those affected may include descriptions of their treatment under the rule or policy or, when the rule or policy is particularly egregious, responses in the form of criticisms and protests. Without this part of the feedback loop, we would not be able to determine whether the rules and policies are in fact consistent with respect for basic human rights. A government may adopt a constitution with extensive guarantees of civil and political rights, but act inconsistently with such guarantees, as was the case in Egypt under President Mohammed Morsi. The protests against President Morsi provided feedback from citizens effectively asserting that, among other things, their basic liberties were not being respected. If we relied on the official constitution and other documents, and if we ignored the protests of the Egyptian people, we may not make an accurate determination of compliance or noncompliance.

Public comment from those affected also provide an occasion to correct for any deficiencies in the rules or policies so that the amended rules and policies indeed would have the effect of respecting basic human rights. Rules or policies, if untested, may not have the desired effect under the circumstances involved in a particular political community or cultural context. Rules or policies, as they are worked out in practice, may require certain specifications to address unanticipated challenges and other features of a legal system or a particular political or cultural context. Without feedback from those affected, we would not have occasion to know about and correct for such defects or deficiencies and may make a premature determination of legitimacy.
Some still may be skeptical of the need for corroborating circumstantial evidence. One may wonder why a requirement of justice alone not enough? Or, why not include actual compliance in the requirement of justice? The first condition of Applied Justice-Based Legitimacy is substantial compliance with a just international normative structure, which is a set of rules and institutions that respects basic procedural and substantive rights. This condition requires the adoption and implementation of a set of rules and institutions that respects basic human rights. The test for compliance involves evaluating an international actor’s rules and institutions. This may include a consideration of the international actor’s procedures and practices. The problem, however, is that the main source of data is provided by the international actor itself. International actors may intend to protect the interests of the international community and those affected by its rules and institutions, but these intentions, when untested and unconfirmed, are inadequate to establish the fair treatment of those affected.

One may also wonder, then, if evidence of perceived compliance plays such a crucial role in determining legitimacy, why is the requirement of justice also necessary? If we are concerned about how people are actually treated, why not place greater or complete weight on reports from citizens’ groups and human rights organizations? Applied Justice Based Legitimacy is a constitutionalist approach and, as such, is justified for the same underlying reason of any constitutional system. Even if an international actor, in practice, treats people well and never violates their basic human rights, there is something critically missing if the international actor does not also adopt rules and institutions guaranteeing the protection of human rights. For one, there is no effective constraint to prevent those who may rise to positions of power from committing human rights violations. Without a constitutional structure, another weakness is the lack of effective constraints to prevent existing agents from committing future violations. Even if
no violations have occurred thus far, there is no guarantee that violations will not occur in the future. The main justification for a constitutional system is to preserve the rule of law, as opposed to a rule of men. A constitution establishes a set of basic rights to protect people from arbitrary abuses of power. There is no perfect guarantee that human rights violations will not occur under a constitutional system, but a constitution establishes norms and a basis for criticism and, when the constitution also establishes procedural mechanisms to review and remedy violations, provides the resources for addressing violations and deterring future violations. A set of laws and institutions form a framework for existing and future agents, so that changes in leadership or leadership policies would not diminish the basic rights of those subject to an international actor’s exercise of power. A requirement of justice with its demand for a constitutional framework is therefore indispensable to maintaining a minimally just political community.

Even if the need for corroborating circumstantial evidence is granted, others may worry whether opening the door to public criticism would invite unreasonable perspectives and inappropriately obstruct an international actor from being identified as JINS-compliant. The requirement of good standing, however, only opens the door to reasonable perspectives and the views offered that are substantiated with sufficient evidence. The requirement provides that an international actor obtains good standing if and only if no one who is substantially affected by its exercise of political power comes forward with reasonable and sufficient evidence to reject its being JINS-compliant. The qualification of sufficient evidence concerns the content of the evidence, namely, that the evidence is relevant and sufficiently weighty to undermine an initial finding of JINS compliance. The evidence is relevant only if it is evidence pertaining to the question of whether the international actor’s rules and policies are just, in that, they substantially
comply with basic substantive and procedural rights. Relevant evidence includes evidence falling in the following categories: evidence of the actor’s present and historical identity, evidence of the actor’s present and historical record, evidence of the actor’s national and/or international reputation, and evidence of the actor’s past and present relationships with states and other international actors. The qualification of reasonable evidence concerns the source of the evidence, namely, that the evidence comes from perspectives consistent with a reasonable conception of justice. As discussed below, the requirement of good standing is open to the perspectives of all those affected, but only if those perspectives are reasonable. These parameters operate as a filter to exclude unreasonable and unsupported opinions.

The requirement of good standing is necessary as a procedural check of an international actor’s JINS compliance to establish that it qualifies as legitimate. After open public comment, if no one comes forward with reasonable and sufficient evidence of violations of basic substantive or procedural rights, then the international actor would satisfy the requirement of good standing. If individuals, citizens’ groups, nongovernmental organizations, or others come forward with evidence of violations, and this evidence falls within the parameters above, then this provides a sufficient basis for finding that the international actor has not satisfied the requirement of good standing and, hence, not qualified as legitimate. The requirement of good standing takes into account not official good faith belief in the proper administration of law, but is open to the reasonable and justified perceptions of all those affected by an international actor’s decisions and actions. The requirement of justice requires a constitutional framework and the requirement of good standing verifies that an international actor is indeed implementing JINS fairly and equally and, therefore, protecting the basic substantive and procedural rights of all those affected by its activities.
4.2.2. Toleration of Reasonable Pluralism

The second reason that circumstantial evidence of JINS compliance is necessary for international political legitimacy is because it is required by justice and a principle of toleration. This section defends a certain principle of toleration and shows how the principle operates to take into account diverse perspectives and the factors that may be afforded greater weight in different cultures. My account of international political legitimacy does not privilege the perspectives of powerful states or the international actors that are often established or maintained by powerful states. It instead accommodates the reasonable pluralism of the international context by considering different cultural perspectives with different but reasonable conceptions of justice. The aim of the requirement of good standing is to establish a level playing field, in which the perceptions of compliance or noncompliance by those affected by the international actor’s activities also count to determine whether the actor is legitimate or illegitimate.

From the outset, it may be argued that the requirement of good standing does not accommodate the pluralism of the international context because the requirement operates not only against dominant cultures, but also against minority cultures, making it difficult for international actors that are established or maintained by those cultures to qualify as legitimate. While it is true that the requirement of good standing makes it harder for any international actor to qualify as legitimate, the condition nevertheless is required by justice and, specifically, the toleration of reasonable pluralism. The requirement applies equally to international actors from dominant cultures and minority cultures. The requirement is intended to protect those affected by powerful international actors, not to privilege perspectives from minority cultures or insulate international actors from those cultures from criticism just as it also does not privilege perspectives from dominant cultures.
The requirement of good standing takes into account different perspectives and perceptions by considering evidence of the international actor’s identity, history, reputation, and relationships. I assume for the purposes of this section that some cultures assign greater weight to evidence of one or more of these factors than direct evidence of JINS compliance based on the international actor’s charter, rules, policies, and practices. My objective here is to make a case for toleration and show how the requirement of good standing tolerates reasonable pluralism in the international context.

Toleration, in the normative sense, is not merely a matter of convenience or mere practical necessity, but a matter of justice. Normative toleration requires not only forbearance or putting up with divergent perspectives, but recognition that the perspective is worthy to some extent of moral respect (see Tan, 2011, p. 491). The principle of toleration applied here is a principle of normative toleration. The justification for a principle of toleration is justice itself. This can be explained in one of two ways.

One explanation is based on substantive justice and the right of each community to liberty and, specifically, liberty of conscience and expression. Every community is entitled to its own set of beliefs and values. A community’s beliefs and values may include a set of moral norms and a particular conception of justice. A community’s beliefs and values, and, specifically, its conception of the good and its conception of justice, also may result in a different way of seeing the world and in different perspectives of events and activities in the world. The right to liberty of conscience and expression allows a political community to preserve and

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56 Kor-Chan Tan explains, “[The second sense of toleration] entails not only the accommodation of the tolerated object, but the recognition that it is acceptable in some respects even if not fully approvable. So unlike the practice conception, this second understanding of toleration requires, in addition to forbearance, the adoption of a certain normative stance toward the tolerated. The tolerated is not simply ‘put up’ with because there is no feasible way of opposing it, but is tolerated because it is deemed acceptable from some moral perspective” (Tan, 2011, p. 491).
express its identity in these ways. These rights have a correlative duty, namely, the duty of those outside the community to respect (not necessarily accept for themselves, but respect) the beliefs and values of the community and those within the community to the extent that it does not conflict with some weightier right or duty. This correlative duty of respect is one basis for a principle of toleration.

Another basis for a principle of toleration is procedural justice and the procedural right of impartiality. Procedural justice includes the right of impartiality. When one is selecting between different yet reasonable conceptions of justice, the right of impartiality requires no bias in favor of one or against the other unless there is some sufficient basis for partiality. Unreasonableness may be an appropriate or sufficient basis for partiality, thereby disqualifying unreasonable conceptions of justice. But between different yet reasonable conceptions of justice, no exceptions apply and impartiality requires no favoritism. This right of impartiality directly opposes the adoption of normative requirements that favor one set of beliefs or values or disadvantage others. It would be a violation of this right, therefore, to adopt any normative requirement that favors one perspective or disadvantages others without appropriate grounds or sufficient justification. This right also provides a basis for a principle of toleration.

Substantive and procedural justice require the toleration of reasonable pluralism and, therefore, provide the bases for some principle of toleration. There may be different principles of toleration, but I rely here on a principle of toleration similar to the one advanced by Rawls. Rawls’s principle of toleration provides that there are many reasonable yet competing comprehensive doctrines and that it is unreasonable to use political power to repress other reasonable comprehensive doctrines (Rawls, 1999(1), p. 16, fn. 8). Similarly, for the purpose of this project, we can define a principle of toleration, as follows:
Principle of Toleration: if x has a comprehensive doctrine CD1 and y has a comprehensive doctrine CD2, and CD1 and CD2 are both reasonable, but incompatible, x must tolerate y by not imposing upon y a set of normative requirements that disadvantages CD2.

Given this definition, if we have many reasonable, yet competing perspectives, then we tolerate perspectives different from our own by not imposing upon others a set of normative requirements that disadvantages others. A set of normative requirements, including the requirements for international legitimacy, would satisfy the principle of toleration only if it does not favor one comprehensive doctrine to the disadvantage of another. Different cultures have different comprehensive doctrines, so the principle of toleration requires no favoritism among different cultures. It requires the adoption of normative requirements that respect different cultures.

The requirement of good standing is consistent with the principle of toleration because it recognizes the political realities of the international context, including reasonable pluralism and the reality that different cultures have different beliefs and values and, as result, different perspectives of global justice. Even after establishing a shared standard of minimal justice for international political legitimacy (e.g., respect for basic human rights), the determination of whether the conditions are satisfied may be complicated by different cultural perspectives. Recent history suggests that what constitutes a violation of the conditions for legitimacy varies depending on one’s perspective. The United States finds offensive the violation of the right to peaceably protest at Tiananmen Square and Trafalgar Square, while other Asian and Middle-Eastern states find offensive the United States’ unilateral aggression in Iraq, its treatment of prisoners at Guantanamo Bay, and its use of unmanned aerial vehicles in Yemen and Pakistan. These different perceptions may be based on different conditions for legitimacy or specification.
as to which human rights are indeed universal human rights. The different perceptions also may be based on fundamentally different political, ethical, and cultural perspectives through which one views current acts and historical events.

