

Just International Normative Structure

Chong Un Choe
Georgetown University

Abstract. This paper offers a solution to the global justice challenges presented by the power and influence of global governance institutions and other international actors. The international situation suffers from a fundamental lack of the sort of normative structure common in the domestic context to provide for justice and the protection of human rights. My solution involves an alternative justice-based account of legitimacy that requires substantial compliance with what I call a “Just International Normative Structure” grounded on the principles of natural justice, specifically due process and formal equality. It is due process and formal equality when specified with the relevant details that provide the rules of order and procedure, judgment and review, impartiality, transparency, accountability, and fair dealing. I argue that any adequate theory of legitimacy must overcome objections concerning effective application. I briefly discuss Allen Buchanan’s two proposed accounts for international legitimacy and identify weaknesses related to effective application in these proposals. I then offer an alternative account of international political legitimacy and explain how it addresses the weaknesses in Buchanan’s proposals and provides a solution to the structural problems in the global context.

Keywords: international legitimacy, global justice, procedural justice, fair dealing, accountability, global governance institutions, and human rights.

This paper offers a solution to the global justice challenges presented by the power and influence of global governance institutions and other international actors. The international situation suffers from a fundamental lack of the sort of normative structure common in the domestic context to provide for justice and the protection of human rights. The difference can be demonstrated by comparing the transactions of an international institution such as the World Bank 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,¹ and state and federal constitutions to protect the client from unfair lending practices and discrimination. The World Bank, however, despite its own bylaws and conventions when it makes a loan to a developing country and imposes conditions on that loan, is not constrained by the same or similar normative structure necessary to allow for justice and fair practices.

In this paper, I offer an alternative justice-based account of legitimacy that requires substantial compliance with what I call a “Just International Normative Structure” grounded on the principles of natural justice, specifically due process and formal equality. Under my account, an international entity is legitimate only if its laws and institutions are consistent with a just international normative structure, and an international normative structure is just only if its laws and institutions include these key elements of justice. Other justice-based accounts of legitimacy, such as the ones offered by Allen Buchanan, include some requirement of justice, but they fail to include any mechanism for effective

1] Title 15 US Code sections 1601 et seq.

implementation. My approach features what I take to be the universally applicable heart of the rule of law, namely, due process and formal equality. It is due process and formal equality when specified with the relevant details that provide the rules of order and procedure, judgment and review, impartiality, transparency, accountability, and fair dealing. An international entity may provide for the protection of all the right substantive norms, but, without these key elements of procedural justice, there would be no fair and effective mechanism for achieving compliance with those norms.

What follows is divided into three parts. In the first part, I briefly identify the problem targeted in this paper. In the second part, I argue that the standard of justice necessary for legitimacy must overcome objections concerning practical application. I then describe Buchanan's two proposed accounts for international legitimacy and identify weaknesses related to practical application in these proposals. In the third and final part, I offer my own alternative account and explain how it addresses the weaknesses in Buchanan's accounts and provides a solution to the structural problems in the global context. As this project concerns an evolving field with different actors and changing rules, the goal is not to provide a definitive account, but to offer critiques and insights that may move the dialogue forward with new ideas and strategies. 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 limit the exercise of authority and a theoretical basis for developing mechanisms for implementation and enforcement.

I. THE PROBLEM

In addressing the subject of legitimacy, my target is global governance institutions and what may be akin to 'arms of the state' in some domestic contexts, 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.² The problem that I want to focus on are the ones that arise in transactions with certain international actors, particularly, those with charters focusing on economic functions such as poverty relief or securing economic stability, including the World Bank Group, the International Monetary Fund (IMF), the World Trade Organization (WTO), and, regionally, institutions of the North

2] What I would suggest and what may be helpful in thinking about promulgating rules and enforcing them is to consider the concepts "arms of the state" and "public function" in the domestic case, as in the United States. Some public entities are not officially part of the state, but are authorized by the state to promulgate rules and regulations or perform certain functions. There are also private entities that have no connection to the state, but are engaged in activities previously or traditionally performed by the state, such as providing public services. Such quasi-governmental actors in the domestic context 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.

Atlantic Fair Trade Organization (NAFTA).³ As international action and intervention into domestic affairs by these and others actors become increasingly common, the worry is whether they themselves are legitimate or whether their governing laws and institutions are sufficient to ensure that they are using their power and influence in ways that are just and fair.

