

‘Victors’ Justice’? Historic Injustice and the Legitimacy of International Law.¹

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Thomas Nagel has recently written, “We do not live in a just world. This may be the least controversial claim one could make in political theory.”² Nowhere does this seem more clear than in the field of international justice. In recent years, political theorists have put forward a range of accounts of how international society should, ideally, be ordered. Whilst there is disagreement as to what a just world would look like, defences of the justice of the *status quo* are few and far between. Even those writers who deny that redistributive duties of justice extend across state borders and who believe that it is appropriate that peoples take responsibility for the results of their own decision making typically accept the existence of transnational duties to ensure minimal levels of well-being for the world’s poor – duties which, tragically, are clearly not being fulfilled in the present day. Such judgments as to the injustice of the real world international situation, however, do not necessarily extend to present day principles of international law, which contain at least formal provisions for the fulfilment of minimal socio-economic rights, whilst privileging ideas of national responsibility and self-determination. In this article, I consider the relation between the injustice of contemporary international society and the legitimacy of international law. The article is motivated by the thought that the existing international legal system is unfair. The history of its development is, in some ways, one whereby Western powers, who were historically responsible for extensive wrongdoing, shaped international law so as to secure and legitimate their own advantages – advantages which were often improperly obtained. The article is divided into two parts. The first part argues that the current international legal system is unjust, in terms of how existing international law endorses and perpetuates an unjust distribution of resources between states. I argue that this claim should be accepted from two prominent, and rather different, perspectives on international ethics. The second part holds that this injustice calls the legitimacy of international law into question.

Part One: Justice and international law

Many feel that contemporary international law is a good thing. Insofar as it contains provisions which, for example, seek to advance peaceful conflict resolution, or to delineate and promote certain basic human rights, the development of international law is commonly portrayed as positive, and conducive to the progress of civilisation.³ Certainly, the nature and scope (both actual and desirable) of international law is controversial. Theorists disagree over the extent to which the consent of each and every state of the world is necessary for a given norm or proposal

¹ For comments on this paper, I am grateful to Rahul Kumar, Chris Brooke, and an anonymous reviewer, and to audiences at the Nuffield College Political Theory Workshop in Oxford and the International Symposium on Justice, Legitimacy and Public International Law in Bern.

² T. Nagel, ‘The Problem of Global Justice’, *Philosophy and Public Affairs*, 33 (2005), 113-147 at 113.

³ See, for example, the American Society of International Law’s publication, *International Law: 100 Ways It Shapes Our Lives* (available at http://www.asil.org/files/asil_100_ways_05.pdf). This takes its inspiration “from the proposition that international law not only exists, but also penetrates much more deeply and broadly into everyday life than the people it affects may generally appreciate”, and so lists 100 ways in which international law has an appreciable impact on modern day individuals’ everyday life. It is striking that every example listed portrays the development of international law in a positive light.

to be understood as a principle of international law, with universal applicability. An obvious potential conflict emerges with the collective self-determination of particular peoples, and some maintain that international law can represent the imposition of a particularly Western, liberal world view upon communities with different traditions and values. But it does seem that a consensus has emerged around certain key principles of international law, most notably those which respect national sovereignty, other than in cases of human rights abuses, and prohibit certain violent forms of international interaction, such as attacking another country in order to expand one's own territory or gain access to resources.⁴ One way of viewing the development of international law, then, is as a positive development which seeks to prevent such serious harm to basic interests. But this need not be taken as endorsing the substantive justice of the international legal system. The claim that international law has helped to make the world a better place in terms of justice is not incompatible with the claims, first, that the world is still deeply unjust, and second, that this injustice is endorsed and perpetuated by our current system of international law. Even if certain forms of immoral, human rights infringing interaction between states are now prohibited by international law, we are, on some accounts, a long way from realising distributive justice between states. Although the extent to which modern day states are independent sovereign entities has certainly changed in recent years, with significant limitations being placed on states' ability to run their own affairs in a number of policy areas,⁵ the defining characteristic of international law in terms of distributive justice is still the sovereignty which states have over their own borders in two critical respects: in relation to control of their resource holdings, and to immigration policy. As will be seen, this is problematic from two rather different approaches to international distributive justice. From both perspectives, it will be argued, international resource holdings are unjust. Individuals and groups in one state have entitlements to resources currently controlled, according to the tenets of international law, by others. These entitlements are enforceable claims on others, based in distributive justice. International law, however, positively upholds an alternative distributive scheme, and backs this scheme by the use of coercive force. This means that international law is unjust – and calls its legitimacy into question.

For those who hold forward-looking, redistributive accounts of international distributive justice, the claim that the distributive scheme sanctioned by international law is unjust is straightforward. The key factor is the paucity of redistributive mechanisms between states. What international law certainly does not do is to require a redistribution of resources across national boundaries so as to bring about a particular distributive pattern, such as equality, or priority for the worst off. One perspective from which this is obviously problematic is that of egalitarian cosmopolitanism. Advocates of cosmopolitanism maintain that national boundaries are not of ethical significance in terms of distributive justice. Cosmopolitan writers who advocate extensive redistribution of resources at a domestic level will typically argue for the same kind of redistribution across communities. Such a redistributive position may be founded on a view of the extensive nature of international interdependence in a globalised era, maintaining that the world should be seen as a single scheme of social cooperation. Or one can simply maintain that persons have equal moral worth, and as such are entitled to equal concern and respect regardless of their national background. On either account, redistributive cosmopolitans must seemingly condemn the distributive implications of contemporary international law. As Buchanan notes, "some would argue that the control over resources that international law accords to states as an element of sovereignty is the single greatest impediment to eradicating the most grievous distributive

⁴ See Michael Walzer's account of the "legalistic paradigm" in *Just and Unjust Wars* (New York: Basic Books, 1977).