For an example of a perspective not often heard in western liberal circles, we can look to the 2001 Declaration of the Asia-Pacific NGO Forum and its statements on racism in the global context:

At one level, globalization has seen the continuation of the domination of one-time colonial powers together with newly established economic ‘big powers’ over the world system. At another level, the global order of nation states has seen the emergence of a multitude of nationalisms from which have developed a number of instances of ethnic hegemonisms. This has resulted in the creation of ethnic exclusivist states.

At the global level, we see the iniquity of this system within the international community, for example in the United Nations and in the international financial institutions in which the globally dominant powers retain control. The political structures that are required to facilitate the free flow of capital and unregulated financial speculation are themselves authoritarian and have led to repression, exclusion, intolerance and violence.

This regional declaration represents a perspective of world history and the present global order as drastically different from the perspective held by many in western cultures.

Another example of a non-western perspective is provided in the Cultural Charter for Africa (1976). The preamble begins with the following statements:

We, Heads of State and Government of the Organization of African Unity….

CONVINCED that all the cultures of the world are equally entitled to respect just as all individuals are equal as regards free access to culture;

RECALLING that, under colonial domination, the African countries found themselves in the same political, economic, social and cultural situation; that cultural domination led to the depersonalization of part of the African peoples, falsified their history, systematically disparaged and combated African values, and tried to replace progressively and officially, their languages by that of the
colonizer, that colonization has encouraged the formation of an elite which is too often alienated from its culture and susceptible to assimilation and that a serious gap has been opened between the said elite and the African popular masses.

These different perspectives suggest that, even with a shared standard of minimal justice and the protection of human rights, there may be different perceptions as to whether the standards are satisfied depending on an individual, group, or states’ position and culture. With such diverse perspectives, what also is needed is an account of legitimacy that not only offers a set of minimally just rules that can gain wide acceptance, but also includes a way to take seriously evidence from different perspectives.

The requirement of good standing satisfies the principle of toleration and respects different perspectives, particularly non-western perspectives, because it requires not only direct evidence of an international actor’s JINS compliance, but also circumstantial or corroborating evidence from those who may be substantially affected by the actor’s decisions and actions to determine whether the actor is legitimate. This circumstantial evidence includes justified perceptions from all those affected by the international actor’s activities. This evidence plays a crucial role because it can effectively veto an initial finding of compliance under the requirement of justice. An international actor’s charter, rules, policies, and practices may seem to uphold basic substantive and procedural rights, as required by the first condition, but the perspectives of those affected by the international actor’s activities, under the second condition, may cast doubt upon an initial finding under the first condition and provide grounds for denying a determination of legitimacy.

As mentioned above, the perceptions are not mere opinions, but justified perceptions based on reasonable and sufficient evidence of the international actor’s identity, history, reputation, and relationships. The consideration of this additional evidence can greatly affect an
ultimate determination of legitimacy. Evidentiary rulings, as in judicial proceedings, have a significant effect on the outcome of trials. What often determines the outcome of trials are the decisions made before trial at the preliminary hearings to establish the rules at trial, including the preliminary hearings on the admissibility of certain evidence. In a criminal trial, the admissibility of evidence of prior bad acts, key eye witness testimony, or forensic evidence may be crucial to a determination of a defendant’s guilt or innocence. The preliminary determination of the evidence’s admissibility based on the evidence’s prejudicial effect, reliability, or general acceptance within the relevant scientific community may be decisive in the guilt phase of a criminal trial. The outcome of criminal trials often turns on what evidence is allowed or not allowed. Similarly, with international legitimacy, the determination of legitimacy may depend on what evidence is allowed or not allowed. The requirement of good standing opens the door to what I have called circumstantial evidence. Direct evidence, again, is evidence of an international actor’s charter, laws, policies, and practices. Circumstantial evidence is evidence of the effect of an international actor’s charter, laws, policies, and practices on those in vertical and horizontal relationships with the international actor and are affected by the international actor’s activities. Opening the door to circumstantial evidence effectively renders admissible other kinds of evidence and evidence from other perspectives. Rather than a narrow evaluation of an international actor’s rules and practices, this approach takes into account evidence from those affected by the international actor’s activities and, specifically, perceptions of the international actor’s identity, history, reputation, and relationships.

As argued above, as there is no adequate international court or independent or impartial judge of an international organization, the requirement of good standing calls for additional evidence from those affected by an international actor’s activities to confirm or
disconfirm the actor’s JINS compliance. Effectively, states, nongovernmental organizations, and other international actors making determinations of legitimacy should consider other perspectives to a make a complete and accurate determination. They should consider not only an international actor’s charter, rules, policies, and practices, but also justified perceptions by those affected by the international actor’s activities. This may include not only their own judgments (e.g., the US State Department or Amnesty International), but also judgments from other perspectives (see Blitt, 2004). If the international actor is the IMF, then the other perspectives may be from citizens or citizen groups of those client states that interact with the IMF. In a way similar to how a court’s opinion may protect minorities from tyranny or oppression, the requirement of good standing in part protects minority perspectives from being ignored in matters of international legitimacy. It takes the principle of toleration seriously and recognizes the realities of the international context by accommodating reasonable pluralism in a significant and meaningful way.

A determination of international legitimacy may be complicated by this additional requirement of good standing, but this is what makes it different from a mere determination of legitimacy by a state department in deciding matters pertaining to its own foreign policy. It is not simply a dominant culture tolerating other cultures that it finds reasonable. This is what makes my account an account of international legitimacy. A determination of international legitimacy must apply a standard of legitimacy that tolerates reasonable pluralism of the international context. It cannot accept a normative standard that favors one perspective to the disadvantage of another. My account tolerates reasonable pluralism by accommodating pluralism in the very design of its normative requirements. The result is a requirement that renders relevant and effective perspectives from all affected members of the international community.
My account of international legitimacy may open the door to many different and conflicting perspectives and it may be difficult to resolve these conflicts and arrive at a final determination of legitimacy. But I think this involves a further question concerning the resolution of conflicts. It is not the specific question that concerns us here. At this point, I am less concerned about the problem of conflicts, i.e., that there are too many voices, and more concerned about developing an account of international political legitimacy that genuinely accommodates the pluralism of the international context, i.e., that all voices are heard. My objective here was to show how the requirement of good standing accommodates the pluralism of the international context and is necessary for international political legitimacy.

I have argued in this chapter that the requirement of good standing is a necessary condition for international legitimacy, both as a procedural check on an international actor’s charter, rules, polices, and practices and as an accommodation of reasonable pluralism. The requirement of good standing allows those who are affected by an international actor’s activities to offer their justified perceptions as to the actor’s compliance or noncompliance with the requirement of justice. This broader consideration of the perspectives of others, including others from different cultures than those typically relied on for evidence of human rights violations, applies the principle of toleration in a way that genuinely respects cultural diversity. Unless the consideration of different perspectives or particular interests of justice are specifically included as part of the normative structure of legitimacy for the international context, there will always be ways to neglect or undermine such contributions. Toleraton is not merely an afterthought in my account, but plays a significant role as a basis for this second condition of legitimacy.
5. Implementation of Applied Justice-Based Legitimacy: Preliminary Considerations

My account of international political legitimacy is designed with implementation in mind. Implementation is where theory begins to be worked out in practice. When we are speaking of implementation, it is hard to identify the philosophically interesting questions or offer answers that are practically meaningful or useful. The theoretical work on implementation is a starting point, but much is left to be decided as theory is worked out in practice, as implementation usually involves empirical variables, many of which are uncertain or unforeseeable. At this stage, two preliminary questions arise: first, whether the account is even plausible given the political realities of the international context and, second, whether the account provides sufficient action guidance for its own implementation and enforcement. While it is difficult to foresee every challenge that may arise in the implementation of a particular approach to the development of international law or the development of an internal system of rules within an institution or organization, there are general challenges in the international context such as the fragmentation of laws and the threat of persistent noncompliance. The fragmentation of laws concerns the inconsistency of implementation and the resulting laxity in protection against human rights violations. The challenge of persistent noncompliance is essentially a problem of enforcement. There are many human rights regimes and most international institutions and organizations already operate under these constraints, but, despite these constraints, there continues to be flagrant violations of human rights without adequate enforcement and without recourse.

As primarily a theoretical project on international political legitimacy, my claim here is a modest one, namely, that legitimacy is a motivating factor in the enforcement of international

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57 These two questions coincide with the last two criteria for international political legitimacy, namely, that the account is pragmatic and effective.
human rights law and that my account of legitimacy in particular, which features procedural justice, offers sufficient action guidance. My account of legitimacy depends in large part on voluntary compliance, namely, that international actors would implement JINS or something similar, as a constitutional structure designed to protect human rights, because they want to advance justice or legitimacy. My account, therefore, depends on the plausibility of legitimacy as a motivating reason for action. Although my account recognizes other material benefits for those qualifying as legitimate that may motivate an international actor, such benefits only arise after the account gets off the ground and a kind of quorum of JINS-compliant actors exists. Before this, the account depends critically on voluntary compliance. My claim of the plausibility of legitimacy as a motivating reason is contrary to the prudential view that it is not legitimacy, but ultimately self-interest alone that motivates international actors to act, including acting to enforce human rights norms. In the first section of this chapter, I defend my claim of the plausibility of legitimacy as a motivating factor in the establishment and enforcement of international human rights law by considering a contrary view, as presented by Jack Goldsmith and Eric Posner in *The Limits of International Law* (2005). Relying in part on Ian Hurd’s essay on legitimacy, I argue that legitimacy can provide effective motivation for establishing and enforcing international human rights law.

In the second section of this chapter, I turn to the question of action guidance. As mentioned in chapter 3, my approach is to offer model JINS or sets of model rules and mechanisms that can be adopted and implemented by new and existing institutions and organizations. One important point of clarification is that my approach applies only to international institutions and organizations that are engaged in global governance, thereby exercising political power, rather than every single international institution and organization. The
requirement of adopting a set of model rules and mechanisms would be unduly burdensome and even undesirable for small international actors such as the Inter-American Tropical Tuna Commission or the Universal Postal Union that already may be adequately regulated by domestic or international laws and institutions. The target of my approach are global governance institutions and organizations that wield considerable power, even outstripping the power of some small states. The development of a final set of model rules and mechanisms for global governance institutions and organizations would involve an ongoing interdisciplinary project. What I offer here is a skeletal set of model rules and mechanisms with further directions and recommendations for future development. My argument here is simply that while an account that does not offer clear directions and guidelines for implementation is not sufficiently action-guiding, one that does offer clear directions and guidelines for implementation is. My account offers clear directions and guidelines for implementation. My account therefore is sufficiently action-guiding. To show that my account includes sufficient guidance, in this second section, I begin the work of putting theory into practice by offering a set of general norms and a set of sample mechanisms. An example of a norm is the norm of impartiality. An example of a mechanism is the mechanism of arbitration or judicial review. What I offer in outline here is intended to be developed further through the help of practitioners, including policymakers, lawyers, and judges. The work would involve taking the outline offered here and formulating a JINS for different institutional needs and different political and cultural contexts.
5.1. Legitimacy’s Plausibility

My account of international political legitimacy relies on the view that morally-minded states and non-state actors could adopt and enforce a certain human rights regime voluntarily for reasons of justice or legitimacy. In this section, I defend the plausibility of legitimacy as a motivating reason for international actors to act. Plausibility here refers to the possibility and reasonableness of implementing a theory under current political realities. Theorists who work in international relations recognize two dominant modes of international law enforcement, often working in tandem, that the law is enforced by states when the law is consistent with their interests and the law is enforced by the use of coercion or force. Self-interest indeed is one crucial motivation for enforcing human rights norms, but self-interest, I think, is not inconsistent with also adopting and eventually internalizing rules because of their legitimacy (see Hurd, 1999; Peters, 2009, p. 402). Recognizing that it is usually the coincidence of interest and legitimacy that motivates morally-minded members of the international community to act, my view is that both are motivating reasons and both have an important role to play in the enforcement of international human rights law.58 Other theorists, including Jack Goldsmith and Eric Posner, however, argue that it is ultimately self-interest that motivates international actors, particularly states, rather than any other motivation such as the internalization of rules because of the rules’ legitimacy (see Goldsmith and Posner, 2005). I defend my claim here by showing weaknesses in Goldsmith and Posner’s arguments and by relying on insights from Ian Hurd to show the plausibility of legitimacy as a motivating reason for establishing and enforcing international human rights law.

