Legitimacy, Justice and Public International Law

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based on impartial criteria. The above discussion aims more at identifying the sort of arguments that will not work than the full scope of the ones that will. Certainly, utilitarian arguments – though only ones with some empirical backing – have a role to play here, for international organisations first and foremost need to carry out their functions, and membership criteria that in the end further those functions seem prima facie impartial. Nonetheless, I am not willing to put all the balls in the utilitarian basket, for if other impartialist justifications find such a policy indefensible, the organisation will be playing favourites in an immoral way. International institutions do carry out functions, but also are themselves embodiments of the international order, and certain values are now so much part of that order that no organisation should be able to ignore them completely in choosing its members.

Finally, it may be asked why international organisations should need to justify their membership policies at all – what is so immoral, after all, about a group of states simply picking others with whom to work on a particular issue and keeping others out, just like individuals in a private bridge or golf club or sorority do? The answer to this difficult question may lie in the difference between individual morality and institutional morality discussed earlier. We do not say that a sorority's membership policy is just; instead, we would say simply (or at least the sorority's defenders would) that it is not morally unacceptable for its members to pick the young women they want as new members. But for conversations about the justice of institutions, domestic or international, I believe we need to adopt a higher standard, one where personalities and partiality are not decisive factors. Moreover, as noted earlier, these institutions are often formed through organic instruments and thus founded on law, for which impartiality and impersonalised decision-making is central. Finally, the power of international institutions over member states, both in terms of advantages they bring and disadvantages they can impose, also argues for an admission policy based on criteria defensible in partialist terms.[32]

[32] I appreciate comments from Máximo Langer and Daniel Halberstam on this issue. As Carlos Vásquez has pointed out, this view is in tension with my claim in 'Is International Law Impartial', 55–7, that special duties based on voluntarism, e.g. in bilateral treaties, are easily justifiable. Without fully resolving this issue, I believe the power of international institutions suggests that voluntarism will not suffice for an ethically defensible membership policy.

Decision-making processes and powers

The influence and power of an international organisation turns upon the legal and political effect of its decisions upon member states and others. These effects in turn both depend upon and help determine the mechanisms it uses for making decisions. The decision-making processes used by a number of international institutions have come under great criticism internationally for perceived favouritism to certain interests. To appraise this charge, I examine whether certain members enjoy special rights or duties and how we might justify such treatment.

The United Nations

I begin with the two key organs of the United Nations, the General Assembly and the Security Council. The General Assembly includes all member states, each of which has the right to one vote. The Assembly passes many resolutions each year, but under the UN Charter the Assembly can legally bind members over only a handful of issues, all of them internal to the operation of the UN, notably the budget and the dues, the admission of new members, the composition of UN bodies and the election of various UN officials. Resolutions on external issues – an ongoing war, a human rights atrocity, economic injustice – are mere recommendations.[33] Contrast this with the Security Council, comprised of fifteen states, five of them permanent members and ten elected for two-year terms from the broader UN membership. Council resolutions require a majority of nine votes, with the additional condition that none of the permanent members oppose the resolution. The decisions of the Council enjoy a special status – automatic binding international law – under Article 25 of the Charter: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'[34] The Council has repeatedly made such decisions since the end of the Cold War, for example to order members to impose economic sanctions or to give states permission to use force that would otherwise be precluded under Article 2(4).

[33] UN Charter articles 10, 11, 13, 14, 17, 18.

[34] Not all the Council's resolutions are decisions; many are meant to be recommendations. But the decisions are binding under Article 25 and, moreover, under Article 103, prevail over any other duties a state may have under other treaties.

Stated simply, the General Assembly is characterised by equal rights for all states but no power over those states beyond internal UN matters; the Security Council is characterised by special rights – for its members vis-à-vis the membership as a whole and for the permanent five on top of that – and vast power over member states.[35] This formula has elicited substantial criticism over the years from the majority of member states, as well as many international lawyers and philosophers, who claim that the Assembly is too weak, the Council too strong and the permanent five too privileged.

The Charter formula is easily traceable historically. The governments preparing the Charter during the Second World War limited the Assembly's powers precisely because of its universal membership and one-state-one-vote rule, for the strong powers did not want the UN to order them to do anything opposed to their interests. Moreover, they granted the Council vast powers only because of its small membership and the veto, the former essential for rapid decision-making and the latter, again, to prevent any decisions against great power interests. And the five states designated in the Charter as permanent members were the principal Second World War victors (with China's membership passing to the PRC upon its replacement of the Taiwan government in 1971). The status quo is thus no accident.[36] But can it withstand the charge of favouritism? I believe much of it can.

With regard to the Assembly, critics, particularly from the developing world, argue that the Assembly's members ought to enjoy *greater* general rights, e.g. the right to make decisions binding on member states. The argument is essentially that sovereign equality, one of the founding principles of the UN according to Article 1 of the Charter, demands greater powers than the Assembly currently enjoys – that just as there is a general right of all states to vote on the budget, there ought to be one to vote on other matters that will bind member states. Such a general right is superficially justifiable if we compare the General Assembly to a domestic polity, where legislators create binding law by majority vote and citizens may do so as well through referenda.

