Jus Cogens
https://doi.org/10.1007/s42439-019-00001-1

ORIGINAL ARTICLE

"Most Reasonable for Humanity": Legitimation Beyond the State

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Published online: 27 March 2019

Abstract
Legal and political philosophers of a normative bent face an uphill struggle in keeping themes of global justice and cosmopolitan governance, at the forefront of their disciplinary debate, given the perceived urgency of confronting, at the domestic level, the populist upsurge in mature democracies and "democratizing societies" alike. In this paper, these two levels of analysis—national and transnational—mutually enrich one another through a reflection on the ground of legitimacy. In the first section ("Perfectionism Redux"), (a) neo-perfectionist approaches to the legitimation of transnational authority (rooted in Kantian or Hegelian notions, or in some natural law conception of human rights) and (b) public reason approaches rooted in the paradigm of "political liberalism" will be contrasted. In the second section ("From Balance to Separation of Powers"), a non-perfectionist and normative conception of the legitimacy of transnational authorities will be derived from Rawls's "liberal principle of legitimacy" (renamed "legitimation by constitution by F. Michelman) and the difference with the application of the same principle at the domestic level will be elucidated. In the third section ("Legitimacy and the Flourishing of Humanity: Buchanan and Keohane on Global Institutions"), on the basis of such conception, one of the most complete and influential approaches to the legitimacy of transnational authorities—i.e., the "Complex Standard of Legitimacy" expounded by A. Buchanan and R. Keohane in "The Legitimacy of Global Governance Institutions"—will be critically assessed.

Keywords Humanity · Rawls · Legitimacy · Public reason · Global governance

The year 1989 brought about a major dislocation in world politics: the collapse of the Cold War bi-imperial order and the rise of a multi-polar world fraught with resurging nationalisms and explosive religious divides. It also caused a major realignment of the debate in all the disciplines that reflect on politics and law. Starting with the 1995 bicentennial of Kant's "Perpetual Peace," a body of scholarship has been growing that has taken up in earnest a question left up for utopian speculation during the past two millennia: *what is a just world*? Political philosophers of a normative bent, who previously had addressed justice on the scale of a national society, now

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ventured to address the conditions under which relations among societies and States could be understood as fair and just. This debate has generally amounted to a confrontation around distinct formats that a "transnational order" could take on, and their desirability. As a widely accepted narrative goes, the realist defense of "anarchy among nations" *qua* de facto and at the same time desirable, freedom-enhancing, predicament quickly yielded to a new sense that as early as 1928, with the signing of the Briand-Kellogg Pact, the world-system had left behind the Westphalian notion of the international arena and a new kind of transnational coordination among nation-states began to emerge. Sheer national hegemony in the international arena gave way to an uneasy cohabitation of old-style *hegemony* and a new transnational *legitimacy*.

1 Perfectionism Redux?

The focal point of the debate has ever since moved *within* the post-Westphalian camp. Minimalist positions have advocated the preservation of the current status quo, summed by Walzer as the presence of "a series of global organizations of a political, economic and judicial sort" (UN, World Bank, WTO, IMF, ICC), that already go beyond international anarchy but remain weak, only partially influential, with decision-mechanisms "uncertain and slow", often stalemated by veto-powers, and with limited enforcement capability.[1] More normatively demanding are cosmopolitan programs of governance that come in diverse gradients on a scale of global integration. Rawls's idea of a "Society of Peoples," reminiscent of Kant's *foedus pacificum* and amounting to a security-enforcing "confederation" of only liberal and decent peoples, yet with no attempt to pursue global redistributive justice, is one of such schemes,[2] followed by Habermas's notion of "world domestic politics" for the "post-national constellation"—where national governments and regional and global structures of governance coexist. These are among the more moderately reformist conceptions. Pogge and Beitz correct the Rawlsian scheme by introducing significant elements of global distributive justice.[3] Held and Archibugi propound a kind of cosmopolitan democracy which includes a democratic reform of existent institutions of global governance and the projection of democratic rule worldwide.[4] Republican views also have been invoked in order to ground a deliberative structure of supranational governance.[5]

As Scheuerman has pointed out, these diverse understandings of the transition from the current predicament towards more robust forms of global governance all converge in rejecting the hypothesis of a world state or world government proper.[6] The cosmopolitans' arguments for dismissing full-fledged federalization of the world under one government, however, have been criticized by Scheuerman and others for being cavalier repetitions of Kantian *topoi* presented as self-evident truths and never probed in depth: namely, world government is likely to result in tyranny, would compress diversity to an unacceptable extent, would lack the stimulus of competing against other states, would leave dissenters with no place to go, and would discourage participation by virtue of mere size. Yet recently, new defenses of the idea of

[1] See Walzer (2004), 178–179.
[2] See Rawls (2005) and Rawls (1999); see Habermas (1992), transl. by William Rehg (1996), translated, edited, and with an introduction by Pensky (2001); (2006).
[3] See Beitz (1979) and (1999), 269–296; Pogge (2008), 168–195 and (2010). See also Caney (2005).
[4] See Held (1995); Archibugi (2008); see also Archibugi and Held (eds), (1995).
[5] Bohman (2004), 336–352, and (2007); Laborde (2010), 48–69 and Pettit (2010), 70–94.
[6] Scheuerman (2014), 419–441.

a *world state* have emerged: for example, A. Wendt has argued in favor both of the causal inevitability of a world state and of its normative desirability.[7]

It would then seem that the focal point of debate is between (a) advocates of world governance (ranging from moderate reform of present institutions to a Rawlsian "society of peoples," to redistributive global governance, all the way to cosmopolitan democracy and republican global deliberativism) and (b) advocates of a global federal state proper.