While some who would advocate a free market system 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 and environmental interests, and other considerations of justice (Mason 2003; Stiglitz 2002, 2003). 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 decision-making activity, and there is little in terms of enforceable norms to allow for fair dealing. International actors operate much like private businesses beholden only to their shareholders,⁴ despite their enormous impact on national and international affairs. What is lacking and different in the international context, in contrast to the domestic one, is the absence of an appropriate normative structure necessary to secure at least minimum justice and the protection of human rights.

As mentioned at the beginning, the difference can be brought out by comparing the transactions of an international actor such as The World Bank's and the IMF's transactions 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, and state and federal constitutions to protect the client from unfair lending practices and discrimination. The World Bank's and the IMF's transactions, however, despite their own bylaws and conventions when they makes 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 allow for justice and fair practices.

This is not only possible, but arguably it is what we have witnessed in recent years with The World Bank's and the IMF's activity in places like Latin America. The World Bank's and the IMF's efforts in these counties have not only failed to stabilize their economies, but also have acted in ways that have intruded on the sovereignty of these states, forced upon them foreign economic policies, and possibly contributed to greater instability and civil unrest, as in the case of Argentina in 2001 and elsewhere.

3] I do not specifically refer to multinational corporations, but, to the extent that these corporations function in ways similar to global governance institutions, the same analysis also would apply to them.

4] Some may be accountable to a broader group of stakeholders, but nonetheless without accountability adequate to ensure fairness, particularly those without a stake or without much of a stake.

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 2002, 50.)

Although the situation is complex and, with public criticism, international actors are moving toward changing their rules and practices to allow for greater accountability and conformity with human rights norms, this does 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 criticism, 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 and strategies.

II. CRITERIA AND PROPOSALS FOR A SOLUTION

In the absence of a world government or adequate centralized mechanism of international law enforcement, any solution that is offered must be able to achieve substantial voluntary compliance and contain sufficient resources for its own implementation and enforcement. It is not necessary to achieve universal voluntary compliance, but it must provide sufficient moral justification to garner wide acceptance by most states and international actors, so that unreasonable dissenters could be persuaded or compelled to comply at risk of exclusion or sanction. With regard to possible solutions and, specifically, accounts of international legitimacy, the skeptic of a just global structure could raise a number of objections or family of objections.

Some common objections include the following: the account fails to apply universally and assumes or relies on certain features of a particular political community (“the parochialism objection”); the account would lead to splintered and divisive sources of authority producing results that lack uniformity, consistency, and predictability (“the fragmentation objection”);⁵ the account lacks moral weight or moral justification sufficient to garner wide acceptance by the international moral community (“the moral justification objection”),⁶ and the account fails to address the political realities in the

5] Subsumed in what I am calling the “fragmentation objection” is the related concern over the relationship between our international laws and institutions and the sovereignty of states (Tasioulas 2010, 112).

6] The moral justification objection, which may disqualify certain accounts of legitimacy, raises a fundamental disagreement on the concept of legitimacy. Even if we focus on legitimacy in the normative sense, there is disagreement as to what counts as moral justification to exercise the power to adopt and enforce rules and the corresponding moral reasons to conform to those rules. I would argue that, at least in the international case, the moral justification should be based on justice even if not full-blown justice. While those under authority may act for moral reasons other than reasons based on justice (see, e.g., Joseph Raz’s content-independent theory of legitimacy), I agree with the view that the primary goal of international

actual world (“the realist objection”) (see Buchanan 2010b; Tasioulas 2010; Nagel 1990).⁷ What I would add to this list of common objections, and what goes hand-in-hand with the realist objection, is the objection that the account fails to include sufficient theoretical resources to facilitate its implementation and enforcement (“the enforcement objection”) (see Blake 2008; Tesón 1998). While it may be argued that a solution that satisfies the moral justification objection also would address the enforcement objection, the skeptic would demand more from an account than some intrinsic quality of justice in the rules themselves. The skeptic could draw an important distinction between something that is compelling to warrant assent and something that is compelling to prompt action. 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 behavior. There are many ways to prompt action, for example, giving specific directions, providing incentives, attaching costs, promulgating rules to establish procedures and mechanisms to ensure compliance, all of which are aimed at achieving certain objectives. What theories often neglect is this second sense of being compelling, in that, they contain neither resources nor practical guidance for shaping or reforming the global 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 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 ready-equipped with resources for implementation and enforcement.