But to say that states enjoy general (or equal) rights to do some things implies nothing at all as to whether they should enjoy general rights to

[35] As noted in footnote 10, discussion of special rights rather than special duties is a better way of understanding disparate treatment in some cases.

[36] See, for example, G. Simpson, *Great Powers and Outlaw States* (Cambridge University Press, 2004); S. Schlesinger, *Act of Creation: The Founding of the United Nations* (Boulder, CO: Westview Press, 2003).

do other things. I have an equal right to vote, but I do not have an equal right to be on a professional baseball team; indeed I would not have an equal right to be on such a team even if I had the best baseball skills in the world. Sovereign equality does not mean equality for all purposes nor should it. Sovereign equality has a very limited scope. It simply means that states are juridical equals, that none of the attributes of a state – size, power, population etc. – *automatically* endow it with greater or lesser legal rights than another state.[37] It is a baseline for the future allocation of rights and duties and does not mean they must be treated as equals for all purposes. The General Assembly's makeup flows from sovereign equality, but not directly so – rather, it originates in a decision by the equally sovereign states ratifying the Charter to create a body where each state gets one vote.

Indeed, to extend the general rights of Assembly members would prove highly unjustifiable from many impartial perspectives. Most obviously from a cosmopolitan viewpoint, as recognised by many philosophers, each member state is not a person, but rather a political entity composed of numerous people, and equal rights in the Assembly to large and small states means unequal rights to the people living there. Indeed, a cosmopolitan might say that the equal voting in the Assembly is already morally flawed because it does not grant equal rights to the citizens of the member states, but is partial to the interests of small states. Thus cosmopolitans would call for something akin to the European Parliament at the international level.[38] (I think, however, equal voting rights could be justified from a second-order impartial perspective if we see some value for resolution of international disputes in providing certain arenas in which states have equal votes.)

If we move beyond the claim that the Assembly ought to enjoy greater powers by virtue of its universal composition and one-state-one-vote decision-making process, we face a harder set of objections when it comes to the Security Council – for the Council is characterised by special rights for (a) its fifteen members and (b) the permanent five in

[37] See, for example, Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States, UNGA Res. 2625 (1970), 1; *Oppenheim's International Law* 340–2 (R. Jennings and A. Watts, 9th edn, 1992). I thus disagree with Gerry Simpson, who writes that 'the effect of the collective security provisions [in the Charter] is to entrench a form of sovereign *in*equality', Simpon, *Great Powers*, 187 (original emphasis).

[38] D. Archibugi, 'The Reform of the UN and Cosmopolitan Democracy: A Critical Review', *Journal of Peace Research*, 30 (1993), 301; see also T. Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1997), 482–4.

particular, special rights that require independent justification beyond the historical account.[39]

(a) The special rights for the fifteen states are justifiable from a second-order impartialist perspective based on a utilitarian calculation. As the organ entrusted with the 'primary responsibility' for maintaining international peace and security, the Council simply cannot function with a large membership. A large membership is a nearly sufficient condition for paralysis, an unacceptable option for the Council. It is hard to see how any sort of deontological argument should require the Council to enlarge to the point of such paralysis. Can a utilitarian calculus target the best number at fifteen out of 192 states? No, and I do not wish to preclude the wisdom of an improved composition, an idea that nearly every state in the UN endorses. But the notion that the Charter picks favourites by virtue of the small size of the Council alone does not pass muster.

(b) The special rights of the P5 are two-fold: permanent membership and veto. The former ensures in principle that those states will always participate in the deliberations of the Council, and in practice is the basis for their control of much of the Council's agenda (though it does not guarantee that they will convince enough of the other ten members necessary to pass resolutions supporting their positions, as the United States discovered in the spring of 2003 regarding Iraq). The veto, as noted earlier, also ensures that the Council will not pass a resolution that any of the permanent five oppose. To the critics, this form of partiality smacks of the worst type of favouritism, something that cannot be justified from either a first or second-order perspective.[40]

Yet this criticism, while in many ways compelling, overlooks one significant utilitarian defence of permanent membership and the veto – namely that peace, stability and collective security are promoted when the states with power stand behind a resolution of the Security Council and weakened without that endorsement. A stable world order is a state of affairs that Kant and many others since have recognised as a moral good (though Kant rejected deriving duties as a means to further that

[39] For an excellent evaluation of the problem from the perspective of international law, see D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', *American Journal of International Law*, 87 (1993), 552.

[40] See, for example, Simpson, *Great Powers*.

goal and instead insisted that practical reason and satisfaction of the Categorical Imperative would lead to the perpetual peace).[41] This may also be viewed from a social contract perspective, namely that stability and peace are promoted in granting certain states a special responsibility for the maintenance of peace, and with that responsibility comes the special right to block measures that they believe will not advance it.[42] The special rights of the P5 thus emanate from their special duties – special not in the sense that they are owed only *to* some states, but special in that they are owed only *by* some states.[43] Indeed, the Charter specifies that the non-permanent members of the Council should be chosen based on 'due regard … to the contribution of [UN members] to the maintenance of international peace and security and to the other purposes of the Organisation'.[44] The Charter thus implies that the non-permanent members have a special duty to other states to further international peace, and the Council and Assembly have stressed that the permanent members bear such a special responsibility as well.[45]

These impartial justifications are vulnerable to a number of counter-arguments, each from a different moral perspective. First, within utilitarianism, one can make the descriptive claim that the assent of powerful states is not a necessary condition for global order. Perhaps international peace and security might be advanced even against the interests of some of the most powerful states if the majority of the population of the planet backs a particular measure. Second, within the social contract model, one could argue that whatever the theoretical justification of hinging the permanent five's special rights on their special duties, they have clearly abused their special rights and neglected their special duties. Third, bringing in deontological arguments, one can asset that global order, even if advanced by permanent membership for some states, should not supersede other values (like protection of human rights and thus greater participation by states that protect them).

