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# THE THIN JUSTICE OF INTERNATIONAL LAW

A MORAL RECKONING OF  
THE LAW OF NATIONS



STEVEN R. RATNER

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*A Moral Reckoning of the Law of Nations*

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*To Nancy, Ben, and Isabel,  
With love and appreciation*

## *Peace*

WHEN will you ever, Peace, wild wooddove, shy wings shut,  
Your round me roaming end, and under be my boughs?  
When, when, Peace, will you, Peace? I'll not play hypocrite  
To own my heart: I yield you do come sometimes; but  
That piecemeal peace is poor peace. What pure peace allows  
Alarms of wars, the daunting wars, the death of it?

O surely, reaving Peace, my Lord should leave in lieu  
Some good! And so he does leave Patience exquisite,  
That plumes to Peace thereafter. And when Peace here does house  
He comes with work to do, he does not come to coo,  
He comes to brood and sit.

Gerard Manley Hopkins

## *Acknowledgments*

This book has been percolating inside me for many years. As I have grappled with issues of war, peace, and human rights from the perspective of international law, I have been nagged by the sense that the truly paramount questions and answers on these matters were beyond law, in the realm of ethics and morality. As I have discovered and navigated my path through international law and philosophy, many people have helped guide me.

I begin by expressing my appreciation to a group of philosophers who helped me navigate the bridge from international law to ethics and global justice. Robert Kane and John Deigh initiated me into key contemporary philosophical debates while I taught at the University of Texas School of Law. In more recent years, Elizabeth Anderson, Allen Buchanan, and Robert Goodin have shared countless conversations and exchanges with me, simultaneously pointing out the shortcomings of my arguments and encouraging me to dig deeper as well as share my work with philosophers. Other scholars steeped in ethics have provided enormously useful commentary on various chapters of this book—Rainer Forst, Kristen Hessler, David Lefkowitz, Daniel Philpott, and Mathias Risse.

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Although the vast majority of this volume represents material not published before, parts of Chapter 1 appeared in the 2013 volume of *International Theory*, in Ulrich Fastenrath et al. (eds.), *From Bilateralism to Community Interest: Essays in Honor of Bruno Simma* (Oxford: Oxford University Press, 2011), and in Mahnouch Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Leiden: Brill, 2010). Parts of Chapter 2 appeared in the 2005 volume of *Legal Theory*, and one part of Chapter 5 appeared in the 1996 volume of the *American Journal of International Law*. An earlier version of Chapter 7 was published in Lukas Meyer (ed.), *Legitimacy, Justice, and Public International Law* (Cambridge: Cambridge University Press, 2009).

Long before I had any inkling of what global justice or human rights were, my parents, Anne and Milton Ratner, encouraged me to learn and think about social justice as well as the fate of those beyond our borders. In the years during which I have made those concerns central to my professional life, I have always been able to count on my wife Nancy and my children, Ben and Isabel, to keep everything in perspective. I cannot offer enough thanks to them for their support in this and all my other endeavors.

Steven Ratner  
Ann Arbor

Michigan  
September 2014

## *List of Shorthand References used in Footnotes*

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- VCLT: Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331

*Note: All abbreviations used in the text (other than UN, EU, UK, and US) are spelled out in full the first time they appear in a chapter. Journal abbreviations used in the footnotes are spelled out in full in the Bibliography.*



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## Introduction:

# Looking for Justice in International Law

In a world suffused with war and human misery, global justice remains one of the most compelling missions of our time. Philosophers, political scientists, historians, international legal scholars, and others have all sought to make their mark on global justice debates, whether through abstract theorizing, qualitative and quantitative empirical examination, or the development of norms and institutions for effecting justice. Each discipline must eventually put its faith in real-world decisionmakers—states, international organizations, NGOs, corporations, citizens, and others—to carry out its particular visions.

