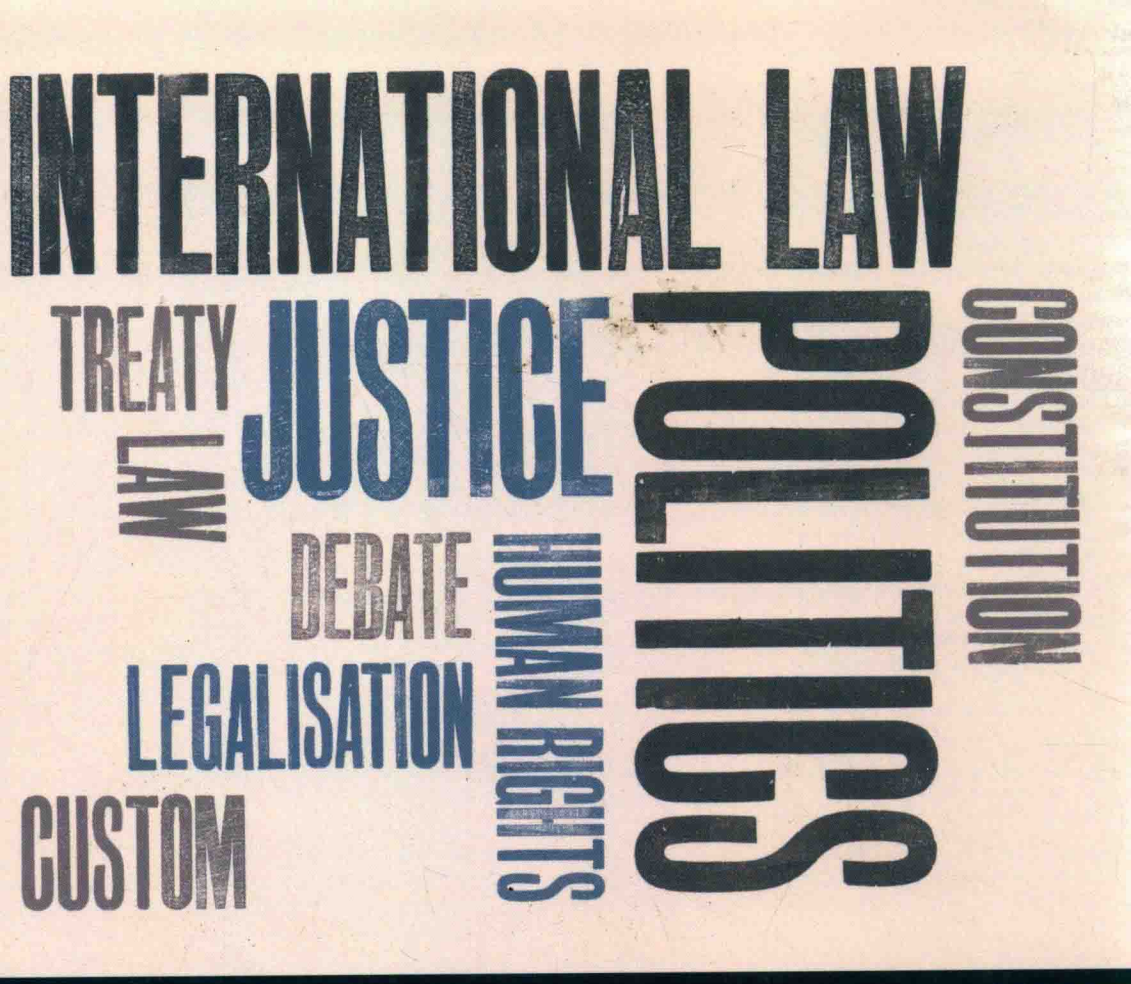

The Politics of International Law and International Justice

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Finally, I wish to thank and dedicate this book to Prince Emmanuel – my main inspiration. You are a Friend who sticks closer than a Brother!

Edwin Egede

* * *

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Peter Sutch

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Introduction: International Law and International Justice

This is a book about public international law, and about the relationship between law, politics and ethics in global affairs. International relations (IR), more than any subfield in political studies, has disputed the relevance of the law and of the idea of justice to its scholarly project. This book is premised on the argument that there is a palpable and increasing need for students of IR to understand the nature of international law and its place in international politics, and that doing so requires a full engagement with questions of justice. As law becomes ever more central to the practices of global politics, we also believe that it is essential that lawyers look beyond the horizons of their profession to consider the political and ethical dilemmas that constitute the contested parameters of international law.