The argument I would like to defend cuts across this divide. My concern is that the confrontation between these two versions of cosmopolitanism risks to obscure *another* divide is no less crucial for the purpose of rethinking the legitimacy of global authorities, be they of a *governmental* or a mere *governance* nature. This other divide concerns the distinction, inaugurated by the Rawls's "political liberalism," between on the one hand a "political" understanding of legitimacy, based on the "democratic dualism" associated with Ackerman's view of constitutionalism and called by Michelman "legitimation by constitution"[8] and, on the other hand, the traditional *perfectionist* arguments and deductive models that derive legitimation from comprehensive, putatively well-grounded, conceptions of human dignity, reason, objective values, and transcendentally derived principles.[9] A concrete risk exists that the global governance debate may function as a gigantic Trojan horse, ingenuously welcomed by contemporary political philosophers, that carries no less than the resurgence of perfectionism in its belly. Evidence of this concrete risk is the popularity of arguments that draw their normative force from some antecedently posited, or transcendentally derived, normative notion. For example, the idea that human rights are moral entities, ultimately protective of universal needs and interests shared by all human beings, and antecedent to, and binding on, legitimate law-making at the national or supranational level is not just found in the controversial natural-law type perfectionism of Dworkin and Griffin.[10] The so-called "institutional understanding" of human rights propounded by Pogge also puts them on a line of strict continuity with "natural law" and "natural rights". Conceived as "weighty moral demands", human rights "ought to play an important role in our thinking and discourse about, and ought to be reflected and respected in, our social institutions and conduct. They should normally trump or outweigh other moral and non-moral concerns and considerations".[11] For all his reluctance at embracing the

[7] For the argument on the inevitability of the rise of a world state, see Wendt (2003), 491–542. For an argument concerning its desirability, see Wendt (2015).

[8] See Michelman (2003) and, more recently, Michelman (2015). For an insightful reconstruction of the nuances of what is meant by "constitution" in Rawls's liberal principle of legitimacy, see Michelman (2018).

[9] The term "perfectionism" is used here as a synonym for the *comprehensive* quality of a conception of justice and its attendant notion of legitimacy. In that sense, its meaning is broader than the one associated by Rawls with perfectionism as a specific moral view in *A theory of justice* (325–332). Rather, it encompasses *all* the teleological conceptions that, regardless of the value(s) they posit as supreme, understand justice and legitimacy (qua standard for assessing the merits of institutions) as the maximal possible realization of that supreme value (see ibidem, 24–25). A "perfectionist" view of justice and legitimacy is then understood generically as the opposite of a "political-liberal" conception of justice and legitimacy, though it may take many specific forms. See also Quong (2011), 26–30.

[10] See Dworkin (2011), 332–344 and Griffin (2008) and the interesting collection by Crisp (2014).

[11] Pogge (2008), 54. Caney (2005), a similar way can be found of proceeding from "universal moral values" to principles of justice that specify what human rights follow from these antecedent moral entitlements (25–96). Caney then moves on to spell out distributive entitlements are required by justice on a global scale (102–140), to then finally derive an argument in favor of a specific "kind of world order" from these considerations (148–182). For an original attempt to avoid perfectionism and actually bypass both perfectionist and agreement-based conceptions of human rights, see Beitz's "practical conception of human rights," aimed at reconstructing the implicit meaning of human rights within the practice of international political interaction as carried out by the relevant actors, in Beitz (2009), 102–121. Beitz's conception, however, falls short of articulating an understanding of the *normativity* of human rights (a point substantially conceded in ibid., 115). For one of the most interesting "political" approaches to human rights, and critique of the perfectionist approaches (based on the so-called "Mirror View"), see Buchanan (2013), 50–84.

program of political liberalism, even Habermas has found this renewed foundationalism unpalatable. In critical remarks addressed at Rainer Forst, but applicable to Pogge's view of human rights as well, Habermas objects to importing "morally justified rights" into the framing of a constitution: in fact, then "the liberal priority of human rights would be translated into the paternalism of an assembly of morally pre-programmed founders who cannot proceed democratically because the system of rights and the democratic procedure ... would be a function of their antecedent moral wisdom that they bring to bear prior to any political considerations".[12] Other authors' perfectionist propensities revolve around democracy: Held and Archibugi implicitly take democracy, recast as "cosmopolitan democracy" when operating supranationally, as the one and only one valid scheme of legitimate rule, thereby failing to accommodate even that basic duality of liberal and decent peoples envisaged by a moderate post-national theorist like Rawls as the cornerstone of an acceptable post-Westphalian international order. Although they refrain from deducing schemes of global governance from comprehensive and contentious philosophical notions, from the pages of Held's *Democracy and the global order* or Archibugi's *The global commonwealth of citizens* one receives the impression that progress towards a just, or a less unjust, world necessarily presupposes the increase of the number of countries adopting democratic governance, not just bona fide abiding by some fair term of cooperation.[13] While it is not uncommon for religious believers to equate a just world with every human being's converting to their own religion, the view that progress towards legitimate global governance is coextensive, as a necessary condition, with other societies' coming to adopt our liberal-democratic patterns clashes with the pluralistic stance undergirding liberalism and with the anti-perfectionism of "political liberalism." Bohman's creative rethinking of transnational democracy as a democracy of *dêmoi*, which never aims at transcending them into a global demos, rests on the "republican ideal of freedom as nondomination as constitutive of the powers of citizenship"[14] and on the perfectionist assumption that "human rights require democracy in order to be exercised".[15] In his envisaging a "human political community", as "the community to whom those who are denied their basic rights can appeal" and as "the basis for any claim that any person's basic rights and statuses have been arbitrarily denied by particular delimited political communities",[16] Bohman creatively brings to fruition a Meadian insight about the intersubjective nature of such version of the generalized other, linking it with a dialogical reflective equilibrium and with the Kantian "enlarged mentality."

More examples could be cited, but the point is that when discussing the legitimacy of *transnational* orders we should be wary of backsliding into perfectionist conceptions of legitimacy *qua* responsiveness to values and premises antecedently posited and often contentious. On the domestic scale, those perfectionist schemes have been challenged by "political liberalism" and its liberal principle of legitimacy. Let me briefly recall it and then explore some difficulties that arise when we try to apply such principle to legitimacy at the transnational level.

Drawing on and incorporating Ackerman's *dualistic* view of democracy, Rawls' liberal principle of legitimacy intimates that coercive power is used legitimately when its exercise is *consistent with a constitution* "the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational".[17] A total game-changer, this view relegated all other *normative* conceptions of legitimacy to the

[12] Habermas (2011), 296.
[13] See, for example, Held (1995), 232–233 and Archibugi (2008), 86–87.
[14] Bohman (2007), 173.
[15] Ibidem, 115.
[16] Ibidem, 120.
[17] Rawls (2005), 217.

role of iterations of a bi-millennial foundationalist scheme, best rendered in the language of movie plots: philosopher posits normative principle or value, assesses the legitimacy of authority against such posited standard, but the verdict usually convinces only those who previously endorsed the philosopher's controversial premise.

