

Legitimacy, Justice and Public International Law

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or else is profoundly impaired as a shared agent, and so is as compromised as a normative people can be and still have the name.

How does an aggregation of individual 'I's somehow go *POOF!* and become 'We', a unified moral agent capable of shared action and that is the proper proximate subject of moral appraisal? Two sorts of answers are needed. One answer should be sufficiently general so that, when we look at aggregations as diverse as marriages, string ensembles, baseball teams, street demonstrations, universities, hospitals, business enterprises, professions, organised crime families, governments, ethnic groups and political societies, we are able to say which have the capacity for shared agency and which do not. Then we need an answer that is sufficiently specific to the kind of aggregation in question, so that we can specify the necessary and sufficient conditions for success as a shared agent of that kind. Conditions for succeeding at 'playing the Mendelssohn octet' may be different than conditions for succeeding at 'amending the Constitution'.

Unified, shared agency can come about in at least three general ways. Every plausible account of which I know follows these three routes, either singly or in combination.

Meshed aims and plans

The structurally simplest route to shared agency is through the intermeshing of aims and plans.³³ Very roughly, a 'we' is formed that plays Mendelssohn when each of us aims to play the piece together, knowing that each of us has that aim, and with each of us planning to (and knowing that each plans to) adjust our actions (tempo, pitch, dynamics, phrasing) to mesh with the actions of others as necessary to support each other to achieve our shared aim. Because no organisational or procedural structure needs to be relied upon for the intermeshing of aims and plans, the paradigm cases are face-to-face, small-scale and synchronic (although more complicated collective agency is not precluded). Note how this simple collective agent succeeds at being the proximate locus of responsibility. The octet itself is a proper subject of evaluation, to be praised or

³³ Michael E. Bratman has what I think is the most plausible account in M. Bratman, *Faces of Intention* (Cambridge University Press, 1999), chs. 5–8. I loosely follow his view. Margaret Gilbert has written the seminal works on this topic, but I am not persuaded by her holism or by her views about how involuntary commitments are formed. See M. Gilbert, *Living Together* (Lanham, MD: Rowman & Littlefield, 1996), and M. Gilbert, *Sociality and Responsibility* (Lanham, MD: Rowman & Littlefield, 2000).

criticised, and this praise and criticism to some extent distributes onto the individual players in a way that is not simply an evaluation of the individual contribution of each. This is captured by locutions such as 'We did it' after a good performance: 'we', all together, the weakest player and the strongest, did one thing, 'it'. But note too that, if the intermeshing of aims and plans is the only route to shared agency relied upon here, if the eight string players are a subset of a larger chamber orchestra, the woodwinds and horns who stayed home did not 'play the Mendelssohn octet'. For the stay-at-home players to be authors of this action in any way, so that some sort of responsibility for the performance could distribute on to them, recourse to one of the other two routes to shared agency is needed.

Representation

The second route to shared agency relies upon representation and impersonation. Hobbes of course is the great propounder of the view that unity of agency is achieved only through the unity of the natural agent.³⁴ A shared agent is formed and can act as one only if each of many individuals severally authorises a natural individual to represent each, or, in Hobbes's phrase, to impersonate each. The core idea here is that, under certain conditions, A can act for B in a way that makes B the author of the action, and so the proper locus of responsibility for the action. Via this route, collective agency comes about when a natural agent is authorised to act in the same way on behalf of each of many. There need not be coordination or intermeshing of the plans of the many, or even common knowledge of the multiple representation (although one might make authorisation contingent on the authorisation of others, in which case common knowledge would be necessary). Notice how the route of intermeshing plans and the route of representation can combine. A multitude of unmeshed individuals can be represented by a team with intermeshed plans; or we can together, through an intermeshed plan, appoint a single representative to act for us.

³⁴ 'A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*. And it is the Representer that beareth the Person, and but one Person: And *Unity*, cannot otherwise be understood, in Multitude.' T. Hobbes, *Leviathan* (1651), R. Tuck (ed.) (Cambridge University Press, 1996), ch. 16: 'Of Persons, Authors, and Things Personated'.

Procedure

The third route to shared agency relies on procedures, practices or organisational structures. The various capacities of considering, willing and doing are functionally accomplished by the combined efforts of many, though perhaps no one natural person has considered, willed or acted in a way that matches the shared action.³⁵ A mechanism that produced an authoritative decision or action out of (and sensitive to) practical inputs of individual agents would be such a procedure. A shared action produced by a procedure could be relatively simple, such as friends choosing a movie by majority vote, or as complex as the rendering of law in a legal system in which the admission of evidence, factual determinations given the evidence, legal rulings given the factual findings, and appellate review given this and other precedential legal rulings are produced by many actors, not one of whom may will the outcome for a consistent set of factual and legal reasons. Complex instances of shared agency typically will rely on all three routes. A corporation or association might form through the intermeshing of the aims and plans of its founders, appoint representatives to make decisions through procedures, and then delegate the implementation of plans to intermeshed teams of workers. To make sense of ‘amending the Constitution’ as an act of a shared agent, the web of intermeshed aims, representations and procedures would have to be even more elaborate.

For each of these routes to shared agency, we must ask what gives it its authority in Hobbes’s sense: what makes any particular natural agent an author of the group agent’s actions, and so a candidate for distributed responsibility? The mere existence of a procedure is not sufficient to create a shared agent out of those natural agents whose practical capacities and functionings are taken to be inputs. Your neighbours may, to

³⁵ Indeed, one tempting test of whether a procedure constitutes a shared agent is that the outcomes of the procedure meet some appealing standards of rationality even when the collective choice is at odds with the individual choices appealingly aggregated. Philip Pettit has fruitfully pursued this line of argument. See especially P. Pettit, ‘Responsibility Incorporated’, *Ethics*, 117 (2007), 171–201; P. Pettit, ‘Groups with Minds of Their Own’, in F. Schmitt (ed.), *Socializing Metaphysics* (New York: Rowman & Littlefield, 2004), 167–93; and C. List and P. Pettit, ‘Aggregating Sets of Judgments: An Impossibility Result’, *Economics and Philosophy*, 18 (2002), 89–110. For a precursor, see H. Raiffa, *Decision Analysis* (Reading, MA: Addison-Wesley, 1968), who relies on a result later published in A. Hylland and R. Zeckhauser, ‘The Impossibility of Bayesian Group Decisionmaking with Separate Aggregation of Beliefs and Values’, *Econometrica*, 47 (1979), 1321–36.

your surprise, announce a procedure whereby each house on the block is to be painted the colour preferred by the majority, and under that procedure, after duly taking your fondness for blue into account, the colour of your house is to be changed from blue to yellow. Yet surely something more than the counting of your preference as an input must tie you to this procedure before you assume any authorship in or responsibility for the alleged shared agent that has arrived on your doorstep with cans of yellow paint. If instead of employing a procedure, your neighbours appointed as representative a natural agent to make the neighbourhood painting decisions, what is she to you? Or if a neighbour appears with a couple of yellow paintbrushes in one hand and a shotgun in the other, you may find it prudent to join him in painting your house yellow and – one eye on the gun – take pains to do it right, meshing your plans with his. Although you would be taking the action of painting your house yellow, you would not, in any normatively important sense, have formed a shared agent to paint your house yellow.³⁶

Authorship of a shared agent's actions is attributable only in two ways: one is if the natural agents who constitute the group agent, under uncoerced and informed circumstances, commit to constituting a group agent in this way for this purpose, either by consent, promise, or

³⁶ What are we to say about string players in a concentration camp ordered to play Mendelssohn for the guards? Autonomous individual action can be nested inside a generally coercive background. An individual cellist ordered to play the Bach solo suites for the guards may be forced to do something she would not voluntarily choose to do, but, against that forced background, she may out of defiant pride or simple pleasure amid misery decide to exercise the discretion that remains hers to play her best, and then, again within limits, she is a responsible competent agent. So too, eight prison musicians may form a locally autonomous group agent whose purpose is instrumental survival, or defiant pride, or a bit of happiness amid the misery. They do not form a collective agent, however, with the guards. Is a collective agent formed with a guard who also is a good violinist and orders that the prisoners play with him? Under some circumstances and for some circumscribed purposes, yes. If, nested inside the larger coercive background, the prisoners have and exercise local autonomy in performance with the guard, then for purposes of aesthetic praise and criticism, they are acting collectively with him. If the guard also is a musical bully who demands obedience note by note under threat of punishment, then no. Either way, the prisoners do not form an all-purpose group agent with the guard that is responsible, as a group agent, for all of the consequences of the forced performance. Suppose the performance also served as the signal to commence atrocities elsewhere in the camp. Performing under those circumstances may or may not be excusable, but this is a direct assessment of responsibility to be made of each musician taken as an individual natural agent, rather than an assessment of distributed responsibility for the action of a group agent. Group agency is a normative ascription that supervenes on some descriptive facts, but is not itself a descriptive fact of the matter.

