ADVANCING PEACE AND RESPECTING BASIC HUMAN RIGHTS? A NARROW MORAL APPRAISAL OF INTERNATIONAL LAW

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Steven Ratner. The Thin Justice of International Law: A Moral Reckoning of the Law of Nations (Oxford: Oxford University Press, 2015). 496 pp. ISBN 9780198704041, £50.00

International lawyers and international relations scholars certainly have a role to play, along with moral philosophers, in debates on global justice. The expertise of international lawyers could most obviously help to characterize existing norms in international law, thus providing a factual basis for a moral reckoning of international law. International relations theories, on the contrary, may help us to envisage realistic steps toward a more just international law. Thus, while ethical reasoning is necessary in order to identify standards of justice (the end goal), moral philosophy alone is unlikely to lead to relevant proposals for incremental steps toward a more just international law. Some forms of interdisciplinary encounter are necessary to identify deficiencies in international law or windows of opportunities for reforms.

Therefore, The Thin Justice of International Law: A Moral Reckoning of the Law of Nations is to be welcomed as one of a few recent attempts by an international lawyer to contribute to global justice scholarship. While evidencing the relevance of international law to the debate, this work also reveals the difficulty of the enterprise: identifying relevant ethical standards for a moral reckoning of international law. Steven Ratner’s methodology is based on the assumption that ‘[w]e can, without being circular, find justice in international law by applying a philosophical conception to legal norms, but also see the corpus of international law as saying something about what is just in the first place’.1 Thus, Ratner purports to show that ‘the core norms of international law . . . conform in major respects to a standard of global justice deserving of the name’—a standard that he also calls ‘decent’.2 This standard—the

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so-called ‘thin’ justice of international law—is proposed as a ‘moral minimum’, which is ‘less dense, and certainly less demanding on individuals, than the justice needed for the governance of domestic societies’—and, in fact, much less ambitious than virtually any global justice theory. Even though Ratner’s monograph is a serious and interesting intellectual exercise, its conclusions rely entirely on an initial selection of ‘core’ norms of international law and of a particular standard of justice.

The thin justice standard proposed by Ratner consists of two consequentialist moral norms or ‘pillars’: the advancement of international and intrastate peace, and respect for basic human rights. On these bases, Ratner submits that, ‘whether in changing an existing rule to meet the standard of thin justice or aspiring to a higher standard of global justice, we must remain aware of the risks to peace or human rights of alternative rules and not endanger what has been achieved to date’. The thin justice framework is intended to take into account some of the main constraints of existing international law—most explicitly the existence of states with unequal power—in order to identify realistic ethical demands and paths of reform toward a more just international law. However, because the two pillars are drawn from a set of norms that Ratner considers central to international law, it is unsurprising that most of these very same norms generally conform to this standard, resulting in what Anne Peters qualified of ‘an ultimately overwhelmingly positive assessment of international law’. Only a few of the specific norms discussed by Ratner are possibly incompatible with the standard of thin justice, for instance, the veto power of the five permanent members of the Security Council, the blanket ban on humanitarian intervention, and certain aspects of sovereign immunity.

Besides developing a general theoretical framework, Ratner’s monograph contains thorough discussions of prominent issues of international governance, such as humanitarian intervention or the liberalization of international trade, which could be read for their own sake. The present essay focuses however on the book as a whole, as a proposal for an innovative non-ideal theoretical framework which would serve to appraise the justice of international law in order to foster progress toward a more just international law (and the application of this framework). The following discussion first focuses on the relevance of the two pillars of thin justice; it then considers an alternative, in particular to broader standards of justice, which could serve to a moral reckoning of international law; and it finally considers the normative implications of the standard of thin justice.

PEACE AND BASIC HUMAN RIGHTS

Steven Ratner writes that ‘it seems clear to [him], as [he] believe[s] it would be to any international lawyer, that the two basic values in [the] normative structure [of international affairs] are peace and human rights’. However, the first reviews of Ratner’s monograph confirm that not all international lawyers agree with this intuition. Anticipating such challenges, Ratner acknowledges mezza voce that different moral appraisals of international law could be based on alternative, ethically defensible standards, and that there are after all ‘many kinds of justice’.
This suggests that Ratner’s theory does not depict the thin justice of international law, as something out there that could be documented following a nearly scientific method, but rather as a view of some considerations of thin justice present in certain norms of international law—a well-informed perspective, but hardly a compelling framework that could be transposed and reused in different contexts.

