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1. Introduction

Can human rights play a role in addressing the "legitimacy crisis"[1] in global governance – and in particular its "democratic deficit"?[2] If so, what? These are my questions in this contribution. They are questions that have formed an important element of Philip Alston's theoretical work over the years; often in relation to the international human rights regimes,[3] but also with regard to global governance institutions more generally.[4] One such occasion was in 2002, in response to Ernst-Ulrich Petersmann's startling claim that the *only* way for governance bodies such as the WTO to gain the democratic legitimacy that they lacked was to "integrate" international human rights law into their own jurisprudence.[5] Alston demurred, arguing that empowering the WTO to adjudicate on human rights matters would fatally undermine the very legitimising force that it sought to co-opt.[6] Of course, these claims could both be true. If so, too bad for the WTO. Or, perhaps, for human rights.

Since the Petersmann-Alston exchange, the literature on the legitimacy of global governance institutions has grown considerably. Much has been from a political science perspective, with a focus on "sociological" understandings of legitimacy.[7] But there has also been an increase in interest from the perspective of normative legal and political philosophy, and an attempt to set out, in general terms, an appropriate "standard of legitimacy" for global governance.[8] Within this literature, there is an emerging "cosmopolitan functionalist" mainstream,[9] characterized by the rejection both of more robust "global democracy-" or "global justice-based" approaches, and of minimalist accounts that equate legitimacy with State consent. Instead, these authors stress the

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1 For example, Johan Karlsson Schaffer, 'Legitimacy, global governance and human rights institutions: inverting the puzzle' in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (CUP 2013) 213.

2 For example, Steven Wheatley, 'A Democratic Account of the Right to Rule in Global Governance: Democracy and Global Governance' (2012) 18 Swiss Political Science Review 158, 160-162.

3 For example, Philip Alston, 'Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council' (2006) 7 Melbourne Journal of International Law 185; Philip Alston, 'Hobbling the Monitors: Should UN Human Rights Monitors Be Accountable?' 52 Harvard Human Rights Journal 561.

4 For example,Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 European Journal of International Law 435.

5 Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 European Journal of International Law 621.

6 Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13(4) European Journal of International Law 815.

7 For a recent set of examples, see Jonas Tallberg and Michael Zürn, 'The Legitimacy and Legitimation of International Organizations: Introduction and Framework' (2019) 14(4) The Review of International Organizations 581.

8 For example, the contributions in Føllesdal, Schaffer and Ulfstein (n 1).

9 Schaffer (n 1) 213-214.

provision of global public goods, with an important but limited role for the protection of core human rights and certain procedural guarantees, which are held to vindicate "democratic values" sufficiently to secure legitimacy. In what follows, I want to offer a broadly sympathetic yet significantly different account of the legitimacy of global governance institutions – one that is I think better suited to address democratic concerns in particular – and of the role that human rights can play in this.

To keep things manageable, I will limit my focus to one key cosmopolitan-functionalist account: that offered by Allen Buchanan and Robert Keohane in 2006.[10] I focus on this, first, because it remains one of the most sophisticated and influential contributions to date; and second, because it gets most of the important things wrong in highly instructive – and widely shared – ways. In particular, I will argue that they (1) "weaken" the dominant conception of "legitimate authority" in an ad-hoc and incoherent manner; and that this leads them to (2) mistake the normative role that human rights play in legitimising global governance; and (3) ignore entirely the important role that *consent* plays in underpinning demands for democratic legitimacy in particular.

One final note before I proceed. This argument has a lot of moving parts. A full defence of any of them would require a paper (at least) of its own. My goal here is to do enough to get the account I offer on the table as a potentially plausible one; nothing more.

2. Conceptual criteria, normative standards

"In order to remain democratically acceptable, global integration law (e.g. in the WTO) must pursue not only 'economic efficiency' but also 'democratic legitimacy' and 'social justice' as defined by human rights".[11] This claim of Petersmann's is striking for a number of reasons. Firstly, it puts democratic concerns at the heart of the legitimacy crisis in global governance institutions. It thus moves beyond the traditional model that viewed the consent of participating States – regardless of their own internal political structure – as both necessary and sufficient for legitimacy. At the same time, it proposes that we address legitimacy issues *within* the functionally-differentiated institutional framework through which global governance is currently conducted, eschewing any grand democratic institution-building project at the global level. Petersmann can thus be read as an example of the "cosmopolitan functionalism" that now forms the mainstream of thinking with regard to the legitimacy of global governance institutions. His account is cosmopolitan in its view that what matters morally are individuals and their universal rights; it is functionalist in its understanding of both why we have, and why we ought to keep, broadly the current set of institutions. The solution to the legitimacy crisis will come not from building anew, but from "constitutionalising" what we have.[12] Human rights have perhaps *the* key role to play in this process. Legitimacy demands nothing less than the full "integration" of international human rights law into the law of "worldwide institutions". The promotion of human rights is thus cast not merely as a sufficient, but also a necessary condition for the legitimacy of global governance institutions, regardless of its particular area of competence.

The strength of Petersmann's claims makes them controversial. It is one thing to assert that global governance institutions like the WTO should respect human rights in the conduct of their

[10] Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4)Ethics & International Affairs 405.
[11] Petersmann (n 5) 624.
[12] ibid 623.

governance activities;[13] quite another to claim that "[t]here is no reason why… the WTO Appellate Body should be less capable than politicized UN bodies, or than the ECJ, to protect human rights in the trade policy area".[14] Similarly, it is one thing to claim that any organization that effectively promotes human rights would be presumptively legitimate;[15] quite another to claim that no institution that *fails* to do so can be legitimate.[16] Within the "cosmopolitan functionalist" mainstream there is widespread agreement on some version of the former proposition within each pair. However, among those that have set out more developed philosophical accounts of legitimacy beyond the State, there is much less appetite for endorsing the latter. Among the most important of these is that offered by Allen Buchanan and Robert Keohane in 2006. It is in dialogue with this contribution that I will, in what follows, set out my own views on the role that human rights play in securing the legitimacy of global governance.

Buchanan and Keohane start with the concept of "legitimate governance". To call a governance institution "legitimate" is to assert that it has the moral "right to rule". Legitimacy assessments are a way of providing support for valuable institutions that strike a middle ground between rational self-interest on one hand, and evaluation as morally optimal on the other. Legitimacy makes moral, and not merely prudential, demands of governance institutions; but its standard is that of moral acceptability rather than full justice. Legitimacy assessments thus make possible coordinated support – and support for the right reasons – for valuable institutions operating under non-ideal conditions, including uncertainty and disagreement over the correct standards of global justice.