some other sort of voluntary action. (Voluntary action short of agreement could constitute participation in a collective agent if the natural agent voluntarily accepts the benefits of a cooperative venture or if the agent voluntarily and intentionally assures others in their expectations concerning his actions.³⁷) The second is if commitment to constitute a shared agent in something like this way for this purpose is a practical necessity, in that it is either constitutive of or a precondition for acting upon the natural agent's prior uncoerced and informed commitments, and the natural agent, knowing that this is so, either cannot or will not give up these prior commitments. These are demanding conditions for authorship, but such demandingness is needed to bring about an entity with the moral standing and powers of a group agent. Recall that a group agent is a proximate locus of respect and responsibility that both bears, in some ways, the moral claims made by and against its constituent members, and distributes over its constituent members, in some ways, the moral claims made by and against it.

The kind of shared agency that is of greatest interest to us, of course, is political agency. Political action has profound effects on the freedom and interests of those subject to it because it nearly always involves coercion, and seeks to change the normative status of its subjects by imposing duties or liabilities. Because of these high moral stakes, the conditions for successfully constituting a political 'We' from a multitude of 'I's are going to have more moral content than what it takes to constitute a string ensemble. For how can a people be *my* people unless, in some way, whoever speaks and acts for the people speaks and acts for me, representing in a morally adequate way both my will and my basic interests across the broad range of freedoms and interests that governments claim the right to regulate?

When the collective agent in question claims the normative power to coerce its constituent natural agents, the criterion that these natural agents be sufficiently free is threatened. Governments, by imposing and enforcing laws, appear to restrict the freedoms of the governed. So governments must either show that these restrictions on freedom nonetheless leave the governed sufficiently free, or show that the enactment and enforcement of law does not, despite appearances, actually restrict

³⁷ For voluntary acceptance of benefit, see John Rawls's account of the principle of fairness in J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 108–14, 342–50; for voluntary assurance of expectations, see T. Scanlon, 'Promises and Practices', *Philosophy and Public Affairs*, 19 (1990), 199–226.

freedom. One strategy for showing that restrictions on freedom leave natural agents sufficiently free is to show that restrictions are for the sake of realising and protecting these same freedoms, for there is no condition of anarchy or other scheme of government under which these freedoms would be more inviolable or less violated, and so no other condition under which natural agents in general would have greater capacities for agency. One strategy for showing that apparently coercive law does not restrict freedom is to show how the subject of law can also be, from some normatively appropriate point of view, its willing author who therefore is not coerced. These are not two separable strategies, however, but two turns of the same justificatory argument.

One of the central questions of modern political philosophy is how, if at all, collective self-governance is compatible with individual freedom. The correct answer, I believe, has both a substantive and a procedural component, because it needs to address agents both from their perspectives as subjects of law and their perspectives as authors of law. The agent viewed as the subject of coercive law must be given adequate justification, and the most promising strategy of justification is to show that a fully adequate set of freedoms for all requires such limits on the freedom of each. The agent viewed as the author of coercive law must be free enough in the relevant ways to count as an author. Only if individuals are free enough to count as authors can the collective body constitute a shared agent. How free is free enough? No more constrained than is necessary to guarantee other constituent members of the collective body the freedoms they need to have the capacity to be authors. To establish that subjects also are authors, we do not look for free founding moments; even if such foundings were not myths, they would not by themselves do the job needed. Rather, we look for virtuous circles in which subjects are free enough to have the capacity to be authors of collective acts, procedures and institutions that realise and protect the freedoms that make them free enough to have the capacity to be authors.

VII

This chapter has explored the conditions for achieving free collective agency, but has not yet said why this achievement is so important. What, one might wonder, is the great moral significance of becoming a normative people? This is a very large question indeed, and here I shall attempt only to present a typology of answers, some more prosaic and some more lofty, that have some initial plausibility. These answers are not mutually

exclusive, so insofar as acting together is morally important, its importance may be over-determined.

First, the achievement of free collective agency could realise a good necessary for survival or basic functioning. So, perhaps prudence universally demands that we end the state of nature's war of all against all. Or free collective agency could realise a contingent good whose importance depends on the ends that persons pursue. The aspiration to flourish as a distinct linguistic community may be an end no more necessary than the aspiration to climb Everest, but the right sort of social cooperation is necessary for success in both. Or the achievement of free collective agency could fulfil a moral duty. So, argues Kant, we have a duty to engage in collective self-rule once we have disputes about what our rights are.

Second, these duties or goods could be connected to collective agency instrumentally, in that collective action is the means to fulfilling a pre-existing duty or realising a pre-existing good. Life, liberty and happiness, independently valued ends, might be best achievable if we act together. Or the duties and goods could be connected to collective agency constitutively, in that they are conceptually possible only under collective agency. This is tautologically true if acting together is a great good in itself. More subtly, we may have a duty to enter into a political relation that gives us duties to each other that we would not and could not otherwise have.

Third, the requirement that group agency be *free*, in that the conditions for genuine collective agency outlined above are met, could be a requirement in three senses. Freedom could be an instrumental requirement, in that only free collective agency is the sort of social coordination that works to fulfil pre-existing duties or realise pre-existing ends. For example, perhaps it is the case that warships staffed with volunteer sailors who choose their own officers outsail and outfight ships of impressed seamen whose coordination is extracted by threat of flogging. So, if a seaman is to go to sea, then his interest in survival is best instrumentally realised by joining a free crew of free sailors. Or freedom could be a constitutive requirement, in that the goods realised or the duties fulfilled are made conceptually possible only by free collective agency, and not by mere social coordination. Or freedom could be an independent normative requirement, in that the only morally permissible forms of social coordination are free ones, whether or not forced coordination instrumentally or constitutively realises goods or satisfies other duties.

To summarise, free group agency may have importance because it realises a necessary good, a contingent good, or fulfils a duty. Group

agency may be instrumental to these goods or duties or constitute them. And group agency must be free either because freedom is instrumental to the realisation of the goods or fulfilment of the duty, or because freedom constitutes the goods or duties, or because freedom is an independent normative constraint. These distinctions yield twelve possible combinations. Not all are of interest, but the standard arguments for the importance of social cooperation are usefully differentiated by locating them on the resulting grid. Note too that there are many ways to find moral importance in free group agency that do not depend at all on communitarian, collectivist or participatory democratic premises that see deciding and doing things together as somehow intrinsically more valuable than deciding and doing things individually.

VIII

I have been offering necessary conditions for collective political agency, but notice that these conditions do double duty as criteria for a normative conception of political legitimacy. This should come as no surprise. If the concept of political legitimacy is, very roughly, the right to rule, then one plausible account of the criteria for the legitimacy of a government is that only governments constituted as shared agents authored by their subjects have the right to rule those subjects, because only then is the puzzle of how we can remain self-governing when governed by others solved. Yet note that, if the account of shared agency above is correct, then the correct account of political legitimacy has substantive as well as procedural requirements. Only free enough natural agents can constitute a shared agent, and no procedure can make a natural agent free enough who is not free enough already. This is why, to be legitimate, procedures of governance must be constrained by substantive preconditions (for example, constitutional rights that limit majority rule).

On the conception of political legitimacy that I believe is correct, the test of legitimate government is two-pronged, just as the test of shared political agency is two-pronged. There needs to be an adequate connection between the governors and the governed (the procedural prong), and there needs to be adequate protection of at least basic human rights (the substantive prong). At a minimum, legitimacy requires those political freedoms and basic protections that are constitutive of or instrumentally necessary for the individual moral agency of the members. *A necessary condition for a free (enough) people is that it be made up of free (enough) persons.* We do not have to be too precise about the

thresholds here. Perhaps something less than democracy will satisfy the political freedom prong, and perhaps something less than the full complement of liberal rights will satisfy the human rights prong. But on no plausible normative account of group agency and therefore of legitimacy does a tyrannical regime that recognises no constraints on the arbitrary will of the tyrant and that systematically violates basic human rights personify the people it rules.