Indeed, the first two of these counter-arguments – those attacking the Council from within utilitarianism or within social contract theory – are especially good arguments against the status quo. For the importance of

[41] I. Kant, 'Perpetual Peace: A Philosophical Sketch' in H. Reiss (ed.) and H. B. Nisbet (trans.), *Kant: Political Writings*, 2nd edn (Cambridge: Cambridge University Press, 1991), 93, 108–13, 121–4. On the acceptance by small states of the special powers of the Council, see Schlesinger, *Act of Creation*, 171–3.

[42] I appreciate clarification from Carlos Rosenkrantz on this point.

[43] See the distinction in Goodin, 'What Is So Special'.

[44] UN Charter, Article 23.

[45] B. Simma (ed.), *The Charter of the United Nations: A Commentary*, vol. 1, 2nd edn (Oxford University Press, 2002), 439.

power in promoting compliance with resolutions does not translate into a permanent seat for the United States, Russia, the United Kingdom, France and China. Mere recognition that these states were the leading allies (and even at that, only three really were) in a war fought sixty years ago seems like a sentimental partialist argument. For a few decades these arrangements might have made sense as these states had nuclear weapons, colonies or satellites (and thus a global reach), or both. But today other states have nuclear weapons, colonies are gone and two or even three of the permanent five can hardly be said to be global political powers. As for the social contract idea, the members of the Council, and the permanent five in particular, have been quite inconsistent (or worse) in carrying out their special duty of maintaining international peace. The permanent five have shown themselves pursuing their own interests just as much as other states when they block resolutions in the Council; indeed for many years UN peacekeeping operations excluded troops from the permanent five because of their presumed partiality. As a result, either serious reconstruction of the Council is needed (perhaps to give permanent membership to states that do take their global duties seriously, like Sweden or the Netherlands), or any permanent membership is simply impossible to justify given the tendency of states to advance their own interests no matter what.

The last fifteen years have witnessed hundreds of proposals, from governments and NGOs, usually couched in impartial terms, for alternative arrangements in the Council that correct these deficiencies. Consider the views of the Secretary-General's High Level Panel on Threats, Challenges and Change:

> The challenge for any reform is to increase both the effectiveness and the credibility of the Security Council and, most importantly, to enhance its capacity and willingness to act in the face of threats. This requires greater involvement in Security Council decision-making by those who contribute most; greater contributions from those with special decision-making authority; and greater consultation with those who must implement its decisions.
>
> Reforms of the Security Council should meet the following principles:
> (a) They should … increase the involvement in decision-making of those who contribute most to the United Nations financially, militarily and diplomatically – specifically in terms of contributions to … assessed budgets, participation in mandated peace operations, contributions

to voluntary activities of the United Nations in the areas of security and development, and diplomatic activities in support of United Nations objectives and mandates;

(b) They should bring into the decision-making process countries more representative of the broader membership, especially of the developing world;

(c) They should not impair the effectiveness of the Security Council;

(d) They should increase the democratic and accountable nature of the body.[46]

Beyond these recommendations, in 2005 all the UN's heads of states and governments endorsed the concept of the Responsibility to Protect, which places a special responsibility on the members of the Council to use that body as an instrument to respond to massive violations of human rights.[47]

The panel thus offers a set of impartial justifications for the special rights that Council members should enjoy. The seemingly impenetrable barrier to Council reform has been that, when states make specific proposals for expansion, most of the participants and their reasons for preferring one set of special rights over another are quite partial. Partial towards whom? – towards themselves and their friends. It is no coincidence that Indonesia, India, Nigeria and Brazil have been sympathetic to the (impartial sounding) idea of permanent members from each region of the globe. Every player in the debate is suspected by every other player of having self-interested reasons for its proposals, so appeal to an impartial justification for special rights rings hollow.

I have no solution to this problem of Security Council reform other than to observe that states who make self-serving proposals for reform are kidding themselves if they think that nobody is noticing. Impartial justifications will probably not convince the most important actors in the end, who will vote for the reform proposals that advance their interests, but to the extent that the debate can be channelled in favour of impartial justifications, such as those offered by the High Level Panel, the better.

[46] *A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change* (2004), para. 249. In addition to changes in the composition of the Council, the Panel and others have made proposals for a greater role of the General Assembly in the Council's work, greater transparency in the Council's deliberations and increased roles for NGOs.

[47] UN General Assembly Resolution 60/1 (2005), para. 139.

The only hope for reform lies in the possibility that the many states that do not have a direct stake in the outcome will convince those who do to compromise. And as noted, critics will continue to argue, whether for utilitarian, social contract, or deontological grounds, that no form of permanent membership will permit the Council to avoid characterisation as an institution based on favouritism.

