

Michigan Law Review

Volume 115 | Issue 6

2017

Thick Law, Thin Justice

Patrick Macklem
University of Toronto

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Patrick Macklem, *Thick Law, Thin Justice*, 115 MICH. L. REV. 1001 (2017).
Available at: <https://repository.law.umich.edu/mlr/vol115/iss6/12>

<https://doi.org/10.36644/mlr.115.6.thick>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THICK LAW, THIN JUSTICE

*Patrick Macklem**

THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS. By *Steven R. Ratner*. Oxford: Oxford University Press. 2015. P. 434. \$85.

INTRODUCTION

In his masterful book, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations*, Steven Ratner¹ argues that the justice of legal norms that constitute our international legal order should be determined according to two criteria: the degree to which these norms causally bring about international and intrastate peace, and the degree to which they causally bring about a state of affairs in which basic human rights are respected. These two criteria are not merely what abstract moral theory demands of international law as a matter of global justice. They are drawn from foundational pillars of our existing international legal order: international law's commitments to international and interstate peace, and respect for human rights.

These two criteria of global justice operate as a screen that filters international legal norms according to the degree to which they merit the mantle of justice, in the following way. A legal norm, say, a prohibition of humanitarian intervention in the absence of authorization by the UN Security Council, is just if it contributes to a state of affairs in which peace is advanced and respects human rights. If the norm does not advance peace, it will only be just if it is needed to create a state of affairs characterized by respect for human rights. Ratner defends this screen in terms of rule consequentialism by positioning himself as “asking whether various rules or alternatives to them, if followed by the actors to whom they are directed, would be reasonably expected to lead to certain states of affairs defined in terms of peace and human rights” (p. 83).

The Thin Justice of International Law thus offers a thin, and nonideal, theory of global justice. It is thin because, drawing from Michael Walzer, the criteria on which its theory is constructed constitute “a ‘moral minimum’—universal in scope, reflecting values shared across cultures that are a baseline from which thicker, community-based morality may be developed.”² And it

* William C. Graham Professor of Law, University of Toronto Faculty of Law. I am grateful to Kaelan Unrau for his assistance in the preparation of this Review, and to Arthur Ripstein, who read an earlier draft.

1. Bruno Simma Collegiate Professor of Law, University of Michigan Law School.
2. P. 90 (quoting MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* (1994)).

is nonideal, because the criteria are drawn from key features of existing international law to form a blueprint for determining the justice of the thick legal norms that structure global politics into an international legal order.

The publication of *The Thin Justice of International Law* comes in the midst of an explosion of scholarly interest in global justice. Much of this scholarship is located in debates within moral and political philosophy. With notable exceptions,³ these debates have had little time for questions relating to the justice of the detailed international legal norms that comprise our international legal order. For their part, international legal scholars, again with notable exceptions,⁴ tend to view abstract questions about a just global order as peripheral matters of moral and political theory that do not engage with issues that arise in international legal theory and practice. *The Thin Justice of International Law* is a timely and significant intervention in such a context, linking concrete international legal rules to abstract theoretical debates about global justice by means of a metric—a metric grounded in nonideal theory that also aspires to determine the contours of a globally just international legal order.

This Review advances three claims about *The Thin Justice of International Law*. First, the theory of global justice it presents is more rule consequentialist than it appears. This is because Ratner does not restrict rule consequentialism to the screening of legal norms. Consequentialism also leaks into the justification he offers for the criteria he provides for determining the global justice of legal norms. According to Ratner, “consequentialist reasoning places the preservation of interstate and internal peace as the first principle of global justice precisely because peace is the linchpin to advancing the welfare and overall flourishing of individuals” (p. 96). The second pillar of global justice—respect for human rights—“is based upon putting the individual’s basic rights first in situations where the advancement of peace may conflict with those rights” (p. 96). As a result, the criteria become

3. See pp. 31–32. For exceptions, see CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* (2009); DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995); PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* (2002); KOK-CHOR TAN, *JUSTICE WITHOUT BORDERS: COSMOPOLITANISM, NATIONALISM, AND PATRIOTISM* (2004); Joshua Cohen, *Minimalism About Human Rights: The Most We Can Hope For?*, 12 J. POL. PHIL. 190 (2004); Robert E. Goodin, *What Is So Special About Our Fellow Countrymen?*, 98 ETHICS 663 (1988); Thomas Mertens, *Defending the Rawlsian League of Peoples: A Critical Comment on Tan*, 18 LEIDEN J. INT’L L. 711 (2005); and Terry Nardin, *Legal Positivism as a Theory of International Society*, in *INTERNATIONAL SOCIETY: DIVERSE ETHICAL PERSPECTIVES* 17 (David R. Mapel & Terry Nardin eds., 1998).

4. See pp. 25–27. For exceptions, see PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* (1990); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995); BRAD R. ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL ORDER* (2011); FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (3d ed. 2005); Frank J. Garcia, *Global Justice and the Bretton Woods Institutions*, 10 J. INT’L ECON. L. 461 (2007); John Tasioulas, *International Law and the Limits of Fairness*, 13 EUR. J. INT’L L. 993 (2002); and Gerry J. Simpson, *Is International Law Fair?*, 17 MICH. J. INT’L L. 615 (1996) (reviewing FRANCK, *supra*).

rules consequentially derived from—and instrumentally serve—the fundamental values of human welfare and human flourishing. This raises the possibility of either a third pillar that directly promotes these values or a list of human rights that includes rights that more directly protect interests associated with these values.

Second, *The Thin Justice of International Law* produces a thick, just international legal order. Its thin global justice criteria result in consistency between much of the existing international legal system and a just international legal order. This is due, in no small measure, to the fact that the legal norms that constitute the international legal entitlement of sovereignty are held constant in the calculus. Sovereignty itself, as a legal entitlement that the international legal order distributes to some geographically concentrated collectivities in the world and not others, is not interrogated in terms of its relationship to peace and human rights. This distribution—its origins, the episodic recalibrations to which it is subject, and its distributional consequences—forms the heart of our international legal order; it is the primary way by which international law provides legal order to global politics. Treating it as “a fixed attribute of the international order,” as *The Thin Justice of International Law* does, means that fundamental questions relating to the justice of this distribution remain outside the normative sphere of global justice (p. 86). But a third pillar consequentially derived from the values of human welfare and flourishing would enable scrutiny of some of the adverse consequences of the distribution of sovereign power in international law.