Might a tyrannical regime personify a subset of the population it rules, or might subsets constitute their own shared agent? First, consider the case of a separatist or revolutionary movement. Surely, once members of such a movement are the targets of massive human rights violations, they do not constitute a shared agent with their persecutors, even if the initial rebellion was unjustified. It would be utterly perverse to think that a regime that engages in mass atrocities against groups of subjects personifies those subjects. The victims of atrocity are not the authors of their own victimisation. It does not follow, however, that such secessionists or revolutionaries have succeeded in constituting a new shared political agent. Political legitimacy does not follow some law of conservation under which it can neither be created nor destroyed, but only changed from form to form. The social solidarity that both makes large-scale political dissent possible and makes group-based suppression instrumentally rational may underwrite anthropological peoplehood, but there is no normative peoplehood without the institutions and procedures necessary for the formation of large-scale shared agency.

Second, consider the case of a favoured group that is not subject to massive atrocity. One might think that such subjects constitute a smaller shared political agent personified by the regime. Under sufficiently repressive regimes, however, where all political dissent is stifled and where one's basic wellbeing is unprotected and insecure, this is not so even of those who are faring well. No one who lives in fear and must curry favour to avoid the arbitrary whims of an unconstrained, absolute ruler is free enough to constitute a shared agent. A regime that considers everything about you violable and has the absolute power to violate you does not represent or personify you, even if in fact you are not violated. Well-treated cattle do not share agency with their rancher.

Finally, could a ruling class, party or bureaucracy constitute a group agent? Perhaps. Officials in a tyrannical regime may have met the necessary and sufficient conditions for constituting a shared agent of its kind, an organised crime syndicate, and so would be capable of unified agency that makes its individual members responsible authors

of the regime's actions. But such a regime does not personify the people it rules.

In a tyranny, the tyrant does not personify the people, and there is no other candidate. Although I will subscribe to a part of Kant's political philosophy in the next section, I do not subscribe to his view that the legislative head of state must never be resisted because only the legislature can speak for the general will.³⁸ It may be the case that, although no body other than a current head of state can possibly speak for the general will, neither can the current head of state. The general will in some circumstances may simply not exist; it may never have existed or it may have gone out of existence. It does not follow from there being a duty to leave the state of nature that it is impossible to be returned to the state of nature, or that one must act as if it is impossible.³⁹

If the tyrant does not speak for the people, the people is mute, and incapable of competent, unified moral agency – incapable of competent willing. Sufficiently determined pollsters or social scientists conceivably could measure public opinion in a tyrannised society, but a poll merely aggregates; it cannot unify. Poll results no more speak for the will of a people than a listing of a person's desires speaks for the will of a person.

So Mill almost has it right about barbarous peoples. He is just wrong about the barbarians. A people that is not capable of shared agency simply is an aggregation of individuals who exist in a state of nature with each other and with other peoples. So, he is right that 'the only moral laws for those relations are the universal rules of morality between man and man'. Yet without further argument, such men are presumed to be competent moral agents.⁴⁰

³⁸ See I. Kant, 'Doctrine of Right' (1797), in M. J. Gregor (ed.), *The Metaphysics of Morals* (Cambridge University Press, 1991), 131; Prussian Academy edition AK 6:320.

³⁹ Indeed, in a passage that generally denies the legitimacy of revolution in order to reform a despotism, Kant implies that the general will can dissolve through natural causes: 'Thus political wisdom, in the condition in which things are at present, will make reforms in keeping with the ideal of public right its duty; but it will use revolutions, where nature of itself has brought them about, not to gloss over an even greater oppression, but as a call of nature to bring about by fundamental reforms a lawful constitution based on principles of freedom, the only kind that endures.' I. Kant, 'Toward Perpetual Peace' (1795), in M. J. Gregor (ed.), *Practical Philosophy* (Cambridge University Press, 1996), 311–52; here 341, AK 8:374.

⁴⁰ Presumptively competent individual agents may fail to form a competent group agent due to a number of causes – physical danger, language barriers, lack of necessary infrastructure – that do not call into question their individual competence as agents. But might some causes of their failure to form a group agent count against their individual competence as well? If so, then a barbarous people could be evidence of barbarians, and I have been uncharitable to Mill. How might this be so? On a thick view

We now can give a partial answer to the question of whether setting a people free is a reason for coercion that meets the criteria of justified paternalism. (This laboured formulation reminds us that paternalism, as used here, is an attribute of reasons for action, not of actions themselves.) A society whose members are deprived of the most basic rights and freedoms might not count as a normative people at all. If what I have called the extravagant view is supported by the morally relevant political facts, there is no normative people to paternalise – there is no shared agent that is the locus of respect and responsibility – so the complaint of unjustifiably paternalising a people does not arise. The invaders are subject only to the ‘universal rules of morality’, standing in relation to each person as one stands to individuals in a state of nature. Alternatively, if such a society is to be counted as a normative people, it is a seriously impaired people, incapable of competent and effective shared agency and self-governance. Insofar as such a people has a will that is subject to being coerced by external military intervention, it is a will whose freedom is not very valuable, and a will that, by hypothesis, is overborne by the intervener for the sake of its own future freedom. Although such a people is capable of being forced for paternalistic reasons, such reasons under the circumstances overcome the ordinary presumption against paternalism. Of course, much more is needed to justify a military invasion than showing that objections to paternalism can be met.

IX

Individuals could concede that the people of which they are members has no ground to complain about being paternalised, but this hardly robs individuals of all moral complaint. Each can complain that as a mature, competent individual agent it is up to each to decide whether to accept the grave risks of violence, destruction and upheaval that an invasion and occupation would bring. Even if the risks to personal safety and restrictions on personal freedom that military intervention imposes are less onerous than life under tyranny, ordinarily it is no defence against the

of competent moral agency, failure to recognise one’s interest in overcoming coordination problems to form a group agent (when indeed one has such an interest) may count as a form of irrationality, and failure to be properly motivated by such an interest may count as weakness of will. On an even thicker, moralised view of competent individual agency, failure to recognise the moral law or to be properly motivated by the moral law may count as irrationality and so be a failure of competent agency. I have in mind a thinner view of irrationality here, under which prudential and moral mistakes are not *per se* impairments of agency.

charge of wrongdoing that one has replaced a worse wrongdoer. The conditions for justified paternalism by and large are not met in the individual case. So we still have not established that it is morally permissible to force individuals to become a free people.

The best response is to deny that the reason individuals are forced is for one's own sake, and so deny that the invasion paternalises individuals. True, each is being forced to constitute a free people, but this is being done for the sake of one's neighbours, or one's children, or one's neighbours' children. To see why this is a plausible non-paternalistic account of the reasons for intervention, we turn to Kant.

Unlike his social contract predecessors, who saw leaving the state of nature as the rational or prudent thing to do, Kant held that it was also a duty to do so. Once we interact in a way that might lead to disputes about our rights, we each have a duty to each other to enter into a civil condition, so that we are not judges in our own case. 'When you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition.'⁴¹ Only in that way do we treat each other with the respect that we are owed. Furthermore, 'each may impel the other by force to leave this state and enter into a rightful condition'.⁴² To realise my rights and yours, I may, and perhaps must, coerce you into meeting the conditions for shared agency.

For Kant, once a right has been established, there is no further question of whether the coercive enforcement of that right is justified. Rather, to have a right just is to have the authority to force compliance, and, correlatively, to have a strict duty of justice simply is to be subject to coercive enforcement.⁴³ Ordinarily, when one is justified in using force – say, in self-defence – one also is justified in enlisting the forceful aid of others. I do not have to stand by and watch you defend yourself against wrongful attackers. (Whether I have a duty to defend you or not depends in part on the risks and burdens I face.) On a vastly different scale, if you are justified in forcing your neighbours in a state of nature to do their duty and enter into a rightful condition with you, I do not have to stand by and let you force them alone. Perhaps in the self-defence case you may refuse my help and I must respect your refusal. If that is so, then if there is unanimous agreement among those in a wrongful state of nature that they want to stay that way, or that they do not want outside help in forcing each other into a rightful condition, then perhaps they too may

⁴¹ Kant, 'Doctrine of Right', 121, AK 6:307. ⁴² *Ibid.*, 124, AK 6:312.