law is peace and stability and that the justice-based approach gives us a better chance for lasting peace and stability, as it provides for stability for the right reasons (Rawls 1999, 12-13; Tesón 1998, 9-14). Under a justice-based approach, those under authority comply with the rules because they are just and not simply because they are advantageous under the circumstances (the normative condition in content-independent theories may not be satisfied for certain actors, giving rise to the problem of exceptionalism). Also, under a justice-based approach, the rules can be reinforced with just social and political institutions designed to cultivate a community that understands 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 theory allows for lasting peace, which presumably is what we need in an international theory of legitimacy.

7] The objection that the theory is unrealistic or unworkable given our current political realities is another common criticism. Always lurking in the background as we attempt to develop a theory of international legitimacy is the realist view that the very notion of global justice is a illusion because ultimately states and other international actors will act in their own interest 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 which states used unfair advantage for purposes of military expansion and economic domination. Malcom Fraser observes, “The 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” (2005, 174).

As a result, such proposal must at least include norms of procedure and the theoretical resources for developing mechanisms for implementation and enforcement. My focus in this paper, as space prevents me from addressing each of these objections, is on the realist and enforcement objections, as my main concern is with the challenge of making our theories work in practice. An adequate theory of international legitimacy must meet at least the following two criteria: first, the proposed account must address the current political realities, and, second, that the account must contain at least the theoretical resources to facilitate its own implementation and enforcement. Before offering my own account, I discuss the proposals offered by Allen Buchanan and briefly explain how they fail to satisfy these two conditions. I then present my own solution and attempt to show how it addresses the weaknesses in Buchanan's proposals.

Allen Buchanan, who is the most prominent defender of a justice-based approach to legitimacy, seems to offer two different proposals, one for international law-making institutions that includes necessary and sufficient conditions (hereafter "Strict Justice-Based Legitimacy") and another specifically for global governance institutions that does not provide necessary and sufficient conditions, but instead proposes a set of substantive and epistemic criteria (hereafter "Multiple-Criteria Legitimacy") (Buchanan 2004 & 2010a). Both are justice-based accounts and take "legitimacy" to mean that international actors are morally justified in making rules and attempting to secure compliance with them and that those to whom the rules are directed have moral, content-independent reasons to follow the rules or not interfere with the compliance of others. The question is, what condition or conditions must be satisfied for an actor to be morally justified in exercising political power in this way.

Under Strict Justice-Based Legitimacy, an actor has political legitimacy if and only if it is morally justified in exercising political power (Buchanan 2004, 233). Buchanan explains that an entity is morally justified in exercising political power (i.e., exercising supremacy in making, applying, and enforcing laws) only if it meets a minimum standard of justice. Buchanan's standard of justice includes 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, 247; 1999a). It is not clear whether Buchanan himself still endorses such a strict account of legitimacy,⁸ but I use it nonetheless to point out weaknesses in an account with such strict requirements.

I offer three main criticisms to Strict Justice-Based Legitimacy. First, a strict requirement of justice may be too restrictive and incompatible with the current political

8] Buchanan also endorses what he calls "broad accountability": "By ['broad accountability'] we mean that these institutions must cooperate with external epistemic actors—individuals and groups outside the institutions 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" (2010a, 147; Buchanan & Keohane 2006).

realities. Ideally, every international actor in every transaction should protect the most basic human rights norms, but, including a strict requirement of justice as a condition for legitimacy may prematurely disqualify many as illegitimate and provide insufficient grounds for intervention or exclusion. While Buchanan probably intends something like substantial compliance,⁹ nothing in the account itself explicitly includes any such accommodation. The second and related criticism, as also noted by Chris Naticchia (1999), is that Buchanan's account fails to accommodate other pragmatic considerations, including deep disagreement on basic human rights norms and pervasive problems with compliance. Buchanan addresses pragmatic considerations in his writings but these considerations also are not reflected in his account of political legitimacy.¹⁰ Third, Strict Justice-Based Legitimacy, and the norms subsumed in this account, may present a model for states and an international system, but the theory does not generate any mechanisms to make those norms a reality. Michael Blake (2008) also points out that Buchanan's approach is incomplete for this reason and suggests that what is needed is more guidance for modern states-- and, I would add, other international actors-- in implementing Buchanan's norms. For these reasons, each of which can be explained in greater detail, Strict Justice-Based Legitimacy fails to overcome the realist and enforcement objections.