⁵ See D. Held, 'The Changing Structure of International Law: Sovereignty Transformed?' in D. Held and A.G. McGrew (eds.), *The Global Transformations Reader* (Cambridge: Polity, 2003), 162-176.

injustice in our world – the vast disparity of wealth between the “developed” and the “underdeveloped” countries.”⁶

Condemning the distributive implications of international law in terms of ideal theory on this basis is a relatively straightforward business. But there is another school of thought within the literature on international distributive justice which appears to be more sympathetic to the vision of global justice reflected in international law. This position has been described in a number of ways, the most well-known perhaps being that of Charles Beitz, who labels advocates as “social liberals”, in contrast to “cosmopolitan liberals”.⁷ I have elsewhere described this position as “international libertarianism”, as I suggest that those within this school adopt principles of distributive justice between states which are analogous to those principles of justice which libertarians such as Robert Nozick maintain should obtain between individuals in domestic society.⁸ Such accounts typically stress the importance of national sovereignty, understood as the (perhaps limited) right collectively to govern oneself free from external interference, of self-ownership, understood in terms of entitlement to one’s own territory and resources, and of a minimal or highly limited state at an international level. International libertarians adopt an intermediate position on international ethics between redistributive cosmopolitanism and prescriptive realism, whereby one accepts that states have duties towards one another without accepting that these are analogous to domestic relations of justice within a particular polity.⁹ The detail of these principles differs, but it is possible to identify a core shared by the different accounts. The key to the core principles is a respect for national sovereignty and self-determination and a commitment to the basic principles of existing international law. In particular, one might identify two principles common to these accounts:

- 1) States should refrain from forceful intervention in the affairs of other states, other than i) when acting in response to aggression, or ii) to prevent human rights violations.
- 2) States should comply with voluntarily made treaties and agreements.

These core principles are often supplemented by further, complementary principles which have the effect of making the account more demanding. For example: one might maintain that states have a duty not to harm other states (in a broader sense than in (1) above); that they have a duty not to exploit other states; and that they have duties of assistance to those who lack some basic minimum level of subsistence. The key theme that such accounts possess in terms of distributive justice is that the redistribution they require is, at best, limited. So, for example, while Rawls argues that, “Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime”,¹⁰ he explicitly contrasts his position with that of the redistributive cosmopolitans on this point. Duties of assistance only apply insofar as other societies are unable to realize just institutions: “Once that end is reached, the Law of Peoples prescribes no further target such as, for example, to raise the standard of

⁶ A. Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004), p. 53.

⁷ C. Beitz, ‘Social and Cosmopolitan Liberalism’, *International Affairs* 75 (1999), 515-529.

⁸ See D. Butt, *Rectifying International Injustice: Principles of Compensation and Between Nations* (Oxford University Press, 2009).

⁹ Examples include J. Rawls, *The Law of Peoples* (Harvard University Press, 1999), p. 37; Walzer, *Just and Unjust Wars*, pp. 61-3 and p. 108; D. Miller, *On Nationality* (Oxford: Clarendon, 1995), pp. 104-5; Nagel, ‘The Problem of Global Justice’, 130-2; M. Frost, *Ethics in International Relations* (Cambridge University Press, 1996), pp. 106-110; T. Nardin, *Law, Morality and the Relations of States* (Princeton University Press, 1983), pp. 269-70.

¹⁰ Rawls, *The Law of Peoples*, p. 37. For discussion, see pp. 105-120.

living beyond what is necessary to sustain those institutions.”¹¹ In opposing patterned redistribution across national boundaries in the name of national self-determination, or by denying that distributive justice applies in an international context due to the absence of a particular kind of relation between members and non-members of the state, international libertarians endorse backward-looking principles of distributive justice whereby there is no requirement of justice to redistribute resources across state borders with each new generation.

The principles of justice advocated by international libertarians seem very close to those enshrined in existing international law. It might, then, be supposed that an advocate of such an approach would reject the claim that international law is unjust in terms of distributive justice. However, this would be a mistake. The problem with existing international law for international libertarians is that it does not take sufficient account of unrectified historic injustice. Some discussion of the more familiar account of Nozickian libertarianism, based upon historical entitlement, may be helpful here. Nozick famously outlines three principles of distributive justice: the principle of just acquisition, by which individuals can come to possess property rights over objects; the principle of justice in transfer, by which entitlement to properly acquired property can be transferred from one individual to another; and the principle of rectification, by which illegitimate transfers of property are to be corrected.¹² The consequence of Nozick’s political theory is that it is *possible* for a society characterised by extreme distributive inequality to come about in keeping with the principles of justice. It follows that subsequent attempts by the state to redistribute property from one party to another will be illegitimate insofar as doing so ignores the justly acquired entitlements of property owners. Such a policy disregards the history by which the distribution came about, treating resources as if they were “manna from heaven”. But it does not follow from this that we need see Nozick as endorsing the actual distributions which we find in modern day societies. There is no reason to think that such distributions came about in keeping with the principles of justice in acquisition and transfer, since we recognise the pervasive injustice which has characterised how present day real world holdings have come about. So real world holdings look open to challenge under the principle of rectification. Nozick saw this clearly. He accepts that it might be best to see some patterned principles of distributive justice as “rough rules of thumb meant to approximate the general results of applying the principle of rectification of injustice”. On the basis of particular empirical assumptions, one might even end up endorsing a one-off version of the difference principle. An important question for each society will be: “given *its* particular history, what operable rule of thumb best approximates the results of a detailed application in that society of the principle of rectification?”¹³ He concludes that, “although to introduce socialism as the punishment for our sins would be to go too far”, it is possible that the extent of past injustices is so great as to justify a more extensive, redistributive state in the short run. In other words, his theory does not legitimate real world contemporary property holdings and shield them from a redistributive state.

