Legitimacy, Justice and Public International Law

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political decision: they can govern the system as a whole rather than every single institution.[40]

Third, we should note that democracy is not necessary for accountability. As a growing literature in international relations scholarship has shown, there are very many different kinds of accountability, including non-electoral types of accountability. A useful taxonomy is provided by Ruth Grant and Robert Keohane. They distinguish between the following types of accountability: 'hierarchical' accountability (accountability to one's superiors), 'supervisory' accountability (accountability to monitors), 'fiscal' accountability (accountability to budget-holders), 'legal' accountability (accountability to the judiciary), 'market' accountability (accountability to market forces), 'peer' accountability (accountability to one's peer institutions), and 'public reputational' accountability (accountability to the public).[41] We should not therefore assume that international institutions can enjoy accountability only if they are democratically accountable. One might, for example, seek to make them accountable to other international institutions with related concerns ('peer' accountability). One could argue, for example, that the WTO should be accountable to the ILO and to an environmental body nominated by the United Nations Environmental Programme.

Do these three considerations entail that we should eschew cosmopolitan democracy altogether and commit ourselves to the wholly instrumental approach adopted by the cosmopolitan justice approach? No. For the cosmopolitan justice approach is less able to cope with the

[40] R. O. Keohane and J. S. Nye Jr., 'Redefining Accountability for Global Governance', in M. Kahler and D. A. Lake (eds.), *Governance in a Global Economy: Political Authority in Transition* (Princeton and Oxford: Princeton University Press, 2003), 388 and 392.

[41] R. W. Grant and R. O. Keohane, 'Accountability and Abuses of Power in World Politics', *American Political Science Review*, 99 (2005), 36–7. For other typologies see R. O. Keohane, 'Global Governance and Democratic Accountability', in D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (Cambridge: Polity, 2003), 137, and Keohane and Nye, 'Redefining Accountability for Global Governance', 389–91. See, more generally, Keohane, 'Global Governance and Democratic Accountability', 130–59; Grant and Keohane, 'Accountability and Abuses of Power in World Politics', 29–43; R. O. Keohane and J. S. Nye Jr., 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy', in R. B. Porter, P. Sauvé, A. Subramanian and A. Beviglia Zampetti (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings Institution Press, 2001), 264–94; Keohane and Nye Jr., 'Redefining Accountability for Global Governance', 386–411; and F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999), 7–21. See also J. Nye *The Paradox of American Power: Why the World's Only Superpower can't go it Alone* (Oxford University Press, 2002), 104–10 and 163–8.

existence of reasonable disagreement about the nature of global justice. Let me explain. It is hard to deny that many reasonable and reflective people disagree about which principles of distributive justice, if any, should apply at the global level. Given this it seems unreasonable simply to state that political institutions should be designed to best realise the correct principles of distributive justice. According to this line of reasoning, to say that global political institutions should be designed to realise the best principle of distributive justice is wrongheaded.[42] There is no consensus whatsoever on what would constitute a just world, and simply to impose any one conception, over and above others, would be illegitimate. Wholly instrumental conceptions of the roles of international institutions, thus, are undesirable because they require the imposition of a contentious moral doctrine.

How then should we respond to reasonable disagreement about justice? Following many, I would make two suggestions. First, a fair way of responding to disagreement is to design institutions which are procedurally fair and which provide a just arena in which the different viewpoints can be expressed and adjudicated. In light of this one can similarly argue that international institutions should be designed so that they provide a fair forum in which competing views about global rules (on say, agricultural tariffs or textile subsidies or environmental protections or labour standards) can be discussed and adjudicated.[43] This kind of institutional design respects persons by giving them a political framework in which they can present their principles and the reasoning underpinning them.[44] Second, a just response to reasonable disagreement requires not simply institutional design. It also requires a certain kind of political culture – one in which persons treat others with respect, acknowledging the reasonableness of (some of) those who disagree with them, and expressing their own viewpoints with appropriate modesty.[45] Put otherwise: a fair treatment of reasonable disagreement requires that all those involved

[42] See, in this context, two illuminating defences of non-instrumental approaches: T. Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder: Westview Press, 1996), especially ch. 2; J. Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999). Both Christiano and Waldron defend democracy on non-instrumental grounds, holding it to be a fair decision-making procedure.

[43] See on this T. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), ch. 15, especially 482–4.

[44] See S. Caney, 'Anti-Perfectionism and Rawlsian Liberalism', *Political Studies*, 43 (1995), 255–6.

[45] See on this A. Gutmann and D. Thompson, 'Moral Conflict and Political Consensus', *Ethics*, 101 (1990), 64–88.

adhere to certain *binding norms* – such as norms of respect, a desire to reach agreement, a commitment to understanding the viewpoint of those with whom one disagrees, and so on.[46]

The Hybrid Model

These four considerations, I believe, support the following:

> The Hybrid Model: This holds that international institutions should be designed so that:
>
> **(a)** persons' most fundamental rights are upheld [an instrumental component] and, then,
> **(b)** over and above that they provide a fair political framework in which to determine which principles of justice should be adopted to regulate the global economy [a procedural component].