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58 By “morally minded members of the international community” I simply mean those state and non-state actors who have among their interests interests of justice and the protection of human rights.

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Under my account of international political legitimacy, the status as a legitimate international actor comes with certain benefits, such as the privilege of participation and engagement in political and economic endeavors, and the status as illegitimate comes with certain burdens, such as exclusion, disengagement and, as necessary, the use of sanctions and force. Although these material benefits and burdens may influence an international actor to act for its own self-interest, it may be helpful to clarify that my account also depends crucially on the voluntary adoption of JINS by morally-minded members of the international community. The benefits and burdens of legitimacy have any effect only after JINS or some other international normative structure gets off the ground. The adoption of an international normative structure in turn may depend on public criticism or demand and its influence on an international actor’s decision to act in its own self-interest. But my claim is that such decisions can be more fully explained by also considering justice or legitimacy as a motivating reason for action.

In *The Limits of International Law*, Goldsmith and Posner defend the opposing view that “international law emerges from states acting rationally to maximize their interests” (2005, p. 3). Using particular models of rational choice theory, Goldsmith and Posner claim that states engage in political and economic interactions with other states and conform to international law, including international human rights law, only insofar as such actions advance their own interests. Goldsmith and Posner argue that states have no moral obligation to comply with international human rights law because of the law’s legitimacy. They assert that those who

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59 Meghana Nayak succinctly explains: “*The Limits of International Law* uses four game theory models: (1) a coincidence of interest model, which assumes that neither state takes into consideration the actions of the other state; (2) a coordination model, which assumes explicit mutual action in order to avoid costs; (3) a cooperation model, which assumes that states explicitly refrain from activities that might be in their interest but would incur high costs; and (4) a coercion model, which assumes that more powerful states force weaker states to take particular actions.” (Nayak, 2005, p. 469.)

60 Goldsmith and Posner also argue that states do not comply with international human rights law from a sense of legal obligation or opinio juris, contrary to view expressed in the American Law Institute’s Restatement (Third) of
argue otherwise are relying on an assumption that states have a moral obligation to comply with international law, which relies on an even more basic assumption that states have moral obligations. Goldsmith and Posner reject this basic assumption.

According to Goldsmith and Posner, individuals have moral obligations, but states have only legal obligations (2005, pp. 185-189). International law is premised on the assumption that international legal obligations rest not with individuals or whatever government happens to be in power, but with states. As for moral obligations, although it is common to speak of a state having moral obligations, the state in fact has no such obligations. The reason is because states lack what is necessary for having moral obligations, namely, autonomy.

Goldsmith and Posner explain that, even when states consent to comply with international law by ratifying treaties, the state is under no moral obligation to keep its promises. They argue that, while individuals may have a moral obligation to keep their promises because such promise keeping is a representation of their autonomy, states are not autonomous. “Individuals should have the power to control their lives, to draft and execute ‘life plans,’ as it is often put, and an important part of this power is the ability to make binding promises….States, however, do not have life plans” (2005, p. 191). Goldsmith and Posner also argue that it is unlikely that a state has a moral obligation to keep promises that is derived from its citizens’ autonomy or the enhancement of its citizen’s autonomy. “The question is empirical, and it seems doubtful—keeping in mind the ambiguity of the concept of autonomy, the many ways that people exercise autonomy in their ordinary local activities, and neglect by many states of the interests of their citizens as well as those of third parties who might be affected by the promise—

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Foreign Relations Law that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation” (see Norman and Trachtman, 2005, p. 544).
that there is a relationship between the autonomy of individual citizens and a state’s power to enter treaties” (2005, p. 192). States often do comply with their treaties, but this is, according to Goldsmith and Posner, a prudential decision and not a moral one (2005, pp. 192-193; see also Posner, 2003, p. 1909).

While some may regard states as similar to other collective entities, such as corporations, Goldsmith and Posner also draw a sharp distinction between corporations and states. Corporations have obligations independent of those of its shareholders because they have some autonomy to bind the corporation and its shareholders. Shareholders purchase their shares with knowledge of the corporation’s limited liability and on condition that the price reflects a discount for the market’s estimate of existing corporate liabilities. If the corporation, through its managers, violates an obligation, the penalties are borne by the shareholders who have no basis for complaining about the corporation’s liabilities. According to Goldsmith and Posner, states are different. States do not have the autonomy to make promises binding itself and its citizens. Citizens generally have not consented, impliedly or tacitly, to assume the state’s obligations and, therefore, are free to disregard the state’s obligations if these obligations do not reflect their interests. With these explanations in mind, Goldsmith and Posner’s point seems to be that, because the state is beholden to its citizens completely without any separate autonomy and authority, it has no moral obligation to do anything contrary to its interests, which are its citizens’ interests (2005, p. 187-188; see also Posner, 2003).

61 It is not clear whether this distinction holds, in that, it is not clear whether citizens have a realistic opportunity to avoid paying for their state’s liabilities. Shareholders indeed purchase their shares and, in a way, consent to the corporate structure, but it also is not clear whether their consent covers the corporation in all of its activities. Citizens similarly may not consent to the state in all of its activities and yet cannot realistically refuse to bear the consequences. Goldsmith and Posner’s view also ignores the concepts of sovereign and qualified immunity, which, as with limited liability in a corporation, protects the state and its officers from suit or liability. States and corporations and citizens and shareholders may have more in common than Goldsmith and Posner’s view admits.
According to Goldsmith and Posner, when a state conforms to international law, including international human rights law, the state is acting not to discharge any moral obligation, but acting in its own interests. The state’s behavior is better explained by the models of rational choice theory, such as coincidence of interest, coercion, and cooperation. Coercion and cooperation are models in which a state advances its interests by either threats or mutual benefit (symmetrical cooperation) or a payment of some kind (asymmetrical cooperation). As explained by Goldsmith and Posner, coercion and asymmetric cooperation are functionally equivalent, but the key difference between coercion and asymmetric cooperation is that when the weaker party cooperates, it is better off from the baseline of the status quo ante, whereas, when the weaker party is coerced, it is worse off (2005, p. 118). Coincidence of interest is also a model of rational choice theory in which a state advances its interest, independently of the interests of other states, and yet its behavior happens to coincide with the behavior of other states. States rarely commit genocide or crimes against humanity, but this is not because of the Genocide Convention or customary international law prohibiting crimes against humanity, but because all but the most authoritarian of states have independent reasons to refrain from abusing populations under its control.

“Domestic political exigencies generated increasingly liberal toleration in states long before the modern international human rights movement sprang into existence. The Ottoman Empire tolerated religious diversity. Most Western European governments stopped using torture as a routine investigative tool in the nineteenth century; political freedom advanced throughout that century as well. The rise of women’s and children’s rights in the nineteenth and twentieth centuries was a phenomenon unrelated to international law; so was the decline of racial and religious discrimination. By the second half of the twentieth century, most liberal democracies could comply with most aspects of the modern human rights treaties without changing their behavior. And the few aspects of these treaties that would have required liberal democracies to change their behavior were easily circumvented by reservation, understandings, and declarations (RUDs)” (2005, p. 111).
It is inaccurate, according to Goldsmith and Posner, to describe this behavior as compliance with international human rights law, because the law does not supply such motivation.

Goldsmith and Posner’s instrumentalist theory seems to ignore moral motivations altogether. They reject that states have any moral obligation to comply with international human rights law. Human rights norms generally do nothing to motivate states to act in ways that they otherwise would not already act in keeping with their own interests. Goldsmith and Posner’s instrumentalist approach is susceptible to many criticisms; I focus on two here. First, Goldsmith and Posner have not offered enough to reject the traditional view that states have the capacity to incur moral obligations and discharge them. Second, their analysis does not support the complete exclusion of law or legitimacy as a motivating reason for state behavior. The second problem concerns their use of rational choice theory and, in particular, the coincidence of interest model to explain state behavior. I agree that states act to uphold human rights when its interest in upholding human rights coincides in some way with its other interests, but this involves a very different phenomenon than described by the coincidence of interest model of rational choice theory. I distinguish among different kinds of coincidence of interest(s). When there is a single-party coincidence of interests, as defined below, I submit, contrary to Goldsmith and Posner’s approach, an interest in complying with international human rights law can be effective in conforming state behavior to international human rights law.

5.1.1. Moral Obligations of States

Goldsmith and Posner’s rejection of the traditional view of states as having moral obligations seems to rest on their own assumption about states, which is itself doubtful. The
traditional view of states as having the capacity to incur and discharge moral obligations is not only more common, but also a plausible interpretation of current international law and practice (see, e.g., Norman and Trachtman, 2005; see also Helfer and Slaughter, 2005). Goldsmith and Posner maintain, however, that states have legal obligations, but cannot have moral ones. In this subsection, I evaluate Goldsmith and Posner’s argument and show that they fail to provide sufficient grounds for rejecting the traditional view. Legal and moral obligations are not mutually exclusive; the fact that states have legal obligations does not preclude them from also having moral obligations.

Goldsmith and Posner’s rely on the assumption that moral obligations require a kind of autonomy and that states are not autonomous, but these assumptions rely on a narrow conception of autonomy. Even for those who believe that the scope of morality includes only autonomous or free acts (or that autonomy is a necessary precondition for acting morally), one need not attribute to the state the same autonomy as that of individuals. To the extent that states are independent and have the right of self-determination, they are in a sense free. They are at least sufficiently free to exercise the right of self-determination, particularly with respect to those interests that emerge upon the existence of the state that previously did not exist when dealing merely with individuals. The obvious candidates for a state’s moral obligations are the obligations to protect

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62 The flipside that individuals cannot have both international legal and moral obligations also seems open to question. Although a state’s debts and obligations run with the state and not the particular government that happens to be in power, individuals also have their own legal obligations and are held accountable for violating those obligations. Former Yugoslav President Slobodan Milosevic, for example, was held accountable for genocide and other crimes by the International Criminal Tribunal for Yugoslavia.

63 My objective is not to prove that states have moral obligations. My claim in this chapter concerns the plausibility of legitimacy as a motivating reason to advance international human rights law. I defend this claim against one main objection inspired by Goldsmith and Posner’s view that states ultimately are motivated by self-interest and not legitimacy and that doing something for the sake of legitimacy would involve a moral obligation, but states do not have any moral obligations. My objective in this chapter is to respond to the Goldsmith and Posner inspired objection and argue that it is not the case that states do not have moral obligations. It is beyond the scope of this subsection to show affirmatively that states indeed have moral obligations. That would require further argument.
its citizens’ interests, keep its promises, respect the sovereignty of other states, help its allies, and come to the rescue of burdened societies. A state has both vertical and horizontal relationships: vertical relationships with those under its authority and horizontal relationships with other states and international actors. These relationships give rise to certain roles and responsibilities. A state, in its role as sovereign authority over a particular territory, has an obligation to protect the interests of the citizens of that territory. A state, in its role as a member of the international community, also has obligations to the other members of the international community. What Goldsmith and Posner seem to neglect are the state’s vertical and horizontal relationships and the obligations that arise within those relationships, including obligations to protect its citizens’ interests, keep its promises, help its allies, respect the sovereignty of other states, and come to the aid of burdened societies. These obligations are not necessarily based on some social contract or system of law. They can be characterized as moral obligations—whether or not based on some broader moral theory—derived from other basic moral principles such as the principle of keeping promises or a principle of reciprocity.