The parallel with the international situation should now be clear. From an international libertarian perspective, insofar as international law has not accepted the existence of obligations to rectify historic injustice, it endorses and legitimates arbitrariness and injustice in distribution. It is a defining feature of international law, as it has developed through agreed treaties between nations and by international customary practice, that it does not have retroactive effect.¹⁴ This is made

¹¹ Rawls, *The Law of Peoples*, p. 119.

¹² Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 150-3.

¹³ Nozick, *Anarchy, State, and Utopia*, p. 231 (Nozick’s emphasis).

¹⁴ This article employs a predominantly positivist conception of international law, which holds that the content of law is determined by its positive provisions, as enshrined in its formulation in written international law and in authoritative international legal norms and conventions. One could argue from a

clear by, for example, Article 28 of the 1969 Vienna Convention of the Law of Treaties, which holds, “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”¹⁵ International law serves to constrain and direct future actions and provide redress when acts of international injustice are committed *once these are illegal*. But there is no redress provided for the victims of injustice perpetrated prior to the passage of the legislation in question.¹⁶ In a domestic case, and, in particular, in a society already governed by the rule of law, there are good reasons for the principle of *nullum crimen sine lege*, which holds that laws do not have retroactive effect, since there is an obvious danger that individuals will be punished for good faith actions, performed at a time when there was little or no suggestion that the actions in question would subsequently be criminalised. Such a situation would clearly create a highly damaging atmosphere of doubt and insecurity. But when one considers the retroactive illegalisation of seriously unjust, harmful actions, where the relevant sanctions are not so much punitive as restitutive or compensatory and apply to sizeable collectives rather than to individuals, the situation is rather different. The injustice of the historic international action in question does not lie in its unlawfulness, but rather in its unacceptable harmful effects on individuals’ interests. Rectificatory duties for such actions would be owed in the absence of any international law whatsoever. In such a context, drawing a line under unrectified injustices and merely requiring that future interaction be just does not necessarily serve the ends of justice.

It is easy to think of situations where the introduction of a rule forbidding certain kinds of harmful interaction without attempts being made to reverse the effects of previous harmful interaction has absurd and unjust consequences. Imagine a case where two communities, each with an equal share of resources, live unknown to each other on two sides of a river. As such, they have no rules of any kind, formal or customary, regulating their interaction. One day, a log jams across the river, forming a bridge. The residents of community A cross the log to explore, and carry off a

natural law perspective that international law is actually significantly different in content from its current positive formulation, and thus even suggest that international law properly understood allows for the rectification of historic injustice. Such a view does not affect the substance of my argument, which then becomes the claim that international law *as currently interpreted* is unjust, and may be illegitimate.

¹⁵ Article 28: Non-Retroactivity of Treaties, *Vienna Convention on the Law of Treaties* (1969), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed 21/11/2008].

¹⁶ It is sometimes suggested that the development of the legal category of “crimes against humanity” at the Nuremberg Trial following World War II, under Article 6 of the *Charter of the International Military Tribunal*, represented the development of *ex post facto* law with retroactive effect. This is far from clear, however, and is probably better seen as a conceptualization of a particular kind of illegal action: the Judgment of the Tribunal makes specific reference to the principle of *nullum crimen sine lege*, and invokes existing international conventions and particular international treaties, such as the Geneva Conventions. Thus Iu A. Reshetov writes, “The well-known principle of justice barring the retroactive effect of the law thus possesses its own substantive peculiarities in international law. These particularities do not boil down to the establishment of a specific sanction already after the commission of corresponding acts. If the criminal nature of that sort of act is already established by international law, then the pinpointing of the objective side of the crime, that is, the criminal effects proper, can be effected later as well. This occurred at Nuremberg... where the Charter of the International Military Tribunal was elaborated... after the factual commission of acts which, however, long before that were recognized as criminal.” Reshetov, “The Temporal Operation of Norms on Criminal Responsibility” in G. Ginsburg and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Martinus Nijhoff, 1990), 111-17 at p. 114. For further discussion of the principle of *nullum crimen sine lege* in international law, see M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen: Intersentia, 2002), 18-21.

