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## The Justice of International Law

MNS Sellers\*

A critical essay on *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas (Cambridge University Press, 2010), 632 pp, ISBN 978-0199208579.

The discipline of international law faces a dangerous challenge at the beginning of the twenty-first century, which is that many people believe it to be illegitimate, pernicious, or at best irrelevant to international relations. John Bolton, while United States representative to the United Nations, denounced the entire enterprise as anti-democratic,<sup>1</sup> and even such respectable scholars as Jack Goldsmith of the Harvard Law School have sought to restrict the province of international law to the positive (and revocable) commitments of states in pursuit of their transient interests.<sup>2</sup> The people of the State of Oklahoma recently passed a constitutional amendment forbidding Oklahoma courts from considering international law in their decisions.<sup>3</sup> If international law rests (as some have asserted) only on the agreements or practices of a collection of illiberal and undemocratic governments, or the mere assertions of self-interested bureaucrats at the United Nations or other transnational agencies, then it would not deserve our deference, or even consideration, beyond its very limited powers of coercion. The law would be a nullity—and rightly so.

This was not how the discipline began. The standard definition of international law from its inception (as well-stated by James Madison and Henry Wheaton) was ‘those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations.’<sup>4</sup> Emer de Vattel found the law of nations

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1 On Bolton’s views as expressed at this time, see Wade Mansell, ‘John Bolton and the United States Retreat from International Law’ (2005) 14 *Social and Legal Studies* 459.

2 Jack L. Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press, 2005).

3 Question 755, November 2, 2010 general election, ‘Oklahoma International Law Amendment’, passed by a 70% majority.

4 Henry Wheaton, *Elements of International Law*, 8th edn by Richard Henry Dana Jr (Boston, 1866).

in ‘une application juste et raisonnée de la loi naturelle aux affaires et à la conduite des nations’,<sup>5</sup> and Hugo Grotius insisted that all of this would be true even if one were to concede (*‘etiamsi daremus’*) that which should never be conceded—that there is no God.<sup>6</sup> Modern international law began when lawyers first looked to reason and justice rather than religion or political power for the basis of international law, and international law has lost influence and interest whenever it departs from these foundations.

Samantha Besson and John Tasioulas have done the world a great service by returning the insights of philosophy to the foundations of international law. Their recent volume on *The Philosophy of International Law* poses two essential questions much overlooked in recent years: what is international law and what justifies its legal authority? To be worthy of attention, law must be either powerful or persuasive—which is to say, either *effective* or *just*. The two concepts are related, because we are more likely to respect laws we believe to be worthy of our respect. This makes the philosophical foundations of any legal system vitally important, but more so in systems such as international law without the coercive power to maintain their effectiveness through force. Laws are most likely to be effective when their subjects perceive them to be just, and are most easily perceived to be just when they actually achieve justice. This gives philosophy a significant role in understanding and perpetuating international law. Besson and Tasioulas remind us how much *moral* and *political* values should guide the assessment and development of international law and legal institutions.

The central question to be considered here is the relationship between international law and *justice*, and I shall review the essays gathered by Besson and Tasioulas in the light of this connection. Besson and Tasioulas have collected the views of 32 thoughtful philosophers and lawyers in 14 ‘sections’ or matched chapters, considering the (I) history, (II) legitimacy, (III) democracy, (IV) sources, and (V) adjudication of international law, and the international legal doctrines of (VI) sovereignty, (VII) state responsibility, (VIII) human rights, (IX) self-determination, (X) economic globalisation, (XI) environmental sustainability, (XII) war, (XIII) humanitarian intervention, and (XIV) international criminal law. By securing at least two opinions on each topic the editors seek to elicit a diversity of views, but the most striking lesson of these essays is the profound unanimity among an otherwise varied group of authors on all important points of international law and justice. As Emer de Vattel observed in his excellent and enormously influential volume on the *Droit des gens*: international law should advance nothing as a principle ‘that would not be readily accepted by every reasonable person.’<sup>7</sup>

5 Emer de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (London, 1758) vi.

6 Hugo Grotius, *De jure belli ac pacis libri tres, in quibus jus naturae et gentium, item juris publici praecipua explicantur* (Amsterdam, new edition 1646) prolegomena at 5.

7 Vattel (n 5) xxiii.

What it is to be a ‘reasonable’ person may be subject to some controversy, but in the context of international law this requires equal concern and respect (as expressed in the United Nations Charter) for all ‘men and women’ and for all nations ‘large and small’. This fundamental doctrine of international law gives short shrift—as do all the authors discussed here—to the misguided ‘realist’ thesis of Carneades that justice does not extend to international relations. Realism in its crudest form is an argument against law itself and self-refuting in a study of international legality. Both international relations theory and post-modern critical theory fade gently into the background throughout these essays, as does the law and economics movement, rational choice theory, and other simplistic antinomian formulae (although most authors do not make this rejection as explicitly as I do here). This is a conversation about law—specifically international law—and how it is or is not justified, or might be justified in practice. Significant attention is due to the practicalities of global governance, but the law’s ultimate and inescapable foundation in justice remains the most important question facing international lawyers today and forever.

Besson and Tasioulas raise two main themes, reflecting the most useful conception of international law, but also the academic strengths of both scholars. The first is law’s relationship to justice: law claims to be just—and should be made to be more so. This is the thrust of Tasioulas’ contribution. The second is legal certainty: good laws should be made more determinate. This ‘rule of law’ virtue seems more to be the province of Besson. Viewed strictly, the second doctrine derives from the first, since consistency is an important element of justice. But sometimes they seem at odds, when making the laws more certain and effective flattens the nuances of perfect justice. To the extent that authors considered here differ, it is in where they place themselves on this continuum between justice and certainty. How high a price in justice is tolerable in pursuit of legal certainty? Most writers strive to reconcile the two. A brief review of their various arguments will relate each author to the broader questions, and clarify their collective contribution to the philosophy of international law.

## 1. HISTORY

The dialogue begins with history. Benedict Kingsbury and Benjamin Straumann (chapter 1) and Amanda Perreau-Saussine (chapter 2) consider the Roman foundations and current interpretations of the international political and legal thought of Hugo Grotius, Thomas Hobbes and Samuel von Pufendorf, and the naturalism of Immanuel Kant. Hugo Grotius deserves and receives special attention as the father of modern international law, the man who separated the law from religious authority and arbitrary power. Thus international law stood from the beginning against the Machiavellian idea of *ragione di stato* and in favour of the Ciceronian conception of justice that arises from the

common good of all human (and non-human) beings. International law developed first as a moral inquiry into the nature of human society.

Straumann and Kingsbury begin as they should with Marcus Tullius Cicero, whose influence on the development of modern international law would be hard to overstate, given his forceful insistence on the inseparability of law and justice. They rightly disparage the exaggerated distinction sometimes made between the humanist and scholastic conceptions of law, and recognise Hugo Grotius' broad commitment to justice, despite (indeed arising from) his deeply 'humanist' sensibility. International law began, in effect, as a system of practical ethics, applied as law. International law first rested and still operates primarily on what scholars once called a 'natural law' foundation—'the law of nature and of nations'. This puts it at odds with Thomas Hobbes' assertion that in the state of nature, 'every man had a right to every thing'.

Thomas Hobbes' prominence in the study of international law arises primarily from his negative influence. The leading publicists sought to correct him, from Pufendorf and Vattel up to the present time. Straumann and Kingsbury describe Hobbes' scepticism towards human sociability, and how this challenged the European legal tradition of justice. Before international law could thrive, Hobbes' 'détestables maximes' (as Vattel condemned them) had to be refuted. The first great publicists developed international law to control the excesses of naked power. The abuses of the Roman and the Spanish empires were contrary to natural justice, and therefore to international law. Grotius built modern international law on the natural sociability of humankind, which drives both our desire and our duty to live together in peace. Thus international law rests at its foundation on an analogy: the analogy between states and real human beings. Just as real persons owe each other the duty to advance their common society as humans—and to do each other no harm—so as 'moral persons' states must follow the 'necessary' laws of their natural and universal community.