Third, *The Thin Justice of International Law* explicitly rests in part on a political conception of human rights, where human rights are defined in terms of their practical function in global political discourse. On this conception, global human rights discourse is a social practice whose participants invoke or rely on human rights as reasons for certain kinds of actions in certain circumstances. What this practice reveals is that human rights protect urgent individual interests against certain predictable dangers associated with the exercise of sovereign power. Such a political conception of human rights rests on a species of originalism that attributes significance to the intentions of political actors producing and reproducing the practice at hand. Relying on practice to identify the normative dimensions of human rights—that is, the role they should play in the international arena—also risks conflating fact and norm, and potentially drains human rights of their capacity to act as instruments of critique of existing practices. And relying on a political account risks relegating some human rights to the sidelines, such as the right to development, because they do not act as reasons that justify the exercise of sovereign power, even though they serve as reasons to mitigate the distribution of sovereign power that international law performs to structure global politics into an international legal order. But if the pillar of respect for human rights is expanded to include rights that protect interests associated with human welfare and human flourishing—specifically the human right to development—then this pillar can assess the justice of the role that international law’s foundational commitment to sovereignty plays in the production and reproduction of global economic inequality.

I. THIN JUSTICE AND RULE CONSEQUENTIALISM

Ratner's standard of global justice comprises two principles or pillars, both of which provide international legal actors with prescriptions and prohibitions for and against certain kinds of action: peace, whereby international actors advance international and intrastate peace; and basic human rights, whereby international actors should respect basic human rights (p. 65). Ratner defines both pillars as referencing particular states of affairs. Accordingly, the first pillar has as its objective a state of affairs in which peace is advanced, whereas the second pillar prescribes a state of affairs in which basic human rights are respected (pp. 66, 80).

Ratner describes this part of his project in terms of rule consequentialism, by indicating that he is asking whether extant legal norms, if followed, will lead to certain states of affairs defined in terms of peace and human rights (p. 83). But he does not clearly define what he means by consequentialism. On occasion, he seems to use the terms "consequentialism" and "utilitarianism" interchangeably, even though utilitarianism is but one species of consequentialism.⁵ Elsewhere, he appears to apply the label of "consequentialist" to any moral view that happens to take consequences into account. For instance, he writes that "[u]nder [the first] pillar, the relationship of international law to justice is seen in consequentialist terms; we judge the justice of international law norms by their consequences in terms of their contribution to international and interstate peace" (p. 66). Ratner's approach differs from classical utilitarianism; it does not require actual consequentialism, where the morality of an act depends upon its actual consequences. And although Ratner ostensibly endorses a version of evaluative consequentialism, where the moral rightness of an act depends only on the value of its consequences, he nonetheless seems to reject a simply additive approach to value.⁶

5. When talking about impartial moral frameworks, Ratner introduces the notion of utilitarianism, which he describes as providing "principles of justice based on the idea of maximizing total individual welfare." P. 57. He then switches gears to talk about consequentialism more generally. See p. 62. Elsewhere, he writes that "[c]onsequentialism tolerates some very serious harms to certain individuals as long as they can be justified for the greater good." P. 73. While this is true for classical utilitarian, a thoroughly consequentialist theory like negative utilitarianism would say just the opposite (albeit with certain qualifications). See, e.g., Walter Sinnott-Armstrong, *Consequentialism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/archives/win2016/entries/consequentialism/> [<https://perma.cc/3GBX-E3MT>] ("[S]ome utilitarians claim that an act is morally wrong if and only if its consequences contain more pain (or other disvalues) than an alternative, regardless of positive values.").

6. Notably, he writes that:

[T]he claims of states cannot all be conceived as simply the sum of the claims of the individuals in them. Some very important state interests are not by their nature additive in the sense that the claims of states with larger populations automatically outweigh the claims of states with smaller populations. If preservation of the state system is important, then, for some state interests, population is irrelevant. For example, the interest of the state in not being invaded, or in having the immunity of its diplomatic agents protected, is not a

Since his view is a nonideal theory, neither does it require maximizing consequentialism, where moral rightness depends only upon the best consequences.⁷ Ratner rejects total consequentialism, where moral rightness depends solely upon the total or aggregate net good in the consequences.⁸ Although Ratner stresses the importance of equality qua impartiality, his rejection of total consequentialism may entail the rejection of equal consideration, where the moral benefits to one person matter just as much as similar benefits to any other person.⁹

Despite ambiguities about the precise kind of consequentialism at work in Ratner's account, it is clear that rule consequentialism motivates how he screens legal norms to determine their status as globally just—that is, as leading to “certain states of affairs defined in terms of peace and human rights” (p. 83). Yet Ratner's motivation for choosing this particular set of pillars—peace and human rights—remains underdeveloped. At times, he seems to rely upon moral intuitions. He dismisses a number of rival standards in part because he finds them “normatively unappealing” (p. 98). But he also appears to ground these pillars in the norms and concerns of international law. His argument in support of this latter strategy is as follows: International law has moral significance, because legal norms and practices are “informing” our notion of what is just (p. 6). Law is one of the several sources that help “generate” our conception of morality (p. 6). If a value is central to morality, then it will likely crop up in the domain of (international) law, since law is one of the sources that informs our understanding of morality (pp. 6–7). And if we believe that “what is morally required must be in some sense feasible”—that is, if “ought implies can,” then international law, wherein practical moral questions are routinely considered and decided, may provide the “can” (p. 6).

Ratner seeks to contain consequentialism to governing the justice of norms of international law and not to the justice of the pillars themselves.

function of the size of its population (even if we think the state is simply an instrument of individual interests).

Pp. 86–87. Insofar as states have “moral standing” (albeit a standing predicated upon individual persons), it follows that Ratner's consequentialism does not involve a simple tallying up of aggregate utility. See pp. 85–87.

7. Thus, he reasons as follows:

I will not generally seek to, nor need I, argue . . . that my standard *requires* a particular norm, i.e. that it passes scrutiny under the two pillars and no other rule would do so, although at times I will make such a claim. Certainly those engaged in ideal theory might wish to make such claims exclusively, endorsing only those rules would do the best job of advancing peace without interfering with human rights. But as the goal of this project is to appraise the norms we have, I need not show that they are the only ones that meet the standard of justice, even as I will need to identify those that do not meet the standard and suggest alternatives that do.

Pp. 84–85.

8. For Ratner's discussion of additive interests, see pp. 86–87.

9. I take this particular delineation of classical utilitarian's subclaims from Walter Sinnott-Armstrong's entry on *Consequentialism* in the *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2016). See Sinnott-Armstrong, *supra* note 5.