large part of the property of community B. B protests, and so A proposes a new rule, whereby no resources shall be taken from within the territory of either community without the consent of the elders. Such an outcome will evidently be unjust if it is not accompanied by the return of the misappropriated property. This is so even if (i) the introduction of the rule improves the situation overall, including from B's perspective, and (ii) B consents to the rule in question. This latter point is important, since it means that one cannot point to the fact of agreement between parties that a line be drawn under the past to resist the claim that justice requires rectification of the injustice perpetrated prior to the agreement in question. It might well be that, without the introduction of the rule, the two communities would engage in a self-perpetuating series of raids on each other's property, leaving both worse off than if the rule is introduced. Or it might be that B is weaker, or just less willing to enter into violent conflict, than A, and so faces the threat of further incursions into its territory if it does not consent to the rule. Such possibilities explain why B may well agree to the introduction of the rule, but also serve to make the obvious point that consent is not sufficient to render an outcome, or a system of rules, just. This is important given the prominence which arguments concerning consent, evidenced by treaty agreements, have traditionally been afforded in the literature on the legitimacy of international law. But as Mattias Kumm notes, "it is doubtful that much legitimating value can be placed on a state's consent to a treaty, when the state is confronted with a take it or leave it option and the costs of not participating are prohibitively high."¹⁷ It is commonly asserted that when consent takes place in a context of coercion or threat, the justifiability of the ensuing outcomes cannot be taken for granted. The historic evidence of widespread international injustice, and the relative prominence and bargaining power of precisely those countries most responsible for the commission of said injustice in the development of international law, is sufficient to call into question the justificatory force of consent in international law. International law was developed on the terms of the affluent states, and shaped in their interests. The claim that the principles of international law which lack retroactive effect were consented to by those who were victims of historic injustice does not confer justifiability upon the outcome. The fact that international law endorses and perpetuates distributive injustice does not mean that it has not been a good thing, compared to a counterfactual where no such rules were developed. But it has not been as good as it could or should have been. Insofar as one believes that uncorrected distributive injustices obtain between states, the lack of provision in international law for the righting of these wrongs renders the international legal system unjust. Thus, from the perspectives of both cosmopolitan liberalism and social liberalism, the current international legal order is unjust. For cosmopolitan liberals, it is insufficiently forward-looking. For social liberals, it is not backward-looking enough.

Part Two - Legitimacy and international law

I have argued that existing international law endorses and perpetuates distributive injustice, that its claims to rest upon consent are problematic, and that the world would be more just if some of its provisions were radically reshaped so as to allow for the righting of the lasting effects of historic wrongs. Does this mean that international law is illegitimate? Not necessarily. International law is not solely a set of rules determining the distribution of resources. It also governs the international arena more generally, seeking to regulate how states treat their own citizens, and those of other countries. We might hope that international law reduces or minimises the incidence of violence and war, and prevents a range of actions which could lead to greater distributive injustice than if it did not exist. So there are reasons both of justice in a broad sense, and of distributive justice specifically, to think that, at the very least, the existence of international

¹⁷ M. Kumm, 'The Legitimacy of International Law: a Constitutionalist Framework of Analysis', *The European Journal of International Law*, 15 (2004), 907-31 at 914.

law is an improvement on what went before. In domestic state of nature arguments, it is often the rich who are portrayed as benefiting particularly from the introduction of law, since without the law they could be set upon by the poor.¹⁸ The principle of equal vulnerability played a key role in Hobbes's account in *Leviathan*. Such suggestions are less plausible in an international context, where rich states are able to defend themselves by means of military technology with a rather greater assurance than was available to the rich in Hobbes's state of nature. The claim that existing international law, though endorsing distributive injustice, furthers justice in a broad sense is a plausible one. This second section therefore scrutinises the claim that the existence of unrectified historic injustice calls into question the legitimacy of international law by looking at the role of justice in contemporary accounts of legitimacy. In addressing this issue, we must confront the variety of meaning which different theorists have attached to the idea of "legitimacy". For example, A. John Simmons has written at length on the desirability of keeping the terms "justification" and "legitimacy" separate. He notes that many contemporary political theorists run the two ideas together, citing (amongst others) Nagels's claim that, "the task of discovering the conditions of *legitimacy* is traditionally conceived as that of finding a way to *justify* a political system to everyone who is required to live under it", as well as Rawls's statement that "the basic structure and its public policies are to be *justifiable* to all citizens, as the principle of political *legitimacy* requires", and Leslie Green's stark statement that "a state is *legitimate* only if, all things considered, its rule is morally *justified*".¹⁹ Instead, Simmons argues for a strong Lockean notion of legitimacy, understood as the right of the state to direct, be obeyed by, and coerce subjects:

Legitimacy... is the exclusive moral right of an institution to impose on some group of persons binding duties, to be obeyed by those persons, and to enforce those duties coercively. Legitimacy is thus the logical correlate of the (defeasible) individual obligation to comply with the lawfully imposed duties that flow from the legitimate institution's processes.²⁰

The question, for Simmons, of whether the state is justified in acting in a particular way is quite distinct from the issue of whether it has a specific kind of relationship with those subject to it which gives citizens reason to obey the state's commands just because they are the commands of the state. There are two distinct normative issues in play here. When we ask whether a given system of law is legitimate, we may be asking one of two questions:

- 1) Is it justifiable for state actors to impose this system of law on persons?
- 2) Do those subject to the law possess a correlative duty to obey the law in question?