Kingsbury and Straumann present the ideas of Grotius, Hobbes and Pufendorf as fundamentally distinct, but resting on shared perceptions, still embedded in current international law. Without their naturalist foundations, contemporary institutions fail. These begin—as Amanda Perreau-Saussine reveals in discussing Immanuel Kant—with the idea of an ever-expanding ethical community. But artificial persons are not the same as real persons, which gives international law its own distinct province. Kant and Vattel both confirmed the distinction between the natural law of human beings as it applies *within* well-ordered states, and the universal law of nations as it applies *between* states in a well-ordered world. 'Perpetual peace' cannot exist (Kant explained) until one great republic of nations ('*civitas gentium*') finally encompasses all the nations of the earth. But Kant also saw the dangers of tyranny and homogenisation inherent in any actual world state. The universal community of nations must remain a *legal* and not a *political* society.

The historical chapters that begin this volume serve an extremely useful purpose in uncovering the *actual* philosophical foundations of *existing* international law. These

may or may not be compelling, but they shaped the doctrines and institutions as we have them and coincide to a remarkable degree with the project of moral and political justification conceived by Tasioulas and Besson. Modern international law arose from the enlightenment values of reason and social justice, applied to states. Perreau-Saussine goes on to examine the reception of these traditional ‘republican’ values by such contemporary authors as Jürgen Habermas and John Rawls, who seek to embody the legacy of ‘reason’ in better institutional design. The origins of international law in Grotius, Vattel and their successors offer an inspiring foundation for those who would seek a more just world order, through law.

## 2. LEGITIMACY

The first question for every normative science is legitimacy. What justifies the enterprise? The normative measure of law is justice. Legal systems can be ‘legitimate’ only if they are substantially *just* (according to any reasonable conception of ‘law’), while unjust legal systems are not legitimate, because justice is the measure of legitimacy in law. Allen Buchanan (chapter 3) and John Tasioulas (chapter 4) both distinguish this real or ‘normative’ legitimacy from conventional or ‘sociological’ legitimacy (in which unjust systems are ‘legitimate’ only in the sense that they are *perceived* to be just) and dismiss the latter as parasitical on the first. Buchanan suggests that normative legitimacy alone confers ‘the right to rule’ in the interest of justice. Legal and political institutions earn the right to rule by serving justice well. Their legitimacy diminishes as they become less just. This fundamental and accurate perception has supplied the basis of international law since Grotius, Pufendorf and Vattel. It is a great virtue of this volume that both its historical and its philosophical sections begin by recognising the existing and necessary foundations of international law.

Recognising (as one must) the inescapable connection between international law and justice supplies the necessary starting point for any useful discussion of the law of nations. Going further requires a conception of justice. Here the authors begin to diverge. Allen Buchanan identifies justice ‘first and foremost’ with human rights. This observation, made only *en passant* in this volume, remains worthy of mention because it permeates many subsequent chapters—but runs counter to traditional conceptions of international law. Justice in its most natural and usual sense, as used by Grotius and his successors, concerns the ideal structure of a human society that is greater than the sum of its parts. Human rights, which protect individuals, are only one element of justice and therefore only one (fairly significant) part of international law.

John Tasioulas offers a bolder, broader and therefore more interesting analysis of the standards which govern the evaluation and development of international law. International law, like all law, asserts the claim of legitimacy. International law purports to deserve our obedience. For this to be true in fact, international law must advance justice

(which we all have a duty to advance, if we can). So far, so good: Tasioulas offers a 'service' conception of laws as being justified when they serve justice better than we could ourselves, acting on our own. This means that neither the consent of the governed nor democratic rule are *fundamental* criteria of legitimacy. Both are justified only to the extent that they serve justice, and not otherwise. This very important perception (shared by Buchanan) justifies international law through its *accuracy* in identifying and advancing justice. The question presented for philosophers and statesmen is: which legal and political institutions will do so best?

It may well be that different institutions and regimes will be more (or less) legitimate in different domains of international law. Tasioulas contemplates various types of 'exceptionalism' according to which certain areas of law or subjects of the law may properly claim the benefit of different rules or regimes than others. Vattel insisted that 'un nain est aussi bien un homme qu'un géant', but should the United States really play the same role in international affairs as the Republic of Vanuatu? Tasioulas has the courage and the frankness to raise such awkward questions. When, for example, should international law impose universal values (such as human rights) against parochial cultures and traditions? This question really concerns the line between domestic national law and international institutions. Some matters are properly subject to local determination. Others are not. Tasioulas distinguishes between them by asking whether, in any given domain, objective reasons are best fulfilled through obedience to international law—or not.

Tasioulas sets the tone and standard for the entire volume by rejecting moral scepticism. His service conception of law recognises the discoverability of reasons for action and the objectivity of social justice. To measure the law by its service to justice does not preclude variation from place to place. Fidelity to values, reasons and norms yields different answers in different cases, depending on contingencies. But by insisting on moral objectivity Tasioulas sustains the possibility of correcting injustice. Questions about international law have right answers. Assertions about justice can be true—or not. By explicitly rejecting the moral evasions of Marx, Rawls and Rorty (to give three divergent examples), Tasioulas maintains the possibility of reasoned discourse and inter-cultural dialogue, conducted in an inclusive and fallibilist spirit, as a vital conduit to truth. International law claims to be legitimate and therefore binding. This incorporates substantive standards of justice into the basic structure of the law.

### 3. DEMOCRACY

Having accepted that the basic purpose of the law of nations is to establish global justice through law, one must still discover what global justice requires and how best to implement it. This concerns institutions and procedures. Buchanan and Tasioulas both reject democracy as the sole measure of legitimacy in international law, but recognise that consent can play a significant role in helping to establish justice. Thomas Christiano

(chapter 5) and Philip Pettit (chapter 6) set out to understand the place of democracy in legitimating international institutions and how these relate to international law. More specifically, they consider whether greater democracy in international institutions might improve the legitimacy of international law. Christiano advocates a system of 'fair democratic association'. Pettit proposes a 'neo-republican' perspective on international law.

'Fair democratic association' does not mean global democracy. The distinction arises from the level at which democratic deliberation should take place. 'Democracy' here signifies taking the interests of all affected persons equally into account. This morally cosmopolitan principle values the good of all persons (and the common good of all people). By advancing this common good (Pettit calls it 'republican') conception of justice, Christiano gives himself a standard for measuring different democratic regimes. 'Democracy' consists less in voting (on this account) than in treating all persons as equals. Distributing political voice equally by offering an equal right to vote is only one technique for advancing a broader 'democratic' commitment to equality. What matters is that all persons' interests should be taken equally into account. This makes it an empirical question whether international decision-making should be strictly democratic in the more usual sense of democracy and at what level this 'democracy' should take place. Christiano suggests that the interests of justice will best be served when democratic deliberation takes place within the borders of existing states, expressed in international affairs by voluntary associations of states, rather than through global or cosmopolitan voting across regional boundaries.

Christiano and Pettit advance the analytical project of the volume as a whole by embracing the 'common good' conception of justice at the heart of the traditional law of nations. To call this 'democracy' is misleading, but useful, in capturing the general spirit of existing international law. Christiano proposes that just as citizens in liberal democracies attempt to discover their common good by fair and equal deliberation in politics, so the states that represent them discover international law by fair and equal deliberation in international affairs. The factual unreality of this description can be modified (Christiano suggests) by recourse to '*jus cogens*' norms of substantive fairness that trump ordinary international law. The true measure of international justice is not democracy but 'fairness', which establishes 'democratic values' rather than democracy itself. Understood in this way the concept of 'fair democratic association' offers very little procedural guidance for the evaluation or improvement of international legal institutions, but does strengthen the shared vision of justice at the heart of international law.

