

INTERNATIONAL LAW AND GLOBAL JUSTICE

Michael Blake

What is the relationship between international law and distributive justice? Domestic legal systems are frequently thought to give rise to distinct duties of distributive justice; those who share liability to a domestic state, on such accounts, share a distinct set of duties to one another, including some duties of distributive justice. The creation of the legal apparatus of the domestic state transforms the duties of those within that state's territory, giving rise to novel duties of distributive justice (Blake 2001). The question this essay will examine is whether or not the international legal system also gives rise to novel egalitarian duties of justice. Does the creation of the international legal system similarly bring about a distinct set of egalitarian duties?

My answer to this question will be negative; sharing the institutions of international law does not itself give rise to new duties of distributive egalitarianism. This is not to say that no duties of distributive justice exist between states right now. It is to say, instead, that such duties are not dependent upon the existence of international law; we would have these duties regardless of whether or not we share the network of norms constitutive of international law. I will not, at present, attempt a full theory of what these duties might be. I will, instead, simply argue that these duties must be applicable to states qua states, regardless of what legal instruments bind states together. International legal institutions may make some difference in how we fulfill these duties; they may make compliance with our duties more or less easy, for example, or specify a particular method by which our duties might be discharged. The duties themselves, however, are not dependent upon the legal system's existence, and this fact marks a significant difference between the domestic and international legal systems.

I will try to justify this assertion below, by examining three ways in which international law might be thought to be the source of distinct duties of egalitarian justice. Before I do this, however, a few clarifications are in order. The first is that I am here dealing only with the norms and practices of public international law, rather than with the related but distinct field of private international law or with those parts of domestic legal systems dealing with conflict of laws. I am here referring to public international law as defined with reference to its sources—namely, international conventions, international custom and the general principles of law recognized by civilized nations (Aust

2010: 1–12). The second clarification is that I will, in what follows, be dealing only with distributive justice, rather than with justice more generally. The latter has many aspects that do not reduce to distribution—I assume, for example, that there is a strong relationship between democratic legitimacy and justice, and that this fact would have to be part of any complete discussion of the justice of international law. I will, in the present context, focus on distributive justice. The third clarification is that I will assume, throughout this paper, that international law will for the foreseeable future have the same relationship to coercive power that it currently does. International law, at present, serves as a means by which states justify their actions towards one another, including such coercive actions as military interventions; it does not, however, involve the creation of a particular collective agent with adequate power to coerce all the states of the world. International law is invoked in justification of what I call *horizontal* coercion, in which states deploy its norms in the justification of their coercive actions towards one another; in this, it contrasts with the *vertical* coercive structure of domestic law, which involves the creation and justification of a central authority with adequate power to coerce all those within the jurisdiction of that authority (Blake 2011). I assume that, in the short to medium term, we are able to change the *content* of international law, but not its foundational *structure* as a creation of state agency (Goldsmith and Posner 2005). The final clarification I want to make follows on from this third one: I will assume that, in the short to medium term, states will have significantly different abilities to make, interpret and break the norms of international law. Powerful states such as the United States are frequently able to ignore unwelcome norms and contrary judgments with something very much like impunity, whereas more marginal states are unable to do the same. The United States was, for example, able to effectively ignore contrary judgments of the International Court of Justice in the case of the mining of the harbors of Nicaragua, and the United Nations in the case of the invasion of Iraq (Gwertzman 1984; Hirsch 2010). For the moment, I want simply to assume that something like this inequality of power will be true for the foreseeable future. I do this not to make the case that this inequality would be true in an ideally just world—I cannot imagine that it would—but simply to accept that this fact is part of the world in which our theorizing must apply; ignoring this inequality, or assuming it away, does nothing to help us in the here and now.

With these ideas in mind, we can proceed to specifying the question that will be the subject of this essay. The relationship between distributive justice and international law might give rise to at least two distinct questions:

1. What duties exist between agents who share liability to the international legal system which do not exist between agents who do not share that liability? We may call this the *question of creation*: it asks us what duties are created by the fact of the legal system itself.
2. What must the legal system look like for it to do justice to all those agents within its jurisdiction? We may call this the *question of fulfillment*: it asks us what the legal system would look like for it to adequately ensure that those subject to it fulfill their duties of justice, whatever those duties might be.