Finally, one last justification for permanent membership for powerful states should be mentioned – one that steps outside the realm of theories of justice, morality or impartiality – a more or less pragmatic argument grounded in the positive criteria of a legal system.[48] As Hart wrote, one of the bare minimum criteria for such a system is that 'those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed'.[49] Under the Charter, the decisions of the Council are meant to be part of the international *legal* system, in particular the part governing international peace and security (though Hart himself said that the lack of obedience meant that there was no international legal system). The guaranteed participation of a core group of states with political power in, and the non-objection of those states to anything considered legally binding furthers the end of general obedience. Without the compliance of the powerful, the prospects for obedience by their many allies are diminished. Moreover, those states also are more likely not merely to refrain from complying, but to block the compliance by obstruction. In a world in which the implementation and enforcement of the Council's decisions necessarily falls to member states, the neutrality or opposition of powerful states decreases significantly the prospects for compliance. The special status of the permanent five enhances prospects for their obedience because they cannot complain that they were not involved in or opposed the decision. This decision-making structure is not a sufficient condition for compliance (any more than it is for world order), but it may well be necessary; for without it those states would have to be persuaded to obey something they had opposed. In this sense the status of permanent membership and the veto are not *just* a case of historical power politics. Rather, they preserve the international law of the collective security system from irrelevance.

The likely response to this justification for the veto is that it is circular – that it justifies, and not merely assumes, non-obedience to resolutions

[48] I appreciate this distinction from Chaim Gans and Douglas Husak.
[49] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 113.

that the permanent members oppose. For if the UN Charter gave the Council binding decision-making power without special rights for the permanent members, those members would still have an obligation to obey it and should not be able to opt out simply because they were not involved or opposed the resolution. But this is a charge that can be levelled at Hart's views as well. Hart's inclusion of the criteria of general obedience can be seen as a justification for non-obedience. But neither his reasons for saying that a legal system can exist only if there is general obedience nor my defence of permanent membership based on that proposition do that – they simply flow from a realisation that however much we might have legal rules validated by rules of recognition, the existence of a legal system turns upon certain realities about society's attitude towards the rules of recognition.[50]

The International Monetary Fund

In contrast to the UN Charter, the Articles of Agreement of the International Monetary Fund provide for decision-making by the member states, but allocate votes based on each state's financial contribution to the IMF or quota. Quotas are determined based on a variety of economic factors about the state, including GDP and foreign exchange reserves. Key decisions – in particular the extension of loans to member states facing shortfalls in foreign exchange reserves due to economic distress – are made by an Executive Board, comprised of twenty-four people entitled to cast the votes of all of the states. The Board has one member from each of the top five quota holders, who casts the vote of that state alone (together they control almost 39 per cent of the votes); and nineteen other members, each representing other groups of countries, with each Executive Director's votes depending on which countries he represents. A majority of votes, required for most Board decisions, can be obtained with the votes of as few as eight Executive Directors, representing thirty-five states. The developing world, however, retains more leverage over votes requiring a supermajority (such as adjustments to quotas, which require 85 per cent of votes), where, if they act together, they can block a decision. The total number of votes as of 2009 was 2,217,033. Consider this sample votes per member state:

[50] See Hart, *Concept*, 100–1.

State	Number of votes	Percentage of total
Argentina	21,421	0.97
Botswana	880	0.04
China	81,151	3.66
Germany	130,332	5.88
Indonesia	21,043	0.95
Japan	133,378	6.02
Russia	59,704	2.69
United States	371,743	16.77[51]

Sovereign equality notwithstanding, the IMF gives special rights to states in proportion to their contribution to the working capital of the Fund. Poor states have little power to influence decision-making and rich states control the voting. As a result, they have succeeded in promulgating IMF policy that conditions the IMF's lending to its members on domestic adjustments based on the rich states' views of the role of the state in the economy, including concepts of good governance, human rights and environmental protection.[52] Many of the developing world complaints about IMF conditionality are actually complaints about how the IMF itself makes decisions. As Marc Williams has said: 'Those in greatest need of the IMF's resources are therefore permanently in a state of subordination.'[53]

The second-order impartialist rationale for this arrangement is that it does not constitute favouritism to give rich states greater votes in a financial institution because their votes are, in fact, in direct proportion to their share in the working capital of the institution. Banks are, after all, in the business of lending out money, and those decisions ought to be made by those who have contributed the money. This argument has a deontological ring to it based on the notion that those with contributions deserve to have influence. And in the case of the IMF, those contributions themselves are determined based on the application of objective economic criteria. From a utilitarian perspective, in order to increase the

[51] www.imf.org.

[52] A. Newburg, 'The Changing Roles of the Bretton Woods Institutions: Evolving Concepts of Conditionality' in M. Giovanoli (ed.), *International Monetary Law: Issues for the New Millennium* (Oxford University Press, 2000), 81.

[53] M. Williams, *International Economic Organisations and the Third World* (London: Harvester Wheatsheaf, 1994), 67.

overall lending from the bank, help countries experiencing currency shortfalls and thereby presumably increase overall economic welfare, the bank needs to attract capital; and it makes sense to couple voting rights to capital contributions to encourage the rich to join and contribute to the IMF. I recognise that this defence treads close to the line of saying that any voting structure that accepts as a given the political desire of rich states to have influence over poor states is an impartial one, and that it neglects the duty of those states to assist poor states by presumably lending money without controlling the recipients' use of it.