These questions are distinct, since it is possible to maintain that a system of law is justified in the sense that it is morally permissible (or, perhaps, even morally obligatory) for institutional actors to impose it upon those subject to it, whilst also maintaining that those subject to the law in question may justifiably refuse to obey its commands (when they can do so without violating any other independent moral duties, for example.) There is no incoherence in thinking that a given state acts justifiably in imposing a particular traffic law on all those in its territory, and punishing all those it catches breaking the law so that the law is not undermined, whilst maintaining that those subject to the law can justifiably break the law when they can do so without risking harm to

¹⁸ See, for example Jean-Jacques Rousseau's discussion of the development of positive law in "Discourse on the Origin of Inequality", trans. G.D.H. Cole, *The Social Contract and the Discourses* (London: Everyman, 1993), pp. 96-9, and A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. A.S. Skinner and R.H. Campbell (Oxford University Press, 1981), p. 715.

¹⁹ A. J. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2001), pp. 141 (Simmons's emphasis).

²⁰ Simmons, *Justification and Legitimacy*, p. 154.

others. Rather than stipulatively maintaining that legitimacy need or not need refer to (2) as well as to (1), I shall refer to positive answers to (1) as relating to “thin legitimacy”, and positive answers to (2) as referring to “thick legitimacy”. Thus, a system of law possesses thin legitimacy insofar as it is morally justifiable for institutional actors coercively to impose its requirements, and thick legitimacy insofar as those subject to the law possess a political obligation to obey the law. Both of these are pressing questions in relation to international law. Consider, for example, immigration restrictions, whereby states use coercive force to prevent non-nationals from entering the state’s territory without the state’s permission. Are these actions morally justifiable? Do those who wish to enter the state in question but who are refused permission face an obligation to comply with the state’s lawful decision? We need an account of the nature of the legitimacy of international law, which tells us a) whether it exists, and b) if so, whether it is thick or thin legitimacy, in order to answer these questions.

How, then, might a system of law come to possess legitimacy? Traditional accounts of thick legitimacy typically make reference to the consent of the governed. John Simmons, for example, maintains that “the proper grounds for claims of legitimacy concern the transactional components of the specific relationship between individual and institution”. The way to judge the legitimacy of a legal system, on this account, is to look primarily not at its content, but at the particular way that it has come into being, and thus at the nature of the transactional relationship between government and the governed. The question of the justice of outcomes seems to be of secondary importance. Since Simmons is a particular kind of voluntarist, it follows for him that only actual consent constitutes the correct form of relationship. As no existing state achieves this level of consent, it follows that no existing state is legitimate, and, we might surmise, if no existing state meets his criteria of legitimacy, the international legal system cannot do so. Although the idea of consent does have a prominent role in international law in relation to treaties between states, this is clearly insufficient to meet Simmons’s criteria for legitimacy given that the states making the treaties lack legitimacy in relation to their own citizens, and so are not empowered to transact on their behalf. Thus even if we leave to one side the question of how meaningful consent is in a context of extreme inequalities of power and a historical background of gross wrongdoing, the actual consent approach cannot ground the legitimacy of international law. If we adopt such an understanding, it seems as if we cannot really talk meaningfully about the legitimacy of the international legal system at all. Seeking to avoid the conclusion that international law is therefore illegitimate, some writers on international law have sought to provide different foundations for its legitimacy. Simmons’s account has the same basic structure as a conventional promissory obligation. The reason why one has a defeasible obligation to do X (obey the law) is because one has promised to do so (consented to the authority of the state), rather than because X is in itself good. The alternative is to incorporate some idea of the justice of the order which the system of rules sets up, without equating legitimacy with justice *simpliciter*. This sees legitimacy as a threshold concept – the system need not be perfectly just in order to be legitimate, but it must meet some minimal level of justice. It is this move which removes the requirement for actual consent, or a relevantly similar transactional history between governors and governed, and so opens the door to the possible legitimacy of international law, but it also means that considerations of distributive justice can now undermine legitimacy. For example, in laying out his constitutionalist model for analysing the legitimacy of international law, Mattias Kumm maintains that it is a mistake to look to features of domestic legitimacy, such as informed consent, and expect them to be replicated at an international level. The purpose of international law is “to establish a fair framework of cooperation between actors of international law in an environment where there is deep disagreement about how this should best be achieved”; if the law is to achieve this purpose, then “those who are addressed by its norms are generally required to comply, even

when they disagree with the content of a specific international rule.”²¹ However, all this creates is a presumption in favour of international law, and it follows that this presumption can be overridden if international law gives rise to significant injustice. Thus Kumm writes:

The fact that there is a rule of international law governing a specific matter means that citizens have a reason of some weight to do as that rule prescribes. But this presumption is rebutted with regards to norms of international law that constitute sufficiently serious violations of countervailing normative principles relating to jurisdiction, procedure or outcomes. ...each of the relevant principles can either support or undermine the legitimacy of international law.²²