In introducing a second account of legitimacy specifically for global governance institutions, "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" (2006, 106).¹¹ 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 institution'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

9] 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" (2004, 5).

10] Naticchia offers two reasons for favoring a pragmatic account over a justice-based account: (1) the extraordinary high stakes involved in securing long-term peace and justice demand that determinations be based on consequences for peace and justice, and (2) pragmatic considerations probably influence the content of justice-based accounts anyway (see also Naticchia 2005). Buchanan responds to these and other reasons in his rejoinder (1999b). Naticchia's account, like that of Raz, would not survive the moral justification objection, as well as others.

11] Page references are to the reprinted version in *Human Rights, Legitimacy, and the Use of Force*.

epistemic conditions for legitimacy necessary to satisfy the requirements of accountability and transparency with respect to the three substantive norms.¹²

Multiple-Criteria Legitimacy addresses certain weaknesses in Strict Justice-Based Legitimacy. Because the above conditions are “counting principles,” such that the more of them the institution satisfies, the greater its claim to legitimacy, the approach is not a strict approach, but rather leaves room for special circumstances (Buchanan & Keohane 2006, 120, citing Rawls 1971). Also, in adding to minimal moral acceptability other substantive and “epistemic” criteria, Buchanan and Keohane seem to address the need for norms of procedural justice.

Multiple-Criteria Legitimacy nonetheless has its own problems. 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 have rules an organizational structure sufficient for legitimacy, good governance involves more than is necessary for legitimacy (e.g., for justifying economic and political interaction and nonintervention).¹³ If our aim is to isolate legitimacy and identify criteria for determining whether an international actor is or is not legitimate, however, this account is not as helpful. Multiple-Criteria Legitimacy answers the realist objection, but at the cost of leaving us without a clear standard for assessing whether an international actor is or is not legitimate.

Second, and maybe more importantly for our purposes here, Buchanan and Keohane’s account of legitimacy includes certain norms of procedural justice, but still does not do enough to address the enforcement objection. This is true for two reasons. The first is that Multiple-Criteria Legitimacy includes certain important components of procedural justice, but leaves out others. For example, there is nothing in this account that directly requires fair dealing or impartiality,¹⁴ such as requirements of fairness in an

12] “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 and Keohane 2006, 123-24).

13] 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.

14] Buchanan and Keohane may intend to include impartiality in their conception of accountability,

international actor's transactions with a client state or procedures for impartial review of an international actor's exercise of its decision-making authority. Buchanan and Keohane admit that accountability per se is insufficient for legitimacy, so they suggest a broader notion of accountability that takes into account their substantive criteria (2006, 122). I would add, however, that what is also needed, beyond accountability, is greater emphasis on the other fundamental norms of procedural justice.¹⁵

Multiple-Criteria Legitimacy also does not fully dispense with the enforcement objection because it includes as epistemic criteria requirements to ensure accountability and transparency, but these requirements alone also are insufficient to secure compliance with their substantive criteria, including minimum moral acceptability. Their account, as others, consists mostly of rules, but does not provide specific mechanisms for implementation and enforcement. So Buchanan and Keohane may have diagnosed the problem, but Multiple-Criteria Legitimacy is still thin with regard to practical guidance in solving the problem. As quoted above, Buchanan and Keohane describe their efforts as a proposal, and indeed, their proposal includes several extremely helpful insights on global governance. But there is, as they would acknowledge, more work to be done.

III. MY PROPOSAL

The solution that I propose attempts to do some of this work and addresses weaknesses in Strict Justice-Based Legitimacy and Multiple-Criteria Legitimacy by offering an alternative justice-based account that differs from Buchanan's in two important ways: expanding on the requirement of justice to feature procedural justice (i.e., addressing the enforcement objection); and providing a more nuanced definition of legitimacy to account for pragmatic considerations (i.e., addressing the realist objection). An account of legitimacy, as a minimum normative threshold, should include at least the conditions necessary for an international actor to qualify as legitimate. My account, Applied Justice-Based Legitimacy or Applied Legitimacy, does this, and provides, as follows:

An international actor (IA) is legitimate 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.