Ratner asks “whether various rules or alternatives to them, if followed by the actors to whom they are directed, would be reasonably expected to lead to certain states of affairs defined in terms of peace and human rights” (p. 83). But rule consequentialism leaks into the justification he offers for his criteria for determining the justice of legal norms. As noted, Ratner writes:

The consequentialist reasoning places the preservation of interstate and internal peace as the first principle of global justice precisely because peace is the linchpin to advancing the welfare and overall flourishing of individuals, wherever situated. And the second pillar is based upon putting the individual’s basic rights first in situations where the advancement of peace may conflict with those rights. (p. 96)

In this passage, the pillars of peace and basic human rights have moral salience because they are generally effective in realizing human welfare and human flourishing. If this is the case, then the fundamental moral values in his theory are human welfare and human flourishing, and the values of advancing peace and respecting basic human rights are consequentially derived principles that instrumentally serve these fundamental moral values. This gives rise to the possibility that such principles might yield to more fundamental moral concerns relating to the attainment of human welfare and human flourishing. In this case, the pillars of peace and basic human rights are useful heuristics, but their moral value goes no further than that.

Thus, a third principle might be required to test international legal norms to determine the extent to which they promote the attainment of human welfare and human flourishing—a proposition which Ratner rejects by his dismissal of the possibility of a third, “economic welfare” pillar, since his “sense is still that the other two are of a qualitatively higher level of importance” (p. 65). Or it means the expansion of his list of basic human rights to include rights that protect interests relating to human welfare and human flourishing more fully than the limited set of human rights he considers just under his theory. Part II explores the first option, namely, the possibility of a third pillar of justice consequentially derived from the fundamental values of human welfare and flourishing. Focusing on the right to development, Part III addresses the second option, namely, the potential expansion of Ratner’s list of human rights to include rights that protect these fundamental values.

II. THICK SOVEREIGNTY, THIN JUSTICE¹⁰

The Thin Justice of International Law offers a nonideal theory of global justice. Ratner defines the concept of nonideal theory in the context of global justice as one exhibiting the following properties: “[I]t assumes the existence and durability of the state system as the dominant organizing political structure for the globe” (p. 4); it acknowledges the fact that states

10. This and the following Part of this Review draw on and adapt work previously published in PATRICK MACKLEM, *THE SOVEREIGNTY OF HUMAN RIGHTS* (2015).

display differences in power (p. 4); and it factors in the “the role of institutions in administering law” (p. 5). He writes that “[w]hile non-ideal theory has a number of meanings, in this case I mean that my approach develops and applies a standard of justice in a way that takes account of core realities of international politics and the global system” (p. 4). According to Ratner, then, something that is nonideal is something that is factually applicable, in that a nonideal theory of justice will take into account conditions that actually occur in the international realm.

To illustrate, one of the legal norms that Ratner argues is just is the rule that authorizes a colonized people to acquire sovereign statehood in the name of self-determination.¹¹ According to Ratner, as a factual matter, although there were rebellions and wars in some decolonization projects, the majority of efforts at decolonization did not lead to major conflict between colonial powers and their colonies (p. 151). Even if one were to view these projects as detracting from interstate and intrastate peace, the legal norm authorizing them would be only *prima facie* unjust for failing to pass the first pillar (p. 151). And although secession may result in a postcolonial state that may well make “ethnic relations worse, because it simplifies intergroup confrontations,” and authorize “lower-level ethnic tyrann[y],” secession rectifies the denial of basic human rights of colonized peoples for which colonialism is responsible—and other international legal norms work to seek to prevent human rights violations in the future.¹² In contrast, international law’s ban on the use of force except in cases of self-defense promotes peace by removing force as an interstate “policy option” and is conducive to post-conflict intrastate peace (p. 107). The right to use force in self-defense furthers peace through its deterrent effects on potential attackers.¹³

Ratner’s thin theory of global justice deems just a great many legal norms that comprise the existing international legal order. This is not simply because of the fact that, of the thirty-two actual and hypothetical legal norms that Ratner tests against his standard, only three appear to be clearly unjust.¹⁴ The fact that the application of Ratner’s two standards to an extensive number of positive international legal norms results in very few findings of injustice, although striking, has little bearing on the legitimacy of his theory. If the thin standard of global justice deems just a thick body of international legal norms, then that is simply the outcome of the thin standard. Ratner presents arguments as to a norm’s justice or injustice, and many of

11. See G.A. Res. 2625 (XXV), at 124 (Oct. 24, 1970). On state practice, see JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 621–47 (2d ed. 2006).

12. P. 153 (alteration in original) (quoting Donald L. Horowitz, *Self-Determination: Politics, Philosophy, and Law*, in *ETHNICITY AND GROUP RIGHTS* 421, 437 (Ian Shapiro & Will Kymlicka eds., 1997)); see pp. 152–57 (describing how secession can protect human rights and international law operates to protect the human rights of colonized peoples).

13. P. 108. Ratner sees the second exception to the ban—force authorized by the Security Council—as conditionally just only if resorting to it respects basic human rights. P. 110.

14. These are a (hypothetical) complete ban on secession, pp. 160–61; the Montevideo criteria of statehood, pp. 187–88; and a prohibition of nonauthorized humanitarian intervention, pp. 300–01.

the conclusions he reaches are close calls, and conditional on the presence of additional factors.¹⁵ And he, of course, does not present his conclusions regarding the justice of international legal norms as the last say on the matter. Scholars disagree, for example, on the justice of the doctrine of *uti possidetis*, where internal administrative boundaries serve as the borders of a new state in the event of secession.¹⁶ Ratner would comprehend at least some of these disagreements as contestation over the justice of such a role and advocate that they be framed by the extent to which they defend the legal norm in terms that relate to its role in the promotion of interstate and intrastate peace and respect for human rights.

But the thick nature of the just international legal order that the application of the two pillars produces is also due to the fact that the legal norms that constitute the international legal entitlement of sovereignty are held constant in the calculus. “[T]heories of global justice,” according to Ratner, “need to accept states both morally and pragmatically,” as “[t]he state system appears to be a fixed attribute of the international [legal] order” (p. 86). Ratner does test the justice of the criteria for statehood and finds them wanting because they do not include a criterion of respecting basic human rights (p. 188); the principle of sovereign equality, the absence of which would result in powerful states dominating weaker states and which does not compromise the obligation of states to respect human rights (pp. 197–200); and the right to permanent sovereignty over natural resources, which avoids interstate conflict over whose resources belong to whom and does not interfere with the enjoyment of basic human rights (pp. 317–18). But sovereignty itself, as a legal entitlement that the international legal order distributes to some geographically concentrated collectivities in the world and not others, is not interrogated in terms of its relationship to peace and human rights. This distribution—its origins, the episodic recalibrations to which it is subject, and its distributional consequences—forms the heart of our international legal order; it is the primary way by which international law provides legal order to global politics. Treating it as “a fixed attribute of the international [legal] order” means that questions relating to the justice of this distribution remain outside the normative sphere of global justice (p. 86).