It is unrealistic to expect a system of law to coincide perfectly with the requirements of justice – the question is whether the system is sufficiently just both to allow its coercive imposition by institutional actors and to give rise to a correlative obligation to obey its commands. As the preceding discussion suggests, both redistributive cosmopolitans and international libertarians have good reason to question whether existing real world distributions meet such a threshold. To consider international law legitimate, on both Kumm’s and Simmons’s thick accounts, is to maintain that those subject to it have a *prima facie* moral obligation to obey its rules. They should not, for example, seek to redistribute resources in an illegal manner, even if their actions have the effect of bringing about a more just distribution. It is key here that is that the fact that such actions would be illegal which is taken as constituting a reason for persons to forbear from performing them. There may be other reasons – prudential reasons of self-interest, other-regarding reasons based on upholding expectations and life plans – not to act in such a way, but these will not stem from the authority of the law itself. A test case for a redistributive cosmopolitan involves an illegal transfer from those who are, in the real world, better off in material terms than they would be in a just society to those who are worse off than they should be. For an egalitarian cosmopolitan, this would mean a transfer from those who have a greater share of resources than average to those with an inferior share. Does the existence of international law mean that a modern day Robin Hood with the possibility of acting in such a way faces a moral obligation not to do so? Do those who themselves have less than they should face a political obligation to desist from taking the matter into their own hands, even if they could bring about a more just distribution by action which was illegal and redistributive, but otherwise harmless? A corresponding test case for the international libertarian involves a situation where those suffering from the automatic effects of historical injustice seek, illegally, to reverse these effects. Imagine that before international law developed binding force, Nation B’s army stole a cultural artefact (created and paid for by members of Nation G) from G’s National Museum. This artefact now resides in the National Museum of B. A member of G surreptitiously removes the artefact and donates it to G’s National Museum. If we believe that international law possesses thick legitimacy, it seems to follow that G faces a moral obligation to return the item to B. The question is again that of the extent of the injustice which the law allows. Whilst it seems clear that there are good reasons for laws which prevent individuals from taking matters into their own hands and independently seeking to correct distributions they deem to be unjust, it also does seem that, in cases of gross injustice, to require people to forebear from so acting asks too much of them. Jules Coleman makes the point in relation to corrective justice and property rights:

In order for a scheme of rights to warrant protection under corrective justice... they must be sufficiently defensible in justice to warrant being sustained against individual infringements. Entitlements that fail to have this minimal property are not real rights in the sense that their infringements cannot give rise to a

²¹ Kumm, ‘The Legitimacy of International Law’, 918.

²² Kumm, ‘The Legitimacy of International Law’, 917.

moral reason for acting... each of us can imagine political institutions that so unjustly distribute resources that no one could have a reason in justice for sustaining them by making repair.²³

So the crucial question is whether existing resource distributions are sufficiently just so as to be legitimate, and so place obligations on agents to forebear from seeking to promote distributive justice through independent direct action (as opposed to, for example, lobbying democratic institutions to fulfil their justice based duties). It is very hard for either redistributive cosmopolitans or international libertarians to maintain that agents face such obligations, and so this would appear to suggest that significant elements of international law lack legitimacy in the thick sense. It is relatively straightforward to maintain that this is true for redistributive cosmopolitans, such as global egalitarians, who believe the real world to be deeply, profoundly unjust, and who advocate massive international redistribution. For international libertarians, the question of whether the existing international legal system, lacking retroactive effect, meets the relevant threshold of distributive justice depends upon the extent to which we believe that rectificatory justice requires an extensive redistribution of resources in the present day. My view is that if one adopts an international libertarian account of global distributive justice, one must accept that it seems probable that modern day states owe extensive rectificatory duties to others on account of past wrongdoing.²⁴ I have identified elsewhere three grounds on which rectificatory duties can be said to be owed. These are:

- 1) Entitlement: when one state has possession of property to which another state is morally entitled.
- 2) Benefit: when one state is benefiting, and another is disadvantaged, as a result of the automatic effects of an act of historic injustice.
- 3) Responsibility: when one state is responsible for an ongoing injustice in relation to another nation, understood in terms of an ongoing failure to fulfil rectificatory duties over time.

Each of these arguments for the existence of potentially extensive present day rectificatory duties is undoubtedly controversial, but each is conceptually distinct, so that one might reject one or two of these grounds while still accepting the significance of what remains. I have referred primarily in this article to the first category, that of entitlement, and so we might consider the fact that international law does not require the restitution of objects, such as items of cultural property, which were misappropriated prior to the development of the relevant legal provision.²⁵ It is possible to understand “property” broadly here to refer not only to physical artefacts, but also to other categories of entitlement, including money, the value of improvements made to land, wages which should have been paid to slaves but were not, and so on. Such an account is dependent upon an argument as to how and why entitlements to property can persist even when the property in question rests for long periods of time in the hands of others, and upon an acceptance of the justifiability of inheritance. The latter, in particular, has proved controversial with many theorists, who wish to deny that resources can justifiably be transferred from one generation to the next. But while such arguments are available to the redistributive cosmopolitan, it is much less clear that international libertarians, who, as we have seen, deny that justice requires redistribution across national boundaries even when we are considering generations subsequent to those which

²³ J. Coleman, *Risks and Wrongs* (Cambridge University Press, 1992), pp. 352–53.

²⁴ This is the primary claim of *Rectifying International Injustice*.