On a global scale, any attempt to understand the legitimacy of transnational forms of authority along the anti-perfectionist lines of the later Rawls's "legitimation-by-constitution" faces three difficulties.

First, the expression "all citizens" is inapplicable. There are no "citizens of the world," except in a metaphorical and moral, not political or legal, sense. Second, on the latest count of Freedom House (2018), there exist 88 democratic regimes in the world, and the liberal-democratic idea that "all the citizens" qua individuals concur in determining whether the exercise of power is legitimate fails to resonate (wrongly, but that is only our liberal-democratic opinion) with the remaining 107 polities, regardless of the fact that many of them have found it politically expedient to sign the UDHR and the Covenants. To impose a putatively correct view on others within a scheme of governance not of their choice is the epitome of oppression, not of democracy, and for this reason we cannot envisage the legitimacy of transnational orders in terms that comport only with a subsection of the relevant constituency. Third, it is unclear what exactly should take the place of "the constitution" and what should "the constitution" respond to, at the transnational level.

2 A Global *Rule of Law* and its "Political" Foundations

These three difficulties deserve a closer scrutiny, and in this section I will offer some comments from a perspective that relies on and expands Rawls's "political liberalism."

2.1 Constituent Power Beyond State Borders

Does the first difficulty—to repeat: the inexistence of a global constituency in any non-metaphorical sense—enjoin us to conceive of a possible transnational order along the lines of the Kantian *foedus pacificum*[18] or, in other words, as an "association" (to remain on neutral ground about its federal, confederal, or mixed nature) of (most or, ideally, all) the states of the world? Unless one is prepared to take a utopian leap of faith into a unified planet with one global constituency of over 7 billion people, it seems that the idea of a transnational order must take the shape of an order that as primary members has not individuals, but states or "peoples," as Rawls famously put it.[19] This conclusion can be defended by considering the shortfalls of the competing hypotheses. Barring the utopian view of a world-demos that iterates the Big-Bang-like creation of a global commonwealth in the same way as a national demos creates a new political order on the ashes of a previous regime or ex nihilo—namely, by enacting a constitution (written or unwritten) that captures that people's sense of how free and equal citizens could regulate their communal life through law—two innovative views of transnational constituent power are worth considering.

One is Habermas's "dual sovereignty" thesis. Originally designed to account for the legitimacy of EU transnational authority, his account could be extended to cover transnational

[18] Kant (1957), 100.
[19] For useful commentaries on this issue, see Pettit (2006), 38–55, and Tan (2006), 76–94.

global orders. According to Habermas, three fundamental documents—the 1992 Maastricht Treaty, the 2004 Treaty Establishing a Constitution for Europe, and the 2009 Lisbon Treaty—in various ways all refer to the idea that sovereignty, in the political space of the EU, stems from *two* distinct constitutional subjects and "is 'shared' between the citizens and the states".[20] Drawing on the work of Claudio Franzius about a *pouvoir constituant mixte* and on Armin von Bogdandy's notion of a dual subject of legitimation consisting of individuals who are at the same time citizens of the states and of the Union,[21] Habermas argues that differently from classical federal states constituted by the national citizenry in its entirety, "the foundation of the European Union can be conceived retrospectively as though the citizens involved (or their representatives) were split into two *personae* from the beginning; ... every person as a European citizen in the constitution-founding process encounters herself, as it were, as a citizen of an already constituted national people".[22] While in federal states the citizens "reserve the responsibility for making constitutional changes either for themselves (through national referenda) or for the federal legislative organs", in the case of the EU, no such creation of a "supreme constitutional authority" occurs. The EU citizens agree to transfer "the sovereign rights of their already constituted states... to the new polity" with a reservation "that goes far beyond the guarantee of the continued existence of the component states" but includes the proviso that "their respective states survive within the federal polity *in their freedom-guaranteeing function* of constitutional states", i.e., as guarantors of rights, including social rights. As a result, the procedure for amending the treaties requires *unanimity* among the member states—a feature that brings the "living constitution" of the EU closer to the Articles of Confederation than to the federalism of the 1787 US Constitution. This dual sovereignty reflects the fact that the citizens of the Union wish their respective states to *continue* "to perform their proven role as *guarantors of law and freedom* also in their role as member states. The national states are more than just embodiments of national cultures worthy of preservation; they *vouch* for a level of justice and freedom which citizens rightly want to be preserved."[23] In other words, the citizens of the member states want *to share* their constituent power with the EU citizens but not "to relinquish it to themselves *qua* EU citizens understood as the ultimate source of the power to amend the supranational constitution."[24] The two levels of authority, the national and the transnational, are co-originary and interdependent. Neither supersedes the other.

Actually, as Vlad Perju has argued, they are far from co-originary or on an equal footing: the transnational levels of EU governance receive authorization and legitimacy from the member states, national courts act as guardians of the national constitutions and their integrity in relation of EU legislation and administrative action, and even when the "citizens of the EU" would have an interest in the supranational level to take on certain functions—for example, by creating its own budget through direct supranational taxation—that outcome has actively been prevented from materializing by the adverse will of the member states.[25] In sum, the putatively co-original supranational authority of EU institutions is really derivative of national authorizing law, and the role of "citizens of the EU," played by the citizens of the member states, is far from being on a par with the role played by

[20] Habermas (2012), 35.
[21] See Franzius (2010), 42 and Bogdandy (2003), 38.
[22] Habermas (2012), 38.
[23] Ibidem, 41.
[24] Ibidem, 42.
[25] Perju (2018), 32.

them as members of national polities. Thus, dual sovereignty, desirable though it might be, can hardly count as a reconstruction of the current practice of EU constitutionalism.[26]