One such question relates to the relationship between a system of sovereign states and global economic inequality. A growing number of political theorists have argued that distributive justice ought not to be confined within state boundaries but instead should be conceived of globally. Naturally, these scholars have differed as to what counts as a globally just distribution. According to Charles Beitz, distributive justice requires that global socioeconomic inequalities be arranged so that the greatest benefit accrues to the least advantaged,¹⁷ while Simon Caney defends a similar view that

15. See, e.g., pp. 317–18.

16. See pp. 176–79.

17. CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979); see also TAN, *supra* note 3, at 60–61 (“[A] just global distributive scheme would be one which meets [Rawls’s] second principle of justice—equality of opportunity and the regulation of global

includes “subsistence rights, a principle of global equality of opportunity, rules of fair play, and a commitment to prioritizing the least advantaged.”¹⁸ Hillel Steiner goes further, suggesting that global distributive justice necessitates that an equal portion of the world’s natural resources be made available to all.¹⁹

Theorists have also diverged on the question of to whom global justice should apply. Some thinkers, endorsing the cosmopolitan ideal that morality is grounded in individual agents, argue that a just distribution of resources is one that includes all citizens of the world.²⁰ For others, it is nations or peoples that make up the proper subjects of global justice.²¹ Others still see global justice as applying primarily to states. Brian Barry, for instance, rejects the claim that states are wholly responsible for the poverty within their midst and instead argues for global redistributive measures that can reduce interstate disparities of wealth and resources.²²

Despite these differences, much of this scholarship rests on the proposition that natural, geographical, and social contingencies underpinning global poverty—such as one’s home state, its location, and its resources—are arbitrary from a moral point of view. If one person is born into an impoverished state in Africa, say, while another is born into a developed state in Western Europe, the geographical dissimilarity between the two may explain the poverty of the former and the relative affluence of the latter, but it does not justify it.²³ The initial distribution may not be morally wrong in itself. However, justice enters the picture because of the arbitrariness in their respective situations: the fact that one state happens to be resource rich does not justify it in excluding others from its resources.²⁴

Accompanying these claims are arguments that there are important similarities between domestic and global economic inequality, such that “the two realms are sufficiently similar that whatever principles of justice we are

equality by the difference principle . . . [and] would keep the plight of the worst-off individuals (globally situated) firmly in its sight.”); Thomas Pogge, *World Poverty and Human Rights*, ETHICS & INT’L AFF., March 2005, at 4–7.

18. SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 264 (2005).

19. HILLEL STEINER, *AN ESSAY ON RIGHTS* (1994).

20. See, e.g., BEITZ, *supra* note 17, at 127–69; see also CANEY, *supra* note 18, at 102–41; DARREL MOELLENDORF, *COSMOPOLITAN JUSTICE* 30–67 (2002); THOMAS W. POGGE, *REALIZING RAWLS* 211–40 (1989). For an illuminating analysis of how international legal scholarship and political theorists conceptualize cosmopolitanism, see Başak Çali, *On Legal Cosmopolitanism: Divergences in Political Theory and International Law*, 19 LEIDEN J. INT’L L. 1149 (2006) (book review).

21. See, e.g., JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

22. Brian Barry, *Do Countries Have Moral Obligations? The Case of World Poverty*, in 2 THE TANNER LECTURES ON HUMAN VALUES 25 (Sterling M. McMurrin ed., 1981).

23. See Goodin, *supra* note 3, at 682–87; David A.J. Richards, *International Distributive Justice*, in ETHICS, ECONOMICS, AND THE LAW 275 (J. Roland Pennock & John W. Chapman eds., 1982).

24. See BEITZ, *supra* note 17, at 136–43. For discussion, see Álvaro de Vita, *Inequality and Poverty in Global Perspective*, in FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR? 103, 120–22 (Thomas Pogge ed., 2007).

prepared to acknowledge in the domestic case, we should be prepared to acknowledge in the international case as well.”²⁵ On certain conceptions of justice, of course, poverty and economic inequality should not necessarily be attended to in domestic political communities.²⁶ But other theorists argue that the very same principles of justice that ground obligations to attend to poverty within a political community also ground obligations to attend to global poverty. As John Rawls explains, a political community is “a system of cooperation designed to advance the good of those taking part in it.”²⁷ Accordingly, so long as justice requires attending to economic inequalities in a political community, then justice ought to make a parallel demand in the international realm, since this realm contains comparable relations of mutual reciprocity and social cooperation. Rawls himself did not believe that the international community manifests the requisite degree of social cooperation to ground an obligation to address global poverty.²⁸ Instead, he recognized a “duty of assistance” to ensure that states possess the capacity to operate in accordance with a public conception of justice.²⁹

The above approaches to global wealth redistribution are beset by two challenges. First, in the words of Kok-Chor Tan, proponents of the view must “show how the aspiration for justice without borders can be reconciled with what seems to be a basic moral fact that people may, and are indeed obliged to, give special concern to their compatriots.”³⁰ This call to action echoes H.L.A. Hart’s distinction between special rights, which “arise out of special transactions between individuals or out of some special relationship in which they stand to each other,” and general rights, “which all men capable of choice have.”³¹ Indeed, critics have argued that the ideal of global justice necessarily contradicts the fact that we owe special duties and obligations to members of our own political community, since the conditions that give rise to these special obligations simply fail to arise within the international realm.

Such an argument has been raised by Thomas Nagel. Although he admits that we have a duty to provide basic humanitarian assistance to those in

25. BEITZ, *supra* note 17, at 200.

26. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

27. JOHN RAWLS, *A THEORY OF JUSTICE* 4 (rev. ed. 1999).

28. See RAWLS, *supra* note 21, § 16.2, at 118–19.

29. See *id.* § 15, at 105–13; cf. Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147 (2006) (suggesting that the existence of common institutions and collective interdependence across state borders calls for a weak form of international distributive justice).