To date, much of the intellectual effort on theorizing global justice has been within political and moral philosophy. Ethical theory from these disciplines has asked the fundamental questions about what individuals or states owe one another and, in some cases, how such relationships can be imagined through domestic and international structures. Scholarship over the last generation or two is quite advanced, moving beyond issues of global distributive justice that dominated in the wake of Rawls' *A Theory of Justice* to address manifold questions of war and peace, self-determination, environmental degradation, global poverty, and others.

Yet philosophical accounts of global justice have more often than not stayed clear of international law, refraining from discussing both its actual workings and the scholarship about it. International law represents a system of norms and processes for resolving competing claims, moral, political, and otherwise, among international actors in a manner both legitimate to them and effective among them. It includes institutions, whether viewed as the conceptual building blocks of world order (for example statehood, global commons, or human rights) or as formal international organizations in which those actors have rights and responsibilities.

International law is critical to global justice in three senses. First, international law transforms moral prescriptions into legally binding rules with implementation mechanisms and processes. Law and legal institutions both constrain and expand opportunities for carrying out visions to advance the cause of global justice. Without some sort of legal form, the ethics of global justice remains academic, or at least incompletely realized. Second, international law tells us something about what morality and justice at the international level mean in the first place. The law is intrinsic to the normative universe of practices, institutions, and expectations

that form our understandings about global justice. And third, the rules and structures of international law turn out to have their own morality and represent a real-world, albeit far from ideal, incarnation of a vision of global justice. We can learn a great deal about the current state, as well as future promise and limitations, of global justice by examining the legal regimes to which states have already agreed. Much philosophical work seems to assume the law to be irrelevant for the derivation of theory or has mischaracterized it to suggest fundamental incompatibilities between global justice and international law.

The disconnect is not one-way. International lawyers, for their part, especially academic ones, either ignore global justice as something belonging to morality and thus outside the law; construe it narrowly as international criminal justice or perhaps the decisions of international courts; or equate it, in an undertheorized way, with a greater concern for populations that have been marginalized in the international legal system. The discipline refuses to see the obvious—that so many choices confronting international actors involved in prescribing, interpreting, and enforcing international law are *ethical choices*. Without ethics, the law of global justice is ad hoc or at best a matrix of bargains.

## The Argument and its Aims

This book offers a new approach to global justice that integrates the work and insights of international law and ethics. It offers an analysis of the international legal order for its contribution to global justice. My specific thesis is three-fold.

*First*, I argue that the core norms of international law, even if they came about as a result of political compromises, power politics, and historical contingencies, conform in major respects to a standard of global justice deserving of the name. Under that standard, one that I term ‘thin’ justice, the justice of international law norms is assessed in terms of two principles or ‘pillars’—their advancement of international and intrastate peace and their respect for basic human rights. *Second*, in some important areas, those core norms do not, or might not, meet that standard because they do not reflect the right considerations under those two pillars. Those norms are therefore currently or, if interpreted a certain way by decisionmakers, potentially, unjust. *Third*, reform of the rules and institutions of international law must take account of the justice reflected in the norms to date and, more broadly, the ethical ramifications of choices for new norms. Whether in changing an existing rule to meet the standard of thin justice or aspiring to a higher standard of global justice, we must remain aware of the risks to peace or human rights of alternative rules and not endanger what has been achieved to date.

In making these arguments, my goal is to demonstrate that to build a more just world order, we must understand what has been achieved in international law and institutions, including both the shortcomings of those rules and the risks inherent in some proposals for alternative rules. As Rawls wrote, ‘political philosophy

may try to calm our frustration and rage against our society and its history by showing us the way in which its institutions, when properly understood from a philosophical point of view, are rational, and developed over time as they did to attain their present, rational form'.<sup>1</sup> In the case of philosophers of global justice, it will, for instance, turn out that some of their calls for major restructuring of international law rely on misunderstandings of key global institutions and thus risk undermining critical normative foundations of the world order. Only this sort of sober appraisal of what has been achieved can pave the way for a path to more just rules. In a word, we must understand the moral character of the existing legal order before we propose changes to it.