One of the distinctive features of post-war international politics is the way that actors increasingly use international law as a key resource in their international dealings. As the law becomes an established medium of international politics, we find that it is increasingly difficult to understand IR without understanding international law. Equally importantly, we find we cannot understand international law without understanding the politics of international law. The legalisation of world politics (a key concept we explore below) does not imply the transcendence of politics. Rather, it points to new modes of 'doing' politics, a new vernacular, a distinctive mindset, a new range of tools and, vitally, a new set of normative (social and moral) commitments. Increasingly, global debates concern the justice of acts, institutions, policies (and so on) where justice is measured, in part at least, by the

lawfulness of the act, institution or policy. This measurement is not always, perhaps not ever, a straightforward matter of demonstrating that policy X complies with the relevant law. Sometimes it is a matter of choosing between a range of potentially applicable rules and pressing the case that best suits a preferred policy outcome or selecting the rule that best coheres with the core values that the agent wishes to promote. In other cases, it is a matter of arguing that an act or policy is just or legitimate because it was performed in the spirit of the law or because it is consistent with the community values the law was meant to further. In others, it is a matter of arguing that a novel challenge requires the reform of existing international legal regimes or governance mechanisms, or the construction of new ones. In each case claims about the lawfulness of acts, policies or institutions merge with claims about the justice or moral desirability of the act, policy or institution. The authority of these arguments depends partly on the skill and power of those making them, and partly on the extent to which international actors have come to accept that legitimacy and justice are closely linked to international legal standards. There is, as David Kennedy notes, an important sense in which the legalisation of world politics has led to a transformation in our understanding of international law. Law is no longer (only) a clear set of rules, promulgated by an appropriate authority. It is a tool of normative debate, part of the vocabulary of politics where persuasiveness is as important as strict legal validity.[1] This in itself generates opportunity and risks, and we need to understand them if we are to understand some of the most urgent and fascinating debates in contemporary world affairs.

Both the study of law and the study of ethics and justice have been labelled 'utopian' or 'idealist' by one of the most formative and significant approaches to the discipline of IR. The classic expressions of this position are to be found in two texts that established the direction of the study of IR after the Second World War. Both E. H. Carr, in *The Twenty Years Crisis: 1919–1939*,[2] and Hans J. Morgenthau, in *Politics Among Nations: The Struggle for Power and Peace*,[3] questioned the power of law or ethics to override or transcend the struggle for power that is the true essence of international political affairs. Their purpose was not to deny the relevance of law or ethics, but to urge the newly emerging political science of IR to focus on the underlying power relations between states that provided, they argued, the foundation for the observance or otherwise of legal rules and moral principles.[4] Their argument was to have a profound effect on the development of IR as a discipline. It provided its subject matter

and founded its methodology. Realism is still a powerful force in IR and has much to offer in a consideration of the politics of international law. Nevertheless, there are many reasons to think that the study of international law and international justice is increasingly vital to the study of IR. The key reason we ought to revisit the traditional disciplinary boundaries between IR, law and ethics is found in the claim that international affairs have become increasingly legalised. The term 'legalisation' emerged out of a series of academic debates published in the journal *International Organization* at the turn of the millennium. Its precise meaning is contested, but in broad terms it refers to the ways that agents increasingly use legal instruments and institutions in their relations, and to the growing ambition that is evident in the reform of existing norms and institutions and in the creation of new ones. It also refers to the claim that a legalised international plane is distinct from earlier global political practices, where less emphasis was placed on the role of international law, that the character of international politics has been (or is being) reconstituted by the turn to law in global affairs.

There are many distinct approaches to these issues. Some commentators argue that nothing has really changed. International law is simply the newest mask for power politics and that, at its root, international law is epiphenomenal on the interests of states.[5] Others argue that everything has changed (or should do so immediately), and that we must remake international society to give more complete expression to core humanitarian and human rights concerns (see our discussions of the liberal cosmopolitan tradition below). Between these (admittedly stylised) poles are a broad range of analyses that seek to present key features of the politics of a legalised world order in a manner that helps us to comprehend the benefits and burdens and the opportunities and challenges it presents.