30. TAN, *supra* note 3, at 136. Tan advances a version of cosmopolitan distributive justice that accommodates but limits patriotic concerns. See *id.* But see SAMUEL SCHEFFLER, *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* 111 (2001) (distinguishing between cosmopolitanism as a “doctrine about culture” and cosmopolitanism as a “doctrine about justice”). Scheffler seeks to defend a theory of cosmopolitanism that takes seriously the particular ties and associative relationships that arise in particular communities of value. See *id.*

31. H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 183, 188 (1955).

need in foreign countries, he maintains that any further obligations promoting distributive justice should vest in, and be owed to, members of political communities constituted as states.³² For Nagel, it is the fact that “we are both putative joint authors of the coercively imposed system, and subject to its norms . . . that creates the special presumption against arbitrary inequalities in our treatment by the system.”³³ He further argues that international institutions lack coercive power putatively delegated by individuals whose lives they affect, which means that “the responsibility of those institutions toward individuals is filtered through the states that represent and bear primary responsibility for those individuals.”³⁴

Andrea Sangiovanni takes a different approach, emphasizing not the state’s potential power to coerce, but the potential for reciprocity that exists where citizens of a state mutually provide “collective goods necessary to protect [them] from physical attack” which in turn can help “maintain and reproduce a stable system of property rights and entitlements.”³⁵ In his view, “[w]e owe obligations of egalitarian reciprocity to fellow citizens and residents in the state, who provide us with the basic conditions and guarantees necessary to develop and act on a plan of life, but not to noncitizens, who do not.”³⁶ Although the global sphere does exhibit institutionally mediated relationships of reciprocity, the nature and character of these relationships yield different principles of justice “in both form and content than those appropriate at the domestic level.”³⁷ Sangiovanni thus rejects the possibility that international reciprocal relationships can ground an obligation to address global economic inequality.

Yet both the advocates and critics of global wealth redistribution tend to overlook the normative significance of the relationship between the international legal order and the distributive injustice of global poverty.³⁸ It is no

32. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113 (2005).

33. *Id.* at 128–29. For Michael Blake, it is the fact that the state restricts the autonomy of citizens that generates a concern for distributive justice. See Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257 (2001). For critique of Blake’s view, see Arash Abizadeh, *Cooperation, Pervasive Impact, and Coercion: On the Scope (Not Site) of Distributive Justice*, 35 PHIL. & PUB. AFF. 318, 348–50 (2007). For criticism of Nagel’s view, see Chris Armstrong, *Coercion, Reciprocity, and Equality Beyond the State*, 40 J. SOC. PHIL. 297 (2009); and A.J. Julius, *Nagel’s Atlas*, 34 PHIL. & PUB. AFF. 176 (2006).

34. Nagel, *supra* note 32, at 138.

35. Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3, 19–20 (2007).

36. *Id.* at 20; see also 2 BRIAN BARRY, *Humanity and Justice in Global Perspective*, in LIBERTY AND JUSTICE: ESSAYS IN POLITICAL THEORY 182 (2d ed. 1991).

37. Sangiovanni, *supra* note 35, at 35. For critiques, see Abizadeh, *supra* note 33, at 336–37, and Armstrong, *supra* note 33, at 304–12.

38. One significant exception lies in the work of Kok-Chor Tan, who weds an international institutional approach to distributive justice with luck egalitarianism, rendering morally relevant the fact “that there is a global social arrangement—consisting of specific institutional entities, and institutionally entrenched or enforced social and legal norms and expectations—that has the effect of rendering random facts about persons and the natural world into actual social inequalities.” KOK-CHOR TAN, *JUSTICE, INSTITUTIONS, AND LUCK: THE SITE, GROUND,*

doubt true that poverty often arises out of morally arbitrary contingencies, such as the place of one's origin. Yet the poverty experienced by a person born in, say, Chad, is not simply a matter of natural, geographical, and social contingency. It is also a function of the fact that she was born into a particular legal jurisdiction, which the international legal community has both recognized and vested with sovereignty over people and territory.

International law relies on sovereignty, as a legal entitlement, to bring legal order to global politics. Sovereignty has been defended in terms of a need "for a presumptive monopoly of the last word on public order in any given territory."³⁹ Moreover, sovereignty in the context of international law also possesses a measure of normative purchase because, for instance, people can and do flourish when they are organized into particular political communities and accordingly generate a complex set of interests that merit protection.⁴⁰ But relying on sovereignty to organize global politics into an international legal order also extends international legal validity to certain natural, geographical, and social—yet morally arbitrary—contingencies that locate us in the world. The degree to which a sovereign state can address poverty in its midst depends in no small measure on its location, boundaries, and resources—variables whose limits and possibilities are determined by the nature and extent of that state's sovereign powers.

In addition, international law also treats states as juridically equal legal actors, such that they possess identical international legal rights and are equal in their formal capacity to exercise them.⁴¹ Ratner does indeed assess the justice of the principle of sovereign equality, holding it just because of how it promotes interstate and intrastate peace and its agnostic effect on respecting human rights (pp. 197–200). But since the distribution of sovereignty is not subject to the critical gaze of his two normative criteria for a globally just international legal order, Ratner excludes from examination the following nonideal fact: that because of international law's foundational commitment to formal equality of states, the substantive equality of states plays a marginal role within the normative architecture of the international legal order. Questions of substantive equality are ultimately domesticated,

AND SCOPE OF EQUALITY 158 (2012). Tan focuses specifically on "global norms (such as those governing sovereignty, resource ownership, territorial rights), economic practices (such as trade laws, intellectual property rights laws), and international laws and principles (such as those regulating movement of persons across borders)." *Id.* at 151–58.

39. See ROTH, *supra* note 4, at 7.

40. See ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* 8–9 (2003) (arguing that because humanity has yet to devise ways that people can flourish without being organized into particular political communities, we should attach moral weight to what is essential for particular communities to survive).

41. See, e.g., U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members."); Convention on Rights and Duties of States art. 4, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 ("States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.").

since international law treats its potential normative significance as a domestic question of distributive justice among citizens, subject to the vagaries of domestic political contestation. By relegating substantive equality norms to the domestic realm, international law further emphasizes the natural, geographical, and social contingencies that contribute to global poverty. To return to our previous example, international law conceives of the people of Chad as forming a sovereign state; it vests them with only those meager resources found within their territory; and, crucially, it prevents them from accessing resources elsewhere, imposing stiff barriers in the paths of those hoping to emigrate to a better life.⁴² A pillar that tests legal norms in terms of their proximity to human welfare and human flourishing would do much to mitigate some of these adverse consequences of the distribution of sovereignty in international law.