Pettit's introduction of explicitly 'republican' vocabulary has the virtue of greater clarity and offers a more detailed conception of which deliberative procedures might justify international law. Briefly stated, governments are legitimate when public deliberations include all permanent residents who are adult and able-minded, and provide sufficient resources so that none are dominated collectively or individually by others, and all are given their due. The international legal order is legitimate when it assures all persons everywhere the benefit of legitimate national governments, preventing domination



at both the national and the international levels. Pettit's criteria of domestic legitimacy require both that government be exercised by agents subject to effective popular influence *and* that this influence be channelled and organised so that it forces government to operate on terms that are endorsed across the population as a whole. The most just world order would guarantee all states and all persons the protection of a republican form of government, both in their national and in their international affairs.

Pettit's argument is vivid and uncompromising. To be just and therefore legitimate, the international legal order must *first* establish conditions under which all populations can form legitimate states to speak and act for them, and *second* set up a suitable international order that is effectively and equally controlled by such states. The first priority of international law should be regime change: to establish legitimate states for peoples who are denied them. Pettit concedes that the best way to achieve this may be to include unjust non-republican states in international legal discourse. But not at the cost of condoning domination or perpetuating injustice. Substantially just states should have equal, effective control over international bodies. This might be a form of 'democracy', to use Christiano's terms, but that in itself is not enough to settle the question of institutional design. Which laws and what world order would be most effective in preventing domination and establishing justice for all?

#### 4. THE SOURCES OF INTERNATIONAL LAW

Hugo Grotius identified the ultimate source of the law of nations as justice, which seems simple enough, but requires specification, leading to injustice in practice. Samantha Besson (chapter 7) and David Lefkowitz (chapter 8) examine the international law-making process that was addressed in much more general terms by Christiano and Pettit. The Statute of the International Court of Justice charges those seeking to apply international law to respect any applicable treaties, but also international custom, 'as evidence of a general practice accepted as law', the 'general principles of law accepted by civilized nations' and, 'as subsidiary means', judicial decisions and the teachings of the most highly qualified publicists. This useful list helps judges and others to specify what otherwise might have remained vague—the actual requirements of law in international affairs—but also raises the question of its own legitimacy. How do these various forms of 'evidence' relate in practice to justice and international law? Besson inquires how, in the absence of a recognised world government, international law can ever be 'made' or 'discovered' at all.

Besson's discussion departs from the more philosophical earlier chapters of the volume by engaging more directly with existing legal doctrine, including the Statute of the International Court of Justice. She follows Christiano and Pettit in proposing a democratic sources theory in which 'democracy' signifies a broad commitment to human equality and inclusion. What distinguishes international law-making from national legislation is the level at which it takes place. Where national law concerns a particular

polity, international law applies to the international community as a whole. Besson's concern is with the *processes* by which international legal norms are created or found. She insists that the law-making processes through which we clarify international legal norms should be as much as possible made clear, public, certain, equal, 'transparent', and fair. This formula is prescriptive, not descriptive, but Besson advances it to avoid the well-known epistemological difficulties of direct appeals to justice. The duty to constitute a just international legal order yields a duty to respect reasonable law-making procedures.

'Democratic' sources theory does not reduce to state consent. Besson explicitly rejects the naïve legal positivism that would make '*pacta sunt servanda*' the essence of international law. Law must be made in such a way that it *can claim* to be legitimate and therefore to bind those to whom it applies. 'This in turn means that the sources of law, i.e. the law-making processes, should be organized so as to vest the law with a claim to authority.' Besson offers 'democracy' (broadly conceived) as the best available legal authority in a world of persistent moral disagreement. This requires functional and territorial inclusion in national, regional and international law-making processes. For example, in discovering the content of customary international law, the development of *opinio juris* should have deliberative qualities. Besson claims that these democratic attributes are already present in international law.

The more settled and finite the 'sources' or 'evidence' of law can be made to be, the more clear and settled the law itself will be—and therefore more effective. Besson proposes that a single and finite rule of recognition stands behind custom, general principles of law, the opinions of the most highly qualified publicists, and other traditional sources and or evidence of international law, and finds this unified standard in the 'democratic quality' inherent in these processes. The more inclusive and egalitarian international law-making processes become, the greater will be their authority. Conflicts, for example, between national, European and international legal norms may be resolved by referring to the democratic credentials of each particular legal order. Besson believes that the constitution of international society should respect the equality of all those affected by the law.

Too much attention to law-making can obscure the fact that for Grotius, Vattel, and most of the history of international law, the law was discovered, not made. Lefkowitz addresses more directly than Besson the challenge posed by that strand of extreme legal positivism that would find all law in 'social facts', without reference to justice. Reference to justice, on this theory, should arise only in evaluating the system itself, and whether to obey it. Such arguments fail because 'social facts' themselves must incorporate justice to earn their legitimacy. But there is certainly a value in clarifying the law—and who has the authority to make such clarifications. Quasi-positivist 'rules of recognition', when well formulated, make it easier to discover the content of international law. Lefkowitz finds the fundamental rule of recognition of the law of nations in *opinio juris*—the shared view that nations are bound by certain standards of law.

## 5. INTERNATIONAL ADJUDICATION

Andreas Paulus (chapter 9) and Donald H Regan (chapter 10) examine the role of courts in determining the requirements of international law. Paulus rightly observes that formal adjudication is only one—and usually the last—method of dispute settlement resorted to by states. Nevertheless, it yields some of the clearest and most objective statements of international legality, and often has influence far beyond the parties to the dispute. Here too, as in all international legal institutions, the courts' powers arise from their legitimacy, which depends in turn on their ability to answer difficult legal questions well. The need for legitimacy is particularly acute for courts that derive their jurisdiction from consent, which otherwise may be hard to secure. This leads to 'fragmentation', as litigants turn to rival courts, depending on their needs and prejudices.

Paulus views international society as more fundamentally confused about first principles than most domestic legal systems. This may be true, but it is not evident from his or other contributions to this volume, which all begin with a common-good conception of justice, according to which all persons and peoples deserve equal concern and respect. Applied to adjudication this implies equality between the parties, which is to say in the International Court of Justice between states, because they alone can litigate there. Yet states, like persons, partake in a common good ('community interest'), which includes all states and persons. This provides the commonality that maintains the coherence of general international law, despite its fragmentation into many rival and overlapping tribunals.

Fragmentation in international law raises the question of value pluralism. Paulus posits a judicial duty to maintain the coherence and integrity of international law. Judges should have a 'positivist' regard for existing rules, a 'Dworkinian' respect for first principles, and a 'postmodern' sensitivity to judicial power, which should be exercised consciously and transparently, within the constraints of law. Legal answers, as Paulus recognises, are supposed to refer to standards, rules and principles established by some kind of generally recognised formal procedure. When judges fail to respect these standards they become arbitrary—and violate their duty. Good judges are creative, imaginative and inspired, working to advance the justice and coherence of international law, with due regard for the constraints and stability of existing international institutions and precedents.

Donald Regan addresses two familiar problems in adjudication: first, that the law may be vague; second, that laws may be unjust. How should judges respond to legal opacity or legal injustice? The first question is easier and Regan answers it as Paulus did. Judges should draft opinions that make the law more certain and more just. This produces the second problem. As laws become more certain, the constraint they place on judges increases—and with greater constraint the possibility also increases that laws themselves may perpetuate injustice. This problem is particularly acute in international institutions and tribunals, where unjust and authoritarian governments often have

significant influence and power. Paulus suggests and Regan agrees that actors in international relations may sometimes seek neither law nor justice, but peace—or even less creditable ends. This can colour international ‘legislation’, perpetuating serious injustice.