In the following chapters we argue that this complex relationship between politics, law and ethics gives contemporary international society a distinctive character. If we are to understand the power of specific claims (poverty is a human rights violation for which the international community is responsible; unilateral humanitarian intervention is just; the United Nations should be reformed; head of state immunity should not apply where international crimes are committed; nuclear weapons should be illegal) then we need to understand the nature of our legalised international society. This is the case because the relative power of such claims is tied to broader claims about the core values of the international political order and to how those values are (or ought

to be) given institutional form. In some cases, the globalised nature of international crises (such as the potentially devastating consequences of nuclear or environmental Armageddon) or the universal value of humanitarian principles or human rights lead to claims that we need more international regulation and governance, a greater hierarchy in or even the constitutionalisation of international politics and law. Yet international society and international law is historically pluralistic and increasingly fragmented; it is heterachical rather than hierarchical. Famously, international society has been described as the anarchical society.[6] International pluralism, it is argued, protects the sovereignty of states, which itself protects the social, cultural and political freedom of the peoples of the world and promotes order in the political relations between them; justice, at the international level, requires the preservation of this pluralism and a respect for the sovereign equality of states. The politics of the legalised world order has thrown up a series of challenges to this traditional view of international society. These challenges, many of which we explore in the following chapters, ask questions about the justice or the desirability of a further move to legal and political hierarchy; of the continuing fragmentation of law as competing legal regimes or institutions generate and institutionalise different approaches to international law; of a continuing respect for pluralism. How these broader questions are answered has significant implications for how we respond to specific global challenges. The legalisation of international affairs contains the seeds of pluralism and of constitutionalism, and both present costs and benefits that weigh heavily when we consider the international response to specific crises and opportunities.

In large part the debates in the legalisation literature concern an empirical question. 'How, if at all, has the increasing legalisation of international politics changed the nature of international affairs?' The word 'legalisation' is found more often in IR scholarship than legal scholarship. This is hardly surprising – law students turn up expecting to study a legal order, but IR students are often told that the study of politics, especially international politics, is distinct from the study of law. In both disciplinary literatures law and politics are often defined in contrast to each other. International politics is anarchical, unregulated, based on interest and power, and is thus subjective. International law is ordered, formally constituted and objective. The rules and techniques of power and law are said to be different. Indeed, one very powerful and long-standing metaphor for international politics is that of a state of nature that exists prior to, or outside of, the

establishment of law and morality. This image of the separation of law and politics, reinforced by the practice of disciplinary territoriality in the professions and in the academy, belies the interrelation between the practices of law and politics in international affairs. This is not to deny that we can benefit from the enormous range of expertise developed independently by social scientists and by lawyers. Rather, it is a claim that the rigid maintenance of these disciplinary borders masks both the legalised nature of international politics and the political nature of international law.

In this book, while we refer to the growing body of work that is designed to aid students of politics trying to understand how international law relates to international politics, we set out to explore a related set of questions concerning the idea of international or global justice. The basic premise of this endeavour has two related parts. The first is that arguments concerning global justice are important to, and have normative authority in, international affairs. The second is that the increasingly legalised nature of international politics has significant implications for considerations of global justice: that arguments about justice are now stronger when they are related to arguments about the politics of international law. An interest in international, global or humanitarian justice is a crucial aspect of moral and political decision-making in international affairs. In contemporary IR it is a matter of exploring and applying the critical techniques of asking whether a particular policy or action is good or bad, right or wrong, just or unjust. These are questions of ethics and of morality and, like questions of law, they were explicitly excluded from the agenda of the post-war science of IR. The legalisation of world politics offers new opportunities for the consideration of questions of justice.

Justice is not an easy concept to define. Indeed, disputes about the nature of justice have driven political theory for millennia, just as disputes about what justice and injustice requires have driven humanity to revolutions, wars, riots and rebellions. It is the illusive content of the idea, as well as its incendiary properties, that makes many scholars and political actors wary of it. Theories of justice are concerned with those elements of social life that can and ought to be politically governed and regulated. They seek to determine the appropriate scope and means of governance. These debates are morally complex and deeply political. At their heart they are normative debates. Normative debates consider how we ought to act or how we ought to legislate or govern. When faced with new political challenges, or when we come to view existing challenges in a new light (so requiring a modified response),

normative questions inevitably arise. A significant part of the politics of international law concerns disputes about how we ought to apply law, or to create new rules, in response to global challenges. It is vital, then, that we learn to critically assess normative claims about justice and the politics of international law.

Most legal scholars use the word normative in a narrow sense to refer to rules that have binding legal force (or quasi-legal force). Law and justice in some regards are expected to be complimentary, which is why in legal terminology the phrase 'court of justice' is sometimes used interchangeably with the phrase 'court of law'. However, in reality not every law is just and history is replete with unjust laws. For instance, the laws passed during the Nazi regime in Germany authorising the horrific genocide of Jews could not by any stretch of imagination be regarded as just laws.[7] Over the years, this issue has resulted in two main schools of law: the naturalists, who believe that law must have a moral and just content, therefore, there is a crucial need to determine what law ought to be; and the positivists, who believe that law, morality and justice, while they may sometimes overlap, are totally different concepts and are thus interested in the law as it is. This raises the question of whether justice plays a key role in international law? Is there a moral content to international law that requires it to be an instrument of justice? Some scholars and jurists appear to take view that there is. According to Judge ad hoc, Dr Ecer, in his Dissenting Opinion in the *Corfu Channel* case (*UK* v. *Albania*), referring to the role of the International Court of Justice, the principal judicial organ of the United Nations, as an instrument to accomplish justice:

> The International Court's task as the juridical instrument of the United Nations is more far-reaching than that of a domestic court. A national court is called upon strictly to apply the law, and nothing more. The cohesion of the national community is provided for by other means. The decisions of national courts have not the same importance for the cohesion of the national community as international justice has for the cohesion of the international community. The International Court's task is therefore to help to strengthen the cohesion of the international community. The instrument of cohesion of the international community is the United Nations Charter. It is true international law, with its source in the new requirements of international life and the juridical conscience of the peoples.[8]

Blackstone in his definition of international law appears to suggest that a key function of international law is 'to insure the observance of justice and good faith'.[9] There are also various instruments that attempt to associate international law with justice. For instance, the United Nations General Assembly Millennium Declaration states: 'We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to . . . resolution of disputes by peaceful means and in conformity with the principles of justice and international law.'[10]

In political theory the word normative has a broader meaning. Normative claims are 'ought' claims. The power of a legally normative claim is tied up with the fact that we ought to follow a particular rule because it is a rule of law. In Chapter Two we investigate the sources of law and, in doing so, critically explore those features of a legal rule that are commonly said to give it normative authority. We go on to show that there are many claims to normative authority that lack or transcend these features that nevertheless have traction (or exert a compliance pull on actors) in international affairs. Here we explore the relative normative authority of appeals to national self-interest, to the rule of law and to ethical claims relating to human rights, humanitarianism, equality, fairness and so on. As IR becomes increasingly legalised there is a tendency to think that actors have moved beyond politics and ethics – to the objective realm of law. But law, especially international law, is intrinsically political and the practice of critical reflection, of standing in critical relation to international politics and law, of asking 'is this a good, the right or the just thing to do?' is essential. In political theory the search for the sources of normativity[11] extends well beyond the question of the sources of legal normativity and beyond questions of justice to the source of moral and ethical value more generally. A detailed exploration of these claims is beyond the scope of this book. However, in exploring questions of justice alongside question of international law we intend to show how political and ethical judgement are an ineliminable element of a legalised world order.

Different approaches to international justice are essentially different approaches to the question of which issues or reasons count as compelling or authoritative in the construction of an argument about justice or injustice. In essence, they are specialised or focused arguments about the source of normative authority. In what follows we will encounter arguments about the weight of reason, culture

and history in the construction of normative orders. In many of the traditions that we explore in this book there is also a claim about the relationship between moral claims, legal claims and political claims. These normative orders provide the context in which values, claims to legitimacy, to legal authority and to justice are shaped and contested. It is vital that we explore these, not because we can find a 'right answer', but because it encourages us to continually expose and to question many of the often hidden, reified 'truths' that support normative claims and political justifications in contemporary IR. The politics of international law is at its most vibrant when the validity or utility of established rules, regimes and institutions are contested. The sort of arguments advanced to support, for example, a doctrine of preventative self-defence or of humanitarian military intervention (see Chapter Seven) challenge both treaty and customary international law. Other claims, especially by those who argue for the reform of international law on the basis of the overwhelming priority of human rights claims (see Chapter Five), challenge the very idea of a consent based legal order, while others, concerned with the preservation of sovereign freedoms, challenge the rapidly expanding normative authority of human rights claims themselves. In each of these engagements, crucial policy issues, such as when to use military force or how to approach the challenges of global poverty, are debated in moral, political and legal terms. Understanding the force of any particular argument is a matter of discerning and analysing the relative merits of the different normative claims in play. For these reasons (and more) this book takes the reader on a search for normative authority in law, politics and ethics.

One of our core arguments is that moral and ethical criticism is simply a part of 'doing' politics, rather than being something external to it. Questions of international and global justice are embedded in the routines and practices of world affairs, and each of the arguments that we explore advances a version of this claim drawing on political, legal and moral argument to make their points. In the history of political thought this account of the sources of normativity is highly controversial, with a variety of metaphysical and philosophical traditions claiming normative foundations external to the practices of international society. While those debates are far from settled there has been a clear move in contemporary political theory towards an account of the social and political nature of normativity. In what follows we focus on a broad range of distinctive political and philosophical traditions that argue that normative debates in politics and law are inherently socially and historically informed. The form of reasoning we explore