III. A POLITICAL CONCEPTION OF HUMAN RIGHTS

Consistent with a nonideal account, Ratner justifies his first pillar of global justice—interstate and intrastate peace, where “peace” denotes the absence of violence—via its foundational status within the domain of international law.⁴³ But, as noted, he also stresses the importance of peace to human welfare and flourishing (pp. 64, 67, 70). For this reason, he seems to view peace as a largely instrumental value, in that it reliably, but not necessarily, brings about a variety of desired outcomes (p. 66). The qualification “but not necessarily” is significant. According to Ratner, although peace is often desirable, it alone is not enough to ground a standard of global justice, insofar as “[c]onsequentialism tolerates some very serious harms to certain individuals as long as they can be justified for the greater good.”⁴⁴ His worry, then, is that this pillar could justify peace obtained at an extremely high cost (p. 73). This anxiety leads him to introduce his second pillar of global justice: respect for basic human rights. Ratner claims that “[a] just outcome

42. Joseph Carens recognizes this problem when he states:

The modern state system organizes the world so that all of the inhabited land is divided up among (putatively) sovereign states who possess exclusive authority over what goes on within the territories they govern, including the right to control and limit entry to their territories.

. . . Because the state system assigns people to states, states collectively have a responsibility to help those for whom this assignment is disastrous.

JOSEPH H. CARENS, *THE ETHICS OF IMMIGRATION* 196 (2013). Carens argues that more porous borders would mitigate some of these morally arbitrary determinants. See Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, in *THEORIZING CITIZENSHIP* 229 (Ronald Beiner ed., 1995).

43. Pp. 65–66. Ratner explains that his view “does not regard peace as the absence of conflict, where the lion lies down with the lamb.” P. 66.

44. P. 73. This claim is actually not entirely true. For instance, the consequentialist theory of *negative utilitarianism* says that (morally prescribed) gains in utility can never be at the expense of less-well-off persons. See Sinnott-Armstrong, *supra* note 5. If Ratner had applied this theory, the above concern would be averted without resorting to (somewhat ad hoc) deontological reasoning.

must also be one that respects certain fundamental values regarding the way we treat people—that we, and thus the law, must treat individuals the right way, with a certain degree of basic respect” (p. 73). Insofar as the first pillar fails to necessarily entail such respect, Ratner introduces respect for human rights. In delineating his set of basic human rights, he endorses a political conception of human rights, such that they should be grounded in actual state practice (p. 75).

In recent years, political accounts of international human rights have garnered attention in international political theory. Unlike most moral approaches, which focus on universal features of our common humanity,⁴⁵ political conceptions define the nature of human rights in terms of their practical function in global political discourse. Global human rights discourse is a social practice whose participants invoke or rely on human rights as reasons for certain kinds of actions in certain circumstances. What this practice reveals is that human rights protect urgent individual interests against certain predictable dangers associated with the exercise of sovereign power. States have a primary obligation to protect urgent interests of individuals over whom they exercise sovereign power, but external actors, such as other states and international institutions, have secondary obligations to secure protection when a state fails to live up to its responsibility.⁴⁶ “To say that something is a human right,” in Beitz’s view, “is to say that social institutions that fail to protect the right are defective—they fall short of meeting conditions that anyone would reasonably expect them to satisfy—and that international efforts to aid or promote reform are legitimate and in some cases may be morally required.”⁴⁷

How does one sift through the global practice of human rights to determine which practices are sufficiently important objectives of global political life to attract the normative value we attach to human rights? Joseph Raz

45. E.g., JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 10 (2d ed. 2003) (“Human rights are, literally, the rights that one has simply because one is a human being.”); JAMES GRIFFIN, *ON HUMAN RIGHTS* 48 (2008) (“Human rights . . . must be universal, because they are possessed by human agents simply in virtue of their normative agency.”); A. JOHN SIMMONS, *JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS* 185 (2001) (“[H]uman rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity.”); John Tasioulas, *The Moral Reality of Human Rights*, in *FREEDOM FROM POVERTY AS A HUMAN RIGHT: WHO OWES WHAT TO THE VERY POOR?*, *supra* note 24, at 75, 76 (“[H]uman rights are moral entitlements possessed by all simply in virtue of their humanity.”).

46. See BEITZ, *supra* note 3, at 107–17. Rawls also defines the functional role of international human rights in terms of justifying interference in the internal affairs of a state. See RAWLS, *supra* note 21, at 79 (stating that human rights “restrict the justifying reasons for war and its conduct” and “specify limits to a regime’s internal autonomy”). But as Beitz points out, Rawls does not also see human rights as justifying external assistance in their realization. Charles R. Beitz, *Human Rights and the Law of Peoples*, in *THE ETHICS OF ASSISTANCE* 193, 203 (Deen K. Chatterjee ed., 2004) [hereinafter Beitz, *Law of Peoples*]. Beitz, in contrast, includes external assistance in his definition of the functional role of human rights, which leads him to define the right to an adequate standard of living as mandating global wealth redistribution. See *id.* at 205–10.

47. Beitz, *Law of Peoples*, *supra* note 46, at 210.

defends a set of selection criteria that are empirical and variable, resting on whether, in the circumstances, external interference in the domestic affairs of a state is normatively justifiable, which in turn rests on contingencies specific to the state in question and the current nature of the international legal order.⁴⁸ Joshua Cohen argues that human rights, properly understood, are those that relate to “an idea of *membership or inclusion* in an organized political society, and not on a deeper outlook about the proper conduct of a good or righteous life.”⁴⁹ Michael Ignatieff offers a minimalist account of human rights, validating practices of intervention in the name of human rights—practices that relate to “the elemental priority of all human rights activism: to stop torture, beatings, killings, rape, and assault and to improve, as best we can, the security of ordinary people.”⁵⁰ Ratner’s selection criteria, building on the work of Henry Shue and Beitz, are based on the following definition: “Human rights are individual entitlements, creating requirements on other actors, for protection from a set of ‘standard threats,’ which are ‘predictable dangers . . . to which [individuals] are vulnerable under typical circumstances of life in a modern world order composed of states.’”⁵¹ His selection criteria yield the following list of human rights that require respect: rights to physical security, nondiscrimination rights, freedom to form a family, freedom of expression and religion, freedom from alien rule, rights of representative government, a right to primary education, and a right to a safe workplace (p. 76).

If the goal is to specify the political role that human rights play in the international legal order as a descriptive matter, then it makes eminent sense to attend to how they motivate and justify the actions of political actors in the international arena. But relying on practice to identify the normative dimensions of human rights—that is, the role they should play in the international arena—risks conflating fact and norm, and potentially drains human rights of their capacity to act as instruments of critique of existing practices. Determining the extent to which a human right should act in this way requires accounting for its normative purpose, and it makes little sense to locate such an account in existing practice.