A contractarian approach might, however, reject the basic starting point of distributing votes based on wealth. If states did not know whether they would be rich or poor, their risk aversion might cause them to endorse a voting system that did not so directly penalise the poor. It is even conceivable that they would endorse an IMF with equal voting power for states. This Rawlsian argument does not, at this point, convince me that the IMF's criteria are partial or immoral insofar as the utilitarian argument seems particularly strong and the deontological arguments at least passable and not in contradiction with fundamental norms of human dignity.

At the same time, as with the Security Council, one particular distribution of votes need not accomplish that goal best or even particularly well. Indeed, the IMF is aware of this concern and in 2008 adjusted upward the quotas of what it calls the 'the most under-represented' members – China, Korea, Mexico and Turkey – and adopted new criteria for quotas 'to make quotas more responsive to economic realities while enhancing the participation and voice of low-income countries in the IMF's decision making'.[54] Prospects for tinkering with voting are all grounded in different forms of impartialist justification. As the IMF considers these proposals, it will be important to see which such arguments have the greatest political traction with member states.

Decision-making outcomes

Finally, we can ask whether institutions are playing favourites when they decide to exercise their authority over one set of problems but not another. How should an organisation's duties translate into particular decisions? Does, for instance, the United Nations have a duty to respond to mass atrocities in Darfur, Rwanda and Bosnia in

[54] IMF Quotas Factsheet, February 2009, www.imf.org/external/np/exc/facts/quotas.htm.

the same manner? Refraining from playing favourites does not require equal treatment for all states and individuals – just that they be treated as equals.[55]

Some duties of international organisations seem general on their face. The United Nations, through the Security Council, 'shall determine' whether there is a threat to the peace and breach of the peace and 'shall make recommendations or decide' what sort of action to take in response to them.[56] The Charter goes on to say that the Council 'may' take non-military measures or military measures, without any requirement that it do so in each case. These provisions give the Council flexibility to respond to situations as it chooses. Yet such flexibility does not by itself conflict with a general duty to act in *some* manner in the event of a threat to the peace. The UN also 'shall promote' high standards of living, solutions to economic problems and human rights.[57] These are obligations to all member states.

At the same time, the Charter regime does not consist only of a set of general duties. Chapter XII of the Charter, on the International Trusteeship System, obligates the organisation to 'promote the political, economic, social and educational advancement' and the 'progressive development towards self-government or independence' of peoples in the trust territories, an obligation it does not have towards other peoples – and most significantly, did not assume towards peoples living in bona fide colonies.[58] Yet ever since it became clear in the late 1940s that decolonisation was inevitable, the UN has assumed special obligations towards colonial peoples to promote their transition to independence, whether through election monitoring, technical assistance, or even transitional administration; and it has continued to assert special obligations to the states in the developing world. The UN's long-term focus on the peoples of Namibia, South Africa, or the Occupied Palestinian Territories stems from a sense among many member states that the Organisation has a special duty towards certain disempowered groups (though for other states it is merely a political axe to grind).

[55] R. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 227.

[56] UN Charter, Article 39. [57] *Ibid*., Article 55.

[58] Chapter XII is now a dead letter as all former trust territories have become independent states.

These special duties, however, can be grounded in an impartial rationale, indeed one that is widely shared by the member states. In the case of peoples under colonial occupation, states shared a sense of the illegitimacy of alien rule – in deontological terms, a flagrant violation of the Categorical Imperative. Indeed, we might even recast this duty as a general one that all states owe to all peoples, namely the duty to promote their self-determination.[59] States exercise this general duty in one way with respect to peoples in other existing states – by agreeing to leave them alone in the choice of their government or political structure (up to the point at which the latter start committing human rights violations) – and in another way with respect to peoples in colonial territories – through convincing imperial states to shed their colonies and assist colonial peoples in establishing new states.[60] At the same time, not all states saw their duties to help colonial peoples impartially. Some states, especially other former colonies, likely saw a tie with colonial peoples that itself created a special duty to them – e.g. certain African states' support for decolonisation (or elimination of apartheid in South Africa) came from a sense of community based on geographic proximity, race and shared history. From this perspective, these ties were morally significant enough to create duties to help certain oppressed people.

Textually grounded duties are, for international lawyers, at the core of how international organisations are supposed to act impartially. They do so when they act *according to law*, whether the law of their constitutive instrument or other international law. Acting according to law is not the responsibility of only judicial bodies, but of all international (and indeed domestic) institutions founded on law. Yet, as the example of the Security Council shows, international law, like other law, may be permissive or mandatory regarding the powers of international organisations. Impartiality takes on different contours with respect to these two possibilities.

(a) When international law *requires* an international organisation to act a certain way – regardless of whether that duty is general or special – we might be able to judge whether the organisation is acting impartially

[59] See Ratner, 'Is International Law Impartial?', 49–50, 52–3.