This much seems widely agreed. Buchanan and Keohane insist that the dominant view of what makes governance legitimate, developed in the context of the State, are too strong for the global level.[17] There are, they claim, two main facets to this view.[18] From the institutional perspective, "ruling" (or governing) involves promulgating rules, and using coercive force both to secure compliance and to exclude all other governance institutions from operating within a given domain. *Legitimate* governance institutions are morally justified in acting in this manner. From the individual perspective, dominant accounts insist that those subject to legitimate governance have a content-independent moral *obligation* to comply with its rules (that is, an obligation that they have regardless of their view on the merits of the rules in question).

Both elements here seem too strong to capture what might be meant by "legitimate governance" (or the "right to rule") at the global level.[19] Few global governance institutions even use force to ensure compliance with their rules; even fewer claim a justified monopoly on governance (let alone force) within their domain of competence. And nor do they, as a general rule, even claim to impose a content-independent moral obligation even on those directly subject to their rules (still usually States) – let alone on the individuals who are ultimately affected by them. They thus propose a "weakening" of the state-based accounts to render them appropriate to global governance. First, "ruling" is to mean simply "promulgating rules, and attempting to secure

[13] Alston, 'Resisting the Merger and Acquisition' (n 6) 829. As Alston himself notes, this is "a proposition with which almost any proponent of human rights would be sympathetic."
[14] Petersmann (n 5) 642.
[15] Recall that Alston's objection was precisely that giving, e.g., the WTO Appellate body competence over human rights questions in the domain of trade policy would result in a failure to genuinely promote human rights.
[16] I will return to the distinction between "respecting" and "promoting" human rights in much more detail below.
[17] They suspect – and I agree – that it may also be too strong for the domestic level, but that is beyond the scope of the current paper.
[18] A point further developed by Buchanan in slightly later work.
[19] Buchanan and Keohane (n 10) 411.

compliance with them by attaching costs to non-compliance and/or benefits to compliance".[20] Their having the "right" to rule means, from the institutional perspective, that they are morally justified in so acting. Individuals have strong reasons *not to interfere*, and must change their "practical attitudes" to legitimate institutions:

> Generally speaking, if an institution is legitimate, then this legitimacy should shape the character of both our responses to the claims it makes on us and the form that our criticisms of it take. We should support or at least refrain from interfering with legitimate institutions… Judging an institution to be legitimate, if flawed, focuses critical discourse by signaling that the appropriate objective is to reform it, rather than to reject it outright.[21]

Buchanan and Keohane then move on to the standard that global governance institutions must meet in order to justifiably claim this weakened "right to rule". General State consent is rejected as too little;[22] full-blown global democracy as too much.[23] Their proposed "complex standard" has two parts. The first is a set of substantive criteria, the second a set of epistemic-deliberative virtues, designed to accommodate the facts of moral uncertainty and disagreement about global justice.

The first of the substantive criteria is "minimal moral acceptability": "Global governance institutions, like institutions generally, must not persist in committing serious injustices. If they do so, they are not entitled to our support". Human rights violations are the "primary instance" of serious injustices. Not just any human rights, however: the facts of moral uncertainty and disagreement mean that we must not require too much in this regard, lest our "presumptive necessary condition", and hence our standard of legitimacy, become too demanding to be met under current conditions:

> There is disagreement amongst… theorists of human rights as to exactly what the list of human rights includes and how the content of particular rights is to be filled out. There is agreement, however, that the list includes the rights to physical security, to liberty (understood as at least encompassing freedom from slavery, servitude, and forced occupations), and the right to subsistence. Assuming this is so, we can say at least this much: global governance institutions (like institutions generally) are legitimate only if they do not persist in violations of the least controversial human rights.[24]

The authors acknowledge that this is "a rather minimal moral requirement for legitimacy", and acknowledge that we might expect institutions to do better "as we gain greater clarity about the scope of human rights";[25] but claim this is the most we can currently demand. They then draw an important distinction, between *respecting* human rights on one hand and *promoting* them on the other. All legitimate global governance institutions must respect at least these most basic of human rights – a point on which we would find both Petersmann and Alston in agreement.[26] *Pace* Petersmann, however, they deny that legitimacy requires all institutions to promote human rights *even if they have the capacity to do so*. This would only hold if, as well as the capacity to promote human rights, the institution in question has a duty of justice to do so – something that must be established independently.

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[20] ibid 405.
[21] ibid 407.
[22] ibid 413. The consent of non-democratic states "cannot transfer legitimacy for the simple reason that there is no legitimacy to transfer". The consent of *democratic* States is, however, presumptively necessary.
[23] ibid 416. "[T]he social and political conditions for democracy are not met at the global level, and there is no reason to think that they will be in the foreseeable future".
[24] ibid 420.
[25] ibid.
[26] Alston, 'Resisting the Merger and Acquisition' (n 13).

The other two substantive criteria, "comparative benefit" and "institutional integrity" can be dealt with more quickly. The main reason we have global governance institutions is instrumental: they can provide us with certain benefits that we could not otherwise obtain. If a governance institution cannot effectively provide the benefits that justify its existence, then this "undermines its claim to the right to rule". Effectiveness here is not *optimal*, but *comparative*: there must not be "an institutional alternative, providing significantly greater benefits, that is feasible, accessible without excessive transaction costs, and meets the minimal moral acceptability criterion".[27] The third criterion of "institutional integrity" requires merely that there not be an "egregious disparity" between actual institutional performance on one hand, and its own procedures or goals on the other.

These three requirements are not to be viewed as "necessary conditions *simpliciter*", but merely as "presumptive" ones. There may be circumstances in which an institution fails to meet one or two, but remains legitimate nonetheless. For example, an institution may lack integrity but nonetheless do important work in promoting human rights that no alternative institution could achieve. Instead, we are to view the three conditions as "counting principles", that have their own dimension of weight in legitimacy assessments, with success in one capable of offsetting deficiencies in the others: "the more of [the substantive conditions] an institution satisfies, and the higher degree to which it satisfies them, the stronger its claim to legitimacy".[28]

These three presumptively necessary conditions are not yet cumulatively sufficient for institutional legitimacy. They must, in order to meet the problems of "factual knowledge" and "moral disagreement and uncertainty",[29] be supplemented by certain "epistemic-deliberative" virtues. These include "broad transparency" (making information accessible to external actors) and "broad accountability" (in which the terms of accountability themselves are up for grabs).[30]

Any global governance institution that enjoys the ongoing consent of democratic states, meets the three substantive criteria, and possesses these "epistemic virtues" will also sufficiently vindicate – in the absence of even a possible global democracy – the values that underpin the demand for democratic legitimacy at the global level. These values are: "equal regard for the fundamental interests of all persons"; "decision-making about the public order through principled, collective deliberation"; and "mutual respect for persons as beings who are guided by reasons". As a result, it will be justified in making rules and seeking to ensure compliance with them; and we will all have content-independent moral reasons to support, or at least not interfere with, it as it does so. It will, in short, be legitimate.