These questions are distinct. We might imagine, for example, someone who believes that individuals have strong egalitarian duties simply in virtue of sharing the status of human, so that the international legal system ought to be reorganized in an

egalitarian manner, even though this system is not itself the source of these egalitarian duties (Caney 2011). My own purpose in this essay is to focus on the question of creation, although I will have the opportunity to make some brief remarks on the question of fulfillment.

I will try to make my argument by comparing the world we have now with what I take to be the nearest possible world without institutions of international law. In such a world, we would still have, I think, collective agents with territorial jurisdiction and coercive force over the inhabitants of that jurisdiction; we would have, in other words, states. Their relationships, however, would not be mediated by the norms of international law. We might imagine, instead, that whatever relationships they derived would be up to the states in question. We can imagine that such states are able to enter into relationships, make contracts, and have a moral nature sufficient to regard these contracts as having at least some moral force. The only difference would be that each of these relationships would have to be, as it were, *sui generis*; the norms governing any given set of states would have to be ultimately agreed upon by those states, with reference to their own interests, desires and moral ideals. I think that such a world without an *international* legal system is a great deal more palatable than a world without *domestic* legal systems. A world in which there are no domestic governments at all seems, to most of us, as a bad—or at least very dangerous—place to live. The space between that world and our own is quite large. The domestic state is a powerful force, to which agency and duties of justice are properly ascribed. The existence of this state seems to transform what the inhabitants of this state's territory can expect; it also transforms what those individuals owe to one another. A world without law mediating the relationships between states, however, seems less obviously distinct from the world in which we currently live.

This project might be thought impossible, for at least two reasons. Someone might insist, first, that the very fact of states is impossible except through international law; what counts as a state is itself a matter of recognition through international legal norms, particularly the Montevideo Convention of 1933. If this response is right, then the closest possible world I imagine is, in fact, impossible. States cannot live without international law, because they do not exist until international law creates them. This response is mistaken, though. International law defines the criteria states ought to use in their decision-making about which states shall be recognized; it is a mistake to think that, in the absence of these criteria, states would themselves cease to exist. The existence or absence of distinct territorial units, each with a rough monopoly on the use of coercive force within that territory, is a matter of fact, rather than a matter of law. The widespread refusal to recognize Taiwan as a sovereign nation, for example, has hardly caused the country to cease to have the functional apparatus of a domestic state. To think otherwise is to confuse a legal set of criteria with a set of existing social institutions. In the world we are examining here, we can assume that states exist as we know them in our own world; the relationships between these states are distinct, in that there are no standing legal institutions to which these states can refer in their interaction, but the existence of these states does not depend itself upon such legal institutions.

It might be asserted, instead, that the world I have described does in fact contain a legal order, insofar as the states in question are able to make and keep promises. Much international law, after all, results from the agreements states make with one another. Indeed, a foundational norm of international law is that agreements shall only be made

in good faith—as noted in Article 26 of the Vienna Convention of 1969. Is it not, then, impossible to imagine that we could have a world in which states make promises, without that fact itself implying the existence of some legal order, however primitive or weak? The answer, I think, is no—so long as one is able to imagine that we might be able to make promises, and bind ourselves morally, in the absence of any particular set of social institutions or norms. Tim Scanlon, on this note, imagines the possibility of a chance meeting between two members of different tribes, who are able to come to an agreement with one another through gestures and broad indicators of what they each decide (Scanlon 1990). It would seem foolish to think that these two tribesmen have thereby created an institution, in the sense demanded by the objection described here. The agency of these tribesmen is their own: they have each indicated a willingness to bind themselves to a certain course of action, and this willingness exists simply in virtue of their status as agents. They neither create nor require any separate institutional set as a part of this endeavor. Similarly, I think it is entirely possible for groups of individuals, or their representatives, to understand themselves as agents with this ability, without thereby demanding that we give rise to something akin to international law. The world I am imagining demands only that states have the ability to communicate and to enter into agreements; nothing in this, I think, demands or constitutes a distinctively legal set of institutions.

With this in mind, we can examine three distinct forms of argument, each of which might be invoked to defend the idea that the international legal institutions we see right now create distinct distributive duties between states. The first argument looks to the international legal order as itself a causal reason for the poverty and underdevelopment of much of the world. We members of well-off states have duties to redistribute wealth, on this account, because we—through a legal order we have set up in our own interests—are causally responsible for this poverty. We may call this the argument from *causation*. The second argument instead looks towards the complex network of agreements that have come into existence between societies, and argues that these agreements themselves constitute a site of justice. On this argument—it can be called, without too much distortion, the argument from *conversation*—the states of the world have distributive duties of justice because they have created complex administrative institutions with substantial degrees of independence from their creating states. Therefore, on this argument, these institutions are themselves subject to the norms of justice, insofar as they are bound to create the conditions under which all agents affected are able to speak and be heard by those institutions. The final argument involves a simple analogy between the domestic and international legal systems, and argues that they are both examples of a common type of norm-governed institution. The *cooperation* argument argues that the international legal system, like the domestic, is a primary site of justice in virtue of its ability to define individual material holdings and affect the lives of all individuals within its reach.