[60] This mirrors the international lawyer's understanding of the right of self-determination of peoples insofar as the right has different contours depending on the type of people (e.g. people of a state as a whole, people of a colony, minority group or indigenous people). See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995).

by simply seeing whether it fulfils that duty uniformly, treating all beneficiaries of the general duty the same and all beneficiaries of the special duty the same (though different from non-beneficiaries of the special duty). Yet the charters of organisations and other principles of international law are often so open-textured that they leave a huge room for discretion to the organisation. The Charter's requirement that the UN promote the 'political, economic, social and educational advancement' of peoples in Trust Territories – a special duty – provides a very amorphous standard on which to judge the impartiality of the UN's actions in different cases. Similarly, the Constitution of the International Labour Organisation obligates the ILO to 'further among the nations of the world programmes which will achieve … full employment and the raising of standards of living', a general duty, though one not specific enough to help much in any inquiry into the impartiality of the ILO's actions.

(b) When international law *authorises* an organisation to act in a certain way, the law itself does not provide any standard for judging impartiality. The Genocide Convention provides that 'Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide', which some NGOs and states mistakenly interpret as an obligation on the UN to prevent and punish genocide but is clearly at best only authority for the UN to do so.[61] One cannot look to the Genocide Convention to determine if the UN is acting impartially to prevent genocide. That does not make permissive provisions of international law irrelevant to international organisations. The law can influence the UN's options by inviting various actions or channelling it in certain directions. Most of the Charter's provisions regarding the Security Council are authorisations rather than duties, but, as Rosalyn Higgins long ago observed, the Council's debates and resolutions show 'political operation *within* the law, rather than decision according *to* the law'.[62] But it does mean that the text will not be that helpful in judging the even-handedness of the

[61] Indeed, such authority is legally unnecessary or perhaps even legally invalid, as the Charter alone is the source of authority for the UN's organs.

[62] R. Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', *American Journal of International Law*, 64 (1970), 1, 16; see also R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984), 57–9.

organisation's decisions. In the end, whether international legal texts require or merely permit the organisation to act, they have limits as standards to determine whether international organisations are acting impartially.

The next best option, in my view, is to look past international norms to the general principle of law that like cases should be treated alike – again a principle not confined to judicial bodies – akin to the philosopher's notion of universalisability.[63] International affairs does not, as we know, afford any examples of identical or even very like cases, but this general principle nonetheless forces members and observers of international organisations to inquire continuously whether the disparate treatment the institutions afford different wars, economic crises, health emergencies, human rights atrocities, environmental problems and other situations are justified by the relevant differences between the cases and not other considerations. Thus, an impartial set of responses might turn on an objective evaluation of the scope of the crisis, whether in terms of human suffering or economic losses. I admit this proposition begs almost as many questions as it answers, including what counts as a relevant difference; my point is simply that it is probably the best question we can ask to judge if the organisation is picking favourites. We might not have a simple recipe for impartiality, but we will have some indicators of clear partiality or favouritism.

Thus, for example, among international law scholars, Christine Chinkin was highly critical of the Kosovo intervention, noting that 'the commitment to human rights that humanitarian intervention supposedly entails does not mean equality of rights worldwide. The human rights of some people are more worth protecting that those of others.'[64] She lamented the inadequate response of the Council to graver human rights catastrophes in Africa. Detlev Vagts, Jose Alvarez and Gerry Simpson have separately noted the link between the decision-making procedures of the Council discussed earlier and its failure to treat like cases alike. In the most obvious sense, the veto ensures that the permanent five 'enjoy complete de facto immunity from the enforcement jurisdiction of the Security Council'.[65] The permanent five's power not only ensures that

[63] See generally P. Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002), 15–28; Hare, *Freedom and Reason*.

[64] C. Chinkin, 'Kosovo: A "Good" or "Bad" War?', *American Journal of International Law*, 93 (1999), 841, 847.

[65] Simpson, *Great Powers*, 188.

certain matters will be off the Council's agenda or at least not the subject of a resolution; it also means that certain issues will dominate it. Thus Alvarez notes the practice of the Security Council in passing resolutions that respond principally to the concerns of the United States, which he calls an example of (in Vagts's words) 'hegemonic international law'.[66] From philosophy, David Held has offered a list of reforms of the UN – compulsory World Court jurisdiction over all inter-state and individual-state disputes, creation of law by a near consensus of the General Assembly (all of which he admits are unrealistic) – based on the idea that it would end the practice of double standards, thereby 'establishing and maintaining the "rule of law" and its impartial administration in international affairs'.[67]

International organisations are hardly unaware of these concerns. In 1991, as the UN began more intrusive peacekeeping operations to protect human rights – long before ideas of more robust measures such as in Somalia, Haiti or Kosovo – Secretary-General Javier Perez de Cuellar wrote:

> It seems to be beyond question that violations of human rights imperil peace, while disregard of the sovereignty of States would spell chaos. The maximum caution needs to be exercised lest the defence of human rights becomes a platform for encroaching on the essential domestic jurisdiction of States and eroding their sovereignty … Some caveats are, therefore, most necessary … The principle of protection of human rights cannot be invoked in a particular situation and disregarded in a similar one. To apply it selectively is to debase it. Governments can, and do, expose themselves to charges of deliberate bias; the United Nations cannot.[68]

Or, as the High-Level Panel stated in 2004:

> The credibility of any system of collective security also depends on how well it promotes security for all its members, without regard to the nature

[66] J. Alvarez, 'Hegemonic International Law Revisited', *American Journal of International Law*, 93 (2004), 873.