The problem of legal fragmentation grows greater as treaties create new international regimes with their own separate tribunals and enforcement mechanisms. To the extent that a treaty exists to advance a specific extra-legal value, such as ‘peace’, or ‘trade’, or ‘European unity’, the tribunals it creates may find themselves at odds with general international law. Regan uses the example of the World Trade Organization to demonstrate that such tribunals do (1) usually incorporate general international law into their founding instruments; (2) usually defer to general international law in practice in making specific decisions; (3) usually respect the requirements of other treaties; and (4) do not necessarily need a higher-level hierarchy of international courts to maintain the coherence of general international law. The primary responsibility for maintaining and improving international law does not in any case belong to courts, though courts should see this as one of their primary responsibilities.

## 6. SOVEREIGNTY

Timothy Endicott (chapter 11) and Jean L Cohen (chapter 12) entertain the possibility that *states* may hold primary responsibility for maintaining international law. This idea arises from the well-established doctrine of state sovereignty. If, as one conception of sovereignty suggests, the governments of states have absolute power within their borders and absolute independence externally, then international law exists only to the extent that they choose to recognise it, and law cannot constrain them, unless they wish it to do so. Endicott notes the absurdity and injustice of these propositions, which imply the power of complete impunity, antithetical to any common-sense conception of law or justice. To be useful, the concept of state sovereignty needs a narrower definition, which Endicott sets out to provide, suggesting that state ‘sovereignty’ confers power and independence upon states only up to the point that power and independence are necessary and proper for the legitimate purposes of a good state and its government.

Just as personal autonomy is compatible with law, so state sovereignty is compatible with constraint. Discovering the nature of sovereignty depends on understanding *which* powers and forms of independence a state needs *in order* to be a good state. Endicott observes that good states not only treat the people of their territory justly, but also act justly on behalf of the community towards other states and persons in international relations. To be a good state, states must have the power necessary properly to regulate the life of their own community and be free from external interference that would impede them from doing so well. There is a real and independent value to national self-determination, when states exercise their capacity to make decisions, good or bad (within limits), on their own behalf. But sovereignty should not be understood as absolute independ-

ence. Sovereignty, properly understood, remains subject to all the necessary constraints of international legal order.

Jean L Cohen proposes what she calls a 'constitutional pluralist perspective' on sovereignty, to better coordinate state sovereignty with such international polities as the European Union or with international law itself. States are not the only actors in international affairs, although they remain important. Alongside the domestic constitutional law of each sovereign state stands an autonomous international legal order coupled to the global political order. Cohen describes this 'constitutional pluralism' as founded on the twin principles of sovereign equality and universal human rights. Cohen wants to make the global system more just, by bringing powerful international organisations more fully under the rule of law that already applies to many sovereign states. Law should constrain global institutions to the common good, as it already does or should do within well-ordered states.

State sovereignty continues to be important, despite the proliferation of broader international constitutional entities, and the growing constitutionalisation of international law (which Cohen embraces). 'Constitutional pluralism', as presented here, challenges the monism of Hans Kelsen and traditional international law. Cohen conceives of national and international law as autonomous and independent legal orders, in which many national legal systems perceive themselves as supreme within their own domestic jurisdictions. This begs the question of where such jurisdiction ends. Cohen proposes a world of overlapping jurisdictions, which is less hierarchical than 'heterarchical' or 'horizontal', resolving conflicts between international and domestic law through mutual recognition and respect. The aim is an 'overlapping consensus' between national and international law, which finds common ground without recognising the primacy of either jurisdiction.

Cohen's laudable desire to avoid conflict requires states to approach international law with a universal rather than a parochial outlook, embracing the project of a global rule of law. Given these requirements, the legitimacy of the global order turns on whether it respects constitutionalist principles of the rule of law and universal human rights. Well-constituted states will rightly reject the claims to authority of illiberal and undemocratic international or transnational institutions. The argument here echoes Endicott's limitations on state sovereignty, extending them to international affairs. For Endicott, national institutions earn legitimacy by respecting universal norms. For Cohen, international law earns legitimacy by respecting universal norms. For both, the conflict over jurisdiction hangs on which level of government has the better constitutional structure. When both the national and the international constitutions respect constitutionalist norms as Cohen hopes they will, there will be no conflict at all.

## 7. INTERNATIONAL RESPONSIBILITY

The republican political principles and democratic aspirations of Cohen, Endicott and the other contributors to this volume preserve and encourage a significant role for states in the international legal order, as the principal focus of political deliberation, within and between the different peoples of the world. This raises the question of legal responsibility, when states engage in international affairs. James Crawford and Jeremy Watkins (chapter 13) and Liam Murphy (chapter 14) defend the existing doctrine of state responsibility as advancing important moral values. Sovereign states should have the legal personality to act on behalf of their citizens and account for their actions before the world. This includes the recognition of liability when states have violated international law.

When a state breaches an international obligation and commits an internationally wrongful act, it incurs an obligation both to cease that wrongful act and to make full reparation for any damage caused. This follows from Vattel's analogy between states and real persons: having caused harm, states should rectify the injustice. But states are not real persons, which raises the problem of whose actions should count as state conduct for the purpose of attributing responsibility to states. States, as Crawford observes, 'lacking bodies of their own', can only act through the agency of others. More important, since states represent real people, is the extent to which the subjects of responsible states share in the state's responsibility. Crawford and Watkins recognise the unpleasant effects that the imposition of liability can have on the general population of a responsible state. In many cases, citizens suffer serious burdens for acts committed by government officials without the participation or support of those they purport to represent. People suffer for decisions from which they gained no benefit and in which they played no part.

Crawford and Watkins justify the existing regime of state responsibility by arguing that the benefits outweigh the costs. People do and should belong to political communities, whose actions they should and could feel responsible for—and strive to improve. The better the constitution, the greater the democratic participation, then the stronger the moral responsibility of citizens for the malfeasance of their states. Yet even the subjects of the least legitimate governments belong to a moral community with their fellow citizens. Like partners in or owners of a business, they share to some extent in the faults of the enterprise. Crawford and Watkins suggest that putting the burden of reparation on the malfeasant state and its subjects is in any case more just and useful in advancing a just international legal order than in letting the harm rest on foreign victims of a state's illegal act.

Liam Murphy inquires more deeply into the moral significance of states and the normative criteria of legitimacy. If questions of social and economic justice arise in virtue of our common humanity (a unifying theme in this volume), then states and their responsibilities will be legitimate only to the extent that they advance human well-being. This instrumental conception of the state and state responsibility justifies imposing burdens

even on the blameless subjects of transgressing states. Justifying legal obligation depends not on moral fault in such cases, but on the requirements of global justice. Murphy's chapter is particularly acute in revealing the state system to be itself entirely the creature of international law. Legal conventions about state responsibility should be valued as they serve justice, welfare and security, and improved if they do not. Murphy proposes, for example, that state legal obligations should be weakened in the case of regime change, liberating new governments that implement more just constitutional arrangements from some of the state obligations incurred by their less legitimate predecessors.

The instrumentalist view of states and state responsibility arises from the foundational role of justice in international law, which entails the constant pursuit of structural reform both between and within states. People, not states, hold ultimate responsibility for justice, both domestic and international. Murphy argues that if the current institutional structure at any level of government is not serving our collective moral aims well, then we all ought to be doing what we can to change it. The philosophy of international law, understood in this way, has two parts, one descriptive and the other prescriptive. First, what justifies the existing system in its current form? Second, how could it be made better? Crawford and Watkins reveal in the case of state responsibility how much ideal theory is already present in existing institutions. Traditional doctrine contains many necessary elements of a better world order. The problem lies in making doctrine more explicit, and increasing compliance with international law.