I leave to others to discuss whether peace or basic human rights are really standards of justice, rather than ‘worthy goals that may be pursued through international law’. What concerns me here is, more practically, whether these standards or goals are relevant for a moral reckoning of international law in general, as opposed to an analytical framework to think about some specific norms involving an arbitrage between peace and human rights. My inquiry is hindered by the lack of a consistent definition of each pillar—in particular, the second pillar is first defined as ‘respect for basic human rights’ (as an obligation of restraint), but Ratner then tends to give at least some weight to positive moral obligations, for instance when assessing whether states should have a legal obligation to intervene abroad on humanitarian grounds.

Indeed, international human rights law requires much more than non-interference with basic human rights, at least within a state’s own territory; recent concepts such as a responsibility to protect and current debates on possible interventions in Syria or in the so-called ‘Islamic State’ reflect a growing expectation that states should also take some positive actions abroad.

More fundamentally, it is not always quite clear whether Ratner refers to basic human rights as legal entitlements defined in international conventions, which are subject to derogations for legitimate goals such as the protection of public order or national security, or as a broader political project promoting the protection of individuals in more general ways, thus requiring the pursuit of the same legitimate goals as an indirect way of advancing human welfare. The former alternative would hardly lead to anything more than a compatibility check between ‘basic’ components of the International Bill of Rights and the rest of the international law. But if the second pillar relates to the political project of advancing human welfare, it would certainly also include peace, and it is accordingly difficult to understand why peace should form a distinct pillar. The advancement of interstate and intrastate peace is, for the most part (if not exclusively), justified by the promotion of human welfare. While the author argues that warfare leads to ‘unparalleled catastrophic consequences’, he immediately acknowledges that more people die of hunger.

Moreover, it appears throughout the book that the two pillars of thin justice do not readily apply to all norms of international law—far from that. It is granted that norms of coordination, for instance norms to avoid collisions of vessels at sea, have little moral value. Beyond, however, the author admits that many regimes of international law cannot really be assessed under a two-pillar standard of thin justice. For instance, peace plays little role in justifying international economic law. Ratner further recognizes that the two pillars of thin justice do not provide a convincing basis for a moral reckoning of international humanitarian law, international criminal law, and international environmental law: ‘their links to peace and basic human rights are elusive and seemingly unimportant for appraising their justice’. One may also
wonder whether the second pillar is really essential for a moral appraisal of the norms on the use of force, whose aim is before all to ensure a durable peace—systemic human rights violations could be viewed as a likely cause of war rather than an intrinsic goal.

The advancement of peace and respect for (basic) human rights appear therefore, at most, as a relevant basis for a moral reckoning of selected norms of international law, to which Ratner alludes as ‘the core norms of international law’.22 But some essential norms of international law are not within the purview of the thin justice framework—for instance, the norms identifying the sources of international law or asserting the sovereignty of states. The author admits that his ‘choice of issues is somewhat selective and based on what [he] regard[s] as the major claims to date’.23 The selected, prominent global governance issues that Ratner addresses relate, more often than not, with the adaptation of ‘classical’ norms, adopted no later than the mid-20th Century, to changing expectations at the turn of the 21st Century.24 Thus, the prohibition of the use of force by the Charter of the United Nations has increasingly been challenged at the time of the ‘global war on terror’ (debate on the scope of self-defense),25 in particular by the idea of a responsibility to protect (debate on humanitarian intervention).26 Likewise, multiple fictions are arising between the classical emphasis on states’ independence at the time of decolonization and the growing awareness of their interdependence, requiring adjustments in international economic law.27

Thus, in an explicit effort at abstracting a moral reckoning of international law from power politics,28 Ratner oversees the role of changing expectations. The author recognizes that more or less demanding standards can be established when he briefly discusses an aspirational ‘thicker’ standard of justice in his last chapter (with a greater emphasis on positive efforts for the protection of all human rights). Nevertheless, the reader is likely to be under the impression that Ratner applies classical normative goals—which are now relatively well integrated in international law—to an assessment of present norms, thus systematically overseeing the inconsistency of these norms with current expectations.29 Even within some of the debates selected by the author—from human rights considerations in international economic law to extraterritorial human rights obligations—the stakes are not just to ensure that international law advances peace and does not interfere with human rights protection. These debates, and many others, point to the need for international law to respond to growing expectations for something more deserving to be called ‘global justice’, including, in particular, demand for active human rights protection and, more generally, for the advancement of something such as sustainable development. Through an excessively narrow standard of thin justice, Ratner comes a bit too easily to the conservative conclusion that international law is not, after all, as unjust as it is often thought to be.30

THE POSSIBILITY OF A BROADER MORAL RECKONING OF INTERNATIONAL LAW

In the era of the Millennium Development Goals and the Sustainable Development Goals, a moral reckoning of international law that would reflect global expectations
should certainly rely on more ambitious standards. As noted before, Ratner outlines in his last chapter a ‘thicker’ standard of justice to which international law could progressively turn, as a form of ‘aspirational theory’ situated somewhere between the standard of thin justice and an ideal theory of justice. Ratner suggests that, according to this thicker standard, ‘the norms are just if and only if they advance the enjoyment of human rights without interfering with interstate or internal peace’. More emphasis is thus put on human rights, including on their active protection.