3. Conceptualising "legitimate governance"

Let's look again at the multifaceted "weakening" to the dominant view that Buchanan and Keohane propose:

> Legitimacy in the case of global governance institutions, then, is the right to rule, understood to mean both that institutional agents are morally justified in making rules and attempting to secure compliance with

[27] Buchanan and Keohane (n 10) 422.
[28] ibid 424.
[29] ibid 425.
[30] ibid 425-429.

> them and that people subject to those rules have moral, content-independent reasons to follow them and/or to not interfere with others' compliance with them.[31]

This looks, at first glance, like a plausible set of moves, producing a conception more appropriate to governance at the global level. "Governing" is weakened by removing both coercion and exclusivity, referring only to rule-making and attempting to secure compliance. The entitlement claimed by institutions is weakened from a moral duty-creating power to a "justification" (or permission) to "govern" in the sense above; and the normative upshot of governance for the governed is weakened both in kind (it is no longer duties or obligations that are created, but mere reasons) and in content (the reason is now "to comply, or at least to not interfere"). Upon closer inspection, however, each move begins to appear problematically *ad hoc*. Being clear about why will be crucial to the arguments that follow.

3.1. What is "governance"?

Buchanan and Keohane are clearly right that the correct concept of "governance" at the global level cannot require either coercion or a demand for exclusivity. We cannot, however, simply remove these requirements and call what remains "governance". One role they are playing in the dominant view is to distinguish the kind of *public* governance of interest to us from the activities of clubs, corporations and other private associations. Many if not most of these will make rules, and "attach costs to non-compliance and/or benefits to compliance". Yet this does not entitle us to view them as "ruling", or as claiming the "right" to do so.

Nor can the weakened "normative upshot" rescue this situation – such that only legitimate *governance* would generate the requisite content-independent reasons "to comply, or at least not interfere". Indeed, a similar criticism applies here. The distinction between "obligations" and "reasons" in this context, when it is drawn at all,[32] is drawn on the basis of the distinctive nature of authoritative directives.[33] The creation of mere "content-independent reasons" to comply is insufficiently determinative, because an individual or institution can have the power to create *these* without having, or claiming, any entitlement to govern.[34] Likewise, we will often have content-independent reasons not to interfere with things that cannot plausibly be understood as

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[31] ibid 411.

[32] Many discussions of the "obligation to obey" the law seem to gloss over the distinction between content-independent reasons and duties. For example, MBE Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82(5) Yale Law Journal 950.

[33] Joseph Raz, 'The Obligation to Obey the Law' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed, OUP 2009) 234-235. Raz claims that "an action is obligatory (p.235) only if it is required by a protected reason which does not derive merely from the fact that adherence to it facilitates realization of the agent's goals... [F]or most people an obligation to obey the law… means something far more demanding than a prima facie reason. It means a peremptory reason best explained in keeping with my general analysis of obligation, as a categorical protected reason."
The extent to which Buchanan endorses this is not fully clear. Elsewhere, he assumes that the content-independent reasons to comply/to not interfere are "substantial" *because* they are "peremptory", where the latter term means "ruling out certain reasons for not complying *ab initio*" (such as compliance being to our personal disadvantage). This seems less strong than the Razian version, but it is hard to be sure; and it is also hard to see what, in Buchanan's account, is the particular feature of legitimate governance that grounds reasons with this feature; Allen Buchanan, 'The Legitimacy of International Law', in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 83-84.

[34] For example, a friend's request for a favour arguably creates content-independent moral reasons to do as requested.

"governance" of any sort. So the *authority-individuating* aspect of the normative upshot for the governed – that moral reasons of a particular *kind* are created – is lost.

To the extent that we can extract a definition of "governance" from the Buchanan and Keohane account, then, it seems over-inclusive. With its exclusive focus on rule-making (and compliance-securing), however, it is also under-inclusive. It takes no account of the fact that, increasingly, things like standard setting and even mere data collection and publication are important modalities of global governance.[35] Not all rule-makers govern; and not all governors make rules. Our definition of "governance" must reflect this.

To say this is not to criticise Buchanan and Keohane; it was never their goal to define "governance" beyond the State. Yet the task remains an important one, even if I can do no more than gesture at a way forward here. In other work, Buchanan has suggested limiting the focus to "international law-making institutions".[36] This would certainly help refocus on the *public* element of governance that is lost in reference to mere "rule-making". But it would again be under-inclusive: as Raz pointed out some forty years ago, even State governments increasingly govern in ways that do not involve the exercise of legal authority, for example through use of their economic muscle to change or entrench certain behaviours.[37] Unlike law-making (or interpreting, or applying), such activities become public governance due to the nature of the *actor*, rather than the *action*.

This suggests a possible way forward. First, we should stop talking about "authority" and "governance" beyond the State as if these were the same thing. "Governance" should instead be recognised as the more extensive category, incorporating exercises of authority and much else besides. Were we to abandon completely talk of "ruling" in the context of legitimate global governance, we would rid ourselves of much unhelpful baggage at no cost. We should then conceive of "governance" as action aimed at influencing the actions of others that is either public in nature (such as making or applying the law, or perhaps the provision of certain basic services) or carried out by a public institution. When we see that the latter can delegate aspects of their governance activities to other actors, public or private, and formally or informally, we can make progress towards a conception that captures the varied modalities of contemporary global governance.[38]

3.2. What is "legitimate" governance?

Our conception of "governance" has important implications for the nature of the "right" to govern that legitimate institutions have. As Raz noted, when governors govern without authority, they "can do so justly as well as unjustly".[39] They can also, we might add, do so legitimately as well as illegitimately. But then we cannot understand "legitimate" governance as consisting in the

[35] For example, Kevin E Davis, Benedict Kingsbury and Sally Engle Merry, 'Indicators as a Technology of Global Governance: Indicators' (2012) 46 Law & Society Review 71.
[36] See generally Buchanan (n 33). We would presumably need to expand this to include law-applying and (authoritative) law-interpreting institutions.
[37] Joseph Raz, 'The Obligation to Obey: Tradition and Renewal' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Rev ed, repr, Clarendon Press 1995) 346.
[38] Thus, for example, a private certification scheme might come to be used as a standard in government procurement decisions, and in doing so become a "public" form of governance that ought to be subject to corresponding standards of legitimacy, e.g. Errol Meidinger, 'The Administrative Law of Global Private-Public Regulation: The Case of Forestry' (2006) 17 European Journal of International Law 47.
[39] Raz, 'The Obligation to Obey: Tradition and Renewal' (n 37) 346.

existence of a moral duty-creating power, as we might "legitimate" authority. It makes no sense to understand the legitimacy of governance generally by reference to the existence of a power that need not even be claimed.