The Hybrid Model recognises that the protection of some fundamental interests takes priority over other goals, such as democratising global institutions. By prioritising these rights, and by affirming (a), it captures the point made in the 'wrong priorities' objection.[47] At the same time it also recognises that there is reasonable disagreement about some aspects of global justice and, by affirming (b), it thereby recognises the need for a fair decision-making procedure. As such it combines the best of the two competing cosmopolitan models (protecting fundamental interests and respecting reasonable disagreement).

Let us now turn to the four tasks identified in the first section of the chapter. The Hybrid Model generates answers to all four questions. First, it maintains that international institutions have a duty to uphold certain fundamental interests and then, above that, to be an arena in which different principles can be fairly adjudicated and evaluated (Q1). It also

[46] This response can be contrasted with that advocated by Rawls in *The Law of Peoples*. Rawls argues that the appropriate response to the fact that some decent peoples reject liberal values is that liberal states and international institutions may not promote egalitarian liberal principles of justice (J. Rawls, *The Law of Peoples with 'The Idea of Public Reason Revisited'* (Cambridge, MA: Harvard University Press, 1999), 42–3). However, to disallow the WTO from acting on egalitarian liberal principles of justice because they are controversial seems to me unwarranted and on my model the WTO could act on these kinds of principles *if they were authorised by the participants in a reformed WTO*.

[47] One key question is, of course, what count as 'fundamental rights'. I cannot hope to answer that here but have sought to answer this in Simon Caney, 'Egalitarian Liberalism and Universalism', in T. Laden and D. Owen (eds.), *Cultural Diversity and Political Theory* (Cambridge University Press, 2007), 151–72.

provides an account of the legitimacy of international institutions, maintaining that international institutions possess legitimacy to the extent that they uphold fundamental rights and provide a context for the fair adjudication of competing visions of how to govern the world economy (Q2). Since it prioritises a commitment to upholding certain fundamental rights, the Hybrid Model also ascribes to international institutions the powers necessary to perform this task, though what this means in practice can only be ascertained with the help of a great deal of empirical analysis (Q3). If we consider now what kinds of binding norms should govern their conduct (Q4), the Hybrid Model calls, as we have seen above, for certain kind of political norms – those of respect and civility which are necessary for the fair resolution of competing viewpoints.

What, though, does the Hybrid Model mean in practice? I have argued elsewhere that this kind of model would require the following reforms to existing international institutions:[48]

(1) equalising representation and influence in international institutions;
(2) enabling the participation of the vulnerable;
(3) ensuring that there are effective enforcement mechanisms that are available to all;
(4) making greater use of international ombudsmen;
(5) increasing transparency;
(6) rendering international institutions accountable to other relevant institutions;
(7) requiring international institutions to provide a justification of their policies; and
(8) exploring ways of making international institutions democratically accountable.[49]

[48] I have provided a much fuller defence of each of these eight proposals elsewhere. These proposals draw on an extensive literature on institutional reform. See, in particular, Grant and Keohane, 'Accountability and Abuses of Power in World Politics'; Keohane, 'Global Governance and Democratic Accountability'; Keohane and Nye, 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy'; Keohane and Nye, 'Redefining Accountability for Global Governance' and Woods, 'Making the IMF and the World Bank More Accountable'. For my defence of these proposals and for references to the literature surrounding them see Caney, 'Cosmopolitanism, Democracy and Distributive Justice', 'Cosmopolitan Justice and Institutional Design', 745–51.

[49] It might be claimed that a state-centric contractarianism could also endorse such proposals. Two points should be made in reply. First, it *might* do so but only under special circumstances. It seems, for example, much less likely that it would do so when there are either very great inequalities in political power between states or when the member states not are

Concluding remarks

International institutions play, and should play, a significant role in the global economy. Yet there has been little normative analysis of the responsibilities, legitimacy, powers and binding norms of international institutions. The tendency has been either to focus solely on states or individuals. Working with the Pluralist Hypothesis, this chapter has sought to identify the responsibilities and sources of legitimacy of international institutions. I have argued that the state-centred contractarian approach to international institutions, in all its forms, represents an unpromising approach. I have further argued that purist versions of what I have termed the 'cosmopolitan justice' approach and the 'cosmopolitan democracy' approach to global institutional design are also unpersuasive. Having rejected these three approaches, I have suggested a Hybrid Model that combines the valuable insights contained in both of the cosmopolitan approaches.

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committed to both a fair treatment of their own citizens or ensuring that the members of other states are properly protected. Second, even if it were true that a state-centric contractarianism might endorse the institutional reforms mentioned in the text this does not, of course, rescue that theory. To do that, one would need to show that the objections to SSC presented earlier are unpersuasive. My concern is whether SSC is a plausible justificatory theory and the objections developed earlier dispute this.

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4

Do international organisations play favourites? An impartialist account

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The recent turn of politics and philosophy to serious appraisals of international law is welcome news for politics, ethics and law. Politics can offer us rich description of the international landscape – the actors and their policies, conflicts and approaches to overcoming them; and political and moral philosophy can produce reasoned prescription for devising a just world order. But international law is a critical bridge between them, for law, with its grounding in the institutional arrangements devised by global actors, provides a path to implementing theories of the right or of the good. Just as scholars of politics have realised that their descriptions must include the norms and decision-making processes of international law, so scholars of international justice are taking account of the norms already institutionalised within the international order. Ethical discourse must understand these institutions, for they both place constraints upon and offer opportunities for carrying out the solutions to ethical problems that philosophers derive. Such an understanding is key not only to making international ethics stronger within philosophy, but to making it convincing to those concerned with operationalising ethical theory – political scientists, legal academics, governmental and non-governmental elites and the educated public.