This also immediately raises problems associated with originalism. Political conceptions of human rights that focus on practice require attributing significance to the intentions of political actors producing and reproducing the practice at hand. A political conception gives credence to the intent of participants in the practice of human rights because it identifies the nature of human rights by reference to the actions of those involved in the practices

48. See Joseph Raz, *Human Rights Without Foundations*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 321, 327–37 (Samantha Besson & John Tasioulas eds., 2010).

49. Joshua Cohen, *Is There a Human Right to Democracy?*, in *THE EGALITARIAN CONSCIENCE: ESSAYS IN HONOUR OF G.A. COHEN* 226, 237 (Christine Sypnowich ed., 2006).

50. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 173 (Amy Gutmann ed., 2001).

51. P. 74 (first quoting BEITZ, *supra* note 3, at 109 (alteration in original); and then quoting HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 17 (2d ed. 1996)).

that exemplify their discursive role in global politics. Ascribing meaning to such actions requires determinations of the intentions, aims, and objectives of those who engage in them. A political conception, in other words, attributes relevance to the intent of participants in the practice of human rights because the meaning of an action cannot be gleaned without a grasp of the intent behind it. The nature of the human rights that comprise the field, according to this perspective, rests in no small measure on what political actors intend to accomplish when they engage in the practice of human rights.

A focus on the original intent of those who invoke human rights as reasons for intervention in the internal jurisdiction of states assists in distinguishing political conceptions of human rights from moral accounts that seek to locate their nature in essential properties of what it means to be human. But although reliance on originalism might bolster the plausibility of political accounts, in the eyes of those otherwise tempted by the allure of natural law that moral accounts implicitly rely on, it exposes what they must repress to acquire explanatory power. Ascertaining the intent of those responsible for the enactment of a legal norm is a thoroughly interpretive enterprise that must specify a plausible method of discerning intent, distinguish actual intentions from stated intentions, identify which actors count as framers, assume that each actor was motivated by a single objective or assign weights to her multiple objectives, specify how much weight is to be given to their intentions in relation to the intentions of those whom they represent, and sift through countless, competing political motivations of a multiplicity of international actors.⁵²

Supplementing his political conception of human rights, Ratner claims that human rights are also moral concepts: “I thus take human rights to be a *moral* concept even as we give that concept some content by reference to its political role and legal codification in the world” (p. 74). This claim rests on his ability to defend the normative value of his selection criteria that determine which practices are sufficiently important objectives of global political life to attract the normative value we attach to human rights. Such a defense

52. One way to address some of these concerns is to narrow the class of political actors whose practice defines a human right. Jean Cohen, for example, focuses on “the politics of actors who invoke the international documents and rely on strong moral arguments when declaring and claiming *their own rights* vis-à-vis the exercise of the public power first and foremost of their own state.” JEAN L. COHEN, *GLOBALIZATION AND SOVEREIGNTY: RETHINKING LEGALITY, LEGITIMACY, AND CONSTITUTIONALISM* 164 (2012). This enables Cohen to box out the politics of actors who invoke the discourse of human rights in the context of “the enforcement model that humanitarian intervention articulates regarding grave humanitarian crises or grave rights violations” from “the heart of the international human rights ‘regime.’” *Id.* at 194. For an illuminating account of international human rights that derive their normativity from the practices of feminist human rights activists “working to make marginalized people and marginalizing structures visible,” see BROOKE A. ACKERLY, *UNIVERSAL HUMAN RIGHTS IN A WORLD OF DIFFERENCE* 16 (2008). For a critique of various methods of identifying the practice of human rights and its practitioners and a proposal that one needs to construct an “idealised practitioner” for this task, see David Jason Karp, *The Location of International Practices: What Is Human Rights Practice?*, 39 *REV. INT’L STUD.* 969, 971 (2013).

must be mounted independently of the global practice of human rights, which only establishes their factual existence as reasons for certain kinds of actions in certain circumstances, and not why they should be reasons for such actions.

Ratner relies on Beitz and Shue for the heavy normative lifting here, and both scholars offer eloquent accounts of the normativity of their selection criteria.⁵³ But, like Beitz and Shue, Ratner sees international legal codification of human rights as secondary to this task. According to Ratner, “the codification of some claimed rights into legal form is neither necessary nor sufficient for something to be a human right” (p. 74). Selection criteria operate to determine whether a human right in international law possesses the requisite normativity to be an instrument of global justice (and whether the absence of a positive international human right is an instance of global injustice). But if one’s selection criteria generate a list of human rights that is narrower than those that exist in international law, as in the case of Ratner’s selection criteria, they are not normative accounts of international human rights law. They are normative critiques of international human rights law. This fits with a broader project of sifting through positive international legal norms to determine their proximity to a just international legal order. But if the task is instead to determine the legal functions that human rights might play in mitigating some of the adverse consequence of the deployment of sovereignty to constitute global politics into an international legal order, then those functions may only be coincidentally related to political practice or the normativity of one’s selection criteria. And if peace and human rights are the only pillars consequentially derived from the fundamental values of human welfare and flourishing, then one’s selection criteria should include rights that protect interests associated with these values.

One international human right that protects interests associated with human welfare and human flourishing is the right to development. Its codification in the UN Declaration on the Right to Development,⁵⁴ as well as its enshrinement in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,⁵⁵ for example, calls on states to exercise external sovereign power to address economic inequality beyond their boundaries. The Declaration on the Right to Development refers to the right to development as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁵⁶ It defines the right as an entitlement to “a

53. BEITZ, *supra* note 3, at 48–95; SHUE, *supra* note 51, at 109.

54. G.A. Res. 41/128 (Dec. 4, 1986).

55. International Covenant on Civil and Political Rights art. 1, *adopted and opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights art. 1, *adopted and opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

56. G.A. Res. 41/128, *supra* note 54, art. 1, ¶ 1.

comprehensive economic, social, cultural and political process.”⁵⁷ It comprehends the alleviation of poverty as an objective of development, by referring to development as aiming “at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”⁵⁸

The Declaration on the Right to Development further comprehends the right to development as imposing negative and positive obligations on both the internal and external exercise of sovereign power.⁵⁹ The internal dimensions of the right require states to exercise their sovereign power over resources and revenues in ways that promote development for the benefit of its population. Article 2(3) of the Declaration, for example, imposes on states “the duty to formulate appropriate national development policies.”⁶⁰ Article 8 requires states to undertake “at the national level, all necessary measures for the realization of the right to development.”⁶¹ The external dimensions of the right speak to the exercise of sovereign power in the international arena. Article 3(1), for example, imposes positive obligations on states to create “international conditions favourable to the realization of the right to development.”⁶² Article 4(1) provides that states are under an individual and collective obligation “to formulate international development policies with a view to facilitating the full realization of the right to development.”⁶³ Other articles refer to duties of international cooperation and assistance, further specifying the external dimensions of the right.⁶⁴

The Declaration on the Right to Development thus verifies the international legal existence of the right to development and validates its international legal character as a human right. The Declaration defines development in comprehensive and participatory terms and comprehends development as requiring the alleviation of poverty. And it imposes internal obligations on all states to promote development for the benefit of their respective populations and imposes external obligations on states to facilitate development beyond their borders.