As to the first condition, the IA satisfies (1) only if it is in substantial compliance with a set of laws and institutions that meet the requirement of justice.¹⁶

but the concept itself does not entail this additional normative requirement.

15] Elsewhere Keohane refers to the "accountability gap," but the problem may be better characterized as the 'enforcement gap' as other safeguards are necessary to ensure fairness and equality (Keohane 2004, 139).

16] This current 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 requirement of justice, condition (1), refers to a minimum standard of justice involving both procedural and substantive rights, stated more precisely: an IA satisfies the requirement of justice if and only if its laws and institutions respect basic procedural and substantive rights. Substantive rights refer to basic 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 equality.¹⁷ While many legal theorists have discussed due process and equality either as an element of natural justice or as included in a list of basic human rights (see, e.g., Finnis 1980; Rawls 1999), the failure to recognize procedural justice as foundational to any law-governed system and to develop it effectively as a theoretical basis for laws and institutions is not only a missed opportunity, but also 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, accountability, and other theoretical tools for implementing justice.¹⁸ 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.

As mentioned above, Applied Justice-Based Legitimacy differs from Strict Justice-Based Legitimacy by specifically accommodating pragmatic considerations in the account itself. One way that I do this is by attempting to provide a more nuanced approach to the condition of justice, by requiring only substantial compliance. In a non-ideal theory of legitimacy, it is not enough simply to begin with a minimalist or bare conception of justice that can be applied across cultures (i.e., that justice requires respect for only the most basic rights necessary for security and subsistence), but what also is required is some accommodation for imperfect compliance with even the most basic norms (i.e., that justice requires respect for some right to a certain measure).¹⁹ My solution

the word “laws” here to refer to any formal set of rules, which would include internal regulations in the case of non-state actors.

17] Formal equality requires that similarly situated persons be treated alike. I would agree with others that what is necessary for legitimacy is this bare formal conception of equality, rather than a substantive conception like Rawls’s domestic equality of opportunity or Ronald Dworkin’s equality of resources (Rawls 1971; Dworkin 1981). The problem with formal equality lies not with its conception, but with its application. For example, Rawls includes formal equality in his short list of human rights but understands this to allow unequal treatment of women in decent societies. I would question, however, how men and women are not similarly situated in a morally significant way so as to justify different treatment, at least insofar as it concerns being entitled to certain basic rights. While some theocratic societies may not view men and women as equals, this is where we can say that toleration does not require deference to others in their reliance on certain basic assumptions, particularly when they are inconsistent with well-settled facts. When applied correctly, the formal principle of equality can be a robust tool for securing a greater degree of justice, and addressing inequalities in our treatment of individuals and collectives.

18] Many theorists offer a list of what should be included as norms of procedural justice (see, e.g., Hayek 2007, 112; Mason 2005, 125; Tasioulas 2010, 115).

19] As mentioned above, in his synopsis of his chapters, Buchanan describes his account in this way: “political entities are legitimate only if they achieve a reasonable approximation of minimum standards of

attempts to address both by including a minimalist conception of justice and requiring only substantial compliance. By “substantial compliance” I mean that the international actor’s act complies with JINS by respecting basic procedural and substantive rights in substantial part, even if it falls short of strict or full compliance, and does not result in any egregious violation of human rights.²⁰ This approach allows for some flexibility to address the realities of the international situation, for example, a developed state that temporarily lapses into committing isolated violations of some basic human right or a developing state that is limited in resources and yet making good faith efforts to advance justice with its limited resources. This is not to say that some violation of justice, for example, the torture of prisoners of war, is morally acceptable, but only that it may not by itself provide grounds for losing legitimacy and intervention by the international community. The requirement accommodates certain political realities, but at the same time makes no concession for egregious human rights violations.