Beyond institutions, the connection between international law and ethics is also tied to international law's own claim to morality. As Andrew Hurrell has put it, 'the ethical claims of international law rest on the contention that it is the *only* set of globally institutionalised processes by which norms can be negotiated on the basis of dialogue and consent, rather than being simply imposed by the most powerful'.[1]

[1] A. Hurrell, 'International Law and the Making and Unmaking of Boundaries' in A. Buchanan and M. Moore (eds.), *States, Nations, and Borders: The Ethics of Making Boundaries* (Cambridge University Press, 2003), 275, 277.

International lawyers thus analyse and seek the construction of an international order with a normative component. I do not claim that the legality of certain institutional arrangements is a sufficient condition for their morality, but it is certainly possible that their legality is a necessary condition for their morality.

The three fields nonetheless differ when they refer to institutions. Philosophers see them broadly as human constructs that organise and transform principles of interpersonal ethics into principles of justice for society. Buchanan has described an institution as 'a kind of organisation, usually persisting over some considerable period of time, that contains roles, function, procedures and processes, as well as structures of authority'.[2] Under this view, international law is both itself an institution and comprised of institutions. Lawyers and political scientists are much more focused on political structures. International law is not an institution, but the WTO is. The terms international institution and international organisation are often deployed interchangeably – something I will do here.

International lawyers have been arguing over the design and function of global institutions for a century at the very least, a not unsurprising turn of events since lawyers are central to the design and functioning of such organisations. When called upon by policy makers, they have attempted to create or reform organisations to match their clients' visions regarding the two most central features of those organisations – (1) their legitimacy vis-à-vis the particular community they serve and (2) their effectiveness at advancing the goals set out for them. The drafting of the constitutive instruments of international organisations or of treaties with implementation mechanisms (like compliance committees of the states parties) is part of the bread and butter of the public international lawyer. Many of the developments on which philosophers write, for example changing notions of sovereignty, the proliferation and increased power of international organisations, or the large role of non-governmental actors in international society, are old news to international law. The appraisal of those organisations for the extent to which they are legitimate and effective is at the core of legal scholarship. Legitimacy, in particular, has been the stuff of countless books and articles, for it seems to offer some standards for assessing the worth of existing organisations.[3]

[2] A. Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford University Press, 2004), 2.

[3] See, for example, T. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990); D. Bodansky, 'The Legitimacy of International Governance: A Coming

In this chapter I take a different tack from that of other legal scholars and seek to appraise international organisations based on debates within ethics rather than law. I propose to consider whether international organisations act impartially in the broad sense of not playing favourites in the way they treat certain actors and situations with which they deal. I address this issue because much current criticism of key international organisations is based on the observation that they do not treat all actors or situations the same way and so therefore are morally suspect. Critics repeatedly urge international organisations to be more democratic, whether in terms of greater equality in the privileges of membership, greater even-handedness in treatment of the concerns of rich vs. poor states, or direct involvement of individuals in decision-making.[4] These claims of inequity, partiality or unfairness are central to contemporary philosophical treatments of international law as not meeting a certain vision of a just world order and need to be addressed very carefully. This chapter attempts to engage this important debate through an approach introduced in an earlier article,[5] by viewing international organisations and the states in them as having various rights and duties towards other actors in the international arena; I will then ask whether rights possessed by or duties owed to only some actors – special rights and duties, which translate into various forms of unequal treatment of actors – can be justified.

In particular, I will examine three aspects of international organisations: membership, decision-making processes and choices of targets for action. My goal is to appraise these features of the organisation to see what they indicate about the organisation's impartiality. Although impartiality with respect to these three aspects does not equate with a just international organisation, an appraisal of institutions' impartiality is a critical prerequisite to understanding the institutions that we currently have and proposing ideas to reconstruct them.

I thus will consider organisations from a moral perspective, but, as a legal scholar, I take existing institutions as a fundamental starting point and ask whether they fit some vision of justice. This approach to the status quo differs in two ways from that of most philosophers working in this area. First, unlike cosmopolitans like David Held and Simon Caney, I see no need to justify strong international institutions in the first place,

Challenge for International Environmental Law?', *American Journal of International Law*, 93 (1999), 596.

[4] See, for example, the essays in C. Barry and T. W. Pogge (eds.), *Global Institutions and Responsibilities* (Malden, MA: Blackwell, 2005).

[5] S. R. Ratner, 'Is International Law Impartial?', *Legal Theory*, 11 (2005), 39.

because these bodies are already part of the international legal landscape, with more to come in the future to address new challenges (though we do not yet have institutions as strong as Held and Caney would like).[6] Second, I prefer to focus on existing institutions because changes in the status quo must respond to problems with it rather than write on a tabula rasa based on ideal theory. This approach should not be confused with an apology for the status quo, but rather as a pragmatic acceptance that global justice must be pursued, in the first instance, through the institutions that we already have.

I begin with an overview of the concepts of general and special duties in international law, impartiality and their application to international organisations. I then turn to the three traits noted above and end with some conclusions about the limitations and promise of my inquiry.