Another interesting view of transnational constituent power as resting on sources other than the consent of the existing states has been put forward by Mattias Kumm. Kumm's initial premise is that sovereign nation-states cannot lay a self-standing claim to constitutional legitimacy because they exist alongside other similar constitutional nation-states in a context where "justice-relevant negative externalities" occur. These externalities consist of the effect of state policies (e.g., in areas of security, crime prevention, environmental pollution, the management of energy sources and supplies) onto other similar sovereign states. Some of these effects are assessed differently by different actors and "it would be a form of domination to have such a disagreement settled authoritatively unilaterally by one of the parties to the dispute."[27] The need for an impartial assessment of these externalities "challenges the authority of 'We the People' and limits the authority of national constitutions"[28] and at the same time establishes the need for a transnational legal order, much in same way—Kumm argues—as domestically "the problem of establishing just relations between free and equal persons", and the impossibility of solving it merely through goodwill and shared epistemic intuitions, generate the need for a legal system capable of solving epistemic impasses and overcoming the endemic shortfall of motivation through sanctions. It is then claimed that "the legitimacy of the state in a world of sovereign states depends on its integration into an appropriately structured international legal system which must be conceived as constituted by the international community as a global *pouvoir constituant.*"[29] Thus, in Kumm's dual scheme of legitimacy, "'We the People' and the 'international community' are co-constitutive of a globally integrated system of public law, comprising both international law and the constitutional law of sovereign states."[30]

An attractive aspect of Kumm's argument is that the cogent quality of international law over the law of singles states does not derive from natural rights or any natural law in disguise: it stems from another, concurring constituent power of global scope—*the international community*. What remains in need of clarification, however, is the exact nature of the so-called "international community," as distinct from a collection of well-meaning states. Unfortunately, the analogy with the domestic rule of law does not help.[31] In fact, while the *function* of legal authority is to remedy the shortfall of motivation and the epistemic partiality of single actors, that is not at all the *ground* that legitimates the law and makes it binding. That ground of law's binding nature rests on the *will*, on the part of all the consociates, to leave what classic contract theory used to call "the state of nature" and to create a commonwealth. Without that all-too-voluntary endorsement of the transition from the state of nature to a commonwealth, the law would not be worthier than the sheets of paper on which it is written. Therefore, the domestic analogy does not rule out, but on the contrary confirms, the indispensability of the voluntary consent of those, either free and equal future citizens or constitutional nation-states, whose communal life is to be regulated by law. In neither case does the legal system derive legitimacy from itself, nor can its function be any worth in the absence of that will and consent. In a purely Westphalian world, sovereign nation states would not care less about the negative externalities

[26] Ibidem, 43.
[27] Kumm (2016), 14, 3, 704.
[28] Ibidem, 706.
[29] Ibidem, 708.
[30] Ibidem, 709.
[31] Ibidem, 706–707.

of their actions. If after all they *do* care, and see the need for some sort of impartial regulation, it is because—perhaps on the basis of certain historical experiences, e.g., the two World Wars of the twentieth century—nation-states have come to the widely shared, if not unanimous, conclusion that, like the individuals in the Hobbesian, Lockean, or Rousseauian states of nature, they had better generate a "global commonwealth," regulated by law, that secures certain goods, say international security and an impartial way of settling controversies, and remedies the shortfall of motivation and epistemic partiality. The "international community" is just another way of collectively designating the set of states that wish that their mutual relations be regulated in an impartial way.

In sum, it has not yet been conclusively shown that a transnational order can take a form other than that of a *foedus pacificum* or a Society of Peoples, generated by the constituent power of the aggregated units—leaving aside the important question whether these units should be conceived of as states or *demoi*.

2.2 Global Rule of Law Versus Global Democracy

The second difficulty compounds the first. Even if a deus ex machina appeared on the world-scene, dissolved state boundaries and merged all the citizens of the 193 existing states into a global 7billion-people constituency, that miracle would not by itself enable such constituency to share *one* standard for assessing the legitimacy of the new global order. Only those whose political cultures are rooted in the tradition of liberal-democracy would understand legitimacy as resting on the compatibility of legislative, regulatory, administrative action with the essentials of a "constitution" endorsed by *free and equal individual citizens* out of reasons of principle. The rest of the putatively unified world constituency would understand the legitimacy of world authorities on the basis of *other* standards—congruence with some tradition, with the momentary will of the majority, with some sacred text, or the will of a revered leader. A world state, even if miraculously respectful of cultural diversity in its policies, could not be responsive to *one* standard of legitimacy without thereby failing to respond to *other* standards of legitimacy shared by sizeable components of the citizenry: "legitimate for some, arbitrary for others" would constantly be the fate of its institutions and authorities. That is why a world state, even if hypothetically constituted, could not be *democratic*—i.e., could not rest its claim to legitimacy on the will of its individual citizens—without thereby imposing an alien standard of legitimacy on the citizens of the over 100 non-democratic nation-states presently existing. For this reason, in *The Law of Peoples*, Rawls not only envisaged his scheme of transnational order as a "Society of Peoples" (*qua* variation on the Kantian theme of the "foedus pacificum"), and not as a world state, but also imagined that the "constitutional core" of such order—the eight principles of the Society of Peoples, the future yardstick of the legitimate exercise of power on a global scale—be endorsed in *two* distinct and sequentially ordered instantiations of the original position. On a first run, peoples sharing a liberal-democratic culture would approve of it, and in a second run the rest of the decent peoples (so identified on the basis on their respect for human rights and their political process resting on a decent consultation hierarchy) would also approve of it albeit in ways presumably other than democratic will-formation.[32]

Thus, if we wish our scheme for legitimate transnational authority to remain consistent with a non-perfectionist program, we ought to imagine it as resting not on a unified, even (con)-

[32] See Rawls (1999), 68–70.

federally unified, constituency but on the association of autonomous constituencies, some of which are internally democratic, others *not democratic* though at least "decent." All other forms of transnational order are oppressive—either for the democratic or for the non-democratic sections of the world population. Therefore, a legitimate transnational order can only take the form of a transnational *rule of law*, not of a transnational democratic regime.[33]

2.3 A Constitution for the World

What remains an open question, at this point, is the meaning to be assigned to the term "constitution" on a world scale. Certainly *fundamental human rights* will be part of it. Also, the other principles of the Society of People (i.e., equal sovereignty, *pacta sunt servanda*, duty of non-intervention, right to self-defense, respect for human rights, *jus in bello*, duty of assistance) may be shown to be acceptable for all the concurring states.