We should, then, as Buchanan and Keohane propose, understand this "entitlement" in terms of a moral justification or permission. Doing so gives us a conception of legitimacy that can be fully general across types of governance (and has the additional benefit of being generalisable to almost all of our uses of the term "legitimacy" in other contexts).[40] Nor does this commit us to any controversial view on the nature of authority. It is usually – wrongly – thought that the "permissibility-based" and "power-based" accounts are mutually exclusive. In fact, they can be complementary. Exercising a power – moral or otherwise – is an *action*; and we can ask of any action whether or not it is morally permitted. We can have moral powers without being permitted to exercise them.[41] So we can affirm a permission-based account of legitimacy whilst remaining agnostic on whether the correct conception of legitimate *authority* requires the permissible exercise of a moral duty-creating power. If there are global governance institutions that exercise moral authority of this sort – I leave this open – they do so legitimately when they do so permissibly.

The proposed weakening of the normative upshot of this entitlement for the governed is more puzzling. On the dominant view, the creation of content-independent, peremptory reasons for action is conceptually tied to the entitlement justifiably claimed by legitimate authorities. It is *because* authorities claim the power to create moral duties for their subjects, and legitimate authorities do so truthfully, that legitimacy has the normative upshot of creating moral reasons for the governed.[42] It is not enough to simply "weaken" both sides of this equation, as Buchanan and Keohane do; we must ensure that the relations between them continue to obtain. But when we "weaken" the power-based account to a permissibility-based one, we lose the most familiar reason reason for conceiving of legitimate governance in terms of the new moral reasons it creates for the governed. That an action is permissible does not entail that anybody else has reasons not to interfere.

Buchanan and Keohane do offer an independent argument in support of this criterion. Legitimate institutions satisfy the "comparative benefit" criterion; they thus produce goods that could not be otherwise produced. This requires coordination, which gives those to whom its rules are addressed a content-independent reason to comply, and everybody else a content-independent reason not to interfere.[43] As a result, that an institution is legitimate if flawed means that the "appropriate objective is to reform it, rather than to reject it outright".[44]

Even assuming that we are dealing with "objective" public goods – goods that any reasonable person would value – there are two problems here. First, from the fact that a governance body produces such goods, it does not follow that *every* governance action it takes plays a role in doing

[40] Euan MacDonald, 'Legitimacy as Liberty' (unpublished, 2020) for an argument to this effect.
[41] We might, for example, make a valid promise that we ought, morally, not to have made. In such cases, we have exercised our power, but impermissibly. Tasioulas misses this possibility in his response to Buchanan when he asks "it is not obvious what justified *governing* could be other than the issuing of directives that are genuinely content-independent reasons for action." Tasioulas (n 33) 99.
[42] A John Simmons, 'Justification and Legitimacy' (1999) 109 Ethics 739, 749. Simmons is typical: "State legitimacy… includes an exclusive power over subjects to impose duties and enforce them coercively, which correlates with obligations on others to refrain from these tasks. It also includes a right, held against subjects, to be obeyed".
[43] It is not clear that the latter reason is "content independent", at least in the same sense as the former.
[44] Buchanan and Keohane (n 10) 407.

so. It is difficult to see – without further argument – why a moral reason not to interfere with the production of a public good would extend to governance actions that are not plausibly playing that role. Second, where the action in question *is* contributing to the production of the good in question, it is difficult to see why the existence of my reason not to interfere should be dependent upon institutional legitimacy in any way. Imagine, for example, a governance body that effectively guarantees international peace; but commits serious violations of human rights in the process. Imagine further that these rights violations are sufficiently serious to render the institution illegitimate overall. Intuitively, although interference may even be morally required, I still have *some* reason not to; the fact that I will thereby be undermining world peace makes some kind of regret – often a marker of defeated reasons – seem appropriate. But if *this* is right, then the generation of reasons not to interfere is conceptually independent of legitimacy judgments.

Of course, it is plausible that there will often – perhaps even usually – be moral reasons not to interfere with legitimate governance. I do not think that Buchanan and Keohane's argument can show more than this. But this shows, at best, that the presence of reasons not to interfere is a typical feature of legitimate governance; not that it is a conceptually necessary one. There is no way to infer the latter from the former. Other accounts that try to tie political legitimacy into duties of non-interference, which proceed by way of examples in which such a duty plausibly arises and conclude that its presence is thus necessary for legitimacy, seem to make this mistake; a sort of conceptual variant of the *post hoc ergo propter hoc* fallacy.[45]

There are thus good reasons to reject Buchanan and Keohane's "weakened" version of the normative upshot of legitimate governance in favour of an even weaker one: that the legitimacy of governance is exhausted by the question of its permissibility, and thus does not *entail* the creation of any new reasons for action for the governed. As we will see, from this perspective accounting for the fact that reasons of non-interference will nonetheless typically accompany legitimate governance is a relatively straightforward matter.

3.3. Legitimacy, permissions and reasons

The terms "permission", "justification" (or "justification-right") and "liberty" are, in the literature on legitimacy, often used interchangeably. This is an artefact of conceiving of legitimate governance in terms of an "entitlement" to govern. It is not without risks. For while there is a sense in which "justified" and "permissible" action is synonymous, and a sense in which a "permission" can be equated to a "liberty-right", they are not the same sense. The following from Buchanan is instructive:

> 'Justified' in the phrase 'being justified in governing' is itself ambiguous between (a) having a liberty-right to govern, that is, it being morally permissible to govern; and (b) there being good moral reasons in favour of (the institution's) governing.[46]

Buchanan here understates the ambiguity between "liberty-right" and "permissibility", and overstates it between "permissibility" and "there being good moral reasons in favour". Note first that a "liberty-right" is something that an individual *agent* posesses; while "permissibility" is a feature of *action*. Second, after Hohfeld it is natural for us to think of liberty rights as *directional*

[45] For example, William A Edmundson, 'Legitimate Authority without Political Obligation' (1998) 17 Law and Philosophy 43.