²⁵ For discussion of this, in terms of the 1969 Vienna Convention on the Law of Treaties and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, see J.H. Merryman and A.E. Elsen, *Law, Ethics and the Visual Arts* (London: Kluwer Law International, 2002).

generated the resources in the first place, can oppose the idea of a national inheritance of resources. Accordingly, my view is that it is possible to argue for rectificatory duties in connection with a wide range of different kinds of entitlement. I would also maintain that categories (2) and (3) are relevant to judging the justice of the international legal system – both specify what justice-based obligations modern day states should perform as a result of their rectificatory duties stemming from the past, but in neither case does international law mandate such action. By drawing an arbitrary line under centuries of international wrongdoing and disregarding the ways in which historic actions have affected the distribution of benefits and burdens in the present, international law requires many individuals and groups to live with a dramatically lesser share of the world's resources than they would possess in a just world. There are two senses in which this is problematic for the legitimacy of international law from the perspective of international libertarianism in particular. Some individuals possess a significantly reduced share of resources than they would possess if states fulfilled their rectificatory obligations. One problem, then, is the *distance* between the unjust world and its rectified counterpart which may mean that the world is not sufficiently just to meet the threshold for legitimacy. But there is a further element to unrectified injustice, which concerns the *character* of unrectified distributions.

There is something particularly unacceptable, from a moral perspective, about requiring those who are directly affected by unjust action which violates negative rights to refrain from acting in a way which would lessen their unjust disadvantage. It is one thing to note that a just world would conform to a given distributive pattern, such as equality, and to maintain that individuals are disadvantaged insofar as they lack resources they would have if redistribution were to take place. It is another to say that individuals are disadvantaged by a failure to rectify the effects of rights-violating wrongdoing. It is particularly onerous for individuals to have to live with the fact that others are failing to rectify negative rights infringements. Thomas Pogge has argued that ordinary moral reasoning is committed to a hierarchy of moral reasons, which holds that negative duties not to wrong (unduly harm) others are sharper and weightier than positive duties to protect others from wrongdoing.²⁶ An analogous point can be made concerning the experience of those who suffer as a result of violations of negative duties – everything else being equal, it is more demanding to expect them to respect an unjust distribution than it would be were the distribution unjust only in relation to a normatively desirable distributive pattern. Let us return to the case of the misappropriated cultural artefact, belonging to G but currently held by B. Imagine that the sum total of G's holdings is 100 units, and that of B is 120 units, and that the artefact has a value of 10 units. Both egalitarian cosmopolitans and international libertarians would hold that similar courses of action should take place – B should transfer the equivalent of 10 units to G.²⁷ But it seems coherent to argue that the distribution is intolerably unjust in terms of the legitimacy threshold from the international libertarian, but not the egalitarian cosmopolitan, perspective. It is thus potentially the character of the unjust distribution, and not simply its distance from the distributive ideal, which renders the law which upholds the distribution illegitimate. As such, international libertarians have particularly strong reasons to doubt the thick legitimacy of international law.

Is, then, international law illegitimate? The alternative to this conclusion is to change, once more, the way we view the idea of legitimacy in an international context, and move from the thick to the

²⁶ T. Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002), p. 132.

²⁷ Whether B transfers the artefact itself or property of equivalent value does not matter from the egalitarian viewpoint. From an international libertarian perspective, G may, if it chooses, insist on the return of the artefact specifically. I am obviously working with a simplified version of egalitarian cosmopolitanism in this example.

thin conception. We saw that Kumm shares with Simmons a belief that, for a system to be legitimate, it must be the case that, generally speaking, its members are obliged to obey its commands. That is to say that they see legitimate systems of law as being those which possess political authority. By contrast, Allen Buchanan argues that law can be legitimate without individuals subject to it being obliged to obey it. Acknowledging the force of Simmons's work, Buchanan argues that the question of political legitimacy should be seen as distinct from that of political authority, since, "the single most compelling conclusion to be drawn from the recent normative literature on political authority is that virtually no government possesses it."²⁸ However, Buchanan dismisses the suggestion that the international legal system should be judged legitimate on the basis of consent, and instead links the legitimacy of international law to its capacity to promote justice. To be legitimate, in this sense, is simply to be morally justified in wielding political power, where to wield political power is to (make a credible) attempt to exercise supremacy, within a jurisdiction, in the making, application, and enforcement of laws.²⁹ Buchanan's account of moral justification here refers explicitly to the achievement of justice: "The chief moral purpose of endowing an entity with political power is to achieve justice... A wielder of political power that does a credible job of achieving justice is morally justified in wielding that power, if it provides a reasonable approximation of justice through processes that are themselves reasonably just".³⁰ This is a much less demanding conception of legitimacy, but a straightforward link between justice and legitimacy may nonetheless seem to undermine international law's legitimacy straight away, given the preceding argument relating to the injustice of the current international legal system. This is, however, too quick. Although Buchanan does assess international legitimacy in terms of justice, he defines justice, for this purpose, primarily in terms of basic human rights. Thus, "A wielder of political power... is legitimate... if and only if it (1) does a credible job of protecting at least the most basic human rights of all those over whom it wields power and (2) provides this protection through processes, policies and actions that themselves respect the most basic human rights."³¹ Key here is that his definition of such rights in an international context has little place for questions of distributive justice, being comprised of the following: the right to life (in terms of not being unjustly killed); to security of the person; to resources for subsistence; of due process and equality before the law; to freedom from persecution and against some forms of discrimination; to freedom of expression and to association.³² This does not deny that distributive justice is a constitutive element of justice in a wider sense, but only denies that it should be included as part of the criteria by which we judge the legitimacy of international law. Clearly, there is more to justice than ensuring everyone has basic human rights. If I enter a society of the affluent and take away all luxury goods for my own personal enjoyment, I act unjustly, even though (on the above account) I need not have infringed anyone's basic human rights. But the point of Buchanan defining justice, in the context of international law, in terms of these basic human rights is that, in current non-ideal circumstances, upholding these rights is the most important job international law has to do. So the crucial question is whether he is right to exclude considerations of distributive justice from his account. In what follows, I suggest that redistributive cosmopolitans and international libertarians should see this matter rather differently.