None of these arguments, I suggest, is ultimately successful as an attempt to derive distributive duties from international law. I do not mean by this that these arguments are utterly mistaken; I mean, instead, to argue that none of them is successful at differentiating between the world of international law and our imagined world without international law. What this means, I suggest, is that our duties to the less developed nations of the world may in fact be quite strong—for reasons closely related to the reasons discussed here—but that these duties do not have international legal institutions as part of their justifying stories.

The Argument from Causation

The argument from causation is not a new one; it finds expression as far back as the earliest writers in the dependency theory tradition, which argued that the persistent underdevelopment of the global South could be ascribed to decisions and practices taken by the global North (Roberts and Hite 2007). What is common in those who make this argument is the idea that the wastage of human life endemic in the underdeveloped world is neither inevitable nor the fault of domestic mismanagement and corruption. Rather, this underdevelopment stems from a set of global institutions that are imposed on the poor by the rich, for the benefit of the rich. The result is that those who are benefitting from this injustice have a special duty to overcome it—by first ceasing to be the beneficiaries of injustice, and then in working to create an alternative, justified global order.

These ideas have found their most prominent modern advocate in the recent work of Thomas Pogge, who has articulated a view on which the inhabitants of modern Western societies are guilty of collectively imposing a set of institutions on the global poor which is causally responsible for an enormous quantity of avoidable death and misery (Pogge 2002). There are several strands of Pogge's argument that are worth noting in this context. The first is that the basis of Pogge's claim is the international legal practice of state recognition. The legal practices of recognition consist of any set of persons who are able to effectively control a state's territory, and who give incentives to individuals to take over the political apparatus of states. The group, no matter how vicious or nonrepresentative, obtains the right to speak internationally in the name of the people. The most serious problem emerges when these patterns of recognition are combined with the international borrowing privilege, by which these individuals are able to bind the people of their society by incurring debt in their name, and the resource privilege, by which the natural resources of that society may be sold without any regard for the interests of the population. The conclusion of all these issues is that the international legal system is directly causally responsible for the poverty and death faced by the global poor (Pogge 2010). The global wealthy have, on this account, a distinct set of duties to alleviate the poverty created by international law; they are responsible for the law's creation of poverty, and therefore responsible for overcoming this historic evil.

I will not, in this context, discuss what has proven to be Pogge's most controversial idea—that our system of international norms is actually harming the poor, rather than simply failing to adequately help them (Risse 2005). I will, instead, simply assume that he is right about that, and that he is right about the causal story he tells about the origin of poverty and underdevelopment. The question we must ask, though, is what this tells us about international law. Pogge interprets the facts described above as sufficient to tell us that international law is responsible for the poverty and underdevelopment of the global poor. My own response is to think that these facts tell us something quite different: that the powerful states of the world are violating the rights of the global poor, and citing international law as an unsuccessful method of justifying these violations. The two are not the same, and should be distinguished from one another. If the international system itself is—in whole or part—responsible for the poverty of the underdeveloped world, then the system itself must count as an agent, so much so that it can itself be the bearer of duties and rights. I think this way of speaking is natural in the domestic context, in which the vertical coercion we set up naturally leads us to think that the state—through its legal system—can be ascribed intentions and desires, obligations and

entitlements. But it seems a mistake to take this language and apply it in the international context. The only agents to whom these moral concepts properly apply seem to be states, rather than the norms cited by states in justifying their acts.