[46] Buchanan 'The Legitimacy of International Law' (n 33) 83.

(the absence of a directed duty not to take the action in question). But we often use "permissibility" to refer to an *overall* judgment: that *it is not the case that the action in question ought not to be taken*. On the assumption that directed duties create only *pro tanto* reasons (reasons that *support*, but do not determine, overall ought claims), the difference between "liberty rights" and "permissibility" is clear: we might easily have a liberty-right to do something relative to some individual, but it might remain impermissible overall. On the assumption that directed duties do not exhaust the field of moral reasons, an action might be impermissible even though we have a liberty-right to take it relative to *everybody*. Likewise, the fact that we owe someone – even many people – a duty not to take an action (that is, we have, relative to them, no liberty-right to take it) does not determine its impermissibility overall.

My proposal is that we understand legitimacy in terms of permissibility, and permissibility in terms of overall "not-the-case-that-ought". An action, therefore, is legitimate if and only if it is permissible; and it is permissible if and only if it is not the case that it ought not to be taken. By extension, an action is *il*legitimate if and only if it ought not to be taken (that is, if we are required not to take it). On the grounds that an action's being morally required entails that it is permissible (that is, if we ought to take it then it is not the case we ought *not* to take it), the illegitimacy of an action entails the legitimacy of not taking it.

Clarifying this has a number of advantages, even in Buchanan and Keohane's own terms. First, it gives us a straightforward account of the relation between moral reasons and legitimacy judgments. A moral reason is a fact that supports – that is, that has some independent weight in determining the truth of – some "ought" claim. A reason for action supports some ought claim – positive or negative – about whether an action ought to be taken. Any reason *for* an action supports the claim that it is required (that is, that it ought to be taken); and, by entailment, that it is permissible. Any reason for an action thus supports the claim that it is legitimate. Any reason against the action supports the claim that it is *im*permissible, hence illegitimate. We can thus call the reasons in favour of any action "legitimacy reasons" with regard to that action; and those against it "illegitimacy reasons".[47] An action is permissible (hence legitimate) if and only if the overall valence of the set of applicable reasons is either neutral[48] or positive (in the former case, it is optional, meaning that either doing it or not doing it is permissible; in the latter case, it is required). An action is impermissible (hence illegitimate) if and only if the overall valence of the set of applicable reasons is negative.

This helps us with the puzzle of the relationship between legitimacy and justice highlighted by Buchanan and Keohane: that "legitimacy" is a distinct and less demanding standard than "full justice", but that some things are illegitimate precisely because they are seriously unjust. That an action would be unjust is a reason against taking it – an illegitimacy reason. If the injustice is serious enough, it will be near impossible for there to be competing reasons that could offset this sufficiently to return the overall valence of the set of applicable reasons to neutral or positive. But on the assumption that not all reasons against an action are reasons of injustice, we readily see how an action might be just but illegitimate; likewise, on the assumption that not all

[47] The class of "legitimacy reasons" is, I think, broader than "reasons for an action". In particular, there exist reasons that support "not-the-case-that-ought"-claims directly and only, and not by entailment by also supporting "ought not" claims. This idea has proved surprisingly hard to articulate, and impossible by means of our standard "balancing" metaphor for reasons. Luís Duarte d'Almeida and I have tried to account for this new class of reason in Euan MacDonald and Luís Duarte d'Almeida *"Contra Tantum* Reasons" (unpublished, 2020).

[48] For example, if the reasons for and against are equally balanced; or if there are no applicable reasons in play at all.

positively-valenced reasons are reasons of justice, we can see how an action might be (somewhat) unjust, but remain legitimate.

This is why Buchanan overstates the ambiguity between "permissibility" and "good moral reasons in favour": the latter is not a distinct sense of "justification", but merely one way in which an action can come to be permissible overall. This helps us account for the fact that individuals will often, but not always, have a reason not to interfere with legitimate governance. Governance actions will often be actions that the institution *ought*, morally, to take. In such cases their permissibility (hence legitimacy) is entailed by this requirement. It seems plausible that we always have a *pro tanto* moral reason not to interfere with an institution (indeed, with anybody) doing something that they are morally required to do. Thus, any legitimate governance action that is morally required will give rise to such reasons; any that is merely morally optional, however, will not. And these will be ordinary reasons. They will not be "content-independent" in any obvious way. And I can see no reason why they would have "a privileged status vis-à-vis our reasons for acting".[49]

Actions can be permissible or impermissible. Institutions cannot. Adopting the approach half-endorsed by Buchanan and Keohane, and fully here, means taking the notion of "legitimate action", and not that of the "legitimate institution", as primary.[50] A "legitimate institution" is an institution that is, in general, permitted to take the actions that it takes (or claims to be permitted to take). This gives us a straightforward way of making sense of the uncontroversial idea that "legitimate institutions can sometimes act illegitimately", deploying the *same sense* of "legitimacy" in each use. If this is right, then it is unhelpful to think of legitimacy in terms of an "entitlement" at all; to do so shifts focus away from the action and back to certain features of the actor, and risks confusing overall permissibility with directed liberties. Talking of legitimate governance in terms of a "right to rule" thus reveals itself to be misleading pretty much in its entirety.

4. The normative role of human rights

These clarifications help us see that Buchanan and Keohane's heavy circumscription of the list of human rights currently relevant to legitimacy judgments is unwarranted; and that their claim that respect for human rights can function as a "counting principle" in such judgments is mistaken.

The distinction they draw between "respecting" and "promoting" human rights is an important one. To fix ideas, I will say that an institution *respects* human rights when it is not responsible for an increase in the number of human rights violations in the world. I will say it *promotes* human rights when it is responsible for a decrease in the number of human rights violations in the world. And I will assume that promoting human rights is good, and failing to respect them is bad.

4.1. Reasons or conditions?

[49] Buchanan (n 33) 83.

[50] Buchanan seems to oscillate on this point. In one article, he claims that "political legitimacy is an agent-justification notion, having to do only with the normative sufficiency of the justification for the act of imposing rules"; Allen Buchanan, 'Political Legitimacy and Democracy' (2002) 112 Ethics 689, 695; but elsewhere he insists on "the primacy of institutional legitimacy", such that "international laws are legitimate only if the institutions that make them are legitimate"; Buchanan (n 35) 79-80.