But this project will also offer a framework for lawyers and legal scholars who may be designing the rules and institutions of the future. For even those who identify themselves as purely positivist, in the sense of seeing the law's moral content as irrelevant to its status as law, should appreciate that law should reflect certain moral principles. Certainly, international lawyers understand the importance of rules that advance peace and human rights, the values at the heart of the two pillars of justice. But the right balance between those goals is a moral question requiring moral reflection. This study represents one way to move beyond legal analysis centered on the internal coherence of the international legal system to one that can contribute directly to a just international legal order.

An evaluation of the justice of international law is not, however, merely a project for scholars or lawyers. This study thus has a deeper purpose. Because international law is central to constructing a more just world order, we need to give international actors—from presidents and prime ministers to ordinary citizens, from business tycoons to leaders of rebel movements—*good reasons* to respect it and develop it, or good reasons to change it or supplement it. When governments, citizens, or scholars question the justice of international law, a sometimes easy task because some of its features seem *a priori* unjust, the result is reduced respect for it. This challenge cannot be dismissed on the ground that 'the law is the law' or by reference to the law's formal characteristics (the response of many international lawyers), nor on the ground that the law is irrelevant to global affairs or justice (the response of some political realists). Rather, it needs to be taken on its own terms.

Thus, when it turns out that a set of norms is morally defensible under a considered moral viewpoint, we have provided those actors additional reasons for respecting it beyond just the fear of adverse consequences for ignoring the rules, or an appeal to some inner respect for the law as law, and a good reason to appreciate the consequences of altering the law and its institutions in one direction or another. Where, on the other hand, the critics are right, this study will have given us good reasons to change some rules, as well as guideposts for that change. With greater awareness of the values underlying a just international law, we can move to create new rules that will earn our respect as just. Such an evaluation of the justice

<sup>1</sup> John Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA: Harvard University Press, 2001) 3. As the reader will discover, I am not suggesting that all of international law is rational.

of international law's norms does not overlook the possibility that there may be reasons for us to follow or tolerate even unjust rules—perhaps out of a respect for the rule of law generally or stability—but it gives us the ability at least to discern better exactly what we are doing and why.

So my aim here is to provide those good reasons for stasis or change, as well as a set of guiding principles for the latter. For in the end, we want actors to follow the rules of international law not simply because they are law, but because they are just. To use another term frequently found in legal and political discourse, one might say that a just international law is also a legitimate one insofar as it gives us good reasons to comply with it.<sup>2</sup>

## A Project of Non-Ideal Theory

The appraisal of the law and legal institutions in this volume is a project of non-ideal theory in the philosophical sense. While non-ideal theory has a number of meanings, in this case I mean that my approach develops and applies a standard of justice in a way that takes account of core realities of international politics and the global system.<sup>3</sup> It does so in three key ways. First, it assumes the existence and durability of the state system as the dominant organizing political structure for the globe. The system of independent and sovereign states can be justified normatively in a number of ways, which I will discuss, but regardless of one's views about its desirability, it has been around for centuries and seems unlikely to disappear any time soon. Most philosophers long ago abandoned theorizing about a world state not merely because of its impossibility but because, as Kant pointed out even longer ago, of the many dangers it poses to individual liberty (as well as communal autonomy).<sup>4</sup> Although many other clusters of power and authority, public and private, are competing with the state at the internal, transnational, or supranational level, the state system is still absolutely central to global politics.

Second, and relatedly, this foray into non-ideal theory accepts that states will continue to possess different amounts of power, broadly conceived, and that those differences cannot be assumed away. We might hope for a world in which these capacities of states are somehow evened out, but that is not a realistic prospect. We must derive principles of global justice that work within a structure in which such power differentials are likely to persevere in the long term. These heterogeneous capacities include the power of some states to refuse to comply with rules

<sup>2</sup> Indeed, as Raz points out, it is often too much to ask any actor to follow the rules solely because they are rules. Joseph Raz, *Practical Reasons and Norms* (Oxford: Oxford University Press, 1999) 178–82.