The requirement of good standing, condition (2), is another way in which my account accommodates the political realities without compromising justice.²¹ The international actor satisfies the requirement of good standing based on a combination of factors including relevant aspects of the actor’s historical identity, record, reputation, and relationships. The requirement of good standing takes into account certain practical considerations and provides a supplemental basis for grounding legitimacy on other circumstantial indicators of justice rather than some pure determination of an actor’s present compliance with basic human rights norms. Some of the practical considerations include that our judgments are often based on other factors such as the actor’s reputation and relationships. These other status factors provide additional evidence of legitimacy, as considerations of justice often are a part of the reason for an international actor’s good reputation and long-standing relationships with other legitimate states and non-state actors.

justice, again understood as the protection of basic human rights” (2004, 5). The phrase, “reasonable approximation,” however is not included in his definitions, as stated above. It seems, then, that this language reiterates only the fact that his account of legitimacy requires a minimalist account of justice, rather than full-blown justice. Even if it is Buchanan’s intent to apply this accommodation to his account, my approach makes this sort of qualification explicit and relies specifically on the language of ‘substantial compliance.’

20] I define “due process” in terms of a relation of justice, where the goal is fairness or balance: in a particular situation involving an injustice between two parties, x and y , any procedure or set of procedures necessary to bring x and y into a relation of justice R , such that Rxy entails that x has no outstanding moral or legal obligations to y and y has no outstanding moral or legal obligations to x . Based on this conception, one can imagine scenarios where there is some part left outstanding, but substantial compliance would allow for some deviation so long as no egregious human rights violations results.

21] Although the second condition is less relevant given the focus of this paper, I provide it here for the sake of completeness. Requirement of good standing: an international actor (IA) achieves good standing if and only if those who are subject to the IA’s authority or those who interact with the IA recognize it as being in substantial compliance with the requirement of justice based on relevant factors including the IA’s historical identity, historical record, national and/or international reputation, and past and present relationships with other legitimate states and non-state actors.

More importantly, in addition to addressing the realist objection with these pragmatic accommodations, my account specifically addresses the enforcement objection by introducing JINS. JINS refers to a set of laws and institutions that respect basic substantive and procedural rights. My focus here is on the right to 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 facilitate their realization.

The first aspect (i) refers to due process and formal equality and, with respect to due process, norms pertaining to order and procedure, judgment and 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 at the beginning, 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, 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 and resources between the parties may be significant, but due process and formal equality at least provides the procedural safeguards necessary to allow for fair dealing.

The second aspect (ii) of procedural justice involves mechanisms for implementation and enforcement. 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 to allow for fair dealing. But, with 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 include mechanisms for implementing those norms. Maybe the best way to accomplish this is by establishing models consisting of structural designs and directions that are consistent with the norms of procedural 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 appointment or election of officers, the public availability of rules and records, fair negotiations with clients, impartial decision-making, and internal and external review.

While some may argue that such structural design and direction should be left to particular international actors as they implement the norms of procedural and substantive justice, this objection fails to recognize two important considerations. The first is that, in the same way as the norms themselves involve justice, the means by which the norms are implemented also should involve justice. The long-term benefit of achieving certain political and economic ends should not be achieved by adopting strategies that perpetuate unfair asymmetries of power and in the long-run result in a more unjust global structure. The second consideration is that we may leave international actors with inadequate guidance for implementing norms of procedural justice, which could lead to inaction or the implementation of unjust or inadequate procedures. While some discretion is due to those international actors with the requisite expertise in selecting the appropriate models to suit their particular institutional needs, political or legal theorists can do much more in terms of practical guidance in evaluating procedures and offering models that comply with the requirement of justice.²²

If I am right that an adequate account of international political legitimacy must provide the resources for its own implementation and that this is best done through model rules and mechanisms, then there remains further collaborative work to be done in developing these international models. For example, in implementing the norms of impartial review of decisions by international actors, legal theorists may 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.²³ A JINS would be comprised of an entire set of rules and models tailored to fit different institutional functions and different contexts.

In summary, what I have argued here is that our current justice-based theories of international legitimacy do not adequately address the realist and enforcement objections, particularly the problem that our theories do not include the resources necessary to generate

22] Legal scholars and jurists currently engage in this kind of work by providing model substantive rules (e.g., Model Penal Code and the Uniform Commercial Code) and rules of court. While some details must be left open to be specified in particular political communities, scholars and jurists can provide model rules and model mechanisms for order and procedure, judgment and review, impartiality, transparency, accountability, and fair dealing that could be tailored for application in different international contexts.