To be sure, several aspects of this "constitution" are controversial at the moment. For example, Rawls opts for a minimal list of "human rights proper" (the ones listed in Articles 3 to 17 of the UDHR),[34] because the remaining ones seem more culture-specific and dependent on institutional arrangements far from universal. Only a subset of the human rights listed in the UDHR can then be claimed to have priority over the states' prerogative of not being subject to interference in their domestic affairs. Which concrete human rights are "fundamental" and why—based on some philosophical argument? On the legal interpretation of the priority of listing in official documents? On the basis of a *Second Declaration of Fundamental Human Rights*, arguably the solution most consistent with the paradigm of "political liberalism"?—is open to debate.[35] The basis for identifying "human rights proper" is all important, because they are supposed by Rawls to be binding also on non-well-ordered peoples, who never subscribed to them since they were never a party to the dual run of the original position. Rawls's position contains then an ambiguity which must be solved: human rights have a "political" status for the well-ordered peoples (liberal and decent) which they lack for all the other peoples.

Second, the duty of assistance could be extended to cover a global redistributive scheme, as Pogge and Beitz have suggested. Third, significant new dimensions could be added to this tentative "constitution." For example, Pettit has convincingly suggested that a republican emphasis on non-domination could be woven into a non-cosmopolitan scheme such as Rawls's, namely, the intimation that states concurring in a *foedus-pacificum*-like association could also share a threefold commitment to (i) resist domination of their citizens, (ii) abstain from dominating other states, and (iii) do what they can to prevent others from dominating third states. Nothing prevents a more robust view of the constitutional core of a Society of

[33] On this point, see also Buchanan's defense of the legitimacy of transnational orders and institutions as independent of democratic credentials, and best accounted for by his notion of "meta-coordination," very close to public reason, in Buchanan (2013), 178–180. For an insightful appraisal of Buchanan's proposal from the perspective of a discourse-theory of legitimacy, see Ingram (2018), 231 and 273.

[34] See Rawls (1999), 80.

[35] The identification of which human rights are "human rights proper" that have priority over state sovereignty is one of the weakest points in *The Law of People*. It burst the "political" credentials of the paradigm—in that human rights are said to be binding also for peoples who are not parties to the Society of Peoples and thus never subscribed to them. On the idea of a Second Declaration of Fundamental Human Rights as more responsive to the new historical function expected to be exerted by a declaration of human rights in the post-1989 world and as more in line with the paradigm of political liberalism, see Ferrara (2012), 173–187.

Peoples to include also these considerations—if such view were to pass the test of public reason.

What matters most, however, is the method. If we stick to the non-perfectionist paradigm of "political liberalism," we are barred from grounding the legitimacy of transnational orders in controversial philosophical notions not shared by all the parties to the *foedus pacificum*, i.e., states in representation of *dêmoi.* The *foedus pacificum* need not be underwritten by *all* the existing states, including the tyrannical ones and those which reject human rights or other principles of peaceful coexistence. As in the Rawlsian scheme, one could envisage a transnational order that includes only *a majority* of the states (liberal and decent) and then understand the whole world as a multivariate political entity[36] that includes also other kinds of polities, to which the signatories of the *foedus pacificum* relate along purely prudential lines. This view seems more inclusive than Held's proposal to start building a transnational structure of governance from the smaller number of the already democratic states. It gathers within the *foedus pacificum* the majority of the political units of the world, which is in itself a remarkable result.

The methodological point, not explicit in *Law of Peoples* and in need of clarification, is then the following. Domestically, the constitutional essentials are supposed to be endorsed by the citizens "for reasons of principle" rooted in a "political conception of justice," which in turn is the focus of an overlapping consensus. However, justice a fairness—taken as one, if not the only, political conception of justice[37] susceptible of functioning as the focal point of an overlapping consensus—*cannot perform that function on a global scale*. It presupposes the framework of free and equal individual citizens (controversial for decent peoples) and, furthermore, the second principle is controversial at the global level. Will the eight principles of the Society of Peoples *qua* constitutional essentials then lack a more general normative reference, and be reduced to simply being the precipitate of the merely factual political will of the signatory states? How could they then be endorsed out of those "reasons of principle" that make them different from a modus vivendi?[38]

In *The Law of Peoples*, the dual instantiation of the original position is the key justificatory device. However, we should not interpret the outcome of such procedure—in our case, the eight principles—as resting its normative cogency on pure rational grounds, as though the fairness of just relations among the political units of the world were to be derived from considerations of mutual advantage. Starting from "Kantian Constructivism" and also in *Political Liberalism*, the normative credentials of justice as fairness are said to rest also on *the reasonable*, actually on justice as fairness being the conception of justice "most reasonable for us."[39] That is the single most groundbreaking formulation of a non-perfectionist view of the *domestic* political order: the exercise of coercive power is legitimate insofar as it is in harmony with a constitution the essentials of which are singularly endorsed by the citizens in light of their reflecting a "political" conception of justice "most reasonable" for them to have.

[36] For a more extended version of this argument, see Ferrara (2014), 105–108.

[37] In his "Introduction to the Paperback Edition," Rawls explicitly acknowledges that while he continues to consider justice as fairness as the most reasonable view of justice "for us," it is not to be denied that "other conceptions also satisfy the definition of a liberal conception" and thus that within a contemporary pluralistic society there co-exist not only several rival comprehensive conceptions of the good, but also "different and incompatible liberal political conceptions," Rawls (2005), xlvii.

[38] For an interesting public-reason approach to the legitimacy of authority and coercion "in a world of states," see Gaus (2011), 470–479.

[39] Rawls (1980), 88, 519. A similar view can be found in Rawls (2005), 28.

When we address legitimacy *at the transnational level*, we must operate a translation nowhere to be found in *The Law of Peoples.* The eight principles should be understood as the essentials of a world-constitution reflective of, and responsive to, the one conception of justice "most reasonable" not for a single national demos, but "for humanity as a whole".