<sup>3</sup> See Laura Valentini, 'Ideal vs. Non-ideal Theory: A Conceptual Map', *Philosophy Compass* 7 (2012): 654, 658–60.

<sup>4</sup> Immanuel Kant, 'Perpetual Peace: A Philosophical Sketch', in Hans Reiss (ed.) and H.B. Nisbet (trans.), *Kant: Political Writings*, 2nd ed. (New York: Cambridge University Press, 1991) 93, 113–14.

that make heavy demands on them. Non-ideal theory accepts and adjusts to the possibility or reality of non-compliance.

Third, my approach appreciates and takes strong account of the role of institutions in administering law. General visions of and specific proposals for global justice are carried out significantly through institutions, whether the law itself or the organizations and structures that make, interpret, and enforce it. We must understand the institutions we have because they inform both the meaning of and possibilities for justice—even as we may push them to do more or argue for additional institutions. Most importantly, we must remain vigilant to the limited capacities of institutions at the global level compared to those at the domestic level. For instance, once we know more about the International Court of Justice or the UN Human Rights Council, we will have a better sense of their weaknesses as vehicles to carry out a vision of global justice. Taking account of institutions means more than wishing for new institutions to carry out an ideal theory of justice.

The advantages and disadvantages of non-ideal theory are the subject of seemingly endless philosophical debates. I come down squarely in favor of non-ideal theory for the simple reason that I think it is the better route for imagining and achieving a more just world. It sees the world as it is and finds a way to make it better rather than assuming away the most difficult obstacles to the better path. With respect to institutions in particular, as Allen Buchanan has noted, they matter not only because they affect the feasibility of proposals for ethical conduct, but also because they affect the underlying moral justification for the principles in the first place. Failure to consider them results in prescription that ignores the moral costs of changing existing institutions.<sup>5</sup> Ideal theory thus has its place, but it must be complemented by institutionally grounded or referenced theory.

None of these three starting points associated with non-ideal theory equates with an acceptance of the status quo. My approach certainly does not accept all the realities of the international system as fixed—indeed, its project is to improve the prospects for global justice—but it prescribes justice and evaluates international law rules for their justice from certain initial positions, certain core constructs of the international system as it exists today.<sup>6</sup> These choices I make thus rest on my sense that we *must* work from a realistic foundation to propose a better world order, and that we *can* improve the world order with such a starting point. An acceptance of these core constructs is no more inconsistent with an improved status quo than is a doctor's recognition that a broken arm is better healed with a cast than replaced with a new arm. While I recognize the intense disagreements throughout philosophical discourse surrounding decisions on what aspects of the world we must accept before we offer our own views, at a certain point some

<sup>5</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) 22–3.

<sup>6</sup> It could be argued that my project is one of ideal theory insofar as such theory can take account of realities, and that, rather than offering a set of second-best principles, I am offering a vision of justice tailored to its subject, international law. I nonetheless see my approach as distinctive in its integration and acceptance of the three realities so as to be closer to the non-ideal end of theory.

choices must be made. Though I am not seeking Rawls' 'realistic utopia' for the world, I underline his own recognition that we must 'proceed[ ] from the international political world as we see it'.<sup>7</sup>

## A Project Grounded in Law

While non-ideal theories of global justice are not new (though they are still the exception rather than the rule), my non-ideal theory is particular in one important sense: it is grounded in international law. By grounded I mean three things. First, the *subject* of my inquiry is international law itself, because I see that law as central to the construction of a just world order. If we have a set of just or unjust core international law norms, namely those that regulate the major claims of global actors, then we are that much closer to or further from, respectively, a more just world order. A just international law cannot be sufficient for a just world order for the same reasons that a just domestic law is not sufficient for a just domestic order—law can only regulate certain aspects of behavior.