23] *Kiobel v. Royal Dutch Petroleum* (No. 10-1491), the case currently before the United States Supreme Court under the Alien Tort Statute (28 U.S.C. § 1350), which involves 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 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 and leave the victims without a remedy. This is a dilemma for the courts, but for legal theorists, the case presents a challenge 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 in the future for remedying injustices.

mechanisms for implementation and enforcement. While Buchanan and Keohane move us in the right direction with Multiple-Criteria Legitimacy and, specifically, the additional requirements of accountability and transparency. I argued that neither Strict Justice-Based Legitimacy nor Multiple-Criteria Legitimacy fully dispense with the enforcement objection. I offered an alternative, Applied Justice-Based Legitimacy, which requires that international actors adopt a version of JINS, which, when fully developed, would include model rules of procedural justice and models of mechanisms for the implementation and enforcement of both substantive and procedural norms. Applied Justice-Based Legitimacy is aimed at greater compliance with our substantive human rights norms and, also, at realizing a greater degree of procedural fairness in our international transactions.

cuc2@georgetown.edu

REFERENCES

- Michael Blake. 2008. Review: Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. *Ethics* 118 (4): 721-26.
- Buchanan, Allen. 1999a. Recognition Legitimacy and the State System. *Philosophy & Public Affairs* 28 (1): 46-78.
- — —. 1999b. Rule-Governed Institutions versus Act-Consequentialism: A Rejoinder to Naticchia. *Philosophy of Public Affairs* 28 (3): 258-70.
- — —. 2004. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. Oxford and New York: Oxford University Press.
- — —. 2010a. The Legitimacy of International Law. In *Human Rights, Legitimacy, and the Use of Force*. Oxford & New York: Oxford University Press. Originally published in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 79-116. Oxford & New York: Oxford University Press.
- — —. 2010b. Human Rights and the Legitimacy of the International Order. In *Human Rights, Legitimacy, and the Use of Force*, 71-102. Oxford: Oxford University Press.
- Buchanan, Allen, and Robert O. Keohane. 2006. The Legitimacy of Global Governance Institutions. In *Human Rights, Legitimacy, and the Use of Force*, 105-133. Oxford: Oxford University Press, 2010. Originally published in *Ethics and International Affairs* 20 (4): 405-37.
- Dworkin, Ronald. 1981. What is Equality? Part 2: Equality of Resources. *Philosophy & Public Affairs* 10 (4): 283-345.
- Finnis, John. 1980. *Natural Law and Natural Rights*. Oxford: Oxford University Press.
- Fraser, Malcolm. 2005. Sovereignty, International Law and Global Cooperation. In *Globalisation and the Rule of Law*, edited by Spencer Zifcak. London & New York: Routledge.
- Hayek, F.A. 2007. *The Road to Serfdom*. London: University of Chicago. Originally published in 1944.
- Keohane, Robert O. 2004. Global Governance and Democratic Accountability. In *Taming Globalization: Frontiers of Governance*, edited by David Held and Mathias Koenig-Archibugi, 130-59. Cambridge: Polity Press.
- Mason, Anthony. 2005. The Rule of Law and International Economic Transactions. In *Globalisation and the Rule of Law*, edited by Spencer Zifcak, 121-39. London & New York: Routledge.
- Nagel, Thomas. 1990. Moral Conflict and Political Legitimacy. In *Authority*, edited by Joseph Raz, 300-324. New York: New York University Press.

- Naticchia, Chris. 1999. Recognition and Legitimacy: A Reply to Buchanan. *Philosophy & Public Affairs* 28 (3): 242-57.
- — —. 2005. Recognizing States and Governments. *Canadian Journal of Philosophy* 35 (1): 27-82.
- Rawls, John. 1971. *A Theory of Justice*. Cambridge: Harvard University Press.
- — —. 1999. *The Law of Peoples*. Cambridge: Harvard University Press.
- Stiglitz, Joseph. 2002. *Globalization and Its Discontents*. New York: Norton & Company.
- — —. 2003. Globalization and Development. In *Taming Globalization: Frontiers of Governance*, edited by David Held and Mathias Koenig-Archibugi, 47-67. Cambridge: Polity Press.
- Tasioulas, John. 2010. The Legitimacy of International Law. In *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas, 105-12. Oxford: Oxford University Press.
- Tesón, Fernando. 1998. *A Philosophy of International Law*. Oxford: Westview Press.