In *Force of the example*, I have identified that conception of justice most reasonable for humanity not with a scheme for societal justice writ large, but with a "concrete universal"—the normative idea of a flourishing *humanity* understood as the set of all the human beings that have existed, are presently living and will live in the human condition. Once again, the idea of humanity invoked here is a "political" notion of humanity, distinct from the comprehensive views of humanity that in the past have demanded allegiance on religious or secular grounds—humanity as created by God in His likeness, humanity as the collection of the possessors of reason, humanity as those who can use symbols, and humanity as the set of beings whose instinctual deficit is made up by culture. It must be a view of humanity *compatible with the diversity of cultures present on the planet*—humanity as the conceptual point where the concrete and the generalized other coincide. Supposedly, in fact, the representatives of the human societies which consent to a certain scheme of cosmopolitan governance—centered around the preservation of peace, the protection of human rights, the redressing of unjust distributive arrangements, the preservation of the viability of the planet for human life—do so for the benefit *not just of the society they represent* (if it were so, we would be envisaging a mere global *modus vivendi* based on reciprocity) but with a view to creating *the best conceivable world for all human beings*. Even those who do not subscribe to the ideal of human equality still have a shared sense of one predicament of the world being potentially better for each human being. Thus, the empirical consensus of the "society of peoples" *qua* collection of States—some of which are democratic, whereas others are not—must be understood as being in accord, or at least as not being incompatible, with the flourishing of humanity, taken as the most inclusive imaginable human grouping.

The standpoint of the good-of-humanity possesses the desired characteristics of being *impartial* with respect to the particularism of the contending identities and at the same time it is not an abstract principle. Rather, the good of humanity is a *concrete universal* whose content varies over time. It was arguably different, for example, before nuclear weapons or when the total aggregate output of the production processes still posed a limited threat to the integrity of the natural environment or when science was in no position to interfere with genetic processes. To be sure, the idea of humanity that ultimately orients our judgments concerning justice on a global scale must be neutral with respect to the locally prevailing articulations of the meaning of "the human."

In partial correction of what stated in *Force of the Example*, the element of facticity still contained in this *political conception of transnational justice*—i.e., humanity conceived as the sum total of existing societies *as they are*, with their injustices and vices—can be overcome by appealing to a normative view of humanity that undergirds what the phrase "most reasonable for humanity" tries to capture. When we understand humanity in light of this normatively more demanding concept, we conceive it as the set of all human beings who have lived, are living, and will be living on the earth. Among them, presently living ones are the only human beings endowed with *agency*, yet this does not make them the sole arbiters of what constitutes the flourishing of humanity. The flourishing of humanity, in fact, consists among other things in bringing to fulfillment projects, aspirations, and values typical of the past generations and in preserving the future generations' chances to live a life of quality not inferior to that of their predecessors.

3 Legitimacy and the Flourishing of Humanity: Buchanan and Keohane on Global Institutions

To show how this expanded "political-liberal" perspective can help us distinguish legitimate transnational institutions from the exercise of hegemony by global players, let me discuss one of the most complete and insightful accounts of the subject, offered by A. Buchanan and R. Keohane in their influential article "The Legitimacy of Global Governance Institutions". They aim at articulating a standard "for the *normative legitimacy* of global governance institutions",[40] and proceed in two steps. First they discuss six criteria to which such standard of legitimacy should be responsive: such standard (1) must provide a suitable basis for consent for *moral* reasons in spite of moral disagreement on more general issues; (2) must set the bar lower than full justness but not allow "extremely unjust institution" to pass the test; (3) must presuppose "the ongoing consent of democratic states"; (4) without making legitimacy conditional on endorsement on the part of some global democratic constituency, not yet existent, "it should nonetheless *promote* the key values that underlie demands for democracy"; (5) must be open to change over time; and (6) must address "the problem of bureaucratic discretion and the tendency of democratic states to disregard the legitimate interests of foreigners."[41]

To these six metacriteria, three further "substantive requirements" are then added for the legitimacy of global governance institutions: *minimal moral acceptability* (defined as respect of some restricted set of fundamental human rights), *comparative benefit* (providing "benefits that cannot otherwise be obtained" without incurring excessive costs), and *institutional integrity* (alignment of actual practice with declared goals).[42] Finally, according to Buchanan and Keohane, appraisals of legitimacy must take into account the two basic democratic values of *accountability*[43] and *transparency*.[44] Given their "broad" conception of both notions, as (a) including revisability of the terms of accountability and (b) disseminating readable information to "weak constituencies" of stake-holders and potential critics, Buchanan and Keohane qualify their conception of legitimacy as "ecological", insofar as "institutional legitimacy is not simply a function of the institution's characteristics",[45] but depends on an institution's surrounding

[40] Buchanan and Keohane (2006), 405–437.
[41] Ibidem, 417–418.
[42] Ibidem, 419–424.
[43] Interestingly, Buchanan and Keohane observe that "most global governance institutions... include mechanisms for accountability," but that often these are "morally inadequate," for example because they make an institution like the World Bank accountable mostly to the main donor countries, and not enough to the rest of the affected participants (see ibidem, 426). What is then needed, they conclude, is not accountability per se, but "the right sort of accountability" (ibidem). For this purpose, they distinguish "narrow accountability" (which does not include provisions for contestation of its own terms) and a broader version of it, which includes "provisions for revising existing standards of accountability" (ibidem, 427). On the relation of accountability to the legitimacy of structures of governance, see also Ferrara (2014), 178
[44] Buchanan and Keohane (2006), 427 point out that "transparency by itself is inadequate." Understood narrowly as mere availability of information concerning the operation of the institution, it cannot even ensure "narrow accountability". Broader accountability, designed to include provisions for revising its own operative standards, is going to require a "broad transparency," with relevant information not just available, but available "at reasonable cost," in a format properly understandable and directed to the addressees of accountability-reports as well as to those "who may contest the terms of accountability" (ibidem, 427). Most importantly, Buchanan and Keohane argue that "if national legislatures are to retain their relevance ... they must be able to review the policies of global governance institutions. For legislatures to have information essential to performing these functions, they need a flow of information from transnational civil society" (ibidem, 431).
[45] Ibidem, 432.

context and especially on the extent to which the external "epistemic actors" are organized and proactive in critically processing the disseminated information.