To see this, look only to the core idea of state recognition identified by Pogge as a key part of the legal system's wrongness. States offer one another recognition, or fail to offer one another recognition, and they use the tools of international law in justifying how they do so. Their patterns of recognition do not accord perfectly with the norms of international law; the above-mentioned example of Taiwan demonstrates that much. But the entities doing the recognizing—and thereby demonstrating a willingness to enter into trade—are states themselves. If these states were in a lawless international world, would they face a substantially different set of moral duties? I do not see how they could; they would still have to face the moral question of which states are entitled to recognition, and they would still have the same strong moral reasons adduced by Pogge to avoid granting recognition to morally illegitimate claimants. We should distinguish, I think, between the act of recognition itself and a given pattern of argument about when such recognition is appropriate. The latter is the realm of international law, but the former is distinctively the realm of states. Recognition, after all, is the precursor to more specific forms of relationship such as trade, and the willingness to trade with despots is a presumptively immoral act even if there is no standing norm prohibiting such trade. If this is right, though, then states have the obligation to avoid causal complicity in the sorts of evils described by Pogge as a matter of course under all circumstances. These duties are not brought into being by international legal instruments, and they are not dependent upon their continued existence.

States are blameworthy, then, if they engage in actions that have the effect of encouraging or abetting theft and tyranny in the underdeveloped world; so much I am accepting, here, for the purposes of our argument. My contention is that they would have the same duties even under anarchic circumstances. States always have an obligation to avoid lending comfort and material support to tyrannical regimes. If what I have said is correct, then this burden falls on all states in all circumstances.

What, then, does international law change, if it is not the source of our duties? For this, I think we can return to the idea that international law can be used to make our duties more or less easy to fulfill, even if this law is not itself the source of the duties. This is, of course, to move from the question of causation to the question of fulfillment. International law, as I have described it above, is at least part of a backdrop of normative argument that can be invoked by states in the defense of their international agency. As such, international law might be fruitfully changed so as to make the legal standards for recognition more in tune with our moral duties as described above. Allen Buchanan has come up with a promising plan by which such legal reform might be undertaken (Buchanan 2003). It might be possible for international law to be used to make it more difficult—if only through moral suasion—for states to do business with kleptocracies and corrupt regimes. The moral duties of states, though, persist even if such legal reform is not undertaken. Indeed, I think it might be plausible that those states that have the most ability to violate the terms of international law—such as, notably, the United States—are the most blameworthy for refusing to do so in the cause of justice. I will not, however, pursue this thought any further in the present context. I will say, instead, only that even if Pogge is right about the causal analysis of international poverty, it does not follow that the duties held by Western states are ultimately produced by international law. These duties are, instead, held by states more generally; they affect what

international law should be, but do not themselves depend upon the existence of international legal institutions.

The Argument from Conversation

The view that justice has some relationship with discourse—and, therefore, with some appropriate set of norms for mutually respectful discourse—is not a new one. It is a key aspect of John Rawls's political liberalism, although the appeal of this view is by no means limited to this context (Rawls 1993). The idea is applied to international justice, however, by Josh Cohen and Charles Sabel, who have articulated a particular view of how the modern web of international institutions that states have created gives rise to a distinct set of international duties of justice (Cohen and Sabel 2005, 2006). Their argument is developed in response to Thomas Nagel, who has argued that outside the state there is no justice—or, more precisely, that outside the state there are no relationships to which duties of justice apply (Nagel 2005). Cohen and Sabel respond to this by noting the complex web of governance set up by transnational institutions such as the World Trade Organization (WTO) and the International Labor Organization (ILO). Acceptance into these organizations is, in practical terms, a necessary precursor to entry into the international marketplace. These organizations are, moreover, to some degree independent in their operations, set up as adjudicative entities able to resolve disputes between member states. These facts, collectively, mean that novel norms are created by these institutions; states who join the WTO acquire duties towards other member states which are best described as duties of justice, and which do not exist between states generally. Cohen and Sabel describe these duties in terms substantially similar to the duties ascribed to domestic citizens in Rawls's political liberalism: states have duties to justify their actions to one another through reasons that are derived from the public political culture of the shared institutional set. In this, states acquire a distinct set of duties of justice, in virtue of their shared membership in international legal institutions. Although Cohen and Sabel do not emphasize the point, it is surely right that this methodology could be used to defend duties of distributive justice between states. If justice applies to states in virtue of their shared membership in a set of institutions, then they might be thought to have duties to ensure equal standing before that set of institutions, potentially including some guarantees of material equality.