## 8. HUMAN RIGHTS

Joseph Raz (chapter 15), James Griffin (chapter 16) and John Skorupski (chapter 17) all address the philosophical foundations of human rights in international law. Raz is something of a special case among the contributors to this collection. His leading role at Oxford as an apostle of HLA Hart and teacher of this volume's two editors explains the gentle consideration given throughout to a positivist philosophy fundamentally at odds with the foundations of international law. Where Jeremy Bentham decried the concept of rights as 'nonsense on stilts' and John Austin refused international law the status of law at all, 'properly so-called', their successor attacks the analytical usefulness of the term 'human rights' in international law. Raz notes the proliferation of rights claims by people who simply want something (he gives sexual pleasure as an example) and therefore assert a right to have whatever it is they desire. Raz denies that any useful laws can be discovered in the nature of humanity itself.

Raz's discomfort about rights grows out of his narrow definition of law, which derives all legal authority from social facts about the determinate will or understanding of specific human beings. This positivist conception of legality is so deeply at odds with the traditional law of nations that it incapacitates Raz from fully engaging any aspect of

international law. Starting from false premises, Raz misses the point of the enterprise. He observes that the scope and application of specific rights often varies depending on the circumstances of the polity concerned. This is true, but not a decisive argument against rights discourse in international law. Raz does not deny that there may be universal human rights that people have in virtue of their humanity alone. He denies their legal status to limit the sovereign power of the state.

Joseph Raz is surely wrong to assert and James Griffin surely right to deny that the primary function of human rights is to limit the power of sovereign states. The primary purpose of rights is to advance justice, like everything else in the law. But there is more to justice than rights. Griffin follows the Universal Declaration and common discourse in associating rights with human dignity, which he recharacterises as 'personhood', constrained by the 'practicalities' of the human condition. Rights protect normative agency, on this theory, offering human beings the possibility of pursuing worthwhile lives. This recognises values as inextricably present in any useful conception of rights. Evaluative considerations drive the entire enterprise. Thus rules of recognition (to use the positivist vocabulary) should be servants to the values that justify the law. Social facts and legal authorities function primarily as instruments of legal specification, not 'sources' of the law.

Griffin recognises the necessary distinction between moral rights and legal rights, maintained by international law. The legalisation of what should have remained moral (not legal) rights can lead to injustice, through the intrusive and heavy-handed application of law. John Skorupski would go further, by identifying international human rights with those rights whose 'active enforcement and promotion by all states anyone can legitimately demand'. Such human rights would be *erga omnes* legal obligations owed by everyone to all. This seems unnecessarily broad. Skorupski derives international human rights from the moral aims of the international community, a category of rights that would exist even in the absence of law. On this theory, rights constitute *demands* that we may legitimately make of all other members of international society.

The point of international human rights declarations is to get states to implement and actively protect those universal rights they could not decently reject, but fail to act on in practice. Such rights (Skorupski believes) justify rectificatory intervention on behalf of the oppressed. This makes the identification of international human rights a moral judgment. What warrants intervention? What should be universal? What will work? Questions such as these illustrate the general points about 'personhood' and 'practicalities' raised by James Griffin. Not all moral rights are or should be legal rights under international law. Philosophers can entertain themselves by drawing delicate distinctions, but statesmen will need a reasonable procedure for drawing bright lines. Human rights declarations and conventions serve the useful purpose of making the requirements of the law more determinate for those who must actually police its borders in international affairs.



## 9. THE SELF-DETERMINATION OF PEOPLES

Will Kymlicka (chapter 18) and Jeremy Waldron (chapter 19) consider the self-determination of peoples and other groups of persons in international law. If, as all contributors to this volume agree, global democracy requires mediating groups to fulfil human needs for society and collective deliberation, then the borders of national, international, and other legal communities need delimitation. Kymlicka's concern is 'minority rights'—the requirement to recognise and accommodate the autonomy of ethnocultural minorities within or across the borders of existing states. States do not necessarily replicate existing cultural boundaries. While (for example) Article 27 of the International Covenant on Civil and Political Rights protects such groups in the rights they have to their own cultures, religion and language, Kymlicka also proposes special 'targeted rights' for certain specific types of minority, whose needs may differ from those of others.

Kymlicka relates the 'liberal multiculturalism' of philosophers to the minority rights norms of international law. 'Indigenous peoples' have gained political autonomy and other special protections under international law while other 'national minorities' have very few protections, outside of Western Europe. It is difficult to find a principled reason for making this distinction. Whether long-settled national minorities will count as 'indigenous' often hinges on the rights that we wish to give them, rather than the nature of the group itself. The realities of international relations place sharp limits on the implementation of liberal multiculturalism through international law. Many international organisations serve primarily as clubs or associations of governments, generally opposed to minority rights for purely self-interested reasons. Even so, Kymlicka expects that assertions of unprincipled *raison d'état* will eventually give way to law, as has already occurred in many Western democracies. 'We are still in the earliest stages' of developing the law of self-determination. Better understanding will follow.

Despite its vagueness, the self-determination of peoples is deeply embedded in international law. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights both insist, for example, that '[a]ll peoples have the right to self-determination'. The French and the American Revolutions both depended on this principle, which led to decolonisation and national liberation throughout the world. Jeremy Waldron raises the question of what constitutes a 'people' for the purposes of international law. 'The citizens of a particular polity' would be the classic and most usual understanding, as in the 'populus Romanus' or 'We, the People of the United States'. But as the second example illustrates, one part of a larger people or polity may find themselves dominated or subordinated, and eventually decide to 'dissolve the political bands which connected them with another'. How far should this principle extend? Waldron embraces the doctrine that members of existing political communities should be able to work out their own constitutional and political arrangements without outside interference. He calls this the 'territorial' conception of

self-determination. Waldron balks at extending this privilege too far to ethnic or cultural ('identity-based') communities within the broader political society.

Note the sharp difference between Waldron and Kymlicka on this point. Kymlicka wants to promote and recognise cultural diversity within existing states by strengthening the political autonomy of minority groups. Waldron does not. But both start with the premise of local self-determination. They differ on the relevant communities within which the right should be exercised. Here, as elsewhere in the volume, a closer familiarity with international law might have been useful. Waldron sometimes seems to equate self-determination with secession, which implies much more radical consequences for existing states than the limited autonomy enjoyed by some national minorities under current international law. But his underlying point is both important and persuasive. Fellow citizens should conceive of themselves as participants in a common enterprise which embraces them all and requires mutual concern and respect. Making identity-based distinctions within the borders of existing political communities will undermine the unity and the sense of common purpose that leads to greater justice for all. Equating citizenship with ethnicity excludes and diminishes some members of the group.

Waldron advocates a genuinely liberal model of citizenship, advancing equal human and constitutional rights in states comprising a variety of ethnic and cultural associations, without making any legal or political differentiation between the members of these different groups. Rather than privilege any particular culture over others, Waldron sees the reality of states that include elements of many different cultures, which influence each other and overlap, so that the lines between the various cultures blur and change over time. This deeply attractive picture describes the world as actually experienced by the most fortunate citizens of existing states, in which individuals may belong in part to several cultures, but also enjoy the participation of other groups, to which they themselves do not belong. Given that the world is already divided into separate bounded territories, Waldron suggests building just communities as much as possible within existing state boundaries, without preferring any group of inhabitants over another. The function of law should be to encourage cooperation among people who are not necessarily well disposed to one another already. Law makes it possible to live together in justice and peace.