Buchanan and Keohane, like most authors in the field, conceive of legitimacy as an entitlement: something that certain kinds of institutions possess. Their focus is thus on the *status* of the institution *qua* right-holder. The inquiry then naturally becomes one into the conditions, necessary and sufficient, for acquiring that status.

Merely respecting human rights – even fully respecting all human rights – cannot be a sufficient condition of institutional legitimacy. A governance institution must be instrumentally justified (that is, it must actually produce the benefits for which it was established) if it is to be legitimate. And clearly not all violations of just any human right is sufficient to render a governance institution illegitimate, even presumptively so. Violations of human rights sufficiently serious to rise to this level are in; those that aren't are out. As the latter are neither necessary nor sufficient conditions of legitimacy, the thought seems to be, there is no normative role for them to play.

Buchanan and Keohane are correct that some, but not all, human rights violations are so serious as to render a governance institution presumptively illegitimate. But necessary and sufficient conditions – even "presumptive" ones – are somewhat blunt instruments. And while it may be normal to think in these terms when inquiring into the acquisition of an individual or institutional status (such as "right-holder"), it is not at all our natural way of thinking about justified – permissible – *action*. In the latter case, we usually think instead of the balance of applicable reasons. A reason can be normatively significant – even determinative, in context – without ever rising to the level of a presumptively necessary or sufficient condition of permissibility in the abstract.

Fully endorsing a permissibility-based approach helps us both retain what is plausible in Buchanan and Keohane's proposal, and to see where they go wrong. That a governance action would violate human rights is a reason against it, an illegitimacy reason. That it would do so seriously is a weighty illegitimacy reason, unlikely to be outweighed by positively-valenced legitimacy reasons. Because a claim of "institutional legitimacy" is shorthand for judgments of the permissibility of institutional action, even a single very serious violation of human rights could undermine that claim. (It seems plausible, for example, that a very serious violation of a duty in some institutional role could render it morally impermissible for an individual to continue in that role, or to perform it again in the future). The absence of very serious violations of human rights can thus be viewed as a presumptively necessary condition of legitimacy, because it is hard to imagine a scenario in which such violations could be offset by sufficiently strong legitimacy reasons.

We can even grant that Buchanan and Keohane's truncated list of the most important rights are the only ones that rise to this level. None of this means that those human rights violations that we *can* imagine being offset are therefore irrelevant. Note first that Buchanan and Keohane overstate the degree of disagreement on the broader set of human rights. Certainly, there is much disagreement about the full extent of what each of these covers, and how they ought to be balanced with competing considerations. But this fact does not preclude there being widespread agreement both that a broader set of rights exist, and that certain actions would be clear violations of them. All violations of human rights are illegitimacy reasons; and any single violation, however trivial, will be sufficient to render an action illegitimate if the set of applicable legitimacy reasons is not sufficiently strong to offset it. And were the majority of a governance institution's actions to be of this type – rendered illegitimate by relatively trivial but undefeated illegitimacy reasons – we would have no reason to think the institution itself legitimate.

Fully endorsing the permissibility-based account shifts our focus from agent to action, and from necessary and sufficient conditions to applicable reasons. When we do so, we see that we ought not to limit the set of "legitimacy-relevant" human rights in the manner proposed.

4.2. Reasons and deniers

A shift in focus from "conditions" to "reasons" is already incipient in the Buchanan and Keohane approach. The suggestion that their substantive criteria are also "counting principles" speaks to a dimension of *weight* that seems to belong to the realm of reasons, and not that of necessary conditions.

That some of their criteria have this feature does seem right. Take "comparative benefit". It is plausible to think that, the more of a public good is secured by the actions of a global governance body or the more important the good in question, the greater the legitimacy of the institution. But can human rights, with their relevance limited in the manner that Buchanan and Keohane propose, play this role? Recall that we are here dealing with "minimal moral acceptability", understood as respecting (i.e. not violating) the most basic of human rights. It is difficult to see how the mere fact that a global governance institution doesn't violate very basic human rights could be thought to count in its favour. Certainly, if it violated human rights, this would count against it. And arguably, if it promoted human rights (rather than merely respecting them), then this would count in its favour. But the mere absence of a bad-making feature is not a good-making feature.

Again, thinking in terms of reasons makes the point clearer. Reasons have this offsetting, balancing feature – we can weigh a reason for a particular action against a whole set of reasons against it and find the action justified overall, if the initial reason is strong enough. But it is a truth about reasons in general that the absence of a reason against something is not itself a reason for it. So were an ice-cream to taste of engine oil,[51] that would be a reason against my eating it. But the fact that it doesn't taste of engine oil is not a reason *for* me to eat it. It should not have positive weight in my deliberations; it merely indicates the absence of something that would – if present – have had negative weight. It would be absurd for me to think of balancing my reasons not to eat ice-cream (such as the fact that it will cause me to gain weight) against the fact that it doesn't taste of engine oil it trying to decide whether I am justified in eating it.

In much the same way, the fact that a global governance body achieves some minimum standard of moral acceptability cannot be used to offset legitimacy deficiencies elsewhere. Indeed, the same is true even of maximal respect for all human rights. The absence of an illegitimacy reason is not a legitimacy reason. We need a further term to refer to those facts about a governance body's actions that pick out the absence of features that would otherwise contribute to its illegitimacy. I propose that we call these *illegitimacy deniers*, to keep them distinct from legitimacy reasons. Both are important in the overall legitimacy calculus, but play different normative roles: the former, such as respecting human rights, operate to remove considerations that would

[51] On this, see generally Jonathan Dancy, *Ethics without Principles* (Clarendon Press, OUP 2004), 44-45.

otherwise have negative weight; the latter, including promoting human rights, contribute positive weight of their own.

This gives us a further reason to concur with Buchanan and Keohane, *contra* Petersmann, that the *promotion* of human rights is not in general necessary for institutional legitimacy. Failure to promote human rights – an absence of a legitimacy reason – is not an illegitimacy reason. That a governance institution fully respects human rights is enough to keep its legitimacy slate clean in this regard; and this alone will suffice for its legitimacy *in the absence of further illegitimacy reasons*. Of course, in the current climate further illegitimacy reasons are not hard to come by. But there is one, I think, that everyone has missed.