I do not want to defend Nagel against Cohen and Sabel; unlike Nagel, I think international justice exists, and that it binds states even in the absence of a global sovereign. I want, instead, to dispute the idea that the norms identified by Cohen and Sabel are genuinely novel norms, created by the institutions in which states are situated. Even if Cohen and Sabel are right about the substance of the duties held by states, that is, they are wrong to think of these duties as being dependent upon the existence of shared social institutions. These duties are, instead, one specific form taken by a more general duty to avoid certain forms of illegitimate exploitation of impoverished and marginal states. To see this, I think we might note that there are at least two different ways in which we might think that the norms of reason-giving as described here are obligatory upon us. In the domestic case, the citizens who create a coercive state give themselves genuinely novel duties towards one another. These citizens are all subject to the coercive power of the state, and this new normative fact gives rise to duties that would not exist but for that state. In the case described by Cohen and Sabel, however, we might think that states have a standing duty to avoid certain sorts of behavior. A wealthy

state might be constrained, for example, not to exploit the fact that some other state is sufficiently vulnerable that it can be effectively threatened into full compliance with terms favorable to the wealthy nation. This general duty, however, could be made more specific by some set of principles that demand the giving of reasons sufficient to justify the actions taken by this wealthy state towards the weaker state. Given that—on my view—there is no novel agent created internationally that has coercive power over all states as the state does over all citizens, it seems better to think of the duty to engage in reason-giving identified by Cohen and Sabel as being a means by which violations of this general duty might be avoided.

To see this, we might examine two distinct sorts of hegemonic relationship. Imagine that the United States is able to effectively insist that other, more vulnerable states cease their agricultural subsidies, while continuing itself to subsidize agricultural production (Watkins and Fowler 2004). We might assume that this is unjust, although of course a full theory about why it is unjust cannot be provided here. For the moment, the idea that some forms of exploitation are unjust might stand in for this full theory. In one case, the United States codifies this unequal relationship in a set of institutions, which it imposes as contracts of adhesion upon all states that wish to engage in trading relationships with the United States. In the second case, the United States does not do anything so grandiose; it does not set up a multilateral treaty, or describe its wishes in terms of a standing set of institutions. Instead, it simply makes contracts with all these vulnerable states, obliging each one to accept unjust terms as a precondition for entering into relationships of trade. Is there a significant moral difference between these two cases? I fail to see one; it seems as if the conduct of the two states is likely to fail the tests of basic justice for the same reason. If this is right, then I think Cohen and Sabel are wrong to think that the duty to engage in the process of political justification is itself a product of the legal system. Instead, it seems that this duty precedes the legal institutions discussed here, and constrains all states regardless of whether or not such institutions exist.

Cohen and Sabel might, of course, insist upon the novelty of such institutions; they rightly point out that these institutions are rather unlike a series of bilateral treaties. The institutions are denser and more administratively complex, for one thing. Perhaps more importantly, in this context, they operate with some degree of independence from the wishes of the parties that set them up. This latter fact, in particular, seems relevant, insofar as it seems to hold out the possibility that transnational institutions of this form might represent a genuinely novel form of international institution. Does this difference not lead to an analysis more akin to that found in the domestic state, in which the creation of a new agent gives rise to the creation of new duties?

The response here, I think, is to accept the argument, but deny the premise. If it is true that these institutions can operate in genuine independence, and are not beholden to the wealthy states of the world for their continued survival, then it may be that the case I have described here cannot be made. I believe, however, that this is likely not so for most transnational institutions, including the WTO and ILO. Different states are differentially vulnerable to these institutions; the wealthiest states of the world can, in principle, simply abandon these institutions should their policies prove too costly. This is, I think, one reason why the terms of trade adopted by the WTO have proven to be so favorable to the interests of the wealthier Western powers. The greater power of exit available to these states provides them with greater voice than more marginal states, and therefore with more power to insist upon their own interests being given priority.

If this is right, then I think the best description of the WTO and its ilk is not that they are institutions binding upon all states who are members, but rather that they are a set of rules imposed by the strong upon the weak. This does not imply that there is no need for rules of international justice—if anything, it should emphasize the reason such rules are needed. It does, however, imply that the way these rules are understood internationally should not be akin to the manner in which they are understood domestically. The WTO is morally significant not as an independent site of political discourse, but because it represents—at its worst—a simple threat made by the rich against the poor.