General and special duties in international law and institutions

International law is a set of norms and processes to resolve the numerous claims that global actors – states, individuals, peoples, corporations and others – make upon each other. These rules and processes allocate to these entities various rights, duties and powers, including the power to make the rules. The most important of these, in my view, are the duties by each actor towards other actors, though those duties are sometimes grounded by rights held by other actors. International law has traditionally recognised duties on *states* and towards other *states,* and indeed the bulk of duties today are still inter-state. But in the last century it has come to include important duties on states towards *individuals* through international human rights law and international humanitarian law; on states towards *peoples* through the norm of self-determination; on *individuals* towards states or other individuals through international criminal law; and in other combinations as well.

Those duties can be grouped into general duties – those directed to *all* other states (or individuals or peoples) – and special duties – those directed towards only *some* states. This notion derives from Robert Goodin's work on H. L. A. Hart.[7] Although Hart and Goodin developed these concepts in relation to ethical duties of the individual – what Thomas Pogge calls

[6] See, for example, S. Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford University Press, 2005), 156–82.

[7] R. Goodin, 'What Is So Special About Our Fellow Countrymen?', *Ethics*, 98 (1988), 663, 665. As Goodin points out, a special duty can refer to both a duty on A that B does not have, and a duty on A towards B but not towards C, D and all others. I am referring to the

interactional conceptions of morality and justice – they have much analytic force when applied to inter-state arrangements – in Pogge's terms, institutional conceptions of morality and justice.[8]

Thus, the duty of states under Article 2(4) of the UN Charter to refrain from the threat or use of military force and the duty under the Vienna Convention on Diplomatic Relations to respect the status of diplomats are quintessential general duties, owed to all other states. Indeed, even a state's duties regarding transborder harms, like pollution, are really duties owed to all states, though those duties are often only discharged towards close neighbours (depending on the range of the noxious activity). Other duties are special, such as those a state assumes towards a limited number of other states via bilateral, regional or other non-global treaty. A very important set of special duties is limited territorially, namely a state's duties under human rights law generally to guarantee the human rights only of residents of its territory. The result of this vision of international law is that each actor is surrounded by spheres of duties, with some orbits filled by all other actors and some filled by only some actors. The breadth of the sphere is a function of the strength of the norm – its overall importance to the international legal order – as well as its hardness – the extent to which it creates a true legal obligation on the state.

The pay-off of this construct for examining the ethics of international law is that it allows for inquiry into whether international actors owe *and should owe* different duties to other actors. It permits us to break down core rules or concepts of international law and ask whether they are justifiable from an ethical perspective based on the general and special duties inherent in them. Special duties require particular scrutiny because they involve, at some level, unequal treatment for states (or individuals), with only some actors benefiting from them.

These same sorts of questions can be posed of international organisations. Thus, states within the organisation have particular rights and

latter for most of this chapter but address the former in the context of the UN Security Council below.

[8] T. W. Pogge, 'Cosmopolitanism and Sovereignty', *Ethics*, 103 (1992) 48, 50–2. My use of the terms general vs. special thus differs from Hare's terminology, in which general contrasts with specific and refers to the precision or detail of a moral proposition, whereas universal contrasts with singular and refers to the persons or entities who are the object of the moral claim. R. M. Hare, *Freedom and Reason* (Oxford: Clarendon Press, 1963), 38–40. Nonetheless, I believe Hare's concept of universalisability – i.e. for a prescription about one subject to be a moral one, it must apply to all other subjects with the same non-moral features – resembles the idea of second-order impartiality discussed below.

duties as part of their membership, typically spelled out in a constitutive instrument, such as voting in various bodies (a right) or paying dues (a duty).[9] Moreover, the organisation can have other rights and duties. The UN has the right to bring claims against states for injuries against it, a manifestation of its so-called international legal personality; it has the right to impose binding sanctions against any state if the Security Council so decides; and some have argued that it has a duty to stop massive violations of human rights. The institutions and the states within them possess both general and special duties and the members may have special rights as well,[10] under the organic instruments of the organisation.

Impartiality as a construct for evaluating the conduct of international institutions

Conceptualising the international legal order and institutions in terms of general and special duties allows us to mobilise a set of very useful inquiries posed by philosophers under the rubric of debates over the meaning and scope of impartiality. At its most fundamental level, impartiality describes a way that individuals and institutions decide and act, one based on disinterestedness, consistency and fairness and not merely personal motives.[11] Lawrence Becker has categorised these debates as concerning (1) whether personal interests can play a role in determining moral duties; (2) whether it is possible to adopt a standpoint for moral deliberation that is independent of ourselves; and (3) whether we can take into account personal relationships in assessing moral duties.[12] Most of the impartiality debate and certainly its analysis of special duties, concerns the last issue. These are fundamentally debates over the morality of special duties compared to general ones.

In particular, the partiality/impartiality asks whether special duties are morally justified based on personal relationship per se – what Rawls calls 'relations of affinity'[13] – or some other grounds. As David Miller writes,

[9] It is not always clear to whom these duties are directed – other states or the organisation as a whole.

[10] At times it is more useful analytically to examine the special rights enjoyed by particular member states, which may not map neatly onto a corresponding special duty at all, for example, the special rights of the members of the Security Council discussed below.