The obligations that arise from a state’s vertical and horizontal relationships also are not merely derived from its citizens’ moral obligations, but rather can be considered emergent obligations that rest with the state. A citizen may have obligations not to harm or to help those in need, but the state’s obligation of nonintervention and rescue arise in its relationships with other states. A citizen, for example, does not have a duty of nonintervention, i.e., a duty not to infringe upon the territorial integrity of another state. This obligation rests solely with states. A citizen also may have friends, but not allies, i.e., other states with whom it is associated by treaty or for some mutual benefit. It is the state that has allies and obligations to help them. It therefore cannot be said that the state’s obligation to help its allies is derived from or is co-extensive with an
obligation of its citizens. With respect to a state’s treaties, the terms of the treaties establish legal obligations. But complying with the terms at all and keeping one’s promises to one’s allies are moral obligations. The fact that there can be such moral obligations that are not reducible to the obligations of citizens suggests that states have moral obligations.

Citizens may reject a state’s exercise of its powers to discharge its moral obligations, but this does not by itself somehow strip the obligations of their moral quality. As explained in the preceding paragraph, the interests of the state and the interests of citizens do not necessarily coincide. When they do coincide, we can more accurately refer to the situation as a coincidence of interest. When they do not coincide, we can likewise more accurately refer to the situation as a conflict of interests rather than a rejection of the state’s capacity to have moral obligations. Even if the conflict of interests results in a decision in favor of the citizens’ interest over the state’s other interest (e.g., citizens’ domestic economic situation may prevent the state from discharging its obligation to help one of its allies), this may reflect a balancing of interests and an ultimate decision that the citizens’ interest outweighs the state’s other interest (e.g., balancing a moral obligation to protect its citizens’ interest with a moral obligation to help its allies and a decision that the former outweighs the latter). Presumably states are constantly in the business of making such decisions.

One plausible view, therefore, is that a state’s vertical relationships and horizontal relationships give rise to moral obligations. A state may have many, competing moral obligations which sometimes have to be balanced against each other, as well as considered with its legal obligations, to arrive at the best course of action in a particular situation. For example, a state may have reservations about ratifying a treaty based on its citizens’ interest, but once it ratifies the treaty, it assumes legal and moral obligations to comply with the provisions of the treaty.
When the state later decides not to comply with the treaty because of its citizens’ will or interests, while it may have discharged its moral obligation to protect its citizens’ interests, it has nonetheless violated its moral obligation to keep its promises and will likely be held accountable for the consequences of such breach by the parties of the treaty. There may be legal consequences based on the provisions of the treaty, but there also may be moral consequences, such as moral criticism by the other parties to the treaty and a loss of their trust. This seems not only a plausible way of understanding a state’s obligations, but also one that is more accurate, recognizing the moral and legal aspects of a state’s obligations and its reasons for acting.

Goldsmith and Posner’s view relies on the assumption that moral obligations require a certain kind of autonomy and that states lack this autonomy. They do not provide sufficient grounds for accepting this assumption, particularly against other equally plausible, if not more plausible, views of state obligations.

5.1.2. A Coincidence of Prudential and Moral Interests

My second line of criticism against Goldsmith and Posner’s theory involves a distinction among different kinds of coincidence of interest(s). There are three notable differences between a “coincidence of interests” as I am using the phrase and a “coincidence of interest” as used in rational choice theory and defined by Goldsmith and Posner. First, my use refers to a one-party coincidence of interests, in which one party has different, sometimes competing interests and the two interests coincide to motivate a particular decision or action. This is more consistent with a particular definition of “coincide,” namely “to agree.” Goldsmith and Posner’s use refers to a two- or multiple-party coincidence of interest, where each party pursues its own interest or
advantage and its behavior happens to coincide with the behavior of the other party or parties. This is more consistent with a different definition of “coincide,” namely, “to happen at the same time.” Second, my use refers to a coincidence of interests, rather than a coincidence of behavior or something else. According to Goldsmith and Posner’s use of the phrase, it is not necessarily the interests or advantage that coincide because the interests or advantage may be at odds with each other, but that each party is better off when it happens to do the same thing as the other party or parties. Third, my use of “coincidence of interests” refers to a phenomenon in which the interests of a party coincide and jointly provide sufficient motivation for the party’s decision or action. Goldsmith and Posner’s use of “coincidence of interest” refers to a phenomenon in which the interest of one party provides sufficient motivation for the party’s decision or action irrespective of the interest of the other party or parties.

Based on these differences, we can define the two kinds of coincidence of interest(s), as follows:

**Multiple-Party Coincidence of Interest**: two or more parties are engaged in a situation requiring that each make a decision or perform an action; each party has a sufficient reason for its decision or action irrespective of the other party or parties’ reasons, decisions, or actions; and the party’s decision or action coincides with the decision or action of the other party or parties.

**Single-Party Coincidence of Interests**: one party deliberates on a decision or action and has different and possibly competing interests relevant to the decision or action; two or more interests coincide and jointly motivate the party to make a particular decision or perform a particular action.

With single-party coincidence of interest, a party, including a state, can have many, different interests and the party’s decisions or actions can be motivated not by a single interest, but when two or more interests coincide. For example, state A may have an interest I₁ in protecting its citizens and an interest I₂ in defending its allies. State A may not defend its allies
for that reason alone, but only when defending its allies also advances the security interests of its citizens. It may be the case that, for state A, defending its allies also makes the world more secure and therefore keeps its own citizens safe. Thus, when state A acts to defend its allies, it is because of interests I₁ and I₂. This involves a single-party coincidence of interests, in which two or more interests of the same party coincide and work together to motivate the party’s decision or action.

Goldsmith and Posner use the phrase “coincidence of interest” as a model of rational choice theory (see also Scott, 1987, pp. 411-413; Bardsley, 2007, p. 145). According to Goldsmith and Posner, “[c]oincidence of interest is a situation in which a behavioral regularity among states occurs simply because each state obtains private advantage from a particular action (which happens to be the same action taken by the other state) irrespective of the action of the other” (2005, p.27). Goldsmith and Posner give the example of two belligerent states, states A and B, whose naval forces patrol with expensive naval vessels a common body of water used by inexpensive civilian fishing vessels. Each state independently does best if it ignores the civilian fishing vessels of the other.⁶⁴

Goldsmith and Posner believe the same phenomena applies to compliance with international human rights law. They explain that states have a variety of interests, including an

<table>
<thead>
<tr>
<th>State A</th>
<th>State B</th>
<th>Attack</th>
<th>Ignore</th>
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<tbody>
<tr>
<td>Attack</td>
<td>-2, -2</td>
<td>-1, 2</td>
<td></td>
</tr>
<tr>
<td>Ignore</td>
<td>2, -1</td>
<td>3, 3</td>
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⁶⁴ Goldsmith and Posner relies on the following payoff structure (table copied from 2005, p. 27). If state B attacks, state A would gain more by ignoring than by attacking and seizing the vessels (payoff of 2, rather than -2). If state B ignores, state A also gains more by ignoring than by attacking (payoff of 3, rather than -1). Either way, state A is better off ignoring state B’s vessels, irrespective of state B’s behavior. State B’s payoffs are symmetric to state A’s payoffs and, so, state B also is better off ignoring state A’s vessels, irrespective of state A’s behavior.
interest in complying with human rights norms. Their view, however, is that states only conform to human rights norms when it is consistent with its political and economic interests and that states are never motivated by the law itself. States act only prudentially and not morally. Goldsmith and Posner maintain that “the consistency of much state action with human rights law largely reflects coincidence of interest” (2005, p. 112). They later explain that states ratify treaties when the advantages of doing so outweigh the costs, irrespective of the behavior of other states. The costs of ratifying treaties, such as the International Convention on Civil and Political Rights, are low because the treaty has no self-enforcement or external enforcement mechanisms. The advantage, though small, is enough to motivate those who already comply to ratify the treaties. The advantage being mainly avoiding the reputational costs of sending an ambiguous signal that one is not committed to human rights (2005, pp. 127-131).

Interestingly, Goldsmith and Posner’s discussion of international human rights law and the statement above that “the consistency of much state action with human rights law largely reflects coincidence of interest” (2005, p. 112) is also consistent with a kind of single-party coincidence of interests. For example, as mentioned above, a state has an interest in treating its citizens well or refraining from committing genocide or crimes against humanity independently of international human rights law, yet this interest happens to coincide with an interest in complying with the Rome Statute or the Genocide Convention and customary international law prohibiting crimes against humanity. This suggests a possible alternative single-party coincidence of interests.

**Single-Party Coincidence of Interests with Single Interest Sufficiency**: one party has an interest that sufficiently motivates the party to make a particular decision or perform a particular action and the interest happens to coincide with
another interest relevant to the decision or action that was either another interest that the party had or not.65

The main difference between this and single-party coincidence of interest (with joint interest sufficiency), other than the fact that the interest may or may not have been one that the party had, is that the motivating interest was sufficient alone irrespective of the other interest with which it happened to coincide. Even if this is not what Goldsmith and Posner intended, it seems their theory is not only consistent with single-party coincidence of interests with single interest sufficiency, it also encapsulates their main thesis, namely, that states only act to advance their interest and, to the extent that states act in conformity with international law, this occurs only when their interest happen to coincide with the requirements of the law. According to Goldsmith and Posner, when states establish or ratify multilateral or international treaties to protect human rights, this is not because of any moral obligation to uphold international human rights laws, nor is it usually the result of cooperation or coercion (2005, pp. 119-120), but rather, it is because of the state’s own reasons or domestic or foreign interests (2005, pp. 125). When speaking specifically of the ratification of the International Convention on Civil and Political Rights by liberal democracies, Goldsmith and Posner write, “[a] more important explanation for ratifications by liberal democracies is that their practices already conform to the treaty” (2005, p. 127). When focusing on what motivates states, it is fair to say that Goldsmith and Posner’s theory only involves single-party coincidence of interest with single interest sufficiency and rejects single-party coincidence of interest with joint interest sufficiency.

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65 I refer to a single interest when speaking of the state’s motivating reason for the sake of simplicity, but in reality, the state’s motivating reason may be a bundle of interests. The key point is that the interest or bundle of interest is sufficient to motivate the state’s decision or action irrespective of any other relevant interest, such as an interest in upholding international human rights law.
My main criticism of Goldsmith and Posner’s theory is that, while it may be the case that states sometimes are motivated only by their own interest, their analysis does not render implausible the view that it also may be the case that states are motivated by their other interests and, specifically, an interest in complying with international law. Single-party coincidence of interest with single interest sufficiency may describe some, or maybe even many, cases. But this does not exclude the possibility and reasonableness of single-party coincidence of interest with joint interest sufficiency. Rather, it is possible and indeed plausible for a state to be motivated by both its other interests and an interest in complying with international law. Moreover, an interest in complying with international law can be characterized as a moral interest or the basis of a moral motivation and, accordingly, a state’s behavior can be motivated by both prudential and moral interests. Goldsmith and Posner would disagree, but their analysis is insufficient to reject this alternative view.

Goldsmith and Posner discuss an exception to their theory, namely, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the European Convention). The member states of the European Union agreed to a treaty to respect certain human rights norms, establish a court, the European Court of Human Rights (ECHR), implement laws consistent with the treaty, and uphold ECHR decisions in domestic courts and political bodies. ECHR decisions are upheld by member states even if the decisions are contrary to the member states’ interests. Goldsmith and Posner explain:

To the extent that the European human rights regime is a genuine example of multilateral human rights cooperation, however, it is one that would not have been predicted by our theory. We view the remarkable European human rights phenomenon as part of political and economic cooperation among states that are unifying into a larger state, akin to pre-twentieth-century unification efforts in the United States, Germany, and Italy. (2005, p. 126.)
This exception suggests a larger problem, namely, that Goldsmith and Posner underestimate the moral motivation behind establishing and ratifying international human rights law.