We can return, now, to the discursive duties described by Cohen and Sabel. Despite the criticism I am making here, I think these duties are not implausible; for the purposes of this article, I simply accept that they might be the best description of the duties that states have. I simply want to question their status as genuinely novel duties, created by the legal institutions described here. Again, I think this difference is due to the fact that the domestic state is able to act as a coercive agent in its own right, whereas these legal institutions are better understood as justifying individual coercive actions on the part of states; the former alters the moral relations of citizens at a foundational level, whereas the latter does not do the same as regards the relations of states. The duties of states not to exploit vulnerability, however, might be regarded as a rather broad and abstract set of duties. The best explanation of the egalitarian duties described by Cohen and Sabel might be that these duties are one particular specification of general duties, made more concrete through an insistence upon a particular method of discharging them. One way of demonstrating that we are not engaging in unjustified coercion or exploitation, after all, is the giving of reasons that we can legitimately expect will motivate the other side in the dispute. The duties ascribed to states by Cohen and Sabel are plausible precisely because they seem to give us a means by which this task of reason-giving might be made more operational. The best explanation of these duties, that is, regards them as one particular instantiation of the more general duties applicable to state agents. This means, I think, that even if Cohen and Sabel have specified an attractive vision of international justice, they have not made the case that genuinely novel norms are brought into being by international law.

I would close this section by returning to a distinction made at the start of the chapter, between the question of creation and the question of fulfillment. I have here been discussing only the question of creation, and insisting that international law does not itself give rise to novel duties of justice. I would reiterate, however, that nothing I have said here argues that international law cannot be helpful in the pursuit of justice. If Cohen and Sabel are right, then the international bodies we have set up—if reinterpreted to embody a more egalitarian ethos—might be very useful indeed in the pursuit of justice. This possibility remains open, even if my argument that these institutions create no novel norms of justice is accepted.

The Argument from Cooperation

Very little in the preceding section focused directly upon distributive justice. Our focus was, instead, on justice and its relationship to international law more generally, with distributive justice as one particular implication that might be derived from this analysis. This will change, I think, when we start to look at the argument from cooperation. This argument is, at its heart, an argument about the distribution of material goods. It makes the case that, where we have complex rule-governed activities of a specified sort,

we have an obligation to equalize some form of material holdings between the members of that activity. The argument comes in at least two varieties: the first, and historically most prevalent, is an interpretation of Rawls's basic structure; the second is a more general argument that institutions such as a legal system give rise to egalitarian duties of distributive justice. I will examine these arguments in turn.

The first, Rawlsian version of the argument was prominent in analyses of global justice that emerged after the introduction of Rawls's *A Theory of Justice*. Rawls's concept of the basic structure—the “way in which the major social institutions distribute fundamental rights and duties and determine the advantages from social cooperation” (Rawls 1971: 7)—seemed well poised to offer an analysis that demonstrated the importance of global egalitarianism (Beitz 1979; Pogge 1989). Two related points buttressed this argument: the first is that the international system of legal and economic norms seems to count as a particularly powerful distributive mechanism, and what it distributes is indeed comprehensible as the advantages brought about by economic cooperation both between and within states. The second point is that Rawls insists that the basic structure is the primary subject of justice because its effects are so powerful and present from the start of any human life. If this is true, and if international markets are as influential on life chances as they undoubtedly are, how can the international rules not count as a basic structure?

The second point can be dealt with first: from the fact that the international system is powerful and unavoidable, it does not follow that it is a basic structure. This seems to be a misreading of Rawls, but an unfortunately common one. The best understanding of Rawls's argument, I think, makes it clear that he is thinking of the basic structure as an independently defined entity and only then describing its attributes; he is not saying that any institutional framework with these attributes is therefore a basic structure. Rawls's understanding of the basic structure, as is made clear in both *A Theory of Justice* and (especially) his later writings, involves the major social institutions as enmeshed in the coercive network of a constitutional state. Rawls's refusal to regard the international system as a basic structure for purposes of international justice stems not from insufficient boldness, but from a consistent recognition that the basic structure of the state—which involves the creation of a coercive agent distinct from any found internationally—is a morally distinctive entity, giving rise to novel duties among those who share it. The response to the first point, then, is to simply note the difference between the international realm and the domestic state: while both involve the distribution of benefits from cooperation, only the domestic state involves the creation of a coercive sovereign with effective power over all those agents to whom duties of justice will apply. Not every case of cooperation, even those with profound effects upon human happiness, gives rise to duties of distributive justice. Ideals of beauty, for example, are obviously linked with human happiness; we are likely to do better in our search for love and happiness, all else being equal, when we are beautiful. But it does not follow from this that we have any duty to redistribute beauty, or money as compensation for its lack. Beauty is simply not part of the basic structure as defined through the legal and political system of society. Beauty can, of course, become an avenue through which legal and political injustice occurs: if the non-beautiful are discriminated against in employment, it becomes a legitimate part of the Rawlsian analysis. But beauty itself, however influential, is not part of the basic structure as Rawls understands it.