[67] D. Held, 'Democracy and the New International Order' in D. Archibugi and D. Held (eds.), *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge, MA: Polity Press, 1995), 96–107; see also D. Held, 'Cosmopolitanism: Globalization Tamed?', *Review of International Studies*, 29 (2003), 465, 475 ('The susceptibility of the UN to the agendas of the most powerful states … [is] indicative of the disjuncture between cosmopolitan aspirations and their partial and one-sided application'). I remain highly sceptical of proposals from Held, Caney and others that enhanced power to the International Court of Justice will promote cosmopolitanism in light of the institutional conservatism of that body as reflected in many of its rulings.

[68] *Report of the Secretary-General on the Work of the Organization*, 13 Sept. 1991, 5, UN Doc. A/46/1 (1991).

> of would-be beneficiaries, their location, resources or relationship to great Powers.
>
> Too often, the United Nations and its Member States have discriminated in responding to threats to international security. Contrast the swiftness with which the United Nations responded to the attacks on 11 September 2001 with its actions when confronted with a far more deadly event: from April to mid-July 1994, Rwanda experienced the equivalent of three 11 September 2001 attacks every day for 100 days, all in a country whose population was one thirty-sixth that of the United States.[69]

Nonetheless, claims about selectivity or bias need to be parsed with care, for they can often be a guilty party's first defence against justifiable measures (the reason courts routinely reject them in criminal cases). The Sudanese government's claims that the UN is unfairly singling it out for Darfur through condemnations, the deployment of UN missions or the International Criminal Court's indictment of its president need not be accepted at face value. Sudan might be comparing its treatment with that of less grave situations, in which case the government is asking that unlike cases be treated alike (i.e. through non-action).

Moreover, even if Sudan is comparing its situation to equally grave or worse violations where the UN has not acted (as Chinkin does), we cannot simply say that the most just outcome is inaction in all cases. In other words, some selectivity or partiality, even if merely the result of a confluence of political interests, may advance the purposes of an international organisation (which I have assumed are morally defensible) better than the application of pure even-handedness if the latter means perpetual inaction in the face of situations that the organisation is supposed to address. International organisations, whether composed of states, or, in more far-sighted proposals, of individuals or other non-state actors, are still likely to pick targets with politics in mind as much as law. International lawyers can no more tell them to be consistent than can diplomats.

An act-utilitarian rationale for such politically motivated action would be easy, assuming welfare is overall improved as a result of a particular UN involvement, regardless of what happens in other cases. It is also possible that the Council's resolutions, passed in the context of situation X due to a confluence of political factors, will be invoked by others – not the Council – in the context of situation Y. This pattern of shifting arenas

[69] *A More Secure World*, paras. 40–1.

for invocation of norms is common in international law. But, at the same time, if these are the only possible rationales, we seem to have moved away from the nature of international organisations as creatures of law, for which some consistency in decision-making is needed. This difficult problem, beyond the scope of this chapter, raises the possibility that the individual decision of an international organisation may be morally justifiable, while the overall pattern of conduct is impossible to justify impartially and thus morally suspect (somewhat like the problem of giving charity only to the poor members of one race). As a practical matter, inconsistency is not necessarily crippling to an international institution. The UN Security Council continues to enjoy significant legitimacy among most states despite its membership problems and the inconsistent and unprincipled way in which it often acts.

Does, then, the UN have special duties to certain victims of catastrophes over others? On the one hand, the Charter and other international laws do not specify such duties. Indeed, as can be seen above, the main complaint about the UN from within and without is that it has not acted consistently pursuant to its general duties in the human rights area – duties that, alas, are scarcely mentioned in the Charter but have been accepted over time, most recently in the UN's Millennium+5 Summit Declaration's on the Responsibility to Protect.[70]

On the other hand, global decision makers do seem to increasingly accept that certain sorts of situations ought to trigger some UN action – that it has special duties towards certain particularly aggrieved individuals. Various committees of world leaders, including the Secretary-General's High Level Panel and the International Commission on Intervention and State Sovereignty, have focused on the most controversial response to such suffering, involving humanitarian-oriented military action. They have justified special duties from a second-order impartial perspective by offering a series of criteria for lawful intervention, much of it borrowing from just war theory and incorporating deontological and utilitarian

[70] Though even this commitment is watered down (para. 139): 'The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means … to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'

justifications and limitations.[71] David Miller has offered a useful framework, combining both partialist and impartialist accounts, for considering how to allocate responsibilities of moral agents to remedy bad situations, and Allen Buchanan has offered a defence of humanitarian intervention from a cosmopolitan perspective with keen regard for the institutional constraints.[72] While I believe that any duties must be general or second-order impartial, I have not yet decided whether the difference between those two options will do any practical work in helping us devise the best norms to overcome the current problem of playing favourites.

Conclusion

The foregoing inquiry into the impartiality of international organisations in admission, decision-making procedures and outcomes for action suggests that appraisal of international organisations needs to move beyond knee-jerk opposition to unequal treatment. Instead, it suggests that international organisations may have legitimate reasons to make distinctions in whom they admit, who will decide how they act and what will be the target of their decisions. The challenge for those who seek to reform institutions is first to carefully consider what exactly is wrong with them and to be forthright in the assumptions they make in their criticisms. Reconstruction must be tailored to the individual problem at issue.