The European Convention is indeed remarkable, but not as remarkable as Goldsmith and Posner would have us believe. The European Convention is a phenomenon maybe akin to the cooperative phenomenon among states or populations within a state, but this phenomenon, both domestically and internationally, may show that actors are motivated by justice or respect for human rights, along with their other interests, and, therefore, are willing to cooperate with others to advance these moral interests. The efforts by the European Union and the United Nations are the great social experiments of the 21st century, even when other political and economic interests would make such cooperative efforts disadvantageous—such as with the abolition of slavery in Britain and the Civil Rights movement in the United States in the 20th century—these efforts for some reason move forward. Goldsmith and Posner’s theory fails to fully explain why.

Even others who apply rational choice theory to the cooperative phenomenon of international law disagree with Goldsmith and Posner’s view that states are only motivated by self-interest and not by any interest in upholding international law. George Norman and Joel Trachtman, for example, analyze customary international law as a repeated multilateral prisoner’s dilemma and find the evidence insufficient to support Goldsmith and Posner’s conclusions. They believe that it is plausible to interpret the evidence as supporting the view that state behavior can be motivated by customary international law. Interestingly, Norman and Trachtman preliminarily address a possible circularity in the view that states are motivated by a sense of legal obligation to establish international law by explaining that it is more accurate to substitute a sense of legal obligation with a “a sense of incipient legal obligation” or, as provided in the Restatement (Third) of Foreign Relations Law, “an ‘intent to create or accept a rule of
law’” (Norman and Trachtman, 2005, p. 570). It is this sense of obligation that operates along with other interests to motivate states to establish and ratify international law.

Norman and Trachtman models show that state compliance with customary international law (CIL) could result from a sense of legal obligation. Furthermore, they explain that a sense of legal obligation and self-interest are not mutually exclusive. The state may be motivated by its own interests, but this is not inconsistent with the state recognizing utility in upholding a particular rule or the rule of law generally.

“The field of law and economics has long utilized price theory to understand behavior under legal rules, and there is no question that law can affect behavior through self-interest. In the CIL setting, the motivating force is the broader, or potentially longer term, self-interest that flows from making, and achieving compliance with, a rule or even rules generally-from narrow or diffuse reciprocity, respectively.” (Norman and Trachtman, 2005, p. 572, fn. omitted.).

Norman and Trachtman’s models suggest a different explanation of state behavior that recognizes both self-interest and CIL as motivating reasons for state action. As stated by Norman and Trachtman, Goldman and Posner’s analysis offers one plausible explanation for state compliance with international law, but the analysis or evidence is insufficient to exclude other explanations.

I agree with Norman and Trachtman that an interest in complying with international law and a state’s other interests are not mutually exclusive. Norman and Trachtman do not go so far as to consider whether an interest in establishing or enforcing international law is predicated on legitimacy or justice; they set aside the question of whether states act only prudentially or prudentially and morally (Norman and Trachtman, 2005, p. 546). My view, however, is that

66 Edward Swaine also discusses common objection to Goldman and Posner’s theory (2002, pp. 582-592). Swaine also observes that self-interest and a motivation based on customary international law is not mutually exclusive (2002, p. 592).
states act both prudentially and morally. State cooperation with international human rights law can be explained by a single-party coincidence of interests (repeated below), in which the state’s interest in upholding human rights norms and its other interest coincide to motivate the state to comply.

**Single-Party Coincidence of Interests**: one party deliberates on a decision or action and has different and possibly competing interests relevant to the decision or action; two or more interests coincide and jointly motivate the party to make a particular decision or perform a particular action.

This view would be more plausible if it is further explained how different interests can work together to provide sufficient motivation for a decision or action.

This is where Ian Hurd’s argument is helpful. Ian Hurd offers an insightful argument to show how legitimacy helps to explain state action. Hurd’s argument suggests that states also act morally, or, in other words, they comply with international human rights law because of the law’s legitimacy. In his article, “Legitimacy and Authority in International Politics,” Hurd considers three general reasons for complying with international rules and suggests specifically that, by analogy to the domestic model and by considering empirical evidence, legitimacy also has a role to play in securing compliance with international law (Hurd, 1999; see also Ratner, 1998). The three general reasons for obeying a rule are coercion, self-interest, and legitimacy: “(1) because the actor fears the punishment of rule enforcers; (2) because the actor sees the rule as in its own self-interest; and (3) because the actor feels the rule is legitimate and ought to be obeyed” (Hurd, 1999, p. 379). Hurd attempts to show that, despite the exclusive focus on power (coercion) and interests by international relations scholars, there is no obvious reason, theoretical or empirical, to exclude the workings of legitimacy in international relations. Hurd contends that the exclusion of legitimacy leaves out significant features of the international system. Hurd is not
alone, he refers to a resurgence in legitimacy talk and cites other theorists who emphasize the importance of legitimacy as motivation for actors in the international system (Russett, 1997; Barnett, 1997; Franck, 1990; see also McMahon, 1987). This goes to show that the pervasive realism in international relations scholarship is not always shared by other political philosophers and ethicists.

Hurd begins with a standard definition of legitimacy as “the normative belief by an actor that a rule or institution ought to be obeyed” (Hurd, 1999, p. 381). Unlike my account of legitimacy, Hurd’s account of legitimacy is a conception of recognitional legitimacy that is based on the actor’s perception of the rule or institution in question. “The actor’s perception may come from the substance of the rule or from the procedure or source by which it was constituted. Such a perception affects behavior because it is internalized by the actor and helps to define how the actor sees its interests” (ibid.). Hurd’s conception of legitimacy is not concerned with the justice of the rule or institution, but with the normative conviction of the actor about the rule or institution. Interestingly, Hurd’s view suggests there is a relationship between legitimacy and interest, in that legitimacy or the internalization of a rule affects how an actor sees or prioritizes her interests. As mentioned above, self-interest and legitimacy are not necessarily incompatible particularly when what defines self-interest may, as Hurd suggests, be influenced by considerations of legitimacy.

Hurd considers the role that legitimacy already plays in the familiar domestic context. Legitimacy is motivation for obeying a rule not because of coercion or self-interest alone but because of the rule’s legitimacy or because the actor perceives the rule as right. The process involved is internalization:
Internalization takes place when the actor’s sense of its own interest is partly constituted by a force outside itself, that is, by the standards, laws, rules, and norms present in the community, existing at the intersubjective level. A rule will become legitimate to a specific individual, and therefore become behaviorally significant, when the individual internalizes its content and reconceives his or interests according to the rule. Compliance then becomes habitual, and it is noncompliance that requires of the individual special consideration and psychic costs. (Hurd, 1999, p. 388.)

As between legitimacy and interest, there also is a complex relationship between legitimacy and coercion. Sometimes a rule that is enforced by coercion initially may become internalized and later followed because it is recognized as legitimate. As do many others, Hurd observes that initiating legitimacy as a mode of social control in domestic contexts may be costly in the short run, but legitimacy offers efficiency advantages to coercion in the long run. In particular, it reduces certain kinds of enforcement costs of those asserting authority and increases the apparent freedom of subordinates. Hurd shows that legitimacy plays a role and may be more efficient, given these and other considerations.

Despite the challenges of assessing the empirical evidence of the workings of legitimacy in the international context, Hurd offers one example, namely, the role of legitimacy in helping to explain the institution of state sovereignty. Sovereignty here refers to the principles of nonintervention and the mutual recognition between independent states. While coercion and self-interests leaves certain aspects of sovereignty unexplained, legitimacy helps to fill in the gaps. Sovereignty explained in terms of coercion, e.g., maintaining a balance of powers between two sides of a shared border, may explain certain situations, including, as mentioned by Hurd, the situations between Iran and Iraq in the 1970s and 1980s and between Bosnia and the Serb Republic in the 1990s, and also, in the news more recently, the situation between Ukraine and Russia and between the Palestinian Authority and Israel today. But sovereignty explained in terms of coercion does not explain many, if not most, of the world’s borders, which are largely
undefended or defended by overwhelmingly outmatched forces, such as the border between Canada and the United States. Canada’s right to noninterference against US invasion is not explained by coercion, at least not coercion alone. Sovereignty explained in terms of self-interest is also inadequate. Hurd recognizes the many ways self-interest plays a role in a state’s motivation for observing the norm of nonintervention from directly avoiding political or economic losses to subtler motivations such as appeasing one’s constituency in a democratic state. What he points out, however, is that regardless of the different motivations, what is common to understanding sovereignty in terms of self-interest is the process of calculating costs and benefits, and it is this process of calculation that seems missing with most states in most situations. What is present instead is that borders are simply taken for granted. Self-interest and coercion therefore cannot account for the wide acceptance of the norm of nonintervention and the recognition of state sovereignty.

This is where legitimacy comes into play. Sovereignty explained in terms of legitimacy depends on the internalization of the rules of nonintervention and can be explained, as follows:

The limits of sovereign power over neighbors would then be defined by an accepted scheme of spatially divided internal authority. Compliance with the international ‘rule’ of nonintervention is, then, not a product of self-interest or the balance of power, but a function of states pursuing their interests, where these have been conditioned by a community standard that delimits the acceptable (territorial) reach of state sovereignty. (Hurd, 1999, p. 397, emphasis omitted and added.)

This explanation fills in the gap of making sense of why the rule of nonintervention is adhered to despite the absence of deterrent forces or a balanced army on the other side of a border. While there are those states whom Hurd calls ‘revisionist states’ that considers its self-interests and calculates the costs of every move, the so-called ‘status quo states’ accept the legitimacy of well-established borders. According to Hurd, legitimacy helps to explain the motivations and actions
of the more common status quo states, and also helps to explain the distinction between revisionist and status quo states.

Notably, Hurd refers primarily to states but also recognizes the expanding field of international actors. In discussing areas in need of further research, Hurd asks, “what happens in the international setting to the safeguards we generally expect of our governing institutions, such as representativeness and accountability?” (1999, p. 403). He further explains:

Certain international institutions, such as the UN, are already recognized as sufficiently governmental that they are expected to be somewhat democratic, but international democracy and accountability will have to be much more widely promoted once we recognize that any institution that is accepted as legitimate stands in a position of authority over states and thus exercises power. The power of these institutions runs deep and sometimes orders our lives in ways that are rarely recognized and difficult to democratize. (1999, p. 403.)

Hurd’s analysis helps to explain compliance with international law, both for states and potentially also for non-state actors. While the focus of Hurd’s analysis is not defining legitimacy, his conception of legitimacy involves a process of internalization whereby an actor internalizes a rule because it perceives the rule as right and that this internalization affects how it sees and prioritizes its interests. The rule or norm is not observed because of a possible penalty or because it is in the actor’s self-interest, but rather because the actor perceives the rule as right. Although Hurd’s conception of legitimacy does not concern justice and does not identify what makes a rule right, my conception of legitimacy identifies the right-making features in terms of respect for certain basic substantive and procedural rights. My project also helps to answer Hurd’s question concerning the representativeness and accountability of non-state actors.

I agree that legitimacy can be an effective mode of securing compliance with international law, including international human rights law. While the realist may believe the
world turns on power (coercion) and interests alone, a view that also recognizes legitimacy as a motivating reason for action is better able to explain certain regional and international agreements and relationships. Many in the international community today go about their business obeying certain norms because they believe that the norms are legitimate and have internalized the norms. The norms that apply across borders include not only the norm of nonintervention, but also other rules respecting basic substantive and procedural rights.