The more general point, however, remains. Even if the use of Rawls to justify international egalitarianism fails, might we not simply say that wherever there is a

cooperative enterprise, there is some normative pressure towards material equality? Darrel Moellendorf has recently articulated such an argument, and his argument might well be used to defend the proposition that international law gives rise to novel duties of egalitarianism:

The idea is that duties of social justice exist between persons who have a moral duty of equal respect to one another if those persons are co-members in an association that is (1) relatively strong, (2) largely non-voluntary, (3) constitutive of a significant part of the background rules for the various relationships of their public lives, and (4) governed by norms that can be subject to human control.

(Moellendorf 2011)

I do not think Moellendorf's vision of cooperative justice is an altogether attractive one; I do not think that all of the various varieties of cooperative enterprise that might fall under this description give rise to egalitarian duties in the manner described. More to the point for our present purposes, though, is that we might accept that something like Moellendorf's view might be right, but then ask whether or not the existence of international legal institutions is actually a prerequisite for the application of his egalitarian norms. If the answer is no, then we have at least some reason to think that international law does not give rise to a novel set of norms among those states subject to it.

To see this, imagine again the two versions of the hegemonic United States discussed above. In one world, the United States sets up an unequalitarian system of rules and norms for international trade; it understands this system as an indivisible normative system, which it imposes upon more marginal states as a contract of adhesion. In the second world, the United States does the same, but doesn't refer to anything so grandiose as a legal system—there is no set of rules, or procedures, or anything as law-like as that. The United States simply throws its weight around, and relies upon the greater vulnerability of other states to gain concessions and favorable terms of trade. How do these two worlds differ, in normative terms? I think they cannot differ much; if the United States acts unjustly in the first world, it seems to be acting equally unjustly in the second. Whatever justice-based principles are incumbent upon the former are also incumbent upon the latter. If this is true, then it is not that the creation of any set of legal institutions gives rise to distinct duties of justice; these duties exist prior to any legal relationship, and simply condemn certain forms of state interaction. Whatever duties we have, or fail to have, seem utterly unaffected by the legal or nonlegal status of the norms that states act upon in their dealings with others.

This conclusion might not bother Moellendorf very much, since he understands his argument as defending international justice wherever there is cooperative association between states, rather than wherever there is law. But if someone wished to use Moellendorf to defend the proposition that transnational institutions give rise to novel duties, they would have to insist that state action and international law are so linked that the actions of our hypothetical United States are, in fact, creating a legal order through its actions. This seems, however, rather unpromising as a response. It would seem to assert, first, that any action, however isolated, can be redescribed as an institution or association—which would seem to push very hard indeed upon this concept. Even if we were to accept that such acts create an association, though, I think it would still be true that

the association is simply not of the right *type* to ground duties of distributive justice. The domestic system of law creates a novel coercive agent, and thereby creates novel duties of justice. The international acts described here, even if they could be understood to create associations or institutions, seem to involve no similar creation, and so seem to give rise to no equivalent duties of distributive justice.

Nothing in what I have said justifies these hegemonic actions; they are, I believe, morally wrong. The point, though, is that the wrong is not created by the legal system. Whether or not the actions are given force in law, the hegemonic power used in a nonsymmetrical form is the basis of the objection. Law does not create, here, a system of vertical coercion. There is no novel agent that is itself the subject of moral evaluation, whose acts can be ascribed to it. Internationally, states act; sometimes they cite law, sometimes they do not. These states, however, are the agents to whom the acts are ascribable, and it is their actions that ought to be judged as just or unjust. We confuse the issues unnecessarily by thinking that it is the international *system*—of law, economics or anything else—that is at the heart of our moral evaluations.

If all this is right, then I think we have some reason to think that the first question—the question of creation—ought to be answered with a no. Whatever else we think about international justice, we should not believe that it involves novel duties created by international law. I should note, here, that this does not in any way impugn the character of international law. It is emphatically *not* to say that international law is irrelevant. The second question—the question of fulfillment—matters, and matters enormously. Even if international law does not create our duties of justice, it might make fulfilling those duties more or less easy; it might make certain actions more or less costly, if only by creating the normative language to condemn or approve of those states proposing to do them. We are accustomed, in ordinary life, to thinking of illegal actions as normatively special—marked out by a need for special justification. Illegal international actions seem to give rise to similar normative stories. In the words of Thomas Franck:

Laws, including the U.N. Charter, are written to govern the general conduct of states in light of historic experience and the requisites of good order. If, in a particular instance, a general law inhibits doing justice, then it is up to each member of the community to decide whether to disobey that law. If some so choose, however, their best strategy is not to ridicule, let alone change the law; it is to proffer the most expiating explanation of the special circumstances that ordained their moral choice.