⁴³ *Ibid.*, 57, AK 6:232.

refuse external help and outsiders must respect that refusal.⁴⁴ As a formal matter, however, just one person wrongfully kept in a state of nature would have the authority to invite the world's help in forcing her neighbours into a rightful condition, and, also as a formal matter, the intervener would then have a non-paternalistic reason to force individuals to be free. First-order moral considerations surely would tell against this being an all-things-considered sufficient reason for military intervention in such an unpromising case, but the example demonstrates the point: individuals may sometimes be forced to do their duty, and when that is so, they are not forced for their own sake, but for the sake of those to whom the duty is owed.

Kant admittedly is silent on whether we are permitted to force distant others who do not have a duty to enter into a civil relation with us to enter into one with each other, but it is precisely this extension of the view that would have to be made in order to justify forcing natural persons to constitute a free people. If this extension can be made, then the reply to the individual who complains about being paternalistically forced to constitute a free people is that, though indeed forced, he is not paternalised. Rather, he is being forced to comply with his natural duty to his fellow countrymen.

Now, Kant clearly repudiates forced colonisation, which might suggest that he would reject this extension:

Lastly, it can still be asked whether, when neither nature nor chance but just our own will brings us into the neighbourhood of a people that holds out no prospect of a civil union with it, we should not be authorised to found colonies, by force if need be, in order to establish a civil union with them and bring these men (savages) into a rightful condition (as with the American Indians, the Hottentots, and the inhabitants of New Holland) ... But it is easy to see through this veil of injustice (Jesuitism), which would sanction any means to good ends. Such a way of acquiring land is therefore to be repudiated.⁴⁵

But Kant here does not address colonisation in order to force savages to enter into a rightful condition with *each other*; rather, he rejects colonisation to force savages to enter into a civil union with *us*. In any case, the thrust of the passage is to put limits on the acquisition of land, rather than limits on the use of force.⁴⁶

⁴⁴ I say perhaps, because the analogy to refusing help in the self-defence case is not perfect. The duty to leave the state of nature may not be reciprocally waivable.

⁴⁵ Kant, 'Doctrine of Right', 86f., AK 6:266.

⁴⁶ I am grateful to an Editor of *Philosophy and Public Affairs* for directing me to this passage.

Because Kant's treatment of private right in a state of nature largely concerns the acquisition and transfer of external objects, one might be tempted to think that the sole purpose of public right is to adjudicate conflicts in the acquisition and transfer of property. If that were so, then a Kantian defence of a military intervention would depend, strangely enough, on whether the target regime has adequate civil courts to adjudicate property disputes. This is an excessively narrow reading of why Kant holds that we must leave the state of nature, however, and therefore an insufficiently demanding account of what it takes to enter (and I would say remain in) a rightful condition. To be secure in one's possessions is important in Kant because control over things secures our freedom. But the civil condition secures us more generally against the 'maxim of violence' that follows from the right of each in a state of nature to do what seems right and good.⁴⁷ Threats to our freedom can arise from many sources, including 'the inclination of men generally to lord it over others as their master'.⁴⁸ The provisional rights that a civil condition makes actual are not only rights to things, but rights to persons in the household, the limits of which mark off the correlative rights of wives, children and servants *against* mistreatment by their master. Such dependent persons, or passive citizens, never lose their natural liberty and equality. 'On the contrary, it is only in conformity with the conditions of freedom and equality that this people can become a state and enter into a civil constitution.'⁴⁹

The necessary conditions for the formation of a general united will among the active citizens are considerably more stringent:

In terms of rights, the attributes of a citizen, inseparable from his essence (as a citizen), are: lawful *freedom*, the attribute of obeying no other law than that to which he has given his consent; civil *equality*, that of not recognising among the *people* any superior with the moral capacity to bind him as a matter of Right in a way that he could not in turn bind the other; and third, the attribute of civil *independence*, of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people. From his independence follows his civil personality, his attribute of not needing to be represented by another where rights are concerned.⁵⁰

So a society in which large numbers of persons are denied their natural liberty and equality and in which perhaps no one possesses the three

⁴⁷ Kant, 'Doctrine of Right', 123, AK 6:312. ⁴⁸ *Ibid.*, 122, AK 6:307.

⁴⁹ *Ibid.*, 126, AK 6:315. ⁵⁰ *Ibid.*, 125, AK 6:314.

attributes of a citizen arguably remains a Kantian state of nature, even if there are mechanisms for the orderly transfer of property.⁵¹

Lest I be accused of conscripting Kant into a cause he would not recognise, let me be clear about my claim and its limits. My own view is that there is a non-paternalistic reason to force individuals who live side by side to become a free people: they each have a duty to leave the state of nature and enter into a civil relation with each other. If such a reason is sufficient to justify the force involved, then it does not matter that entering into a civil relation also is for the good of each. If there are sufficient non-paternalistic reasons for using force, it is otiose to inquire about the sufficiency of the paternalistic reasons. Kant does not address whether there is such a permission, let alone a duty, for any outsider to force others into a rightful condition. One might think that, since Kant insists that the legitimacy of existing authority not be questioned and that forced colonialism is repugnant, he cannot be enlisted in support of such a view: Kant would either deny that people living under tyrannical rule can be judged to not be in a rightful condition or deny that outsiders have any right to force them into a rightful condition. I have argued, however, that Kant puts fairly demanding conditions on what it takes to enter into a rightful condition, and that the case of the colonial land grab that he repudiates can be differentiated from our case: his savages have no duty to enter into a rightful condition with colonists before the colonists' arrival, but the savages do have a prior duty to enter into a rightful condition with each other. So my claim that there could be sufficient non-paternalistic reasons to force individuals to become a free people is not, as far as I can tell, inconsistent with Kant's political philosophy.⁵²

⁵¹ I am grateful to an Editor of *Philosophy and Public Affairs* for pressing me on this point.

⁵² Permission to intervene is one thing, a duty to intervene another. Since there are limits on the sacrifices morality requires us to make for each other, and since military intervention almost always is costly in blood and treasure, intervention often may be a sacrifice too great for morality to require. Surely Lord Byron had no duty to give his life for Greek independence. When the would-be intervener is a group agent, we must be careful in the aggregation and distribution of burdens across its members to assess sacrifice correctly. Monetary cost can be distributed widely, but death and injury are concentrated. The technical calculations of generals and the political calculations of elected officials about 'acceptable' casualty rates often involve morally unacceptable aggregation across lives that fails to treat individuals with respect. Each battlefield death must be justifiable to the soldier who is to die, and that is no easy matter. The justification goes something like this: from some morally appropriate *ex ante* point of view, the risk of death that you face is reasonably proportionate to the moral importance of the ends at stake, fairly distributed, and decided under institutions or practices or

X

I have said a lot about the criteria for entrance, but nothing about the criteria for exit. How free does a people have to be before the intervener must withdraw?⁵³ An obvious worry about a claim that interveners may or must stay until a well-functioning democracy has been established is that there are precious few well-functioning democracies around the globe. Does the argument for democratic institution-building underwrite a frighteningly broad permission to engage in never-ending democratic jihad wherever there are defects in collective will formation?

The worry is misplaced, and would be misplaced even if it turned out that *no* country in the world meets the test of legitimacy. This is because even if there are no governments that are morally immune from intervention by virtue of respect accorded to them in light of the respect due to the subjects they represent, first-order moral considerations will ordinarily forbid intervention, because intervention will do more harm than good, destroy more than build, and inflict misery and danger on innocents that cannot be justified to them.

procedures that are connected to you in ways that respect your equal freedom. The argument for the correct point of view is crucial: if too *ex ante* and general, the separateness of persons is threatened and too much individual sacrifice is permitted; if too *ex post* and particular, nearly all have vetoes and not enough individual sacrifice is permitted. Justifying sacrifice for the end of repelling an existential threat to one's own normative people is easier than justifying sacrifice for the end of establishing the normative peoplehood of others. Why? Recall that to be both a free enough author and a free enough subject of the collective agent for this purpose in this way, one either has to have consented, or have voluntarily benefited from the cooperation of others, or have intentionally created reasonable expectations, or face a practical necessity. Dangerous military service is a practical necessity primarily in defence of one's own people, and the other conditions are less likely to be met in the case of intervention as well. So group agents may be prohibited from requiring its members to fight in otherwise permissible interventions. A volunteer force fares better in this regard than a conscript army, but there are substantive limits to the risks that can be imposed even on recruits, just as there are limits to the risks that can be imposed on voluntary employees. Let us then isolate the question of whether there is any sort of presumptive duty upon outside powers to force others into a civil condition with each other from the question of how much sacrifice is beyond the call of duty. Suppose the fantasy of the gunboat diplomat came true, and some intervener had the absolute power to force others into a civil condition by making a nearly costless but credible threat that puts none of the intervener's soldiers at the slightest risk. If there is any sort of duty of rescue among unconnected strangers of the pull-the-drowning-baby-out-of-the-puddle variety, then there is a duty of intervention in this case too. But such pure cases are implausible.