This point is not diminished by the fact that coercion and/or self-interest may have been part of the story leading up to the internalization of a rule. A rule may be initially backed by force before the targeted subjects internalize the rule and observe it for the sake of its own legitimacy, as was the case with the deinstitutionalization of slavery and desegregation in the United States. A rule also may be recognized as legitimate but yet only acted upon if it is also consistent with the actor’s self-interest, as is often the case with humanitarian intervention even in situations involving one of the four enumerated crimes against humanity proscribed in the United Nations World Summit decision in 2005 (see Franck, 2010). Even if it arrives late on the scene, legitimacy still has a role to play when an actor acts no longer because of the presence of any deterrence, but because it has learned to recognize the rule as right. Even if it operates together with self-interest to motivate actors to act, it is nonetheless also effective as a motivating reason for action.

International actors naturally act prudentially, but my point here is that they also act morally. There are many issues today including climate change and global poverty that demand hard choices among competing interests. While states and other international actors may naturally act in their rational self-interest, they also can learn to act morally. Morally-minded states and other international actors may have other interests, but they also have an interest in
promoting justice and the enforcement of human rights law. This interest provides a motivating reason for action. A moral interest may be insufficient alone, but it could be effective in a number of ways, more than one of which could apply in a single situation: it could be combined with other interests to provide sufficient motivation for action (i.e., addition); it could provide additional weight in deliberations on another interest, thereby operating indirectly to provide sufficient motivation for action (i.e., corroboration); it could provide grounds for devaluing (subtracting weight from) other opposing interests considered in deliberations, thereby providing sufficient motivation not to act (i.e., subtraction); and, along with one of these, it could provide grounds for prioritizing one’s existing interests, thereby again operating indirectly to reorder one’s interests and elevate a particular interests, which then provides sufficient motivation for action (i.e., prioritization).

It is easy to overlook the role of legitimacy in motivating an international actor to act. On the surface, it may seem that an actor is pursuing its own interests. But, when one looks closer, one may also see the subtle ways in which legitimacy operates in how an actor sees and prioritizes its interests. Maybe the most important role that legitimacy plays is the role of guiding an international actor in the prioritization of its interests. When deliberating and making decisions among competing interests, legitimacy could provide additional weight to the interest in compliance with human rights norms, so as to warrant its prioritization above other political and economic interests. This characterization of the role of legitimacy does not pin legitimacy against self-interest, but offers a way of understanding how different interests are prioritized and specifically how legitimacy plays a role in this prioritization. An international actor may have several competing interests: Iα, Iβ, Iδ, and Iγ. Interest Iδ may be an interest motivated by justice, for example, an interest in coming to the aid of a developing country in the midst of a
humanitarian crisis. When the international actor acts morally, the international actor recognizes that Iδ is consistent with its obligations to respect human rights, and prioritizes Iδ above the other interests, resulting in a new ordering: Iδ, Iα, Iβ, and Iγ. Because Iδ is included among the international actor’s existing interests, this does not result in legitimacy overriding self-interest, or the international actor choosing to act morally instead of acting prudentially. Rather, this results in legitimacy working to prioritize interests, so that the international actor acts both prudentially and morally.

It may be the case that international actors often have self-interested reasons to do exactly what justice or international law requires and that these reasons are sufficient alone, but showing the plausibility of legitimacy as also an effective motivating reason requires not that it operates jointly with other interests in all cases, but only that it operates jointly with other interests in some cases. Norman and Trachtman observe that international law need not determine behavior in every case; it is enough to show that it does so in marginal cases (i.e., even a relatively small cost associated with noncompliance could affect the payoffs from compliance, thereby tipping the balance in favor of compliance in marginal cases) (Norman and Trachtman, 2005, p. 572). Edward Swaine also suggests that the motivation from law may operate to decide between two or more possible equilibria in a game (i.e., when the payoffs in a particular game suggests two or more possible ways to achieve equilibrium). International law may highlight the right equilibrium. (Swaine, 2002, p. 608; see also Peterson, 2009, p. 74).

Goldsmith and Posner’s theory offers one plausible analysis of why states conform to international human rights law, but their analysis fails to exclude others. Moreover, their theory fails to fully explain certain phenomena, such as when a state ratifies an international human rights convention even when such ratification seems to be to its disadvantage. An alternative
view that it is self-interest and legitimacy that jointly motivate states to act provides an equally plausible explanation. This alternative view also is better able to explain phenomena that would otherwise remain unexplained or labeled as aberrations, such as the European Convention or any agreement or relationship that may disadvantage the parties and yet work to the benefit of others on such matters as global poverty, human rights, and climate change. International actors do not always participate in such agreements or relationships, but, when they do, they may be acting inconsistently with their other economic and political interests for some greater good, such as the protection of human rights or the establishment of a law-governed system. The alternative view shows that legitimacy can play an important and even indispensable role. Moreover, while both self-interest and legitimacy may be motivating reasons for action, only legitimacy also can provide sufficient moral justification for action. Although this chapter is concerned primarily with plausibility, I am always concerned with advancing a view that is also morally defensible. With greater attention to the role of legitimacy and with a growing field of international actors, my view is that interests and legitimacy can coincide in a way that allows these different international actors to pursue their interests and yet also work together to cultivate a more law-governed system.

5.2. JINS in Outline

Legitimacy can play a role in motivating international actors to advance international human rights law, but this does not happen *sua sponte*. My account of legitimacy is a constitutional pluralist approach that offers a template for model JINS featuring procedural justice that can be adopted by new and existing international institutions and organizations. My
account is sufficiently action-guiding because JINS includes clear directions and guidelines for implementation. In this section, I identify a set of general norms and a set of sample mechanisms. What I offer in outline here is intended to be developed further through the help of practitioners, including policymakers, lawyers, and judges. The next steps would be to take the general norms identified below and specifying them with content relevant to different political and cultural contexts.

The concept of a model rule is not new. There are many domestic and even a few international examples of model rules, such as the Model Penal Code (American Law Institute Council, 1962), Uniform Commercial Code (Joint Committee of ALI and the Uniform Law Commission American Law Institute, 1978), and Model Rules on Arbitral Procedure (United Nations, 1958). Model rules serve the purpose of establishing a set of minimal requirements and harmonizing rules across jurisdictions. My approach is to take this familiar concept and suggest its application to the rules that give an organization or institution a constitutional structure that complies with the minimal requirements of justice. The justification for my approach involves the following three reasons: first, international organizations and institutions should implement rules that demand compliance with the minimum requirements of justice; second, a set of model rules would facilitate the implementation of such rules; and, third, there is no such existing set of model rules in use today.

The international organizations and institutions that are the focus of this project are powerful global governance organization or institution with economic charters, including the World Bank Group, the International Monetary Fund, and the World Trade Organization. These international actors assert great power and influence over developed and developing states and yet they are not presently required to exercise their power and influence within the constraints of
justice. States have constitutions, but the World Trade Organization does not have similar rules of justice. It may be argued that these international actors are not concerned with governance, but instead concerned with a specific function, such as trade. The assumption is that only those in the business of governance over a wide variety of functions should be required to respect the substantive and procedural rights of others. The problem with this assumption is that these very powerful international actors are in the business of governance. Their actions often establish the terms of trade, lending and borrowing, or development within a state or between states. Moreover, the fact that they govern only over a specific function does not somehow render the demands of justice inapplicable to its operations. Along with the trends of globalization and an emerging field of international actors, there also are other trends, including the specialization of knowledge and expertise. As functions are delineated and organizations and institutions, domestically and internationally, are assuming very specific functions, this does mean that those who perform a specific function are not bound by the requirements of justice. A state must comply with the requirements of justice and each of its agencies, including its department of treasury, must comply with the requirements of justice. International actors today have authority that outstrips the authority of the treasury departments of large states and even the authority of small states in their entirety.

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67 This project does not apply to smaller organizations and institutions that do not exercise the same or similar power and influence. Organizations or institutions such as the IMF and the World Bank exercise power internationally in ways that are similar to the exercise of public power domestically. Other international organizations and institutions, such as the Inter-American Tropical Tuna Commission and the International Cooperation on Cosmetics Regulation, may be more like private entities that do not have or exercise the same sort of power. It would be a separate project to determine whether and/or how a standard of legitimacy might apply to such organizations and institutions. An extension of the rules and mechanisms proposed in this chapter to such smaller organizations and institutions would be unduly burdensome, impractical, and even undesirable.

68 I do not address the public verses private distinction here, but others have (see Peters, 2009). Some laws only apply to public functions, but my account of legitimacy applies to political activities and, as argued earlier, the activities of these international actors can be construed as political.
For example, in 2013, the IMF offered Cyprus a bailout of 10 billion euros with some standard conditionalities and a novel measure of a one-time tax on Cypriot bank deposits, specifically a 9.9 percent tax for deposits greater than 100,000 euros and a 6.75 percent tax for deposits less than that amount (Kanter, 2013). The final agreement included a higher tax on deposits greater than 100,000 euros and a lower tax on deposits less than 100,000 euros. While there have been criticisms of the standard IMF conditionalities, Cypriots and other Euro Zone states, including Spain, Portugal, and Italy, were also concerned about the Cypriot case setting precedent for future loans. The Cypriot President criticized the bailout as a plan devised by others and coercively imposed on Cyprus. Economists also criticized the measure as wrong because it shifted the burden on taxpayers and increased state debts (Katasonov, 2013). While lenders generally are entitled to expect return on their investment, the IMF is not a typical lender as it imposes conditions that dictate a state’s domestic economic policies and affect the lives of hundreds of thousands, if not millions, of people within the client state. A state’s poor economic situation may not have been the IMF’s fault, but the IMF is responsible for how it interacts with the state and for its policies and decisions. The IMF and other international organizations and institutions previously have not been held to the standard applied to states, but as they continue to interfere with state sovereignty and citizens’ rights, there is no adequate justification for allowing them to exercise authority without also complying with the requirements of justice.

What I propose is constitutionalist approach for such non-state actors that would require JINS compliance for legitimacy.69 A non-state actor can implement JINS or similar constitutional structure, if they are not already in compliance. A constitutional structure usually

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69 Legal theorists also argue for the constitutionalization of international organizations and institutions such as the WTO (see Thornhill, 2013; Cohen, 2010; and Peters, 2005).
identifies the sources and limitations of authority, including respect for certain basic human rights. Although JINS does not identify the sources or scope of authority, as other provisions of an international actor’s charter might, it does include a basic constitutional structure for complying with the demands of justice and, in particular, respect for basic substantive and procedural rights. Model JINS provides a set of rules for respecting basic substantive and procedural rights that can be tailored to fit the specific institutional needs and cultural and political contexts.

While there are other domestic model rules and a few international model rules, there are no model rules for respecting basic procedural and substantive rights as required by legitimacy and applied to non-state actors. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights come close. But they are designed for application by member states of the United Nations. If JINS was expanded and tailored to be applied by states, what may result, at least in part, are covenants such as these. But my approach requires only the implementation of JINS for legitimacy and leaves open for international actors the establishment of additional rules to suit their institutional needs and political and cultural contexts. International actors can always do more than the minimum required for legitimacy, but JINS provides guidance on what is at least minimally required. There is nothing similar to JINS today.

What follows in the next several subsections is an outline of a model JINS.
5.2.1. Substantive Rights

The basic substantive rights included in the requirement of minimal justice necessary for legitimacy are security rights, subsistence rights, and some basic liberties. These rights include the very basic rights necessary for a decent human life. Every JINS should include at least a set of these basic rights.

JINS Rule 1. The right of every human being must be respected, and no human being may be arbitrarily deprived of his or her life.

JINS Rule 2. The right of every human being to bodily integrity must be respected, and no human being can be subjected torture, mutilation, rape, or any similar harm to his or her bodily integrity.

JINS Rule 3. The right of every human being to physical freedom must be respected.

3a. No human being can be deprived of his or her right to physical freedom without due process, as specified in JINS Rules 8 through 11, inclusive.

3b. No human being can be subjected to slavery or its equivalent, including forced labor.