## 10. ECONOMIC JUSTICE

The concepts of sovereignty, self-determination and minority rights all imply special relationships with our neighbours and duties of solidarity towards fellow citizens. Thus, international law protects the boundaries of local autonomy, but also claims universal jurisdiction, which makes it essentially cosmopolitan at its core. International law should govern those questions which are properly international, leaving more parochial concerns to states. The problem arises in making the distinction. Thomas Pogge (chapter 20)

and Robert Howse and Ruti Teitel (chapter 21) consider the extent to which questions of economic justice, such as massive poverty, are properly the subject of international law. 'Self-determination' as set out in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights guarantees the right of each people freely to pursue their own economic development and freely dispose 'for their own ends' of their natural wealth and resources. How far do duties of economic cooperation transcend the self-determination of peoples?

Thomas Pogge criticises existing international legal doctrines for playing a significant role in perpetuating massive poverty and suggests that very minor modifications in the global order would have a dramatic impact on global suffering. Affluent countries benefit from past injustices and protect their markets against competition through quotas, tariffs, anti-dumping duties, export credits and other mechanisms not available to less wealthy nations. Less developed countries simply do not have the resources to ensure that international organisations, such as the World Trade Organization, serve their interests. Pogge suggests that financial support for advocacy on behalf of such states would make international organisations more responsive to the poor. Regardless of how poverty originated, maintaining a global order that perpetuates poverty is unjust, when small institutional changes could relieve unnecessary suffering. For example, the concept of state sovereignty as currently applied encourages corrupt and tyrannical governments to collude with rapacious foreigners to oppress their subjects. Bad governments retain power with outside support and *de facto* rulers transfer ownership rights over national resources for their own personal gain, with the support of global institutions. Pogge recognises such transfers as unjust.

The privileges accorded to the otherwise illegitimate rulers of sovereign states to borrow, spend, trade and otherwise impoverish their subjects greatly benefit the governments, corporations and citizens of rich countries and the politico-military elites of poor countries at the expense of everyone else. Pogge suggests that our common humanity imposes an obligation of global institutional reform. Most national and international injustices arise from the rules governing economic transactions. Pogge insists that relatively small reforms would suffice to eliminate most of the global poverty. Therefore such reforms should take place. This argument makes little reference to international law, but Pogge implies a human right not to be poor, which could be understood as a legal right. Seen in this way, institutional reform would be required by the law itself, but Pogge does not make this explicit. His greatest concern seems rather to be with the conception of international law that elevates the 'sovereignty' (broadly construed) of illegitimate *de facto* governments over justice itself.

Howse and Teitel dispute the empirical foundations of Pogge's vision. If everyone is entitled (as Pogge implies) to a minimum level of well-being, then he ought to be more specific about the alternative world economic order that would bring this about. When Pogge suggests that unjust and corrupt governments deserve less deference under international law, Howse and Teitel wonder how readily developing countries and their

citizens would accept the intervention of foreign powers. This is not to say that changes in the deep structure of international legality are not ultimately necessary to the survival and advancement of international law, but rather that weakening the national independence of despotic or corrupt regimes actually confers a new and dangerous entitlement to 'intervene' on others. Howse and Teitel foresee the danger that powerful countries will make unilateral judgments to intervene for their own interests rather than the common good. (And suggest that such judgments will be questionable, even when laundered through supposed autonomous international organisations.)

The paired essays on international economic law enter into a more direct debate with one another than occurs in other sections of this book, but like the others the authors share certain basic assumptions about the nature of justice and the purposes of law. Like Pogge, Howse and Teitel seek to achieve greater economic justice through the development of a better set of rules to govern international economic transactions. They differ in putting more emphasis on how these rules might be applied in practice, and by whom. This approach is not really at odds with Pogge, but rather extends his concerns to contemplate their implementation. Pogge discovers the principles and purposes of a just global order in the common good of all human beings and suggests some legal rules to advance global justice. Howse and Teitel extend the discussion to institutional arrangements that might actually bring this about. They do not, however, at least in this volume, propose any specific solution. This is in keeping with the current state of international law. Basic principles are well established (though little discussed). The fundamental rules are mostly in place. But the institutions to apply them are in disarray, and are likely to remain so.

## 11. ENVIRONMENTAL LAW

Environmental justice, like economic justice, responds to basic and obvious ethical concerns that yield simple legal rules, well known to all, but widely disregarded in practice. James Nickel and Daniel Magraw (chapter 22) and Roger Crisp (chapter 23) raise the question of how international environmental law, which primarily addresses the actions of governments, can successfully regulate environmental threats that arise for the most part from the conduct of private individuals. We have legal and moral duties to future generations, duties to other species and ecosystems, and together we face the challenge of climate change, which threatens the global environment as a whole. These are not difficult legal or moral questions. Fifty years ago the 1972 Declaration of the United Nations Conference on the Human Environment held at Stockholm recognised principles governing all these issues, and they have not been challenged since. States have 'the responsibility to ensure that activities within their jurisdiction or control do not cause damage to other states' and to 'safeguard' the natural resources of the earth 'for the benefit of present and future generations'. None of this has changed.

The leading problems of international environmental law concern not principles or legal duties, but implementation and enforcement. Countries differ enormously in how much they damage the environment, which may lead to differentiated responsibilities for remediation, but also to coordination problems. Nickel and Magraw suggest that advances in scientific knowledge complicate international regulation, and require novel institutional structures, such as inter-governmental scientific organisations, changeable protocols to general conventions, non-consensus decision-making, and easily modified annexes. As is so often the case, environmental disagreements turn less on law than on the facts. What damage will actually be done (for example) by various forms of pollution? Such questions can be particularly difficult to answer in the case of cumulative or long-term harm. Better international organisations will be needed to clarify the relative damage and therefore the relative duties of various international players in preventing or remediating environmental harm.

International environmental law differs from other legal questions in how often and how directly it raises legal duties that might seem to transcend human well-being. The basic source and measure of international law and ethics since Cicero has been the common good of humanity, but even Cicero conceded the moral importance of the broader world around us. The 'environment', so conceived, has such deep and inherent value in a worthwhile human life that the two questions may not be practically separable, but we usually think of the natural world as valuable in itself, beyond our participation in it. Nickel and Magraw prefer to speak of how valuable the environment is *to us*, because the universal experience of beauty in nature is itself a powerful encouragement to compliance. Speaking of the intrinsic value of nature, while true, may cloud the central issue.

The *Trail Smelter* case and many others have long established the principle in international law that polluters should pay for the damage that they cause. Roger Crisp makes the useful point that *legal* responsibility in such cases may be and often is broader than *moral* responsibility. International law holds states responsible for pollution caused by those operating within their borders even when public officials have no direct connection with the damage. Similarly, one need not speak of 'harm' to recognise our duty to leave future generations a world in which they will be able to live worthwhile and fulfilling lives. Crisp's primary concern is ethical, rather than legal, but he strengthens existing legal doctrine by observing that moderation is a virtue in itself, and greed in the consumption of resources repugnant, even in the absence of any direct harm to others. Crisp observes that much of international economic law is aspirational in the sense that it is lightly enforced. This makes the persuasiveness of its ethical foundations particularly important, as an encouragement to compliance.

Persuasion recurs as the leitmotif of these essays. Crisp worries that international legal or ethical disagreements may lead to an impasse, in the absence of clear international consensus on doctrine. How then to reach consensus? As in the other chapters, Crisp opts for democracy, or rather, the 'democratic decision procedure' implicit in Principle 10 of the 1992 Rio Declaration on Environment and Development, according to

which 'environmental issues are best handled with the participation of all concerned citizens'. The more open the discussion and sharing of ideas and perspectives, the greater the possibility of achieving a reasonable result. Crisp proposes the creation of some kind of 'umbrella' convention, analogous to the GATT in the area of trade, to restate clearly the legal principles governing environmental questions and supply dispute-resolution mechanisms to clarify contentious points. Law, like ethics, can be a form of rhetoric, and process can be as persuasive as substance, when it gives us a reason to defer to a consensus in which we may not fully share.