⁵³ I thank Melissa Seymour for pressing me on this point.

There are second-order considerations that tell against democratic jihad as well. An advantage of the view presented here is that there is an important asymmetry between conditions for entrance and conditions for exit. Suppose that there were some form of theocracy in which the conditions of normative peoplehood and of political legitimacy, though far from ideal, surpass the threshold that immunises that regime from outside intervention. Or suppose that there were some form of rule by an autocrat that met the threshold conditions.⁵⁴ Further suppose that constituting a normative people along the lines of a theocracy or an autocracy is the preferred option among an occupied population, and would also be both quicker and less costly in blood and treasure to bring about.⁵⁵ It still does not follow that the intervener must, or even may, aim at theocracy or autocracy. By assumption, both of these forms of rule, if established, would be owed respect and so be immune from intervention. But until a normative people is constituted, there is no competent will of the people that is owed such respect. The fact that most want a theocracy or an autocracy is simply that: a social scientific fact that by itself has no legitimate authority at all. Strange as it may sound to ears that conflate cultural sensitivity with political respect, until individuals are constituted in the normative sense as a free people, nothing is owed to the people in the anthropological sense qua people.

Much, of course, is owed to individuals. There are limits to how much each can be asked to sacrifice for the freedom of his neighbour. Just as first-order moral considerations and the probabilities of success may tell against intervention in the first place, first-order moral considerations

⁵⁴ There are two separate thresholds at play: minimal normative peoplehood and minimal political legitimacy. A collectivity can count as an impaired normative people but fail to have political legitimacy. Here I am assuming that the theocracy and the autocracy meet both tests. Both forms of government would have to minimally satisfy both the human rights prong and the representativeness prong of the test for political legitimacy. In the case of the theocracy, this would require, among other matters, that women be granted more personal freedom than is commonly the case in societies ruled by Islamic law today, and that non-conforming religious beliefs and practices, though politically disfavoured, be tolerated. In the case of the autocracy, the ruler would need to be not only responsive to the interests of his subjects but also, in some measure, responsive to their wills, as Louis XVI appeared to be when he called for the *Cahiers de Doléances* in 1789. I have in mind forms of rule that meet Rawls's notion of a decent consultation hierarchy, rather than what he calls benevolent despotism. See J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

⁵⁵ In Iraq, we do not need to suppose. In the March 2007 ABC News poll, only a 42 per cent plurality of Iraqis thought a democracy was best for Iraq, with 34 per cent opting for a strong leader for life and 22 per cent for religious rule.

and the probabilities of success may tell against a more ambitious plan for regime change. Although the anthropological facts have no intrinsic normative force, they of course matter instrumentally. Though Mill is wrong about impossibility, surely he is right to worry that free institutions externally imposed are less likely to take root. So the changer of regimes must take into account blood, treasure and odds. And surely there is a diverse set of political institutions to choose from that are free enough and just enough. Over that range, respect for individual self-governance would trump the intervener's views about ideal collective self-governance – though how disagreement among individuals is to be resolved necessarily is underspecified in the absence of legitimate decision rules for resolving disagreements. But these all are what I have called first-order moral considerations. Until properly constituted as a shared agent, occupied persons simply are individuals owed respect as individuals. Therefore – here is the crucial point – this range of free enough and just enough political arrangements is likely to be narrower and more demanding than the range of constitutions and institutions that, once in place, are morally immune from intervention. Hence the asymmetry of criteria for going in and getting out.

The implication is striking: an occupying force may, and perhaps must, prevent the formation of some forms of government that it would not have been permitted to overthrow, had they existed.⁵⁶ So we have reached the surprising result that, in Iraq, US forces may and perhaps must prevent the formation of a minimally legitimate government in order to hold out for more extensive political freedoms and human rights protections, even if that is not what most Iraqis presently want. Although only the hardhearted can fail to be moved by the purple-fingered voters who braved political violence to participate in peaceful

⁵⁶ I am not proposing that powers that have not yet intervened must forcefully stop the formation of legitimate but less-than-just institutions around the world. That indeed would be a counsel for global democratic jihad. Rather, once a power has chosen to intervene with force, and thereby has assumed responsibility for the fate of an occupied population, it acquires a presumptive obligation to forge not merely legitimate but also just institutions. This presumption can be rebutted on various grounds: the higher standard may be impossible to reach under the circumstances, or require too much sacrifice by the intervener, or impose too many burdens on the population. It is a mistake, however, to think that because fairly low levels of sacrifice by a would-be intervener are enough to make intervention merely optional, the same low level of sacrifice is enough to permit withdrawal. Even though it may be optional for an intervener to take a population under its protection, it is not equally optional to withdraw that protection.

elections in Iraq, the adoption of a constitution by referendum and the election of a parliament do not yet constitute a minimally legitimate government. They do not because a government is legitimate only when it can and does act to secure and protect a minimally adequate list of rights and freedoms on behalf of its free (enough) constituent individuals, and surely a government unable or unwilling to prevent widespread sectarian warfare has not met these conditions. Although protection of the basic rights and freedoms of Iraqis is of the utmost moral urgency, if my argument about the asymmetry of entry and exit is correct, the provision of this protection *by a minimally legitimate Iraqi government* may be considerably less urgent. The onset of legitimate government is not an unalloyed good, for one should not be indifferent between the establishment of a minimally legitimate government and a just and democratic government.⁵⁷ These, I hasten to add, are theoretical considerations. I make no claims about the actual capacity of this occupation force to bring about any positive political change whatsoever under the present circumstances.

XI

All foundings are forced. If we, collectively, are free, it is because we too have been forced to be free. In a state of nature, there are no legitimate procedures that can bootstrap us into legitimate government, although rhetoric that makes believe that there is such a procedure is a useful lubricant for achieving legitimate government. When some of us force others of us to be free, the victors look back with pride, the defeated beget political orphans, and so the next generation can tell a just-so story about freedom's origins that is often useful, largely harmless, and nearly always

⁵⁷ Admittedly, a principle that, for the sake of bringing about self-governance, prescribes an *indefinite* protectorate would be self-undermining in cases where legitimate but unjust self-governance is possible. Rawls says that the end of a just war is a just peace (Rawls, *The Law of Peoples*, 94). Similarly, intervention must have an end, with the temporal end driven by its purpose. In purely humanitarian interventions the end is protecting basic human rights, and this may require, without contradiction, indefinite occupation if self-rule that protects human rights is impossible. But an intervention that aims at forcing a people to be free has misfired if it finds itself permanently preventing possible legitimate self-governance. As with so many questions in non-ideal theory, reasonable people may make different judgments about how long an intervener may hold out for not merely legitimate but just self-rule before the intervention becomes self-undermining. I thank an Editor of *Philosophy and Public Affairs* for pressing me on this point.

false. But when they, the foreigners, force us to be free, shame replaces pride, and the just-so story is harder to tell. This is why the just-so stories about home-grown freedom are not entirely harmless – they set up founding expectations elsewhere that are normatively too demanding. The truth is different: sometimes a people must be humiliated before it can be free.