But the right to development, despite its codification in international legal instruments, likely does not manifest the requisite political practice to

57. *Id.* annex, ¶ 2.

58. *Id.*

59. See Margot E. Salomon, *Legal Cosmopolitanism and the Normative Contribution of the Right to Development*, in *IMPLEMENTING THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW* 17 (Stephen P. Marks ed., 2008).

60. G.A. Res. 41/128, *supra* note 54, art. 2, ¶ 3.

61. *Id.* art. 8, ¶ 1.

62. *Id.* art. 3, ¶ 1.

63. *Id.* art. 4, ¶ 1.

64. *Id.* art. 3, ¶ 3; *id.* art. 4, ¶ 2. For a similar, more detailed, interpretation of the Declaration, see Anne Orford, *Globalization and the Right to Development*, in *PEOPLES' RIGHTS* 127, 135–45 (Philip Alston ed., 2001).

qualify, under a political conception of human rights, as a reason that requires international legal actors to take measures to reduce global economic inequality. To put it bluntly, the role that the right to development plays in global human rights discourse is fairly minimal. And, even if political practice regarding its deployment was sufficiently robust to constitute it as a reason validating the exercise of external sovereign power, it would still need to be shown that the right to development protects urgent individual interests against certain predictable dangers associated with the exercise of sovereign power.⁶⁵ This might be the case with respect to the exercise of internal sovereign power, but one would be hard-pressed to make the case that the exercise of external sovereign power threatens urgent interests associated with the right to development. This is because, except in exceptional circumstances, the exercise of external sovereign power does not directly affect such interests. Global economic inequality, generally speaking, is not a function of the exercise of sovereign power in the international legal arena.⁶⁶ Instead, the right to development performs a normative function relatively distinct from political practice and political conceptions of human rights. It speaks to adverse consequences that flow from the distribution of sovereignty that international law performs to bring international legal order to global politics. And if the pillar of respect for basic human rights is consequentially derived from the fundamental moral values of human welfare and human flourishing, then the right to development merits inclusion in the list of human rights designed to secure these values.

CONCLUSION

The Thin Justice of International Law offers a timely, comprehensive, and theoretically rich interdisciplinary theory of international law's relationship with global justice. It is a major contribution to the burgeoning literature on global justice, with a fine eye to legal detail and institutional design, rich with insight into normative dimensions of international legal rules and the extent to which they relate to interstate and intrastate peace and respect for human rights. The book is an invaluable inquiry into whether and how such legal norms serve the cause of global justice. It bridges international legal theory with moral and political theory with a standard of global justice grounded both in nonideal and ideal terms that sorts actual legal norms in terms of their consequences on peace and human rights—criteria immanent in our existing international legal system but also demanded by abstract conditions of global justice.

This Review has explored three features of *The Thin Justice of International Law*: its commitment to rule consequentialism, its treatment of the

65. See *supra* note 46 and accompanying text.

66. An important exception is international economic legal norms that foster liberalization of trade and investment, which have the potential, at least to exacerbate global economic inequality, which Ratner acknowledges. See pp. 323–27.

state system as a fixed attribute of our international legal order, and its embrace of a political conception of human rights. Its commitment to rule consequentialism leads to the possibility that its two pillars of global justice—interstate and intrastate peace and respect for human rights—themselves are rules consequentially derived from more fundamental moral values of human welfare and human dignity. If this is the case, then the fundamental moral values in Ratner's theory are human welfare and human flourishing, and the values of advancing peace and respecting basic human rights are consequentially derived principles that instrumentally serve these fundamental moral values. This gives rise to the possibility that such principles might give way to more fundamental moral concerns relating to the attainment of human welfare and human flourishing, in which case the pillars of peace and basic human rights are not necessarily exclusive criteria of just legal norms. Another pillar—one directly that tests the justice of legal norms in terms of their proximity to human welfare—comprises another part of a normative inquiry of international law's relationship to global justice.

The second feature of *The Thin Justice of International Law* concerns its acceptance of the distribution of sovereignty that international law performs to organize global politics into an international legal order, resulting in a thick conception of a just international legal system. The distribution of sovereignty—its origins, the episodic recalibrations to which it is subject, especially during and after times of war, and its distributional consequences—is treated as a fixed attribute of the international legal order. Questions that relate to the justice of this distribution remain outside the normative sphere of global justice. One such question concerns the relationship between a system of sovereign states and global economic inequality. The natural, geographical, and social contingencies that contribute to global economic inequality—such as the state into which one is born, its location, and its resources—are morally arbitrary determinants of one's station in life. But such circumstances are not simply the function of natural, social, and geographical contingencies. One's station in life is also a product of being born in a legal jurisdiction recognized by international law as vested with sovereignty over its people and territory, and the capacity of a sovereign state in its midst is no small measure a function of its location, boundaries, and resources. These are variables whose limits and possibilities are determined by the distribution of sovereignty in international law, which thus merits normative scrutiny to the extent that the global economic inequality that this distribution validates frustrates the moral values of human welfare and human flourishing.

The third feature of *The Thin Justice of International Law* is its endorsement of a political conception of those human rights that constitute its second pillar of global justice. On this conception, human rights protect urgent individual interests against predicable dangers associated with the exercise of sovereign power. They do not protect urgent interests from the adverse consequences of the distribution of sovereignty performed by international law in its aspiration to organize global politics into an international legal order.

But if respect for human rights is consequentially derived from more fundamental values that relate to human welfare and human flourishing, these values are not only threatened by the exercise of sovereign power. They are also threatened by the very distribution of sovereign power. Human rights that speak to mitigate some of these consequences—the right to development in particular—seek to protect interests associated with human welfare and human flourishing in the face of both the distribution and exercise of sovereign power, and thus merit recognition on the list of human rights that a theory should seek to instantiate as a matter of global justice.