5. The consent of the governed

According to Buchanan and Keohane, that a governance institution meets their "complex standard" suffices for its legitimacy; in part because, although "global democracy" is unfeasible, the standard also serves key democratic values. I think it fails to serve perhaps the most important democratic value of all; and that, as a result, their claim that the "[s]atisfaction of the minimal moral acceptability condition rules out the more serious moral objections"[52] that might undermine institutional legitimacy is false. The value I have in mind speaks to the importance of individual consent – actual consent – to legitimate governance.

There are two main objections to treating the actual consent of individuals as relevant to the legitimacy of global governance institutions in general. The first is specific to the global setting: States, not individuals, are the subjects of global governance. The second generalises to all governance, and is the reason why few scholars today take actual consent to be important to its legitimacy: almost nobody actually consents.[53] I will consider each in turn.

5.1. Who are "the governed"?

Individual attitudes feature in two ways in Buchanan and Keohane's account. First, they are an important consequence of legitimacy judgments. A main reason for an institution to secure legitimacy is to change individuals' "practical attitudes" towards it. Second, they have a role – albeit a highly limited one – in enabling an institution to be legitimate:

> It is important not only that global governance institutions be legitimate, but that they be perceived to be legitimate. The perception of legitimacy matters, because, in a democratic era, multilateral institutions will only thrive if they are viewed as legitimate by democratic publics. If one is unclear about the appropriate standards of legitimacy or if unrealistically demanding standards are assumed, then public support for global governance institutions may be undermined and their effectiveness in providing valuable goods may be impaired.[54]

This is a common view. But there is something weird about it. On one hand, the legitimacy crisis in global governance is understood, in part, in democratic terms: the "distance" between global decision-making and democratic publics is identified as problematic, the consent of democratic States is viewed as necessary, and it is held to be important that our legitimacy standard vindicate

[52] Buchanan and Keohane (n 10) 436.
[53] Those that *do* still take it to be important tend to conclude on this basis that there is little or no legitimate governance. For example, A John Simmons, 'The Anarchist Position: A Reply to Klosko and Senor' (1987) 16, 269."There are no morally legitimate states".
[54] Buchanan and Keohane (n 10) 407.

key democratic values. It is, moreover, acknowledged that global governance impacts hugely on individual interests. And yet the normative significance of the actual attitudes of actual individuals is reduced to a whisper. Negative attitudes register only as the possibility that obstructive individuals might make it difficult for a governance body to effectively pursue its goals, and thus meet the efficacy threshold of legitimacy. It is hard to square this commitment to "democratic values" on one hand with the reduction of individual attitudes to "barrier to effective operation" on the other. Surely one important thought underpinning democratic legitimacy is that actual individual attitudes *matter*, in some direct and robust way, to the legitimacy of governance.

The common view is justified on the basis that States, not individuals, are the subjects of global governance. But there are two reasons to reject this. The first follows from our definition of governance. While it may be true that States are (usually) the subjects of international *law*, we have no reason to limit our conception of governance to exercises of legal authority – or of "the governed" to the formal subjects of legal authority. The second follows from the nature of the governance relation itself. It is *transitive*, such that, if A governs B, and in doing so requires B to govern C, we can say that A has governed C. So when a global governance institution requires States to govern their citizens in a particular way, the individual citizens have been governed by the institution.

To see this, take the most commonly cited example – usually held to be exceptional – of a global body governing individuals: the listing mechanism of the UN "1267" Sanctions Committee. This Committee lists actors, including individuals, who are held to be involved in terrorism, and States are required to ensure that certain restrictions (on travel, on access to funds) apply to such individuals. The legitimacy of this governance has been widely held to require the establishment of *individual* redress mechanisms at the global level; something that has, to an extent, occurred.[55] But look at what happens formally here: the UN Security Council places certain obligations on States, who can respond then by placing further obligations (including obligations not to exercise contractual powers) on other actors (airlines, banks). The impact on the interests of the listed individuals takes place across a range of formal governance relations between different legal orders; and, crucially, the legal entitlements of the listed individuals, even under the State legal order, *need not change at all* for the dramatic impact on their interests to take effect.[56]

To view such individuals as globally governed is to concede both that governance need not require an exercise of legal authority over the governed, and that the governance relation is transitive in nature. And if these points are conceded, we lose our justification for thinking of things like the listing mechanism as exceptional, given the widely-acknowledged impact that global governance more generally has on individual interests. Global governance bodies *typically* govern individuals. This explains our democratic concerns for their legitimacy in the first place.

5.2. The "nobody consents" objection

[55] For a recent discussion, see Nadeshda Jayakody, 'Refining United Nations Security Council Targeted Sanctions: "Proportionality" as a Way Forward for Human Rights Protection' (2018) 29 Security and Human Rights 90.
[56] Generally speaking, placing actors under a duty not to do business with a particular individual need not result in a change in that individual's formal entitlements – at least so far as these can be captured in Hohfeldian positions. But it would be hard to argue that such individuals have not been "governed".

If individuals are globally governed, and the consent of the governed matters to the legitimacy of governance, then individual consent matters to the legitimacy of global governance. If so – the objection may run – then all global governance is illegitimate, because pretty much nobody actually consents to it. This objection has been around (at least) since Hume; and – anarchists aside – is widely taken to be fatal to consent-based approaches to legitimacy. "Actual consent" is viewed as too strong a standard for democratic legitimacy *within the State*; and State-based standards as too strong for the global realm. Tying the legitimacy of global governance in any way to the actual consent of individuals is thus a non-starter.

But not so fast. There are certain elements to the rejection of consent in the State context that – if what I have argued above is correct – do not apply here. First, the debate normally centres on whether consent is a necessary condition of legitimacy. I agree that it is not; to do so would give every individual a legitimacy veto. But I have argued that we must move beyond the "necessary/significant condition or bust" model of normative significance. The fact that an individual does not consent to her governance can be viewed as an illegitimacy reason even if it is not sufficiently strong to amount to a necessary condition, "presumptive" or otherwise. An institution can legitimately govern without the consent of many – perhaps even all – if the other applicable legitimacy reasons are strong enough to offset this.

Second, we must look at the question to which "consent" has been offered as an answer. The question of legitimate governance within the State has been thought by most to be closely linked to the question of political obligation. "Consent" is the suggested answer to the question of how we, as autonomous agents, can become *bound* to do as another says. Consent of this sort is understood as a form of promising or contracting. It is held to require some kind of *performative element*, some explicit act of self-binding. This is plausible; I cannot create moral duties for myself just by adopting some mental state. Since few people make this kind of performance in relation to the institutions that govern them, few people actually consent to their governance.