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INDEX

- 9/11 terrorist attacks, 256, 271
- Abu Ghraib prison, 271, 274
- accountability
- economic international institutions, 114–115
 - human rights protection, 237
 - international public law, 264
 - legitimacy of global governance institutions, 38, 44, 47–49, 50–53
- actual consent, 4–5, 174, 175
- Al-Qaida, 256
- Arendt, Hannah, 260
- Article 28 of the 1969 Vienna Convention of the Law of Treaties, 169
- Articles of Agreement
- IBRD, 95, 96, 99
 - IMF, 99, 149
- asymmetrical information, 50–52
- atrocities and freedom, 298–300
- authority
- consent to instrumental legitimacy, 1–12
 - human rights protection, 240–250
 - justification, 6–7
 - service conception, 5–7
- autonomy, 195, 200, 214–215, 219, 221, 229
- barbarians/barbarism, 275–277, 283, 299
- Beitz, Charles, 15, 166
- borders/boundaries, 245
- crossing effects, 195, 201
 - global justice, 222–230
- borrowing privileges, 201, 203
- Bretton Woods Conference, 99
- broad transparency, 48–49
- Buchanan, Allen, 4–8, 22–23, 61, 124, 159, 166, 180–183, 241, 258–265
- bureaucratic discretion, 4, 37, 38, 41
- Bush, George W., 270
- CAP *see* Community's Common Agricultural Policy
- Catholicism, 95, 104
- challenges to international public law, 253–258, 262
- China, 142, 146, 150, 151, 200, 258
- citizens' responsibilities, 238–250
- civil wars, 239, 275–277, 280
- civilised nations, 275–277
- climate change, 94
- coalitions, 238, 272
- COE *see* Council of Europe
- coercion
- forcing a people to be free, 272–309
 - global justice, 223–228
 - human rights protection, 236, 238
 - legitimacy of global governance institutions, 33
- Cohen, G. A., 24, 212
- Cohen, Jean, 229
- Cohen, Joshua, 225
- Coleman, Jules, 177
- collective agents, 286–291, 294–300
- procedures of shared agencies, 292
 - see also* group agency
- collective interventions, 236–250
- collective security, 144, 148, 156, 252, 254, 256, 266, 268
- colonisation, 302, 304
- communal relationships, 15, 190, 194–197, 200–201

- Community's Common Agricultural Policy (CAP), 109
- comparative advantage, 193
- comparative benefit, 43–44, 55, 56
- competent moral agency, 283, 299–300
- competing standards of legitimacy, 35–40
- Complex Standard of legitimacy, 40–56
- conduct evaluation, 128–132
- consent
 - human rights protection, 242
 - legitimacy, 2–5, 36–39, 174
- contestation of global governance
 - institutions, 52–53
- continuing harm, 201–202
- contractual models, 238, 245
- Copenhagen Criteria, 139
- corrective justice, 15, 190–191, 197–198, 201–202
- cosmopolitanism
 - democracy, 110–117
 - economic international institutions, 110–117
 - global justice, 207–230
 - international law and justice, 165, 178
 - justice, 14–18, 110–117
 - legitimacy of international law, 176
- costs of human rights protection, 235, 236, 238, 239, 241, 244
- Council of Europe (COE), 136–140
- credit systems, 198–199
- cultural dimension challenges, 256
- cultural identity, 257
- cultural property, 176, 178
- Darfur, 157
- decision-making, 125, 141–159
 - IMF, 149–151
 - outcomes, 151–159
 - UN, 141–149
- deliberative global *demoi*-cracy, 71, 74–75, 77–84
 - international forum, 79–80
 - modalities, 81–84
 - national forum, 77–79
 - participation, 81–82
 - representation, 82–84
 - supranational forum, 79–80
- demands of justice, 188–191
- democracy
 - accountability, 38, 51
 - economic international institutions, 110–117
 - global governance institutions, 53–54
 - human rights, 10–11, 240–250, 261
 - institutionalising global *demoi*-cracy, 58–85
 - international institutional reform, 58–85
 - international legitimacy, 61–65
 - jihad, 306
 - legitimacy of global governance
 - institutions, 37–40, 53–56
 - legitimacy of international law, 60–85
 - sovereignty, 54–56
 - supranational democracy, 66–68, 79–80
 - state consent, 4–5, 37–39
- demoi*-cracy *see* deliberative global *demoi*-cracy; global *demoi*-cracy
- deprivation, 233
- descriptive legitimacy, 2
- desiderata for a standard of legitimacy, 40–41
- destitution, 101
- detritorialised global *demoi*-cracy, 70–74
- difference principle, 15, 212, 213–215, 220
- diffused responsibility, 235, 236
- diseases, 114
- distributive justice, 15
 - communal relationships, 190, 200–201
 - economic international institutions, 116–117
 - global justice concepts, 194–197
 - international law, 165–184
 - legitimacy, 25
 - liberalism, 17
- diverse representation, 83
- dualism, 210–215
- duties
 - cosmopolitan global justice, 215–222
 - economic international institutions, 93–94, 100–119

- forcing a people to be free, 296
- international law and institutions, 126–127
- international law and justice, 167
- of assistance, 15, 16, 167, 209–210
- of justice, 208–210, 218, 219, 241
- of omission, 218
- of states, 127
- of virtue, 218
- UN, 152–159
- see also* negative duties; positive duties
- economic cooperation, 196
- economic international institutions
 - accountability, 114–115
 - cosmopolitan democracy, 110–117
 - cosmopolitan justice, 110–117
 - democracy, 110–117
 - distributive justice, 116–117
 - duties, 93–94, 100–119
 - functions, 93–94, 99–119
 - Hybrid Model, 117–118
 - justice, 95–96
 - legitimacy, 92–119
 - neutrality, 95–96
 - Pluralist Hypothesis, 97
 - poverty, 94
 - powers, 94, 96, 98, 99–119
 - responsibilities, 92–119
 - state-centric contractarianism, 98–110
- egalitarian cosmopolitanism, 165, 176
 - see also* cosmopolitanism
- elections, 1, 107, 285, 307
- entitlement factors, 178
- epistemic aspects of legitimacy, 30, 45–52
- equality, 142, 200–201, 207, 209, 213, 214
- ethics, 123, 124, 125–160, 163–184
- European Convention on Human Rights, 136, 137
- European Court of Human Rights, 136
- European democracies, 136
- European states
 - international law, 253
- European Union (EU)
 - citizenship, 79
 - Council of Europe, 136
- exchange relationships, 15, 188–189
- exit criteria, 305–308
- external challenges to international public law, 256–258
- external epistemic actors, 53
- external links to global governance institutions, 52–53
- factual knowledge, 46
 - see also* epistemic aspects of legitimacy
- fair market, 189
- fair rules, 192
- fairness, 46, 189, 192
- Fallujah, 274
- favouritism, 9–11, 123–160
- feasibility of global democracies, 25
- forceful intervention, 167
- forcing a people to be free, 7, 270–309
 - impossibility, 277–281
 - see also* paternalism
- foundation of international public law, 252–253
- framing conditions, 192
- France, 146, 245, 281, 284, 287, 288
- free trade, 193
- freedom, 7, 270–309
- functions of economic international institutions, 93–94, 96, 99–119
- GATT, 193, 198
- general duties in international law and institutions, 126–127
 - see also* duties
- Geneva Manuscript*, 278
- genocide, 154, 239
- geographical proximity, 248
- Germany, 133, 150, 213–214, 250, 280
- global democracy
 - feasibility, 25
 - institutional reform, 58–85
 - institutionalising global *demos*-cracy, 58–85
 - international institutional reform, 58–85

- global democracy (cont.)
 - legitimacy of global governance
 - institutions, 39–40, 53–54
 - legitimacy of international law, 60–85
 - theorising, 66–75
- global *demoi*-cracy
 - concept, 68–70
 - deliberation, 71, 74–75, 77–84
 - detritorialisation, 70–74
 - transnational forum, 80–81
- global governance institutions
 - assessing legitimacy, 31–35
 - legitimacy, 29–56
- global justice
 - boundaries, 222–230
 - concepts, 191–198
 - cosmopolitanism, 207–230
 - international law, 186–204
 - national boundaries, 222–230
 - reform, 202–204
- global market trade and credit systems, 198–199
- global organisations' membership, 132–136
- global public law, 262–268
- Good Samaritan acts, 235, 243
- governance institution legitimacy, 29–56
 - group agency, 284–309
- historic justice, 163–184, 201–202
- historical consent, 3–4
- Human Development Report, 114
- human rights
 - Council of Europe, 138
 - democratic procedures, 10–11
 - economic international institutions, 106–107
 - European Court of, 136
 - forcing a people to be free, 287
 - global governance institutions, 42–43, 46
 - institutionalising global *demoi*-cracy, 7
 - international institutions' impartiality, 152–159
 - international law, 25, 65, 164, 254, 255–256, 259–268
 - justice, 16–17, 164
 - legitimacy factors, 10–11, 42–43, 46, 65
 - moral duties, 215–218
 - people's rights, 106–107
 - political justice, 194
 - procedural legitimacy, 10–11
 - protection responsibilities, 232–250
- Humanitarian International Law, 254
- humanitarian interventions, 234–250, 254, 255–256, 259–260
- Hume, David, 3, 229
- humiliation, 274, 282
- Huntington, Samuel, 241, 243
- Hussein, Saddam, 1, 44, 270, 271, 272
- Hybrid Model of legitimacy, 23, 117–118
- hypothetical consent, 3–4
- IAEA *see* International Atomic Energy Agency
- IBRD *see* International Bank for Reconstruction and Development
- ICC *see* International Criminal Court
- ideal institutional principles, 20, 21, 25
 - see also* ideal theory; non-ideal theory
- ideal non-institutional principles, 20, 22
- ideal theory, 18–26
- illegitimate states, 107–109
- ILO *see* International Labour Organisation
- IMF *see* International Monetary Fund
- immigration, 165
- impartiality
 - IMF, 9
 - international institutions, 9–11, 123–132, 128–160
 - UN Security Council, 9
- imperialism, 192
- impossibility of forcing a people to be free, 277–281
- indignation, 282–283
- individual moral duties, 215–222; *see also* duties
- inequity, 125
- information accessibility, 48