## 12. THE LAWS OF WAR

The laws of war offer a particularly clear example of the law's concern for justice.

Societies and states have always and everywhere claimed to wage war (when they do so) on behalf of justice, and the law, not simple self-interest. Jeff McMahan (chapter 24) and Henry Shue (chapter 25) consider the foundations of just war theory, and when (if ever) law and morality do or should diverge in formulating the laws of war. McMahan suggests that our aim should be to achieve the greatest possible agreement between law and morality, but that this will require significant modifications in the design of international legal institutions. His 'brief history' of international law exaggerates the originality of his observations by disparaging the importance of *jus ad bellum* prior to the Second World War, but his conclusions are persuasive and sound: 'we should seek to bring the content of the law into congruence with the permissions and prohibitions of morality'.

That the law should be congruent with morality does not require that the law should be coextensive with morality, but law and morality should not be at odds with each other. McMahan suggests that existing laws on the conduct of war (*jus in bello*) make insufficient distinction between lawful and unlawful combatants, which leads to injustice by protecting wrongdoers against a sufficiently vigorous response. Those who fought on behalf of Nazi Germany in any capacity deserve moral censure for their participation in an aggressive and unlawful enterprise. Those who opposed them do not. Strong punitive measures against Nazi armies and their supporters were justified. Nazi warriors had no such justification. McMahan criticises the existing laws of war for maintaining an unwarranted equivalence between opposing soldiers. Even civilians might deserve to be targeted when they bear heavy enough responsibility for an unjust war, and when killing them would make a more significant contribution to the achievement of their adversaries' just cause than an attack on combatants alone.

McMahan's uncompromising clarity on the awkward question of moral equivalency leads him to seek more rigorous procedures for distinguishing just from unjust wars and combatants. He proposes an impartial international court to make authoritative judgments on the justice or injustice of wars. By making definitive pronouncements in advance, such a court would clarify the legitimacy of each side in the event of war, and

the propriety of harsh measures against the unjust. This loosening of the humanitarian rules of warfare would bring the law into better congruence with common-sense morality, but at the cost of softening the bright lines preventing wartime atrocities. Henry Shue worries that adequate and accurate information will be hard to come by on the battlefield. Better to maintain strict rules against harming non-combatants, for example, than to allow exceptions that could lead to abuse.

The dispute here is less about the relationship between law and morality, than whether decisions within war can as a practical matter be based on any criterion of moral liability at all. Shue doubts that they can. The laws of war do not and should not (he argues) extend the moral liability to attack beyond the bright line distinguishing active combatants from those who are not. More nuanced distinctions would be too difficult to make and should not be required, because 'ought presupposes can'. Soldiers lose many human rights protections in wartime, but Shue hopes that civilians can still be protected by insisting on their immunity, even when complicit in great moral crimes.

One difficulty in applying the laws of war, as in other areas of international law, is the absence of authoritative political and judicial institutions to legislate, adjudicate or enforce the law. McMahan's proposal for an 'authoritative' and 'impartial' international war court seems implausible in current international conditions and undesirable (as Shue sees it) if it has the effect of entirely delegitimising one or the other side in every international conflict. Shue fears that any exceptions to the strict standard of civilian immunity will swallow the rule. This danger is present not only in McMahan's theory, but also under existing doctrine, which allows attacks on 'military objectives', very broadly construed. Justice is relevant in wartime, as it is in every other circumstance governed by law, but the difficult question is less its relevance than its application. Even when, as in war, the criteria of justice are well known, the procedures for applying them to cases remain uncertain. McMahan's 'international court' will need a lot of elaboration before it can earn the authority to consecrate just wars.

### 13. HUMANITARIAN INTERVENTION

Humanitarian intervention against human rights violations poses much the same question as the differential treatment of combatants. Who shall be the judge? International human rights standards are well known, restated in the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and in many other places. Most agree that certain obligations *erga omnes* concern all nations, but this does not clarify when, if ever, one state may intervene to prevent the domestic human rights violations of another. Thomas M Franck (chapter 26) and Danilo Zolo (chapter 27) both see significant dangers in such interventions. The motives for intervention will always be mixed and seldom entirely

honourable. States may intervene to remedy nonexistent violations, or cause more harm than benefit, even when acting in good faith.

Thomas M Franck was one of the most gentle and perceptive scholars to consider international law, and his chapter in this volume is among his last writings before his death in 2009. This makes his views doubly valuable, as a testament to his insight and a legacy to his colleagues. Who would not favour intervention, Franck asks, if whenever rulers oppress their subjects, angels could fly to their rescue? But humans are not angels and it is humans, not angels, who intervene, when 'humanitarian intervention' seems warranted, according to their own judgment. Franck would restrict humanitarian intervention to measures approved by the United Nations Security Council. Despite the clear and persistent limitations of that body, Franck suggests that unprincipled interveners pose at least as great a threat to justice as do unchecked governments within the borders of their own states. The Security Council offers a widely accepted forum through which to regulate interventions, in the interests of international peace and security.

Franck briefly reviews the history of international interventions since the French Revolution to illustrate the doubtful motives behind most such actions, and questionable facts often offered to justify them. 'Massive and systematic violations of human rights' (in the words of former United Nations Secretary-General Kofi Annan) 'should not be allowed to stand', but intervention should not take place on the sole decision of any interested party. Franck would accept intervention by duly constituted regional organisations, as well as by the Security Council, in response to well-defined serious crimes, such as genocide or crimes against humanity. To be useful and legitimate, intervention should be directed by a trusted international institution that does not merely reflect the interest of one powerful state. Franck concludes that the legal *right* of humanitarian intervention already exists, but is exercisable only after the intervention has been authorised by a legitimate institution. Here again a procedural approach solves the epistemic difficulty.

There is a further difficulty, however, when one or two permanent members of the Security Council abuse their veto powers to prevent action against massive violations of universal human rights. Intervention in such circumstances might be technically improper under the terms of the United Nations Charter, but justifiable, if supported by the international community as a whole. The result would mitigate the violation, particularly if the Security Council eventually concurs. Franck does not deny the present illegality of such interventions, but notes their growing legitimacy. If the Security Council were repeatedly to engage in the retroactive legitimisation of what its majority consider *bona fide* humanitarian interventions by 'decent' coalitions of the willing in undeniable circumstances of extreme necessity, then the law may move towards a new legal norm. Law is in any case perfectly capable of mitigating the consequences of a violation, provided that the violator can demonstrate that the violation avoided a significantly greater wrong.



Danilo Zolo begins his argument with an approving reference to the Nazi legal theorist Carl Schmitt, which tends to discredit everything that follows. Zolo's admiration for Schmitt reflects the moral blindness of fashionable opinion, not necessarily his own real views, which actually oppose imperial expansion. Zolo expresses a general preference for local powers over more distant authorities, without explaining his basis for making this distinction. The driving force throughout his chapter seems to be Zolo's personal affinity for certain parties in the former Yugoslavia. He devotes much of his effort to excusing their excesses. This extraneous material does not sustain his broader argument, which might have been expected to generate a preference for Kosovar autonomy (for example) against Serbian oppression, were it not for Zolo's partisan commitments. Put in the best possible light, Zolo could be understood as generally preferring the domestic jurisdiction of existing states to universal human rights. Franck makes this same argument more gently and persuasively (and with some expressions of regret) as a matter of current international law. The difference between the two chapters arises more from their tone and rigour than from their substance, but Franck's subtle wisdom is vastly to be preferred.