At the same time, my project is essentially a comparative and relative exercise – it asks how institutions treat one set of actors or situations compared to another. As such, it leaves unanswered many questions about the justice of the norms enforced by the organisations (e.g. the international trading rules) or the specific substantive decisions undertaken. It does not ask whether the norms or decisions conform to some notion of distributive justice or even whether they actually advance fundamental community goals like preservation of the planet from environmental catastrophe or nuclear disaster. The conceptualisation of international institutions in terms of general and special rights and duties and the nature of the impartiality inquiry may lead some to conclude that my approach is rather thin and unhelpful on the core

[71] *A More Secure World*, para. 207; *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001), at www.iciss.ca/report-en.asp.

[72] D. Miller, 'Distributing Responsibilities', *Journal of Political Phiosophy*, 9 (2001), 453; Buchanan, *Justice*.

questions. In the end, this chapter does not even conclude definitively whether all the various second-order impartialist accounts are convincing arguments – a necessary part of any determination about the impartiality and justice of institutions. Indeed, there is always some second-order impartial argument (probably of a utilitarian nature) to defend the status quo – although utilitarian claims rebutted by empirical data are easily dismissed. I have not yet worked out a theory to distinguish between all the convincing impartialist arguments and all the unconvincing ones.[73]

Yet I believe my work is complementary to that of theorists such as Held, Caney or Buchanan, who have begun to address these issues (in their case, all from a cosmopolitan perspective) and proposed strategies of institutional reform. Even if it is a thin theory of international morality and even if it does not yet answer which organisations are just, it still acts as a check on some of the claims that international organisations are unjust and channels proposals for reform in a direction that takes cognisance of the achievements in institutionalisation realised to date. It also offers a lodestar for considerations for reform, for even if impartial action is not a sufficient criterion for a just international institution, it is a necessary one.

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[73] I appreciate this insight from Neil Netanel and Gerald Lopez.

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5

'Victors' justice'? Historic injustice and the legitimacy of international law

DANIEL BUTT

Thomas Nagel has recently written, 'We do not live in a just world. This may be the least controversial claim one could make in political theory.'[1] Nowhere does this seem more clear than in the field of international justice. In recent years, political theorists have put forward a range of accounts of how international society should, ideally, be ordered. Whilst there is disagreement as to what a just world would look like, defences of the justice of the status quo are few and far between. Even those writers who deny that redistributive duties of justice extend across state borders and who believe that it is appropriate that peoples take responsibility for the results of their own decision-making typically accept the existence of transnational duties to ensure minimal levels of wellbeing for the world's poor – duties which, tragically, are clearly not being fulfilled in the present day. Such judgments as to the injustice of the real world international situation, however, do not necessarily extend to present-day principles of international law, which contain at least formal provisions for the fulfilment of minimal socio-economic rights, whilst privileging ideas of national responsibility and self-determination. In this chapter, I consider the relation between the injustice of contemporary international society and the legitimacy of international law. The chapter is motivated by the thought that the existing international legal system is unfair. The history of its development is, in some ways, one whereby Western powers, who were historically responsible for extensive wrongdoing, shaped international law so as to secure and

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[1] T. Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs*, 33 (2005), 113–47 at 113.

legitimate their own advantages – advantages which were often improperly obtained. The chapter is divided into two parts. The first part argues that the current international legal system is unjust, in terms of how existing international law endorses and perpetuates an unjust distribution of resources between states. I argue that this claim should be accepted from two prominent, and rather different, perspectives on international ethics. The second part holds that this injustice calls the legitimacy of international law into question.

Justice and international law

Many feel that contemporary international law is a good thing. Insofar as it contains provisions which, for example, seek to advance peaceful conflict resolution, or to delineate and promote certain basic human rights, the development of international law is commonly portrayed as positive, and conducive to the progress of civilisation.[2] Certainly, the nature and scope (both actual and desirable) of international law is controversial. Theorists disagree over the extent to which the consent of each and every state of the world is necessary for a given norm or proposal to be understood as a principle of international law, with universal applicability. An obvious potential conflict emerges with the collective self-determination of particular peoples, and some maintain that international law can represent the imposition of a particularly Western, liberal worldview upon communities with different traditions and values. But it does seem that a consensus has emerged around certain key principles of international law, most notably those which respect national sovereignty, other than in cases of human rights abuses, and prohibit certain violent forms of international interaction, such as attacking another country in order to expand one's own territory or gain access to resources.[3] One way of viewing the development of international law, then, is as a positive development which seeks to prevent

[2] See, for example, the American Society of International Law's publication, *International Law: 100 Ways It Shapes Our Lives* (available at www.asil.org/files/asil_100_ways_05.pdf). This takes its inspiration 'from the proposition that international law not only exists, but also penetrates much more deeply and broadly into everyday life than the people it affects may generally appreciate', and so lists 100 ways in which international law has an appreciable impact on modern day individuals' everyday lives. It is striking that every example listed portrays the development of international law in a positive light.

[3] See Michael Walzer's account of the 'legalistic paradigm' in *Just and Unjust Wars* (New York: Basic Books, 1977).