[11] It is in this sense that Barry and Terry Nardin define justice as impartiality. See B. Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995), 20–7; T. Nardin, *Law, Morality, and the Relations of States* (Princeton University Press, 1983), 258–9, 265.

[12] L. C. Becker, 'Impartiality and Ethical Theory', *Ethics*, 101 (1991), 698.

[13] J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 112.

one position, which may be loosely described as impartialist, says that 'only general facts about other individuals can serve to determine my duties towards them', while the other, loosely described as partialist, sees relations between individuals as so central to ethics that 'fundamental principles may be attached directly to these relations'.[14] Christopher Wellman has characterised the different stances towards special duties as 'reductionist' and 'associativist' (or 'nonreductionist').[15]

Some of the differences between partialists and impartialists have been narrowed through the notion of orders (or levels) of impartiality.[16] Under this view, one can remain impartial while accepting the morality of special duties as long as one can justify those duties from an independent moral perspective such that all individuals owe those special duties to all persons in that relationship to them. An impartialist could thus defend an individual's patriotic ties – a first-order partialist stance – if he was convinced that it was second-order impartial, i.e. that there was a justification that does not give fundamental moral significance to the relationship between compatriots *alone* but instead justifies the duty on 'more fundamental facts which are themselves morally significant'.[17] But without such an explanation, an impartialist could not justify special duties, and their scholarship seeks to find an argument that transcends the particular ties to other generalisable traits of the relationship.

An inquiry into the morality of international institutions should incorporate – and can eventually contribute to – these debates. For if institutions, or the states in them, have special duties or rights vis-à-vis other international actors, we need to ask if they are justified based on morally significant 'relations of affinity' or on characteristics other than the relationship per se. While partiality may have a place in interpersonal ethics, in devising a just world order in which law and institutions play a central role, we must find an impartial justification for special rights and duties of the institutions and of their members. Institutions are not families, but political entities enmeshed in law, and law is a construct in which impersonal duties prevail over personal ones. Only such a

[14] D. Miller, *On Nationality* (Oxford University Press, 1995), 50.

[15] See C. H. Wellman, 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun "My"?', *Ethics*, 110 (2000), 537.

[16] See, for example, Barry, *Justice*, 191–5; M. Baron, 'Impartiality and Friendship', *Ethics*, 101 (1991), 836; see also S. Mendus, *Impartiality in Moral and Political Philosophy* (Oxford University Press, 2002).

[17] Wellman, 'Relational Facts', 540.

justification can withstand charges of favouritism. If an institution's acts cannot be justified based on such an impartial justification, then those actions are highly suspect morally and those aspects require, at a minimum, institutional reform.

Three points require clarification. First, I do not claim that impartiality in the acts of an institution is a sufficient condition for an institution to act justly; and indeed there may even be situations in which an organisation may act justly without acting impartially. But the sort of questions we ask in determining the impartiality of human or governmental conduct can get us far in responding to the concerns voiced about today's international institutions. Second, it is not possible or particularly useful to characterise the totality of an institution as partial or impartial (let alone just or unjust). Institutions are multifaced creations of states, and broadbrush accusations of favouritism need to be avoided. Rather, it is necessary to break down the institution into its key functions and examine them. In the case of this chapter, I examine three core functions of institutions and ask whether the actions of the organisation can be convincingly justified from an impartialist perspective. It may well turn out that institutions act impartially in some ways but not others. But even this scrutiny is, I believe, a step forward, as it allows us to determine which aspects require institutional reform or even replacement.

Third, and most important, asking about the impartiality of international organisations does not prejudge what sort of (second-order) impartialist argument can best justify a special right or duty held by it or its members. One must find a convincing impartialist argument – contractarian, Kantian, utilitarian or otherwise. For example, with respect to individual duties, Goodin offers a consequentialist account of special duties towards co-nationals whereby states represent the most efficient means of allocating general duties among all individuals.[18] Alan Gewirth offers a Kantian perspective emphasising individual autonomy as the ethical lodestar of special relationships.[19] Oldenquist and Samuel Scheffler defend the patriot whose allegiance is based on loyalties or special ties alone.[20]

[18] R. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press, 1985); Goodin, 'What is So Special'.

[19] A. Gewirth, 'Ethical Universalism and Particularism', *Journal of Philosophy*, 85 (1988), 283, 294–6.

[20] A. Oldenquist, 'Loyalties', *Journal of Philosophy*, 79 (1982), 173; S. Scheffler, 'Relationships and Responsibilities', *Philosophy and Public Affairs*, 26 (1997), 189; for other defences of the moral significance of community, see M. Walzer, *Spheres of Justice*

Indeed, this last clarification may lead one to ask how we determine a convincing impartialist justification and whether we need an overall theory of the justice of international institutions to do so. Otherwise, we may simply be shifting underlying moral arguments into a new box called impartiality without answering any important questions. In response, we can, as an initial matter, easily identify some bad impartialist justifications, e.g. in the case of utilitarian arguments, where it can be shown empirically, or at least safely assumed, that action A (e.g. a particular membership policy or voting scheme) does not in fact increase utility. Other utilitarian justifications may seem defensible but risk decaying into the premise of something like: 'If this function of the organisation is ordered in a way that is most feasible politically – or if it permits the organisation to carry out its functions with the least resistance – then the organisation's conduct is impartial morally.'