It is clear that Buchanan accepts that distributive justice would play a key role in the international legal system of an ideal world. He argues for the following three propositions:

²⁸ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 240.

²⁹ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 235.

³⁰ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 247.

³¹ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 247.

³² Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 129.

- 1) an ideal moral theory of international law must include a prominent place for distributive justice;
- 2) due to current international institutional incapacity, there are serious limitations on the role that international law can currently play in contributing to distributive justice;
- 3) international law can and should play a beneficial, largely indirect role in securing distributive justice. Examples include the capacity for international law to promote more equitable trade relations, labour standards, environmental regulation and aid for development; to create a global intellectual property rights regime; to support efforts to liberalise immigration policies; and to encourage the development of the institutional capacities needed to secure, eventually, international distributive justice.³³

The limited role of distributive justice is largely a function of the nature of the non-ideal world. Buchanan points to both institutional incapacity and a lack of political will. He claims that, “at present institutional resources are insufficient to assign the role of primary arbiter and enforcer of distributive justice to any international agency or collection of international agencies”³⁴ In this sense, he suggests, distributive justice is currently relevantly different from the conception of justice focusing on basic human rights. There are neither authoritative international institutions capable of bringing about just distributions, nor the requisite degree of background support for such institutions which is necessary to allow them to function effectively.³⁵ It seems clear that Buchanan’s own favoured account of international justice is a version of redistributive cosmopolitanism. He rejects “anti-redistributive views”, which, he suggests, “deny any significant scope for redistributive principles except for the purpose of rectifying past unjust takings of goods”, and instead endorses an account according to which “individuals have entitlements to goods and opportunities that are independent of the claims of rectification and that require the state to undertake redistributive policies such as subsidizing education, health care services, and income support.”³⁶ Such a position, when extended globally, puts Buchanan firmly into the redistributive cosmopolitan camp in terms of ideal theory. The gap between the ideal and real worlds on such an account is indeed great. But it is not clear that this is true for those in the international libertarian camp. There is no reason why they should accept that the lack of popular support and the institutional incapacities which Buchanan identifies in connection with his preferred, cosmopolitan account of justice should be seen to apply to rectificatory justice. If one believes that distributive justice requires not (for example) redistributing the world’s resources equally to each individual, or an implementation of the difference principle, but rather the rectification of the lasting effects of historic injustice, then the change in international law and society envisaged is potentially rather less drastic. Cosmopolitan principles seem, at present, far more popular in the academy than the real world, where the claim that partiality for fellow nationals is legitimate is still predominant. My view is that it is easier to persuade people in the real world that they owe duties to others in different countries as a result of rectificatory justice than as a consequence of redistributive cosmopolitan principles. Buchanan himself accepts that “there does appear to be less consensus about what distributive justice requires than about the wrongness of violating the most basic civil and political rights.”³⁷ Rectificatory justice often responds to non-controversially wrongful and unjust actions. Indeed, he explicitly argues that one of the ways that international law can serve the ends of distributive justice in the real world is “by helping to ensure that states discharge their obligations to rectify injustices committed against

³³ Buchanan, *Justice, Legitimacy, and Self-Determination*, pp. 193-4.

³⁴ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 219.

³⁵ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 216-230.

³⁶ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 223.

³⁷ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 222.

indigenous peoples within their borders”³⁸ If this is the case for domestic historic injustice, why not also for international historic injustice? It would not be unfeasibly difficult to allocate responsibility for judging disputes and even ensuring compliance to existing international institutions, which already rule on contemporary international injustice. There is a ready made allocation of rights and duties in such cases: particular individuals and groups are already linked together by the character of their historic interaction.

My contention, then, is that support for potentially redistributive principles of rectificatory justice is easier to secure than the alternative of seeking to persuade the general public of the world to adopt cosmopolitanism. Once principles of rectificatory justice are properly understood, and integrated with those principles of distributive justice which already held, extensive redistribution can be seen as a requirement of justice by international libertarians within the terms of a narrow reflective equilibrium, simply as a consequence of properly understanding their own position. We do not need to persuade people to abandon their foundational beliefs about justice; we face the less demanding task of arguing that they have not fully thought through the implications of their existing beliefs. This opens the way for a full incorporation of distributive justice in one’s assessment of the thin legitimacy of international law. International libertarians cannot straightforwardly reject the incorporation of principles of rectificatory justice into their account of justice which legitimates international law on the grounds of institutional incapacity or the lack of popular consensus in favour of such policies. The (perhaps surprising) conclusion is that, on Buchanan’s thin account of legitimacy, contemporary international law is actually more legitimate from the perspective of redistributive cosmopolitanism than that of international libertarianism. This has important implications for states who seek to impose the provisions of international law against those to whom they possess significant rectificatory duties: for example, when developed states use coercive force to prevent the economic migration of individuals from their former colonies. We may accept that states that act in such a way are acting legally, without accepting that their actions are legitimate – in either the thick or thin sense of the term.

³⁸ Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 193.