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Do international organisations play favourites?
An impartialist account

STEVEN R. RATNER

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

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’. 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.

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. 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, 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,
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). 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. Although Hart and Goodin developed these concepts in relation to ethical duties of the individual – what Thomas Pogge calls

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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). 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, 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. 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. 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’ – 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.
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’. Christopher Wellman has characterised the different stances towards special duties as ‘reductionist’ and ‘associativist’ (or ‘nonreductionist’).

Some of the differences between partialists and impartialists have been narrowed through the notion of orders (or levels) of impartiality. 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’. 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

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.20 Alan Gewirth offers a Kantian perspective emphasising individual autonomy as the ethical lodestar of special relationships.21 Oldenquist and Samuel Scheffler defend the patriot whose allegiance is based on loyalties or special ties alone.20

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

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.


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 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)]’.

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. 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

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.)

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, Kyrgyzstan, 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 phrasing29 – 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

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\textsuperscript{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 \textit{acquis communautaire}).\textsuperscript{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


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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.\footnote{As noted in footnote 10, discussion of special rights rather than special duties is a better way of understanding disparate treatment in some cases.} 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.\footnote{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).}

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...
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

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particular, special rights that require independent justification beyond the historical account.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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’, \textit{American Journal of International Law}, 87 (1993), 552.

\textsuperscript{40} See, for example, Simpson, \textit{Great Powers}.

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goal and instead insisted that practical reason and satisfaction of the Categorical Imperative would lead to the perpetual peace). 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. 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. 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’. 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.

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 assert 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

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.
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. 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’. 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.
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 super-majority (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.
<table>
<thead>
<tr>
<th>State</th>
<th>Number of votes</th>
<th>Percentage of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>21,421</td>
<td>0.97</td>
</tr>
<tr>
<td>Botswana</td>
<td>880</td>
<td>0.04</td>
</tr>
<tr>
<td>China</td>
<td>81,151</td>
<td>3.66</td>
</tr>
<tr>
<td>Germany</td>
<td>130,332</td>
<td>5.88</td>
</tr>
<tr>
<td>Indonesia</td>
<td>21,043</td>
<td>0.95</td>
</tr>
<tr>
<td>Japan</td>
<td>133,378</td>
<td>6.02</td>
</tr>
<tr>
<td>Russia</td>
<td>59,704</td>
<td>2.69</td>
</tr>
<tr>
<td>United States</td>
<td>371,743</td>
<td>16.77&lt;sup&gt;51&lt;/sup&gt;</td>
</tr>
</tbody>
</table>

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.<sup>52</sup> 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.’<sup>53</sup>

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

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<sup>51</sup> [www.imf.org](https://www.imf.org).


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’. 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

the same manner? Refraining from playing favourites does not require equal treatment for all states and individuals – just that they be treated as equals.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{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).

\textsuperscript{56} UN Charter, Article 39. \textsuperscript{57} \textit{Ibid.}, Article 55.
\textsuperscript{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. 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. 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


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.

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

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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’. 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’.

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.

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

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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.
of would-be beneficiaries, their location, resources or relationship to
great Powers.

Too often, the United Nations and its Member States have discrimi-
nated 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

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 cata-
strophes over others? On the one hand, the Charter and other inter-
national 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 coopera-
tion with relevant regional organizations as appropriate, should peaceful means be inade-
quate and national authorities are manifestly failing to protect their populations from
genocide, war crimes, ethnic cleansing and crimes against humanity.”
justifications and limitations.\textsuperscript{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.\textsuperscript{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.

\textbf{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


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.

References


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