- informational asymmetries, 50–52
- injustice of contemporary international society, 163–184
- injustices in the present international system, 198–202
- institutional integrity, 44–45
- institutional legitimacy, 31–56
- institutional reform, 58–85
- institutionalising global *demoi*-cracy, 58–85
- institutions
 - legitimacy of economic international institutions, 92–119
 - legitimacy of global governance institution, 29–56
 - legitimacy standards, 22, 92
 - see also* economic international institutions; international institutions
- instrumental legitimacy, 1–12
- integrity, 44–45, 55
- intermeshing aims and plans of shared agencies, 290–291; *see also* collective agents; group agency
- internal challenges to international public law, 253–256
- international, 126
- International Atomic Energy Agency (IAEA), 257
- International Bank for Reconstruction and Development (IBRD), 95, 199
- International Commission on Intervention and State Sovereignty, 158, 234
- international communal relationships, 194–197
- International Court of Justice, 134
- international credit systems, 199
- International Criminal Court (ICC), 30, 248
- international ethics, 163–184
- international global democracy, 66–68
- international global *demoi*-cracy, 79–80
- international institutional reform, 58–85
- international institutions
 - bureaucratic discretion, 4
 - conduct evaluation, 128–132
 - decision-making, 125, 141–159
 - favouritism, 9–11, 123–160
 - impartiality, 9–11
 - international law, 58–85
 - legitimacy, 22, 92–119
 - membership, 125, 132–140
 - neutrality, 95–96
 - powers, 141–159
 - responsibilities, 92–119
 - targets for action, 123, 125
 - see also* economic international institutions
- international justice
 - ideal theory, 18–26
 - liberalism, 13–18
 - non-ideal theory, 18–26
 - see also* global justice
- International Labour Organisation (ILO), 154
- international law
 - democracy and legitimacy, 60–85
 - distributive justice, 165–184
 - favouritism, 123–160
 - global justice, 186–204
 - historic justice, 163–184
 - human rights protection, 233, 234, 247–250
 - injustice of contemporary international society, 163–184
 - international institutions, 58–85, 123–160
 - justice, 163–184
 - legitimacy, 25, 60–85, 163–184, 172–184
 - multilateral legislative modes, 76–84
 - quasi-legislative modes, 76–84
- international legitimacy
 - democracy, 61–65
 - justice, 12–14
 - normative authority, 1–12
- international libertarianism, 17, 166, 179, 184

- International Monetary Fund (IMF)
 Articles of Agreement, 99
 coercion, 225
 decision-making, 149–151
 duties, 93–94
 Executive Board, 149
 Executive Directors, 149
 impartiality, 9
 international credit systems, 199
 legitimacy, 30, 45, 92–93, 99, 101, 114
 political actors, 104
 powers, 105–106, 149–151
 international power, 193–194, 200
see also power
 international public law
 challenges, 253–258, 262
 external challenges, 256–258
 foundations, 252–253
 global public law, 262–268
 internal challenges, 253–256
 military force, 252–268
 UN reform, 262–268
 violence threats, 252–268
 international trade, 192–193, 198–199
 International Trusteeship System, 152
 international wrongness relationships,
 197–198
 Iraq
 forcing a people to be free, 270–271,
 273–274, 284, 308
 Oil-for-Food, 44
 Saddam Hussein, 1
ius gentium, 252–254
ius gentium positivum, 253
 Japan, 280
 jihad, 306
jus ad bellum criteria, 271
jus in bello rules, 271
 just war theory, 17
 justice
 cosmopolitan liberalism, 14–18
 demands, 188–191
 economic international institutions,
 95–96
 favouritism and international
 institutions, 124, 131–160
 forcing a people to be free, 271
 human rights protection, 241
 ideal theory, 18–26
 international law, 163–184
 international legitimacy, 12–14
 legitimacy, 12–14, 35
 liberalism, 12–18
 non-ideal theory, 18–26
 Rawlsian social liberalism, 13–18
 social liberalism, 13–18
 war, 271
 justification of authority, 6–7
 Kant, Immanuel
 duties of justice, 218–219, 222
 forcing a people to be free, 299,
 301–304
 international public law, 253, 265, 267
 Keohane, Robert O., 262
 Kosovo intervention, 155
 Kumm, Matthias, 171, 175, 176, 180
 legal order, 259, 260
 legitimacy
 actual consent, 4–5, 174
 assessments, 31–35
 authority, 5–7
 competing standards, 35–40
 Complex Standard, 40–56
 consent, 2, 3–5, 36–39
 democratic state consent, 4–5,
 37–39, 62–63
 distributive justice, 25
 economic international institutions,
 92–119
 favouritism and international
 institutions, 124–125
 forcing a people to be free, 297–300
 global governance institutions, 29–56
 governance institutions, 29–56
 historical consent, 3–4
 human rights protection, 240–250
 Hybrid Model, 23
 hypothetical consent, 3–4
 IMF, 99
 instrumentalist, 1–12
 international institutions, 22
 international law, 25, 60–85,
 163–184, 172–184

- justice, 12–14, 35
 - normative authority, 1–12
 - procedural, 2, 9–12
 - self-interest, 32–35
 - service conception of authority, 5–7
 - standards, 22, 29–56
 - state consent, 4–5, 36–39
 - thick legitimacy, 174, 177
 - thin legitimacy, 174
 - World Bank, 99
 - WTO, 29, 31
- liberalism
 - ideal theory, 18–26
 - justice, 12–18
- liberation and freedom, 274
- libertarianism
 - international law and justice, 166, 168–170, 178
 - legitimacy of international law, 176
- liberty
 - forcing a people to be free, 275–276, 279–289, 282–309
- Louis XIV, 281, 284
- malnutrition, 114
- Marrakesh Agreement, 99
- mass protests, 35
- Médecins sans Frontières, 237
- membership
 - COE, 136–140
 - international institutions, 125, 132–140
 - regional organisations, 136–140
 - Security Council, 9
 - UN, 132–136
 - WTO, 31, 135–136
- military force
 - forcing a people to be free, 270–309
 - human rights protection, 234, 239, 241–243, 246
 - international public law, 252–268
- Mill, John Stuart, 275–277, 278–281, 283, 299, 307
- Millennium Development Goals, 94
- Miller, David, 16–18, 128, 129, 159
- Minerva Lecture, 259
- minimal democracy, 261
 - see also* democracy
- minimal moral acceptability, 42–43, 55, 56
- modalities of deliberative global *demoi-*cracy, 81–84
- monism, 17, 210–215
- moral commitment, 260
- moral disagreement, 41–42, 46
- moral obligations, 17, 260, 262, 263, 264
- moral permissibility, 7
- moral right, 260
- morality
 - cosmopolitan global justice, 210–222
 - economic international institutions, 106–107
 - favouritism and international institutions, 123–124, 129–130
 - forcing a people to be free, 270–309
 - human rights protection, 233, 244
 - justice and international law, 163–184
 - legitimacy of global governance institutions, 32, 33–34
- Mormon polygamy in the Utah Territory, 275
- multilateral legislative modes, 76–84
- Nagel, Thomas, 163, 173, 223–228
- Najaf, 274
- narrow accountability, 48
- national borders/boundaries, 222–230, 245
- national deliberative global *demoi-*cracy, 77–79
- national democracy, 66–68
- nationalism, 243
- nation-states, 208–209, 222–230
- NATO, 234, 238
- natural disasters, 233, 239
- natural resources, 194
- negative duties
 - cosmopolitan global justice, 210, 216–218
 - economic international institutions, 101–102
 - legitimacy of international law, 179
 - see also* duties
- non-discrimination, 132