In the remainder of their article, Buchanan and Keohane bring together these remarks in a Complex Standard of Legitimacy for transnational institutions and check the consistency of such Complex Standard with the metacriteria stated earlier. The Complex Standard amounts to a three-pronged principle, according to which global institutions are legitimate insofar as: (1) they "enjoy the ongoing consent of democratic states", (2) they satisfy "the substantive criteria of minimal moral acceptability, comparative benefit, and institutional integrity", and (3) they are capable of revising their terms of accountability and to self-monitor their satisfying the substantive criteria, all this through "interaction with effective external epistemic agents."[46]

Such Complex Standard, according to the authors, satisfies all the metacriteria stated at the outset of their argument. First, in spite of persisting reasonable disagreements, it meets the requirement of being a possible object of widespread moral consensus about "the importance of not violating the most widely recognized human rights". Second, the Complex Standard sets the bar of legitimacy below full justice "but at the same time affirms the intuition that extreme injustice, understood as violation of the most widely recognized human rights, robs an institution of legitimacy".[47] Third, the Complex Standard presupposes that consent on the part of all democratic states be a necessary, but not sufficient, condition for the legitimacy of global institutions. Fourth, while it does not rest on the untenable assumption that global institutions "cannot be legitimate unless there is global democracy," nonetheless the Complex Standard requires legitimate institutions to promote democratic values such as "informed public deliberation". Fifth, the Complex Standards requires legitimate institutions to be open to constant revision of their means and of their goals. Sixth, it is in fact unclear how the Complex Standard could address "bureaucratic discretion" or the anti-foreigner bias of democratic nation states. The authors claim that the requirement of accountability "helps to compensate for the limitations of accountability through democratic state consent",[48] but how that solves the above mentioned problems is totally unclear. In sum, "when a global governance institution meets the demands of the Complex Standard, there is justification for saying that it has the right to rule, not merely that it is beneficial".[49]

Buchanan's and Keohane's Complex Standard of Legitimacy certainly has the merit of not falling into the traps of understanding the legitimacy of transnational institution along the lines of the legitimacy of nation-state institutions and of presupposing that the democratic standard should apply directly to global institutions. However, for all their merit in enlarging the circle of addressees of global political justification beyond the circle of the already democratic constituencies, if we compare their Complex Standard with the liberal principle of legitimacy—a natural term of comparison—it must be noted that Buchanan and Keohane make reference neither to a constitution, even of an implicit sort, nor to a "political conception of justice" as a broader frame of reference from which the moral consent mentioned in criterion (1) draws its normative force. Furthermore, only the consent of the democratic states has a legitimating function and is figured in within the Standard, but not the consent of "decent" states. The threshold of the "consent that matters" separates the circle of democratic states from all the indistinct rest, whereas Rawls's model relies on the consent of the "broader-than-democratic"

[46] Ibidem, 432–433.
[47] Ibidem, 435.
[48] Ibidem, 436.
[49] Ibidem, 436.

set of all the states that respect human rights. Finally, the metacriteria for evaluating criteria of institutional legitimacy are supposedly global, but consent on the embedded condition that acceptable criteria should indirectly "promote democracy" can be endorsed at best by 88 states, so legitimate global institutions as understood by Buchanan and Keohane would promote values at odds with the political culture of the majority of existing states.

To conclude, in at least three respects their criterion of legitimacy ultimately falls short of the demands set by "political liberalism." First, by failing to adopt the dualistic framework of "legitimation by constitution" they end up placing on global institutions the "unrealistic" demand that the details of their policies meet with the consent of the existing states—a convergence even less likely to materialize than the classical "consent of the governed" on the legislative, executive, and judicial details of domestic governmental action. Second, by anchoring the *moral* or normative ground of consent to respect of "the most widely recognized human rights", Buchanan and Keohane end up connecting the legitimacy of global institutions with a framework narrower than it can be expected and, above all, not open to the dynamic historical openness of what is most reasonable for humanity. In their framework, that open-ended quality affects the concrete piecemeal accountability of institutions to single groups of stake-holders, the revisability of their policies and modes of operation, but is not immediately connected with the normative ground of legitimacy itself. Compared with the Rawlsian "legitimation by constitution," Buchanan's and Keohane's Complex Standard of Legitimacy fails to connect with any political conception of justice on the global scale, other than the protection of a subset of human rights. The idea that legitimate global institutions are ultimately the most reasonable and consensual approximation to the flourishing of humanity is beyond the minimal frame of reference underlying their view.

Finally, in tension with such normative minimalism, by requiring that legitimate global institutions promote democratic values, Buchanan's and Keohane's Complex Standard seems still affected by partisanship in favor of one at the moment still (unfortunately) comprehensive conception of legitimate political rule, if considered on a global scale, and to that extent falls short of the ideal of a *foedus pacificum* that refrains from imposing on any member principles they do not endorse. Hegemony is therefore not completely inoperative within their standard of legitimacy.

In a subsequent paper, Keohane discusses three *gaps* that affect global democratic governance:

> the *interest-public-good gap,* the *emotional gap,* and the *infrastructure gap.* Well-functioning domestic democratic systems have over decades or centuries developed institutions or common values to avoid creating such gaps, or to bridge them; but the contemporary global system does not have parallel institutional or value infrastructure. Practitioners of global governance are therefore like tightrope walkers without a safety net.[50]

The first gap concerns the mustering of political energies for the pursuit of the general interest, or "public goods," when the political actors involved are mainly self-interested, or pursue their own factional advantage. Keohane raises the familiar problem of the free-rider: "what if our overriding long-term interests lie in the production of a genuinely *public good,* such as prevention of runaway climate change? On the basis of our own relatively narrowly defined interests, we are likely to seek to push the burden of preventing, or adjusting to, climate change

[50] Keohane (2015), 345.

onto others—people in other countries, or future generations."[51] His point is that nation states have found ways of channeling political energies towards public goods—mainly by using the rhetoric of nationalism and antagonizing the "other" as the external enemy—and there is no equivalent for this strategy at the global level, because there is no "other" to mobilize against, at least until extraterrestrial hostile forces materialize.