#### 14. INTERNATIONAL CRIMINAL LAW

David Luban (chapter 28) and Antony Duff (chapter 29) return the volume to reasoned discourse after Zolo's emotional outburst. Luban begins by describing the traditional bases of legal jurisdiction, including universal criminal jurisdiction for 'gross violations of the law of nature and of nations'. Pirates and those like them (to use the traditional vocabulary) are 'enemies of all mankind'. More recently, this old way of speaking has given way to treaty regimes supporting what Luban calls 'pure' international criminal law, enforced by international tribunals. As Luban explains it, war crimes, crimes against humanity, and similar international crimes are all 'widespread and systematic', organised and group-based violations, which occur only in times of cataclysm and major upheaval. Trials to punish them follow the conflict and should therefore be characterised as a form of *transitional* justice—helping societies to move from one form of government to another.

In many cases this makes the transition itself more important than any particular crime or defendant. The trial becomes a form of political theatre, laying the foundation for a new and better political order. Luban offers this purpose of 'norm projection' as often the best justification for international tribunals. The point of such trials, backed by punishment, is to assert the realm of law against the claims of politics. International criminal law responds to the apologists for raw power, such as Carl Schmitt, by insisting that a crime is a crime regardless of its political trappings. Maintaining a pure international criminal law of universal application constrains and controls the power of states.

This makes it radical and subversive in a world of powerful sovereigns. Luban bases the legitimacy of international tribunals on the manifest fairness of their procedures and punishments. 'Their rightness depends upon their fairness.' Actual legal authority must be largely self-generated, by strict adherence to natural justice.

'Natural justice' may be subject to dispute, but does not necessarily fall foul (as some have argued) of the positivist doctrine '*nulla poena sine lege*'. Many crimes are '*mala in se*', needing no promulgation, and this is particularly true of international criminal law. After Zolo, Luban's common sense is refreshing. Those who gang-raped and tortured their captives in the former Yugoslavia (for example) thought that they would never be punished, but that does not confer a reasonable or legally significant expectation of impunity. International law has a normative power antecedent and superior to the sovereign power of states. In stating the latest and most carefully elaborated philosophy of international law, David Luban returns in the end to the insights of Grotius and Vattel. International law rests on eternal truths that are easily perceived by all good people everywhere, simply because they are human beings. Tribunals or governments that deny these truths lose legitimacy. Those who uphold them deserve our respect.

Antony Duff points out in response that fairness alone does not confer jurisdiction. For the most part jurisdiction is and should be exercised locally by those most damaged by the offence, for the benefit of the community most affected by the crime. Trials are 'communicative', in Duff's terminology, because they convey the values that society seeks to maintain. 'Defendants are answerable to their fellow citizens ... for public wrongs that they commit, in virtue of their shared membership of the political community.' International criminal jurisdiction should therefore extend only to crimes that are properly the concern of humanity as a whole. Duff suggests that even when international jurisdiction exists, local communities often retain complementary jurisdiction, which should supersede international jurisdiction, so long as local authorities are willing to take action. The moral community of humanity as a whole may often express itself best through local authorities.

Crimes against humanity are those crimes 'that properly concern us all, in virtue simply of our shared humanity'. Duff recognises in international criminal law the same basis that supports international law as a whole: the moral community of all humanity. Not all crimes are everyone's business, but some crimes are, because we owe a duty of solidarity to all of our fellow human beings—and share a collective responsibility to respond to those wrongs by calling their perpetrators to account. Criminal trials communicate a society's values not only to victims and perpetrators but to society as a whole. This makes it vitally important to identify *which* community in a world of multiple and overlapping multi-level communities properly has jurisdiction over any particular crime. International law has always recognised the value of maintaining local autonomy and domestic jurisdiction in independent nations and states. Some questions and crimes have primarily parochial significance and deserve parochial solutions.

## 15. THE PHILOSOPHY OF INTERNATIONAL LAW

Law is the normative discipline of practical *justice*, which makes it always also *moral* discipline, announcing how we *ought* to behave. Such claims can be true (or not) and persuasive (or not), but cannot be avoided by those who wish to understand the law. Samantha Besson, John Tasioulas and their colleagues have provided a perceptive and convincing analysis of what international law is, what the law ought to be, and what it *must* be, to command our obedience or respect. The diverse and excellent group of philosophers and lawyers who dispute the details with each other in their parallel chapters collectively make a convincing case for the considerable extent to which *moral* and *political* values do and should guide the assessment and development of international law and legal institutions. Despite their incidental disagreements, and with varying degrees of self-consciousness, all the authors gathered here (with the possible exception of Danilo Zolo) rely in the end on justice as the ultimate measure of international law.

Making justice more determinate in theory and maintaining its effectiveness in practice are the ostensible first purposes of every legal system, but the law of nations faces the added challenge of jurisdiction. Some problems should not be the province of international law. A glancing review of the 29 essays discussed here reveals how very often the insights of Grotius and Vattel still provide the best mechanism for separating international law from the domestic jurisdiction of states. International law rests on an analogy between states and real human beings. Just as real persons owe each other duties of care and respect, so the governments of states must respect the necessary laws of their global society. And just as real human beings retain zones of privacy or autonomy into which states should not intrude, so states properly retain domestic jurisdiction, within which to determine their own cultural and economic affairs. The difficulty arises in international as in municipal law in separating the ‘public’ from the ‘private’—in separating the jurisdiction of the transcendent law of nations from the domestic jurisdiction of states.

The historical chapters that open this volume (Section I) reveal the traditional foundations of international law, and the broad philosophical chapters that immediately follow (Section II) confirm their continuing vitality. Justice provides the philosophical foundation for the law of nations, when ‘justice’ signifies government for the common good of all those subject to the law. This ultimate basis of global justice rests primarily not on democracy (Section III), but on the moral principle that values the welfare of all human beings. To make the law more determinate (Section IV), the international community properly has recourse to the reasoned and inclusive deliberation of its members, in courts and academia as well as politics. But the actual legitimacy of courts and all such purported authorities (Section V) ultimately depends on the fairness and accuracy of their procedures. The sovereignty of states (Section VI) also diminishes, when state governments disregard the common good of their subjects. States have a responsibility (Section VII) to act on behalf of their citizens and account for their actions before the world.

Human rights (Section VIII) provide an important measure of the legitimacy of international law. No legal system that denies the inalienable rights of mankind can be legitimate. Not everything valuable is a right, but all rights are basic values. Rights protect the normative agency of real human beings, as national self-determination (Section IX) protects the normative agency of states. Both individual and group rights supply boundaries within which disparate persons and interests may live together in peace. Economic (Section X), environmental (Section XI), humanitarian (Section XIII) and certain types of criminal law (Section XIV) all challenge national self-determination, because they transcend the borders of states. So do the laws of war (Section XII) and indeed all of international law, which exists not only to protect, but also to constrain, the domestic jurisdiction of states. Economic law transcends states because the economy itself transcends states. Better international institutions could prevent much glaring injustice. The solutions to environmental and criminal problems require less thought. Good rules are already in place, but enforcement and implementation fall short. Human rights law and the laws of war are also well worked out at the theoretical level. Better international institutions will be needed to make their protections more real.

One great benefit of such a comprehensive volume is the clarity that comes from comparison. Progressing through these disparate essays brings insight, not only into many different corners of the law, and varying points of view, but also into commonalities. No one can make a persuasive argument about law without reference to justice. No argument from justice makes sense without philosophy. The philosophy of international law stands here revealed as clear, simple and available (in the words of Vattel) to 'every reasonable person'. The shock in this collection arises less from its insights than its apparent novelty. How did lawyers and statesmen lose track of such obvious and self-evident truths? Perhaps they never did, but fashion beguiles judges and academics as much as milliners and tailors, and bullies thrive as much in international affairs as they do in the playground. The best philosophy, like the best law, is not that complicated. 'Il me suffit de ... ne rien avancer comme principe, qui ne soit facilement admis par toute personne raisonnable.'<sup>8</sup>

8 *Ibid*, xxiii.