But if we have to measure a plausible utilitarian argument that suggests an international organisation acts impartially against a deontological argument that it does not, we may well need more. At this point, I will not offer a comprehensive theory for evaluating impartialist justifications. My goal here is more preliminary insofar as it seeks to respond to critics of international organisations who may not even recognise the possibility that some unequal treatment of states by international organisations can be reconciled with a number of anti-favouritist or impartial justifications. At times alternative impartialist grounds are laid out.

Nonetheless, insofar as I offer some guidance for evaluating those arguments, my starting point is that of a 'weak cosmopolitan', i.e. one who sees the individual, wherever situated, as the ultimate unit of moral concern but who also sees benefits to global order and stability that may ultimately not be theoretically linked to individual dignity or welfare. As a general matter, I would posit that most of the well-known multilateral organisations are agents of inter-state cooperation dedicated at least in principle to goals that promote both individual welfare and global stability – although some may promote more invidious goals either in principle or in practice. Organisations whose goals are laudable should be encouraged to carry out those goals – an overtly utilitarian argument – although this must be balanced with the need not to undercut certain essential values in the international community that are best seen as deontological in nature. These include the most basic norms of

(New York: Basic Books, 1983), 33; Y. Tamir, *Liberal Nationalism* (Princeton University Press, 1993), 95–116.

human dignity, such as non-discrimination based on race, ethnicity or gender; bans on summary execution, slavery and cruel and inhumane treatment; and self-determination of peoples. Thus, for those institutions with laudable purposes, impartialist utilitarian arguments, even if convincing on their own terms, will need to be viewed alongside non-utilitarian arguments that may suggest that indeed the institution is not acting impartially.

Whether or not one agrees with my insistence on the need for an impartial justification, my approach still allows us see the world differently by asking two core questions: (a) how far an international institution's (or other actor's) duties extend; and (b) how we might justify duties by organisations to some but not all other international actors. In the end, we will have determined whether, in a word, organisations (and the states in them) can play favourites – whether they can limit their duties in a moral way. In so doing, we are effectively exploring whether there is indeed one international community or multiple communities.[21] This permits a more nuanced appraisal, for example, of cosmopolitan theories that tend to see states and groupings of them as having equal duties to all individuals around the globe; or Rawls's theories that divide the world into various categories of states, with different duties assigned to them.

Membership

International organisations can be grouped along two axes – the breadth of their *participation*, from fairly regional (or sub-regional), to global; and the *issues* over which they have a mandate, from specialised (or highly technical), to those with a mandate to consider all issues. Examples of the combinations are:

Global and general: United Nations.

Global and specialised: World Trade Organisation, International Monetary Fund, World Bank, International Labour Organisation, World Health Organisation, International Telecommunication Union.[22]

[21] Cf. D. Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' in D. Held and M. Archibugi (eds.), *Global Governance and Public Accountability* (Oxford: Blackwell, 2005), 240, 248–9 (on the connection between subsidiarity in decision-making and spatial boundaries of a community).

[22] Some global organisations are only open to states with a particular common interest, such as the International Coffee Organisation or the Commonwealth.

Regional and general: Organisation of American States, African Union, Gulf Cooperation Council.

Regional and specialised: European Union (though its mandate is very large), Association of South East Asian Nations, Arctic Council, Inter-American Development Bank.

The membership rules of each organisation are typically set forth in their constituent instrument (e.g. Article 4 of the UN Charter) as well as policy documents or developed by the organisation over time (e.g. the *acquis communautaire* of the EU). As states set up and operate international organisations, they make choices about whose inclusion will benefit the organisation and who will benefit from inclusion in it. In admitting members, the institution agrees to give them special rights vis-à-vis non-members and to create special duties towards them. The organisation may, for instance, be bound to give financial assistance to members but not non-members. As a result, non-member states will often seek to become members, as is clear from the history of the European Union and the WTO.

Global organisations: the United Nations

At one extreme in inclusivity is the United Nations. Article 4 of the UN Charter states:

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

As of today, the UN has 192 members. For most of its history, it routinely admitted new states resulting from decolonisation, although Cold War politics at times kept other states out (e.g. a group of Western and Eastern states jointly admitted in 1955 and East and West Germany jointly admitted in 1973). Even when Yugoslavia and the USSR dissolved, the UN was generally quick to admit the resulting entities. Clearly, the UN's members have interpreted the term 'peace-loving' loosely and made scarcely any serious inquiries into whether a candidate is 'able and willing' to carry out the obligations of membership, which

include, at a minimum, settling disputes peacefully, carrying out decisions of the Security Council and paying dues.

Does the UN have a duty to admit all states that meet the criteria of Article 4(1)? This precise issue faced the International Court of Justice in its first advisory opinion in 1946, when the General Assembly asked it whether a state voting on membership in the General Assembly or Security Council is 'juridically entitled to make its consent to the admission dependent on conditions not expressly provided by [Article 4(1)]'.[23] The Court said no, implying that the UN and its members have a duty to all states to admit them to membership if they meet those criteria. It is a general – though clearly contingent – duty. As a general duty, whose beneficiaries are all states, it is first-order impartial. I need not choose an underlying basis for this impartiality, though from a utilitarian standpoint there is much to be said for maximising overall welfare if an organisation dedicated to prevention and termination of armed conflict includes all states in the world.