The second gap concerns the fact that while domestic political controversies and struggles mobilize political energies—just think of *Brexit* and the various national elections held in democratic societies since then, "global governance is a very rationalistic Enlightenment project" and "often seems bloodless, technocratic, and bureaucratic" and in the end "does not engage the soul and does not generate strong feelings of identity...". While national anthems still stir emotions, "there is no Cosmopolitan Global Anthem."[52]

Finally, the third gap concerns the relative lack of legal and institutional infrastructure at the global level, when compared with the domestic rule of law. The assets-freezing measures taken by the Security Council against Kadi and other suspects were based on no precedent and no previous regulations. Similarly, at the domestic level, civil society and its voluntary associations, the media and the public, do act as moderating factors on the action of authorities, but nothing of comparable efficacy exists at the level of global governance.[53]

According to Keohane, the teaching to be gleaned from thee three gaps is that the democratization of global governance will require "institutional, legal and social infrastructure... attention to symbolism ... and the ability to frame issues in a way that induce contributions to the public good."[54] Among the strategies that could help progress in that direction, Keohane mentions (a) attempts "to develop structures of international law that mesh with democratic constitutional systems and that promote fairness and due process,"[55] (b) the constant monitoring and criticizing of the current national leaders, and (c) the ongoing building of transnational networks that, though not directly democratic, would accrue to the primitive accumulation, so to speak, of the "social capital" for infrastructure that may sustain transnational commitments, projects, public-good pursuits.[56]

There is some merit to these three difficulties highlighted by Keohane, which come to compound the obvious absence of a world-wide endorsement of the idea—essential for democracy—of free and equals regulating their life in common through law. Again, an approach based on public reason and reasonability can be of help.

The first gap can be addressed by pointing to the temporal trajectory of humanity as a subject that gains its identity not from recognition by another subject, thus far unavailable, but from reflecting on its own past—for example, on the transition from the 600.000 estimated independent settlements and polities of 5000 years ago to the current 193 nation-states,[57] their possible regional aggregates and the achievement of a unified global economy—as well as from anticipating the future recognition of our present choices by the generations to come. The idea of a recognition by a virtual subject is not so bizarre, if one thinks that in Mead's conception of the self the individual achieves her sense of selfhood through the anticipation of a *virtual*

[51] Ibidem, 350.
[52] Ibidem, 350.
[53] See ibidem (2018), 269 and 305–308. On the subsequent remarkable adjustments operated by the EU judiciary, see Riccardi (2018), 1–14.
[54] Keohane (2015), 352.
[55] Ibidem, 352.
[56] Ibidem, 353.
[57] See Wendt (2015), 2.

recognition by the "generalized other." This "generalized other" is entirely a construction of the mind, though it bears a relation to the average individual typical of that society.[58] In the case of humanity, when we think of the flourishing of humanity and envisage what is "most reasonable" for such flourishing, we operate in a not so significantly different way, except for the fact that the generalized other comes to coincide with a concrete historical formation.

The second and the third gap are closely related. While on one hand it would require little effort on the part of a confederation of the states of the world to create the flag and an anthem of a unified humanity, on the other hand the feelings and emotions attached to these symbols can only derive from the intensity and denseness of the relations that will develop in a globalized world. Globalization as a phenomenon that affects the concrete life-style—and not just the life-conditions—of millions of people has only been under way since a few decades. One of the main tasks of a structure of global governance will be to favor the creation of the communicative infrastructure—geared to the media available at the time of its creation—for unifying the national publics.

4 Conclusion

In the spirit of Rawls's *realistic utopia*, let me complete the "ideal-theory" picture of a global rule of law—where liberal-democratic *and* decent peoples cooperate on the basis of principles that (a) generate "world-constitutional essentials," (b) allow a quasi-global public reason to be operative, and (c) respond to a "political view" of the flourishing of humanity—with a note on the *non-ideal* process that might lead to that outcome. As we are reminded by Keohane, institution-building rests on communicative infrastructure and the primitive accumulation of "social capital" among the free and equal future participants. That process can realistically proceed faster and more reliably on a regional level, in the footsteps of what the EU, for all its limitations, has achieved in a few decades. Regional unions of existing states may develop those ties, assuage previous fractures and lines of tensions as the EU has done with its own "warring states," to use the Chinese expression. Regional unions can implement relations of equal respect among the member states and stabilize the practice of public reason. Finally, regional unions can act as intermediate associations capable of moderating the "unilateralism" of competing great powers like Russia, China, and the USA and of self-standing world powers like Japan, Australia, post-Brexit UK, and Canada.

What our grandchildren might witness could be a world where along with the great and the self-standing existing powers, unlikely to merge into any unit different from the current UN, regional associations such as the EU, ASEAN,[59] SAARC,[60] the African Union,[61] and USAN[62]

[58] Mead (1974), 154–55. On this point, see also Ferrara (2008), 144.

[59] The *Association of Southeast Asian Nations*, founded in 1967, includes Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Laos, Myanmar, and Cambodia.

[60] The *South Asian Association for Regional Cooperation* was founded in 1985 among Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

[61] The *African Union* was founded in Addis Ababa in 2001. It includes Algeria, Angola, Benin, Botswana, Burkina–Faso, Burundi, Cameroun, Cap Vert, Central African Republic, Chad, Comoros, Congo, RD Congo, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea Bissau, Guinea, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, and Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Saharawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

[62] The *Union of South American Nations*, founded in 2008, includes Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Surinam, Uruguay, Venezuela and Mexico and Panama as observers.

succeed in bringing together most of the other existing states. The positive aspect of these regional aggregations is that in all of them democratic states exist, which can possibly inspire the complete transition to democracy of the decent ones, by way of providing culturally contiguous examples of the operation of democratic principles. Coalitions of these regional associations may prove effective in taming the unilateralism of great powers, in eroding the significance of their veto power in the UNSC, and in claiming an equally permanent seat in lieu of the presently rotating ones. Taken together, regional unions will push the political unification of humanity one important step further, by reducing the 193 political units to about two dozen actors and above all by *testing the practice of transnational democracy* in a variety of cultural contexts.

Acknowledgements Earlier drafts were presented in 2018 at the Workshops "The Legitimacy of Transnational Orders: The Idea of a World State", held at the Clough Center for the Study of Constitutional Democracy, Boston College, and "Hegemony in the International Order", Luigi Sturzo Institute, Rome. Thanks are due to the organizers, Vlad Perju and Claudio Corradetti, and to the participants for their feedback.

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