3c. A violation of subdivision 3a or 3b occurs when the prohibited conduct either (i) directly results as a consequence of an international actor’s activities or (ii) indirectly results as a consequence of an international actor’s activities and the international actor knows or should have known that a violation could have resulted.70

70 The language here assumes a broader standard of accountability than usual in tort or criminal cases. The rule imposes strict liability for direct harm and liability for indirect harm in cases where the decision-makers have knowledge or constructive knowledge that their decisions or activities could cause the violation in question. The reason for the broader standard of accountability is the dispersion of cause and effect involved in violations that occur on a global scale. It is often extremely difficult to identify an intentional wrongdoer in cases of human rights violations on a global scale. There are of course exceptions, but the norm is that violations are the result of institutional harm involving structural factors and human participation at various levels. Under these circumstances and in cases of violations of the most basic human rights, my approach is to apply a broader standard. Those who commit a direct violation are accountable, even if they lacked knowledge or other specific intent. For example, if an international actor directly subjects a human being to forced labor, the actor is held accountable for violating JINS
JINS Rule 4. The right of every human being to adequate food, clean water, and adequate shelter must be respected. A violation of JINS Rule 4 occurs when the prohibited conduct either (i) directly results as a consequence of an international actor’s activities or (ii) indirectly results as a consequence of an international actor’s activities and the international actor knows or should have known that a violation could have resulted.

JINS Rule 5. The right of every human being to the freedom of thought, conscience, and religion must be respected. A violation of JINS Rule 4 occurs when the prohibited conduct either (i) directly results as a consequence of an international actor’s activities or (ii) indirectly results as a consequence of an international actor’s activities and the international actor knows or should have known that a violation could have resulted.

JINS Rule 6. The right of every human being to social and political participation in matters that are likely to substantially affect his or her interests must be respected.

6a. A violation of JINS Rule 6 occurs when the prohibited conduct either (i) directly results as a consequence of an international actor’s activities or (ii) indirectly results as a consequence of an international actor’s activities and the international actor knows or should have known that a violation could have resulted.

Rule 3b. Strict liability for direct harm also prevents actors from denying responsibility on grounds of lacking intent or knowledge. If an international actor’s activities is connected to another entity’s subjugation of a human being to forced labor, and the international actor had knowledge of this other entity’s activities and failed to intervene, then the international actor is also held accountable. This standard, the full defense of which I will save for another day, is called for because of the urgency of the right involved.
6b. The right of social and political participation includes the right of every human being to associate with others on the basis of shared ethnic, religious, cultural, or other similar interests.

6c. The right of social and political participation includes the right of every human being to participate meaningfully in the decision-making processes of an international actor with regard to decisions that are likely to substantially affect his or her interests.\(^7\)

5.2.2. Procedural Rights and Rules

The basic procedural rights are the rights to due process and formal equality. Respect for the rights to due process and formal equality can be spelled out in the following rules. Every JINS also should include at least a set of these basic rights or rules.

JINS Rule 7. The right of every human being to equal treatment before the law must be respected.

7a. The right to equal treatment requires that if two human beings or groups of human beings are similarly situated, then they should be treated equally.

\(^7\) JINS Rule 6b requires meaningful social and political participation, but does not define specifically the sort of participation required. The participation provided pursuant to JINS Rule 6b may be the sort of group representation and dissent allowed in a consultation hierarchy. Or, the participation provided pursuant to JINS Rule 6b may be the sort of individual participation allowed in a democratic society. JINS Rule 6b is neutral with respect to different political communities and their reasonable conceptions of justice.

It also may be helpful to emphasize that the rule applies only to require powerful international organizations and institutions to allow for participation by those whose interests are substantially affected by the international actor’s decisions. The language here limits this rule’s application to those whose interests are affected substantially. The rule expresses the view that the human right to certain liberties includes meaningful social and political participation and, generally, the application of this right requires that, if a person’s interests are substantially affected by a decision, that person should be able to participate in the decision in some meaningful way. For participation to be meaningful, this process cannot be a mere formality. The international actor should take the affected person’s complaints and concerns into account in its decision-making process.
7b. The right to equal treatment requires nondiscrimination on the basis of race, gender, ethnicity, religion, or nationality.

JINS Rule 8. The right of every human being or group of human beings to receive reasonable notice of any decisions or actions that may substantially affect his or her interest must be respected.\(^{72}\) Reasonable notice is notice that is timely and likely to reach the intended recipients.\(^{73}\)

JINS Rule 9. The right of every human being to be heard on matters that may substantially affect his or her interest must be respected. In accordance with this rule, an appropriate hearing procedure must be provided by [the international actor] to those whose interests may be substantially affected.

JINS Rule 10. The right of every human being to an opportunity for review on matters that may substantially affect his or her interests must be respected. In accordance with this rule, an appropriate review procedure, such as arbitration, mediation, internal review, or external review, must be provided by [the international actor] to those whose interests may be substantially affected.

JINS Rule 11. The right of every human being to have his or her complaint reviewed before an impartial judge. If review is required under JINS Rule 10, the review procedure must occur before an impartial and, if necessary, independent judge or hearing officer.

\(^{72}\) Notice pursuant to JINS Rule 8 may be by either personal notice or publication, whichever is reasonable and effective in notifying those who are substantially affected. If those who are affected are citizens of a client state, for example, the international actor may provide notice by widely-viewed publication in the state.

\(^{73}\) “Interests,” as used in JINS Rule 8 and following, refers to an individual, group, or state’s interest in the enjoyment of the content of the rights included in JINS Rule 1 through 6, inclusive. Because international actor’s can add to the minimum constraints required for legitimacy, this term can be redefined to include other interests, such as other property interests.
JINS Rule 12. Adequate records must be kept to demonstrate compliance with these rules. The records must be made available upon reasonable request.

JINS Rule 13. All decisions and actions that may substantially affect the rights of human beings or groups of human beings must be open and transparent to the public or to those whose interests may be affected.

5.2.3. Procedural Mechanisms

The procedural norms above are intended to generate mechanisms for the implementation and enforcement of the substantive and procedural rights. The following is a set of instructions for sample mechanisms. To satisfy the requirement of establishing procedures or mechanisms, as required by JINS and some of the specific rules above, the international may implement the following guidelines or something similar.

JINS Mechanism 1. Negotiations

Pursuant to JINS Rules 1 through 9, inclusive, every international actor organizing or presiding over any meeting to negotiate matters that may substantially affect an individual, group, or state’s interest must provide to that individual, group, or state, notice of the meeting and a meaningful opportunity for participation. The international actor also must organize the negotiations so as to set aside time to give special consideration to those who may be substantially affected to determine what interests are at stake and whether those interests are

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74 I call these “sample mechanisms” because more details are necessary to provide a template for a mechanism, to qualify as a “model mechanism,” and because they offer examples of the kinds of mechanisms that would comply with the above model rules.
substantially and negatively affected. If found to be substantially and negatively affected, the actor also must either avoid the negative effect or work together with the affected party to arrive at reasonable solution. This mechanism provides guidelines for the structure of negotiations that negotiations occur only in accordance with JINS Rules 1 through 9, inclusive.

JINS Mechanism 2. Public Comment

Pursuant to JINS Rule 9 and the requirement of good standing, every international actor must provide a public comment procedure to afford individuals, groups, states, or their representatives, an opportunity to be heard as to the international actor’s compliance or noncompliance with the requirement of justice.

2a. The international actor may establish its own public comment procedure or subscribe to an external public comment procedure, if available.

2b. The public comment period and the procedure for submitting comments must afford individuals, groups, states, or their representatives a reasonable opportunity to be heard.

2c. Only comments relevant to the international actor’s human rights record, human rights history, relationship with other legitimate international actors, and human rights reputation are admissible.

2d. Pursuant to JINS Rules 10 and 11, after the public comment period, the public comment procedure must be completed with a finding by an impartial judge or hearing officer. If there is solid and credible evidence of significant and widespread or repeated human rights violations, the judge or hearing officer may conclude that the international actor has failed the requirement of good standing.
JINS Mechanism 3. Arbitration and Review

Pursuant to JINS Rules 10 and 11, every international actor must establish review procedures to allow individuals, groups, or states that are substantially and negatively affected by the actor’s decision or action an opportunity for review before an impartial hearing officer. The review of the actor’s decision or action may be through arbitration, internal review, or external review, as necessary to ensure compliance with JINS Rule 10. The hearing officer must be impartial and, if necessary, independent, in that, he or she is neither an employee of the international actor nor a beneficiary of the actor’s activities. Any hearing held during the review procedure must be in compliance with JINS Rule 8 and 9. Every international actor also must establish procedures to recognize the hearing officer’s judgment and take actions consistent with the findings and judgment.

JINS Mechanism 4. Accountability and Transparency

Pursuant to JINS Rules 12 and 13, every international actor must keep adequate records and make these records available upon reasonable request.

4a. Every international actor engaged in interactions with a client state must keep adequate records and provide the client state with regular updates of its activities either directly to the client state or publically.

4b. Every international actor also must establish a procedure to allow individuals, groups, or states that are potentially affected by its decision to allow them to submit requests for records and/or additional information. The international actor must process the requests in a timely manner and, and if reasonable, provide the records and/or additional information as requested.
The above procedural rules and mechanisms would result in drastic changes in how international organizations and institutions conduct their business. While some institutions already have strong claims to legitimacy, others have weaker claims because of their incomplete compliance. For example, as discussed above, the World Trade Organization has only procedures for dispute resolution among parties, but no procedures for fair negotiations (Peters, 2009). Their dispute resolution procedures also have been widely criticized for being weak and ineffective (Sweeney, 2009). The World Trade Organization, therefore, can do more to implement the rules and mechanisms of procedural justice and, in particular, JINS Mechanism 1 regarding fair negotiations.

Despite the drastic changes that would result with JINS compliance, the rules and mechanisms are not onerous, as they reflect very basic human rights. The rules and mechanisms also are general enough to allow for different specifications to suit an international actor’s specific institutional needs and political and cultural contexts. The international actor has discretion in the adoption and implementation of these rules and mechanisms, similar to the discretion afforded under the margin of appreciation doctrine to member states of the European Union discretion in observing the European Convention on Human Rights (O’Donnell, 1982). The initial cost of JINS compliance may be high nonetheless, but the ultimate effect would be to establish a law-governed system where organizations and institutions can continue to grow within the constraints of justice.
5.3. Challenges to Implementation

This section considers two relevant challenges to implementation, namely, the fragmentation of laws and the problem of persistent noncompliance. The first primarily concerns the formulation or adoption of rules and the second concerns the enforcement of rules. The first also is a worry about the excessive promulgation of rules, while the second is a worry about the inadequacy of rules at least insofar as they lack enforcement mechanisms.

In its report on the fragmentation of laws, the Study Group commissioned by the International Law Commission provided the following background:

In the past half-century, the scope of international law has increased dramatically. From a tool dedicated to the regulation of formal diplomacy, it has expanded to deal with the most varied kinds of international activity, from trade to environmental protection, from human rights to scientific and technological cooperation. New multilateral institutions, regional and universal, have been set up in the fields of commerce, culture, security, development and so on. It is difficult to imagine today a sphere of social activity that would not be subject to some type of international legal regulation.

However, this expansion has taken place in an uncoordinated fashion, within specific regional or functional groups of States. Focus has been on solving specific problems rather than attaining general, law-like regulation. This reflects what sociologists have called “functional differentiation”, the increasing specialization of parts of society and the related autonomization of those parts. It is a well-known paradox of globalization that while it has led to increasing uniformization of social life around the world, it has also led to its increasing fragmentation - that is, to the emergence of specialized and relatively autonomous spheres of social action and structure.

The fragmentation of the international social world receives legal significance as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by “general international law” has become the field of operation for such specialist systems as “trade law”, “human rights law”, “environmental law”, “law of the sea”, “European law” and even such highly specialized forms of knowledge as “investment law” or “international refugee law”, etc. - each possessing their own principles and institutions.