(Franck 1999: 118)

States, in short, do not like to be seen as breaking the law.

This means, I think, that international norms that more closely approximate our actual duties will make acting for justice easier—and, perhaps, more likely. We should not overestimate the power of international laws; it is a mistake to think of them as more than a single tool in the struggle for global justice. But they have some force, and we ought to think of them as revisable. My conclusion is that we should neither ignore international law, nor fetishize it. It does not originate our duties of justice, nor can it easily help us fulfill them, but it may be able to help us gradually come closer to our objectives. Such slow and imperfect steps, in a world like this one, may be the steps we have the most reason to prize.

References

- Aust, A. (2010) *Handbook of International Law*, 2nd edition, Cambridge: Cambridge University Press.
- Beitz, C. (1979) *Political Theory and International Relations*, Princeton: Princeton University Press.
- Blake, M. (2001) "Coercion, Distributive Justice, and Autonomy," 30 *Philosophy and Public Affairs*: 257–96.
- (2011) "Coercion and Egalitarian Justice," *The Monist* 94(4).
- Buchanan, A. (2003) *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press.
- Caney, S. (2011) "Humanity, Associations, and Global Justice," *The Monist* 94(4): 506–34.
- Cohen, J. and Sabel, C. (2005) "Global Democracy?" 37 *International Law and Politics* 4: 763–97.
- (2006) "Extra Rempublicam Nulla Justitia?" 34 *Philosophy and Public Affairs*: 147–75.
- Franck, T. M. (1999) "Break It, Don't Fake It," 78 *Foreign Affairs*: 116–18.
- Goldsmith, J. and Posner, E. (2005) *The Limits of International Law*, Oxford: Oxford University Press.
- Gwertzman, B. (1984) "U.S. Voids Role of World Court on Latin Policy," *The New York Times*, April 9, 1984: A1.
- Hirsch, A. (2010) "Iraq Invasion Violated International Law, Dutch Inquiry Finds," *The Guardian*, January 12, 2010.
- Moellendorf, D. (2011) "Cosmopolitanism and Compatriot Duties," *The Monist* 94(4).
- Nagel, T. (2005) "The Problem of Global Justice," 33 *Philosophy and Public Affairs*: 113–47.
- Pogge, T. (1989) *Realizing Rawls*, Ithaca, NY: Cornell University Press.
- (2002) *World Poverty and Human Rights*, New York: Polity.
- (2010) "The Role of International Law in Reproducing Massive Poverty," in S. Besson and J. Tasioulas, eds., *The Philosophy of International Law*, Oxford: Oxford University Press, pp. 417–36.
- Rawls, J. (1971) *A Theory of Justice*, Cambridge, Mass.: Harvard University Press.
- (1993) *Political Liberalism*, New York: Columbia University Press.
- Risse, M. (2005) "Do We Owe the Global Poor Assistance or Rectification?" 19 *Ethics and International Affairs*: 9–18.
- Roberts, J. T. and Hite, A. B., eds. (2007) *The Globalization and Dependency Reader: Perspectives on Development and Global Change*, Malden, Mass.: Blackwell Publishing.
- Scanlon, T. M. (1990) "Promises and Practices," 19 *Philosophy and Public Affairs*: 199–226.
- Watkins, K. and Fowler, P. (2004) *Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty*, Oxford: Oxfam.

Further Reading

For further reading, see: A. Buchanan (2011) *Human Rights, Legitimacy, and the Use of Force*, Oxford: Oxford University Press; L. Cabrera (2004) *Political Theory of Global Justice*, London: Routledge; O. A. Hathaway (2011) "Do Human Rights Treaties Make a Difference?" 111 *Yale Law Journal*; L. May (2011) *Global Justice and Due Process*, Cambridge: Cambridge University Press; R. Miller (2010) *Globalizing Justice: The Ethics of Poverty and Power*, Oxford: Oxford University Press; and J. Rawls (2001) *The Law of Peoples*, Cambridge, Mass.: Harvard University Press.