But we are no longer interested in governance as the creation of moral duties. We are interested in governance as permissible action. And there is another model of consent; a model concerned not with the role of consent in the creation of duties, but with the part it plays in making permissible actions that would otherwise be impermissible. Its paradigm is not consent-as-contract, but rather consent to sex.

The literature on the latter is divided on whether consent-to-sex requires a performative element, or whether a mental state alone can be "morally transformative".[57] Elsewhere, I have defended in detail a version of the latter view.[58] There, I argue that consent should be understood as an overall desire: a desire that the individual in question not owe us a duty not to take the action in question (in circumstances in which *not* wanting this would be sufficient to trigger the duty not to act). I further argue that "consent" of this sort should not be understood as the exercise of a moral power of authorisation, which also plausibly requires a performative element.[59] So "consent to sex" is importantly different from "consent to waive a duty to pay monies owed", even though both have a part to play in making-permissible-the-otherwise-impermissible.[60]

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[57] Amongst those who propose a "performative" view, see e.g. Alan Wertheimer, *Consent to Sexual Relations* (CUP 2003); for an opposing view see e.g. Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121.
[58] Euan MacDonald, 'Sex and the City' (unpublished, 2020). My claim is not that a mere mental state suffices for "permissibility" in the case of sex; only that it is enough to change the applicable reasons for action.
[59] Tom Dougherty, "Yes Means Yes: Consent as Communication:' (2015) 43 Philosophy & Public Affairs 224.
[60] *A* might have a duty to pay *B* £50. *B* can consent to waive this right, releasing *A* from her duty and authorising non-payment. But A's duty does not seem to be well-described as a duty-to-pay-me-£50-unless-I-authorise-

Authorisation is an *action*, and mental states are not actions. In the former case, on the other hand, the mental state is merely one of the background conditions necessary to trigger the reason in question. There is nothing untowards or mysterious about mental states like desires playing *this* normative role. I cannot rehearse the arguments for these claims here. But note that all that is needed to turn the "no actual consenters" objection is that *some version* of the claim that morally-transformative consent consists in a mental state of the consenter succeeds.

Consent-to-sex is the paradigm, but it does not exhaust the field. In fact, consent of this sort is far more common, and more important to our everyday lives, than is consent-as-contract.[61] It does not create reasons for the consenter to perform the action in question; rather, it removes reasons for others *not* to. The strength of these reasons can vary from effectively necessary conditions of permissibility (in the case of sex) to the largely trivial, depending on the act in question. In the terms I have proposed here, consent of this sort is thus an *illegitimacy denier*. This makes the *absence of consent* an illegitimacy reason.

This is how consent thus comes into the permissibility-based theory of legitimate governance: there is *a moral reason not to govern someone without their consent*.[62] This reason is triggered by the actual attitude that individuals have to their governance. No performance is needed, as the consenter is neither creating duties for themselves, nor waiving them for others. Individually, this reason is perhaps not very strong, and can be readily outweighed by countervailing legitimacy reasons. The greater the set of non-consenting individuals, and the higher the intensity of their nonconsent, the harder it will be to outweigh.

When they claim that we should seek to secure institutional legitimacy in order to change individual attitudes, Buchanan and Keohane get the relationship between individual attitudes and institutional legitimacy precisely backwards. Rather, we should seek to change individual attitudes in order to secure institutional legitimacy

5.3. Consent and human rights

If this is right, Buchanan and Keohane are wrong that meeting their complex standard suffices for institutional legitimacy. There may be global governance institutions that meet this standard, but remain illegitimate because they do not command the consent of the individuals that they ultimately govern. Indeed, the view that there is a "legitimacy crisis" in global governance *in general* might be mistaken. The degree of legitimacy of each global governance institution will depend, in significant degree, on the general level of individual consent towards it. It seems plausible that different global governance institutions currently enjoy varying levels of individual consent, in the sense outlined above. This is an empirical question with normative implications. Maybe some aren't in crisis at all.

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nonpayment (that is, the power to waive is not part of the content of the duty itself. Contrast the case of sex: it does not seem plausible that *A* has a general duty-not-to-have-sex-with-*B*, which *B* can then waive in an analogous manner. Rather, *A* has a duty-not-to-have-sex-with-*B*-without-*B*'s-consent. Here, consent *is* plausibly part of the content of the duty itself. And while the former right can- usually – be waived, the latter cannot be.

[61] In Hurd's well-known formulation, consent of this sort "turns a trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment…"; Hurd (n 57) 123.

[62] This is just to say that non-consensual governance bears a higher burden of justification than does consensual governance.

A strong showing in the "comparative benefit" criterion could be used to offset an absence of individual non-consent. Respect for human rights, however, cannot. The inverse also holds: as consent and respect for human rights are both illegitimacy deniers, neither can be used to offset deficiencies in the other. Of course, if a failure – even a perceived failure – to respect human rights was *causing* a lack of individual consent, then rectifying the former ought to help with the latter.

The *promotion* of human rights could be used to offset a lack of individual consent. Indeed, under certain circumstances it might be unreasonable for individuals *not* to consent to an institution that did so successfully. Arguably, this would have the effect of weakening the strength of the illegitimacy reason created by their non-consent.[63] But as a legitimacy-improving strategy, this path seems fraught with danger. First, there is the risk, emphasised by Alston, that any institution that States were willing to empower in this way would promote "human rights" in name only. This would not only undermine the legitimising force of human rights; it also carries the further risk that, with the right publicity, *it might work*: that individuals might be persuaded to consent on the false belief that genuine human rights were being effectively promoted. This would have the perverse effect of genuinely improving moral legitimacy (by removing an illegitimacy reason) *but for bad moral reasons* (a false belief of moral progress, and the undermining of human rights).

Even if such an institution *did* successfully promote at least a permissible interpretation of human rights, there is still significant risk. For empowering global institutions that lack consent to rule on highly disputed questions of morality is likely only to increase both the number of non-consenters and the intensity of their non-consent; and thus increase the strength of the set of applicable illegitimacy reasons. Nor is promoting a permissible interpretation of human rights sufficient to attenuate the non-consent in the manner suggested above. Only an interpretation that it was unreasonable *not* to endorse – a much higher bar – would have that effect. In such cases, the treatment could end up as bad, if not worse, than the cure. Promoting human rights is not a straightforward solution to the problem of individual non-consent to global governance. Merely respecting them is no solution at all.

[63] Dancy (n 51) 42. Unreasonableness would thus function as what Dancy has called an "attenuator": a fact that is not itself a reason, but operates to weaken other reasons in play.