Yet certain ethical viewpoints may object to this approach to membership. One could argue that the UN ought to be more selective in its membership, as is seen in calls – from both the American right and some mainstream academics – for an organisation of democracies as a counterweight or alternative to the UN.[24] But are these critics, who want less than universal membership, opposed to an impartial set of duties on the United Nations regarding admission? On the one hand, they might favour a duty by the UN to all states to admit them, but one simply contingent on the state's democratic political structure. On the other hand, they might be said to favour a UN with membership-related duties only to democratic states – special duties that are first-order partial. If this is argued, however, then even the current membership rules under Article 4(1) are also first-order partial; they simply are partial towards peace-loving states instead of democratic states.

These alternative criteria, while different from the first-order impartial criteria of the UN now, are still morally defensible from a second-order impartial perspective. Their advocates argue (wrongly, I believe) on utilitarian grounds, that such a grouping will contribute to international peace more than the somewhat dysfunctional UN. A better impartialist

[23] Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), 1947–8 ICJ Rep. 57 (Adv. Op. of 28 May 1948).

[24] For a recent academic endorsement, see J. Ikenberry and A. M. Slaughter (eds.), *Forging A World of Liberty Under Law* (Princeton, NJ: Princeton University, 2006), 25–6.

justification, one more appealing to cosmopolitans, would be that because democratic states have governments that derive their power from the consent of the governed and thus their legitimacy from the decisions of individuals, an organisation confined to them has an impartial membership criterion. If, however, someone advocated an international organisation open only to states that had a majority of white inhabitants, a second-order impartial justification would be elusive at best. Even a utilitarian would be embarrassed to argue the effectiveness of such an organisation in the face of the overlapping consensus in international law and morality on the invidiousness of racial discrimination.

The way the UN treats candidate states suggests to me tentatively that the following criteria together represent a sufficient condition for an ethically defensible membership policy: (a) publicly stated (even if somewhat open-textured) criteria for membership; (b) eligibility to any state to apply; and (c) selection criteria that can be justified from a second-order impartial perspective. An organisation may fall short in any of these criteria. This last criterion is, of course, the nub of the membership problem. In my example above, plausible utilitarian and deontological arguments can justify both the status quo in the UN as well as a league of democracies idea, while they cannot, at least prima facie, justify a league of white states.

But organisations may even fall short on the first criterion. Under the 1994 Agreement establishing the WTO, 'Any State … may accede to this Agreement, on terms to be agreed between it and the WTO'. The Agreement thus allows any state to apply for membership, but creates no duties on the organisation to admit anyone. Instead, each application is treated on a case-by-case basis and results in typically prolonged negotiations among the candidate, the WTO Secretariat and member states. As stated on the WTO's webpage:

> The new member's commitments are to apply equally to all WTO members under normal non-discrimination rules, even though they are negotiated bilaterally [between the WTO and the candidate state]. In other words, the talks determine the benefits (in the form of export opportunities and guarantees) other WTO members can expect when the new member joins. (The talks can be highly complicated. It has been said that in some cases the negotiations are almost as large as an entire round of multilateral trade negotiations.)[25]

[25] www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm.

Thus, even as the successful candidate will assume general duties to all other members (e.g. to apply the same tariffs to imports of the same products from all of them), the WTO does not specify exactly what obligation it has to any candidate regarding admission. It assumes no formal duty at all, general or special. It is possible that, as a de facto matter, the WTO admits members based on clear and uniformly applied criteria, but the constitutive instrument does not state them and is thus not ethically defensible without our knowing more. Perhaps the individual admission decisions can be justified from an act-utilitarian perspective – each admission decision is taken in a way to maximise utility according to some standard. But without knowing this for sure, the observer could easily conclude that the WTO resembles a club whose members make ad hoc decisions on whom they wish to admit. The absence in an organisation that purports to be global (*World* Trade Organisation) of any duty to admit new members according to clear criteria creates the potential for that organisation to play favourites in its admissions decisions. It may well contribute to the suspicion with which some in the developing world regard the WTO.

Regional organisations: the Council of Europe

But is admission open to all states a necessary factor for an ethical membership policy? To answer this, I turn to a clearly geographically limited organisation – the Council of Europe (COE), the forty-six-member organisation of European democracies whose most famous treaty is the European Convention on Human Rights and whose best known organ is the European Court of Human Rights. The 1949 treaty creating the COE states:

Article 3 Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council …

Article 4 Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers.

The COE is thus open only to 'European State[s]'. Article 49 of the Treaty on European Union uses the same phrase with regard to the EU, though it then requires the negotiation of a separate agreement between the EU's

members and the candidate on the terms of membership. The Council's membership policy is partial in a first-order sense – it extends only to European countries.[26] The Council, like the EU, has debated the meaning of the term 'European' and has chosen to admit marginally European states – in a geographic sense – like Azerbaijan, Georgia and Armenia, but it has not taken the step of admitting the former Soviet republics of Kazakhstan, Kyrgystan, Uzbekistan or Tadjikistan. This policy contrasts with that of the fifty-six-member Organisation for Security and Cooperation in Europe, whose original purpose was as a forum for East–West dialogue during the Cold War; it included the USSR (as well as Canada and the United States) and now includes all the ex-Soviet republics. But it has no organic instrument specifying membership criteria.