- non-ideal institutional principles, 20, 23, 24, 25
see also ideal theory; non-ideal theory
- non-ideal non-institutional principles, 20, 22
see also ideal theory; non-ideal theory
- non-ideal theory, 18–26
- Nonproliferation of Nuclear Weapons (NPT), 257
- normative authority, 1–12
- normative peoplehood, 285, 289, 295
- norms
 binding rules or norms, 95, 97–98, 99–119
 moral norms, 261, 263
- Nozick, Robert, 18, 166, 168
- NPT *see* Nonproliferation of Nuclear Weapons
- nuclear weapons, 254, 257
- nullum crimen sine lege*, 170
- occupied France, 281, 284, 287
- Oil-for-Food Program, 44
see also United Nations
- On Liberty*, 275
- open-door bargaining, 51
- Operation Iraqi Freedom, 270
- Organisation for Security and Cooperation in Europe, 137
- Oxfam, 237
- P5 rights, 144–146, 155
see also Security Council
- participation factors, 81–82
- paternalism, 7, 277–309
- peace operations, 156, 255–268
- peoplehood, 284–289, 295
- peoples
 forcing a people to be free, 270–309
- Pluralist Hypothesis, 97
- Pogge, Thomas, 17, 100, 126, 179, 200
 cosmopolitan global justice, 210, 213–222
- political agency, 294–309
- political autonomy, 195, 200, 229
- political economic international institutions, 102–106
- political justice, 15
 cosmopolitan global justice, 210
 international power constellations, 193–194
 power relationships, 189
- political legitimacy, 297–300
- politics of favouritism in international institutions, 123
- pollsters, 274
- popular sovereignty, 73–74
- positive duties, 101–102, 217–218, 219–222
see also duties
- poverty
 corrective justice, 201
 cosmopolitan global justice, 207, 210–215
 economic international institutions, 94, 100, 101, 114
 international law and global justice, 186–187
 moral duties, 215–218
- power
 distorted structure, 200
 economic international institutions, 94, 96, 98, 99–119
 IMF, 105–106, 149–151
 international institutions, 141–159
 political justice, 189, 193–194
 UN, 141–149
- pre-emptive military strikes, 256
- principle of equal vulnerability, 172
- principle of just acquisition, 168
- principle of justice in transfer, 168
- principle of rectification, 168, 170
- private banks, 199
- private economic international institutions, 102, 199
- procedural fairness, 24
- procedural legitimacy, 2, 9–12
- property, 178, 303, 304
- protecting human rights, 232–250
see also human rights; rights
- protection gaps, 246, 250
- protectionism, 193
- public opinion polls, 274, 285
- quasi-legislative modes, 76–84

- racism, 243
- Rawls, John
 - cosmopolitan global justice, 208, 210, 212, 214, 220, 223, 228
 - international public law, 258
 - social liberalism, 13–18
- reasonable disagreement, 23, 116–117
- rectification, 168, 170, 177, 178
- reflective representation, 83–84
- reform
 - global justice, 202–204
 - UN, 262–268
- regional organisations' membership, 136–140
- relations of affinity, 128
- religion, 95, 104, 257
- representation
 - deliberative global *demos*-cracy, 82–84
 - shared agency, 291
- rescue, 235–236, 243–245, 246, 247
- resources
 - distributive justice, 201
 - human rights protection, 236
 - international law and justice, 165, 170–172
- responsibilities
 - economic international institutions, 92–119
 - human rights protection, 232–250
 - legitimacy of international law, 178
- restitutive justice, 190
 - restitution of objects, 178
- retributive justice, 191
- revisability of global governance
 - institutions, 52–53
- revolutions, 275–277, 280
- right to rule, 29, 36
- rights
 - favouritism and international institutions, 160
 - P5 rights, 144, 155
 - people's rights, 106–107
 - protection, 106–107
 - violations, 107, 179, 233–250
 - see also* human rights
- risk, 236
- Rousseau, J.J., 278
- Rwanda, 152, 157, 234, 273
- Sabel, Charles, 225, 227
- safe water, 114
- sanitation, 114
- Second World War, 142, 254, 281
- Security Council *see* United Nations
- self-defence, 301
- self-determination, 38, 164, 167
- self-interest, 32–35
- service conception of authority, 5–7
- shared agency
 - aims, 290–291
 - conditions, 289–295
 - forcing a people to be free, 284–309
 - impersonation, 291
 - plans, 290–291
 - procedures, 292
 - representation, 291
- Simmons, A. John, 172, 173–176, 180
- social function of legitimacy
 - assessments, 31–32
- social liberalism, 12–18, 166, 171
- soldiers, 241–243
- Somalia, 156, 241, 255, 273
- sovereignty
 - communal relationships, 200–201
 - deterritorialised global democracy, 73–74
 - global justice, 223–224, 226–227, 229
 - human rights protection, 234–235, 245
 - IMF, 150
 - international law and justice, 164, 165, 166–167
 - international public law, 254
 - legitimacy of global governance institutions, 39, 54–56
 - UN, 142–143, 158
- special duties in international law and institutions, 126–127
 - see also* duties
- standards of legitimacy, 22, 29–56
 - see also* legitimacy
- Stasavage, David, 51
- state consent, 4–5, 36–39
- state responsibility, 236, 238–250
- state-centric contractarianism, 98–110
- subsidies, 109, 116

- Sudan, 157
- supranational democracy, 66–68, 79–80
- targets for action, 125
- tariffs, 109, 116, 136
- taxes, 237
- terrorism, 239, 256, 270–271
- theft, 176
- theorising global democracy, 66–75
- theory of the second-best, 20
- transactional justice, 15, 188–189, 192–193
- transnational democracy, 66–68, 80–81
- transnational politics, 200
- transparency, 48–49, 51–52
- Treaty on European Union, 136
- Treaty on the Nonproliferation of Nuclear Weapons, 257
- tyrannies, 276–277, 298–300, 304
- UN *see* United Nations
- uncertainty, 41–42, 46, 47, 51
- unfairness, 125
- see also* impartiality
- unified agencies, 290–295
- United Nations (UN)
- Charter, 142, 152
 - duty of states, 127
 - international public law, 252, 254
 - decision-making, 141–149, 152–159
 - Declaration, 247
 - General Assembly, 141–145
 - Human Development Report, 114
 - human rights protection, 237, 238, 247, 249
 - international credit systems, 199
 - international public law, 252–253, 254–256, 257, 258, 262–268
 - International Trusteeship System, 152
 - membership, 132–136
 - Millennium+5 Summit Declaration, 158
 - Oil-for-Food scandal, 44
 - powers, 141–149
 - reform, 262–268
 - decision-making, 146–149, 152–159
 - human rights protection, 235
 - impartiality, 9
 - international public law, 252, 255, 256, 258, 262, 266
 - legitimacy, 30, 44
 - membership, 9
 - Sanctions Committee, 31
 - Security Council, 141–145
 - transnational politics, 200
 - United States (US), 137, 144, 146, 150, 156, 200, 271, 273–274
 - utilitarian arguments, 131
- Vienna Convention of the Law of Treaties, 169
- Vienna Convention on Diplomatic Relations, 127
- Vienna Treaty on the Law of International Treaties, 255
- violations of rights, 179, 233–250
- see also* human rights; rights
- violence
- forcing a people to be free, 270–309
 - international public law, 252–268
- voluntariness, 37
- volunteers
- human rights protection, 237, 242, 245
- voting, 1, 107, 285, 307
- Walzer, Michael, 17, 242, 247, 258–265
- war
- forcing a people to be free, 270–309
 - international public law, 252–268
- War on Terrorism, 256
- weapons of mass destruction, 194, 257, 270
- Wellman, Christopher, 129
- Westphalian Peace Treaty, 252, 253
- Wolfowitz, Paul, 273
- World Bank
- accountability, 47
 - binding norms, 95
 - international credit systems, 199
 - legitimacy, 92–93, 99, 105
 - neutrality, 95
 - political actors, 104
 - powers, 105–106

- World Trade Organisation (WTO)
- Articles of Agreement, 99
 - coercion, 225
 - duties, 94
 - global justice, 413
 - international law and global justice, 198
 - legitimacy, 29, 30, 31, 37, 45, 92–93, 101, 114
 - mass protests, 35
 - membership, 31, 135–136
 - political actors, 104–105
 - world wars, 254, 281
 - wrongness relationships, 15, 190–191, 197–198, 201–202
 - WTO *see* World Trade Organisation