But philosophers, even in ideal theory, can theorize about the justice or injustice of international law rules, and some have done so. Thus, second, I see legal concepts and practice as informing, though certainly not determining fully, our understanding as to *what is just*. We can, without being circular, find justice in international law by applying a philosophical conception to legal norms, but also see the corpus of international law as saying something about what is just in the first place. Law is where many of the key claims about what a just world should look like are contested and ultimately resolved through rules. As part of the social context, it is one of many sources that helps generate morality. If we believe that 'ought implies can', that what is morally required must be in some sense feasible, international law tells us much about the 'can' and thus a great deal about the 'ought'. As Peter Cane writes, 'it is a philosophical mistake to think that morality can be properly and fully understood without reference to law. [L]aw has institutional resources that enable it to make a distinctive contribution to answering practical questions about what one ought to do or what sort of person one should aim to be'.<sup>8</sup> This does not mean that we throw out moral concepts and look to the law as the alpha and omega for a standard of justice. Rather, philosophical conceptions of justice, which permeate this book, will be informed by principles, choices, constraints, and opportunities at the heart of a functioning legal system.

Thus, in this study, I will identify and extract certain normative commitments from international law. This strategy does not mean that any values pursued through or by international law are just, but it does claim that those values central

<sup>7</sup> John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) 83; see also David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007) 20 (theory of distributional responsibilities designed 'to fit the world in roughly its present condition').

<sup>8</sup> Peter Cane, 'Morality, Law and Conflicting Reasons for Action', *CLJ* 71 (2012): 59, 83–4.



to justice are present, broadly speaking, within international law. Based on these commitments, I then develop a standard of justice that is philosophically defensible as one of justice but also one that reflects its subject—international law—and apply that standard to that law's core norms. My work takes as given Andrew Hurrell's important insight that 'the ethical claims of international law rest on the contention that it is the *only* set of globally institutionalized processes by which norms can be negotiated on the basis of dialogue and consent, rather than being simply imposed by the powerful',<sup>9</sup> a point that offers a cogent rebuttal to skeptics of the law by virtue of its origins in political compromise. As will be seen, I will go beyond that claim by arguing that those ethical claims are not solely a function of the inclusive *process* by which international law emerges and evolves, but also by virtue of the law's *content*. For we will see that much of its content is just when measured against a bona fide standard of justice, even as significant areas fall short.

Third, my study is grounded in law insofar as I believe that it reflects the lawyer's perspective as one of intimate familiarity with *institutions of governance*. Although institutions are central to much non-ideal theory, the lawyer or legal scholar has a special competence and appreciation when it comes to institutions. For lawyers help design such institutions and advance claims—of governments, individuals, NGOs, businesses, and others—through institutions that make, apply, and interpret the law. They focus on the constraints such institutions face; in particular, at the international level, legal scholarship and legal practice is—or at least ought to be—attuned to the capacities of such institutions in a world of independent states with unequal power.

Clearly my choice to look for global justice in international law, and the standard of justice that I will develop, is based on my own professional identity as an international lawyer and legal scholar. As one who has practiced and observed that law, I see Cane's observation as not merely academic or theoretical, but one that I have experienced in looking at legal rules in the process of development and in action. My way of thinking about justice is one that comes, at least in part, from thinking like a lawyer. Political and moral philosophers need not have a monopoly on theorizing about global justice, in particular of the non-ideal variety where one has decided up front to design a system that takes account of important realities—realities which the lawyer has a professionally imposed predisposition to appreciate.

Non-ideal theory grounded in law will offer not just a different approach to global justice; it will, I believe, offer a better one. Theorizing about global justice by examining international law, and with an understanding of law's normative implications, will be a significant improvement in our way of both examining and advancing global justice. For that project is about constructing a better world, not just imagining it. And at least in the case of global justice, we should seek out

<sup>9</sup> Andrew Hurrell, 'International Law and the Making and Unmaking of Boundaries', in Allen Buchanan and Margaret Moore (eds.), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 275, 277 (emphasis in original).