While the reality and importance of fragmentation cannot be doubted, assessments of the phenomenon have varied. Some commentators have been
highly critical of what they have seen as the erosion of general international law, emergence of conflicting jurisprudence, forum-shopping and loss of legal security. Others have seen here a predominantly technical problem that has emerged naturally with the increase of international legal activity and may be controlled by the use of technical streamlining and coordination. (International Law Commission, 2006, pp. 3-4.)

The Study Group drew several conclusions including that international law was a legal system to which the general rules of resolving conflicts apply. As observed above, the fragmentation of laws refers to the promulgation of rules at different levels and by specialized institutions with different functions. The problem is that this fragmentation could lead to the conflict of laws, forum-shopping, and the erosion of law. The Study Group concluded not only that conflicts among states should be resolved in accordance with the general rules of interpretation, as enumerated in the Vienna Convention on the Law of Treaties of 1969, but also referred to a principle of harmonization in conclusion (4): “It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations” (International Law Commission, 2006, p.8). The Study Group also concluded that, as to the hierarchy between norms of international law, when resolving a conflict of laws, there is no derogation of jus cogens or what is sometimes referred to as “super customary international law” addressing the “elementary considerations of humanity” (International Law Commission, 2006, p. 20). 75 Among the jus cogens norms are the prohibitions against aggression, slavery, genocide, and racial discrimination. These jus cogens norms (and the related erga omnes norms), then take

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75 “One way to think about jus cogens is as ‘super’ customary international law—law so fundamental to the inter-relationship of states that a state cannot through its treaty practice or otherwise, deviate from the law. At the same time, jus cogens appears not to arise from the normal processes of customary international law; the emphasis is less on consensual state practice and more on notions of universal morality or justice.” (Murphy, 2006, p. 82.)
precedence over and are superior to any other norm. This is effectively what the Study Group resolved in its final conclusion:

Hierarchy and the principle of harmonization. Conflicts between rules of international law should be resolved in accordance with the principle of harmonization, as laid out in conclusion (4) above. In the case of conflict between one of the hierarchically superior norms referred to in this section and another norm of international law, the latter should, to the extent possible, be interpreted in a manner consistent with the former. In case this is not possible, the superior norm will prevail.” (International Law Commission, p. 42.)

The Study Group’s report on the fragmentation of laws refers primarily to states and treaty organizations, but the conclusions also could apply here. Because of the potential problems of conflicts, forum-shopping, and the erosion of law, there is a presumption in favor of harmonization. Also, because of the importance of the interests involved, precedence is given to *jus cogens* norms. When interpreting conflicting provisions in an attempt to harmonize them, the standard rules of interpretation apply (rules on statutory and contractual interpretation) and *jus cogens* norms prevail over any other norms in direct conflict with *jus cogens*.

As applied to non-state actors, as opposed to states, model JINS is entirely consistent with these principles. When a non-state actor with an economic charter adopts and implements model JINS, it effectively codifies *jus cogens* and a few additional provisions designed to address its institutional activities. The rules of model JINS include prohibitions against the deprivation of life, liberty, and bodily integrity, and discrimination. They concern our most important and fundamental human rights. The provisions of model JINS that are not part of *jus cogens*, are nonetheless consistent with *jus cogens* and also important when dealing with the rules and policies of global governance organizations or institutions.

My approach also promotes the harmonization of law as to these fundamental human rights. Although my approach recognizes a plurality of international actors and the adoption and
implementation of rules by these actors, JINS and its system of model rules should address the fragmentation of laws and its related concerns over the conflict of laws, forum shopping, and the erosion of law. A system of model rules cannot prevent parties from forum shopping entirely, particularly with a plurality of international actors with their own set of rules and institutions, including their own forums for review or dispute-resolution, but the main point here is that, if these international actors have adopted JINS, then there should be consistency with respect to the certain basic substantive and procedural rights. This can be illustrated by the way state courts must rule consistently with federal constitutional law in the United States and by the way member states must adopt law consistent with a directive of the European Union. Parties may nonetheless forum shop for other reasons in the US and the European Union, but in every forum there would be consistency with respect to the commonly adopted federal or regional law. My approach allows for the general norms to be specified to suit the relevant cultural and political context and the specific function involved, such as trade or development. But it requires substantial compliance with the general norms and, specifically, with respect for certain basic substantive and procedural rights. There may be differences on the particulars, but as to the basics, there should be consistency. Non-state actors who previously were unregulated in large part now would be subject to certain reasonable constraints of justice. While it may be the case that not every international institution or organization would adopt and implement JINS or something similar, this has less to do with the fragmentation of laws and more to do with noncompliance. My approach is the use of model rules, which by its very nature promotes harmonization.

The more difficult problem, I think, is the problem of persistent noncompliance. In addressing this problem, I first would draw a distinction between two types of noncompliance.
The first type of noncompliance is noncompliance by otherwise morally-minded members of the international community. The second type of noncompliance is noncompliance by those who lack positional legitimacy (i.e., those who are not in a position to qualify as legitimate because of their poor relationships with those under their authority and those with whom it engages in political and economic transactions). The second would be analogous to what Rawls calls ‘outlaw states,’ namely, authoritarian or totalitarian states who abuse their authority to the detriment of their citizens and other states. The reformation of law does not affect these states as much, as they are the ones who tend to violate the law anyway. The reformation of law generally affects those who actually want to comply with the law. There will always be lawbreakers and it is not the purpose of international law to accommodate everyone, particularly those who are bent against it. The efforts at the reformation of international law are better spent on those who are morally minded and would comply with the law. Voluntary compliance by those who are morally minded and the resulting momentum in the direction of compliance may allow for the use of sanctions or force to compel compliance by everyone else.

My focus is on noncompliance by morally-minded members of the international community. One problem is that international actors with economic charters have operated largely without the constraints of justice as required for legitimacy. Legitimacy has been applied to states, but not these international actors. As mentioned previously, these actors however wield considerable power over the domestic affairs within a state. Part of my work here is a call for reform and, specifically, compliance with certain requirements of legitimacy. With the exception of the citizens of affected states, there has been little attention paid to the policies and decisions of these international actors; they have conducted their business under the radar. There are no requirements of representation, publicity, transparency, and accountability. What is required of
them is far less than what is required of the states that largely control them. When it is brought to
the attention of these international actors that such defects are offensive to legitimacy, some that
are morally minded may respond to the call voluntarily. In the same way that institutions such as
the IMF have initiated reforms in response to criticisms, there is good reason to believe that
some also may voluntarily initiate reforms upon being informed that JINS compliance is
necessary for legitimacy.

Others may not. This is partly because JINS compliance may be inconsistent with their
interests or policies and partly because there are no adequate enforcement mechanisms to insist
upon compliance. Although we now live in an international community that demands justice, the
international community also retains vestiges of an old era governed almost exclusively by
power and interests. There are at least two ways to approach this. The first is by persuasion,
offering explanations that JINS compliance is consistent with the international actor’s interests.
As mentioned in the previous section, a morally-minded member of the international community
probably has an interest in complying with human rights norms, so it is not inconsistent with its
interests; it just may not be its primary motivation for action. Some actors simply need additional
motivation. As mentioned before, an international community that is largely JINS-complaint
would provide a more level playing field and a more secure environment. As noted by Fernando
Tesón, “international business transactions require stability and predictability to be successful”
(Teson, 1998, p. 11). Furthermore, as citizens of the world are demanding a greater degree of
justice, an international actor who voluntarily complies would find itself ahead of the curve and
also would spare itself of the possible criticism and other consequences of noncompliance. Along
the same lines, as other international actors move toward compliance with JINS or other human
rights regimes, there may be horizontal pressure to comply for the sake of continue participation
in political or economic transactions and, if not that, at least for the sake of one’s reputation among other international actors. The status of legitimacy comes with certain benefits and illegitimacy comes with certain burdens. While the international actor may be so powerful, because it is underwritten by powerful states, that it may not experience some of the burdens of disengagement, it nonetheless would not be immune to some criticism and censure.

The second way to approach the problem of noncompliance by morally-minded members of the international community is by coercion. Those who are deaf to appeals to comply with the requirements of legitimacy would be treated as illegitimate or as if they were not morally minded. They may have human rights as an interest, but their persistent noncompliance suggests that their only concern, in effect, is their own self-interest (or the interests of their constituents) rather than the rights of others. The only way to deal with those who are not receptive to moral appeals or moral justification is to force compliance. Assuming voluntary compliance by a significant number of international actors, those who are JINS-complaint could establish mechanisms for bringing others to justice. For example, JINS-complaint actors could establish rules and an enforcement body, a special tribunal or a permanent JINS Court, to hear cases for declaratory judgments or specific relief, depending on the cases. The enforcement body may declare that an international actor is not JINS-complaint and may preclude it from participating in political or economic transactions. This of course assumes voluntary compliance by a significant number of international actors, the contribution of resources to ensure JINS compliance, and voluntary recognition of judgments by international actors.

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76 It may be more accurate to describe at least part of this phenomenon as acculturation rather than persuasion. Ryan Goodman and Derek Jinks define ‘acculturation’ as “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture. This mechanism induces behavioral changes through pressures to assimilate—some imposed by other actors and some imposed by the self” (Goodman and Jinks, 2004, p. 626).
As for the lawbreakers and their functional equivalents (i.e., the morally-minded members of the international community who never act for reasons of justice), it is not the role of the lawmaker to make pragmatic concessions and to lower the bar to suit the lawbreakers. The role of the lawmaker is to make reasonable rules that could secure voluntary compliance by most and then to suggest other mechanisms to force compliance by the rest, if necessary. There may be other issues that are left unresolved here, but the general idea is that legitimacy is a plausible mode of enforcement because some would act according to the requirements of legitimacy because the requirements are just and because the account would be robust enough to include the theoretical resources to generate other mechanisms to secure compliance by others.

5.4. Final Comments on JINS and Procedural Justice

My expectation is not for the implementation of Applied Justice-Based Legitimacy or JINS as I have presented it here. The expectation rather is for the ideas here to be part of the conversation about international political legitimacy of non-state actors. The hope is for the further development of the model rules and sample mechanisms set forth above with the help of practitioners, including policymakers, lawyers, and judges. After further development, the hope also is for the implementation of something similar to what I have presented here.

As I see it, there are three main contributions to my account of Applied Justice-Based Legitimacy. The first contribution is the concept of JINS and the implementation of a constitutional structure by international organizations and institutions. Rather than a world state or an international system of rules, the idea is for each international organization and institution to adopt and implement its own constitutional structure, consisting of rules and mechanisms.
consistent with the rules and mechanisms set forth above. Just as the world is comprised of states with their own constitutions, each protecting important human rights, these new international actors also would adopt and implement JINS or something similar. The second contribution is the approach of developing and implementing a set of international model rules and mechanisms. The United Nations, for example, could authorize a commission to develop a set of model rules for this growing body of international organizations and institutions consistent with international human rights law. The third contribution is the emphasis on procedural justice and procedural rights. It is procedural rights that provide the basis for norms in how human beings are treated in society. It is procedural rights that also provide the theoretical resources to generate rules of fair play and equal protection and the mechanisms for the implementation and enforcement of both procedural and substantive norms. By emphasizing procedural rights, we learn from what has been necessary in the domestic context, and we recognize the need for procedural rights to grow up alongside substantive rights to develop an effective law-governed system.

The reason for working on legitimacy was to take a principled and comprehensive approach to addressing the violations of human rights at the international level. Applied Justice-Based Legitimacy was designed with implementation in mind. The hope is that such calls for legitimacy eventually will be heeded and that we would indeed move toward a greater degree of justice, particularly with respect to the growing interactions between international organizations and institutions with economic charters and those who are affected by their policies and decisions.
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