What are we to make morally of an organisation that limits its membership geographically? Probably not much as an initial matter. This sort of first-order partiality seems defensible from a number of second-order impartial stances. At a somewhat crude utilitarian level, many of the cooperation and coordination problems that international organisations are created to solve can be addressed most efficiently from a regional perspective. Trade, transportation and migration of workers are examples – although many such problems do not turn on proximity, and proximity can often be a subterfuge for more controversial traits like culture. This does not mean that it is easy to determine the point at which a state is not in the region, especially in the case of geographically adjacent states – why does the Association of Southeast Asian Nations omit Australia or Bangladesh? – but it provides a decent justification for the idea of regionally limited organisations. From a social contract perspective, it is also quite plausible that shared histories, languages or economic philosophies may promote agreement more readily than heterogeneity. In the case of the Council of Europe, a limitation of its membership to European democracies might be justified based on a utilitarian argument based on the institutional constraints inherent in the enforcement of the European Convention of Human Rights by the European Court; a Council of Europe with too many members would overwhelm the Court with petitions alleging violations. Yet such an impartial utilitarian justification may not offer a defence to the current composition of the Council. After all, it has admitted Russia, a state most

[26] This limitation could be viewed as either one concerning eligibility to apply or criteria for membership.

of which is not in geographically defined Europe and whose human rights problems have already led to hundreds of petitions to the Court.

Defenders of geographically limited membership policies, however, do not limit themselves to second-order impartial arguments. Indeed, many supporters of limited membership for both the Council of Europe and the European Union have a partialist justification – that a state's status as European creates special links that *alone* permit, or even require, those organisations to limit membership to those states. These links are akin to Rawls's 'relations of affinity'.[27] Thus, while those advocating impartialist justifications and those offering partialist justifications might agree on the scope of expansion of the EU, the critical threshold question for the former is whether a state is *in Europe*, while for the latter is whether it is *European*. The debates in Europe about the territorial scope of the EU resemble the debates in ethics about special duties to 'fellow countrymen'. When politicians argue over whether Turkey is sufficiently 'European' to be in the EU, they are asking, in partialist terms, whether it is a member of the European family, a group whose members are presumably entitled to be the beneficiaries of special duties. Their notion of the family may hinge on acceptance of the Christian religion, an easy basis on which to exclude Turkey, or perhaps on shared values related to individual dignity and the proper role of the state in society – although this can cross the line to an impartialist justification.[28] For some, it might even mean race.

Those defending limited membership on partialist grounds – associativist in Wellman's phrasing[29] – have, I suspect, captured the terms of the public debate over expansion. This tendency to argue based on European-ness rather than European location may emanate from the very powers of the Union itself. Because the EU has such strong powers vis-à-vis its members and so many benefits to offer them, public support for its enlargement may well depend on offering up a more accessible justification for inclusion, one that does not seek to reduce European-ness to some impartial geographical concept. As we know from the 'one thought too many' exhortation of Bernard Williams, partial arguments have a distinct advantage over second-order impartial arguments in their common sense connection to human

[27] Rawls, *The Law of Peoples*, 112.

[28] When I pointed out to a colleague, a prominent German international lawyer, that the editor-in-chief of the *European Journal of International Law* at the time was an Australian academic who teaches at NYU Law School, he responded that being a European is 'a state of mind'.

[29] Wellman, 'Relational Facts'.

experience of family and community[30] – and the EU is still called the 'Community'.

Yet even if partial justifications have an appeal in debates over admission into the Council of Europe or the EU, it is too simple to say that they are the only justifications advanced. For after governments and citizens in Europe have decided whether a state is European, they must eventually move on to the second question, namely whether its current economic and political system meets the criteria for membership. These criteria are publicly presented in the organic instrument of the institutions or in other policy documents (in the case of the EU, so-called Copenhagen Criteria – a stable democracy, with respect for human rights and the rule of law and protection minorities; a working market economy; and adoption of the *acquis communautaire*).[31] The Council and EU are thus not obliged to admit any European country simply because it is European, but obliged to admit only those meeting the additional criteria. The European-ness of a state might generate a special duty on the institution to consider the state's admission – as well as a right of the institution to preclude admission of non-European states – but it cannot, under the positive law of the organisation, generate a duty to admit it.

Nonetheless, it is plausible that the two stages cannot be so nicely parsed in the real world. One may discover that once COE or EU decision makers identify a state as sufficiently European, they are willing to interpret creatively the objective membership criteria in a way to allow for admission. This account can explain the willingness of the Council to admit states with fragile democratic institutions and guarantees of the rule of law. I could probably endorse such an outcome if the utilitarian argument that bringing them into an organisation will strengthen the states' domestic institutions was in fact provable; but I could not endorse that partialist view that they should be admitted merely because they are somehow European or 'like us'. Examination of ongoing debates over membership in terms of partiality thus helps to clarify the sorts of arguments that states are making about exclusivity or inclusivity of international organisations as well as their reasons for them.

The debates over admission criteria in the EU, as well as the desirability of a league of democracies, lead us to ask which tests of a political or ideological nature for membership in a international organisation are

[30] B. Williams, 'Persons, Character and Morality', in *Moral Luck* (Cambridge: Cambridge University Press, 1981), 1.

[31] http://ec.europa.eu/enlargement/the-policy/process-of-enlargement/mandate-and-framework/_en.htm.