Even if one interprets human rights as a general political project (essentially the promotion of human welfare) rather than as a set of individual entitlements defined by international conventions, this ‘thicker’ standard of justice remains quite under-inclusive. It still fails to apply, for instance, to international environmental law, and it does not comprehend academic discussions as well as civil society engagement in support of some degree of global redistribution. This aspirational, ‘thicker’ standard of justice does not even require that current generations take appropriate measures not to significantly hinder the environment—and perhaps even the possibility of existence—of future generations through massive greenhouse gas emissions. Essential moral considerations remain clearly outside of the discussion.

This leads us to wonder whether it is possible to imagine a broader moral reckoning of international law (as opposed to a thicker one), which would apply to a larger array of international norms. Ratner seems rather dismissive of such an endeavor, if only on practical grounds. In a later discussion of his book, the author put forward that ‘[t]he diversity of international law’s norms makes it very hard to examine their justice through one framework that is not more complex that it is worth’. Ratner thus seems rather to suggest that complementary appraisals of other fields of international law could be based on different standards of justice—for instance, considerations for non-human species in international environmental law, or perhaps economic stability and prosperity to international economic law. Likewise, when excluding considerations of global redistribution from the scope of international economic law, the author suggests that redistribution might better be undertaken ‘by taking other, parallel approaches to economic development’.

But attributing different objectives to different legal regimes (and excluding specific goals from the assessment of specific regimes) suggests an untenable vision of a fragmented and somewhat schizophrenic international law system, whereby the norms adopted in, say, international environmental law could be defeated by other norms in, say, international trade law. Just as Ratner emphasizes the need to balance peace and basic human rights, or also basic human rights and trade or investments, other important objectives—such as the protection of endangered species, environmental sustainability, some sense of international solidarity in addressing issues of human suffering, and even some measure of global redistribution—should, and tend to, be taken into consideration every time they appear relevant to a particular norm. There may be many different goals at play in the development of international law, and some goals might be more or less relevant to particular regimes, but confining specific values to specific regimes runs counter to our understanding of international law as a consistent normative system.
This suggests that the justice underlying international law may have much more than two pillars, and that all of these pillars could in principle be relevant in appraising any norm of international law—and, at any rate, for a comprehensive moral reckoning of international law. Concededly, some pillars might be more or less firmly established in states’ practice, and some might be subject to controversies. Even a principle of sustainable development was agreed by states and civil societies only because it was sufficiently vague to support virtually decent normative claim. Overseeing the multiplicity of the ethical pillars of international law, or denying the diversity of views about what constitutes such pillars, could contribute to legitimizing and encouraging the continued imposition of Western values over the rest of the world, while hindering reformatory counter-projects toward a better representation of the Third World or a better gender balance in international law.

NORMATIVE IMPLICATIONS

Perhaps, the most problematic aspects of the thin justice framework appears when Ratner turns from a purely descriptive moral reckoning of international law, to the production of normative suggestions about future evolutions of international law. Most obviously, there is certainly a risk that the rather apologetic account of existing international law, overlooking current expectations, would make international lawyers a bit too comfortable with the status quo, focusing on the (meager) past achievements of international law—rules that promote peace and do not interfere with basic human rights—while omitting current struggles, for instance, for the advancement of human rights, the promotion of development, and the protection of the environment. More fundamentally, it is doubtful that the assessment of the goals that were pursued through international law could ever suffice to justify what goals international law should—or even could—pursue in the future.

Ratner submits that the reform of international law should aim ‘to rectify those norms currently deficient as a matter of thin justice and to improve those norms that meet the standard but ought to do better, but to do so in a way that does not endanger their thin justice’. One central aim of the theoretical framework of the thin justice is to indicate realistic and desirable reforms of international law. Yet, Ratner’s methodology does not enable him to ‘advocate’ for thin justice, no more that it permits to identify ‘the ways in which the law should and can change’. It is one thing to identify certain prevailing ethical considerations (peace and basic human rights) throughout ‘core’ norms of international law; it is a totally different thing to argue that international law should further develop on these same pathways, or that it could realistically go further in the same direction.

Regarding the identification of desirable goals, Ratner’s advocacy for international law reforms that would build further on international law’s past achievements runs into the is–ought problem, once described by David Hume: a normative statement (here, about what the law ought to be) cannot be deduced only from a factual statement (here, about what the law is) without the adjunction of an additional normative premise. Ratner cannot consistently turn from discovering ‘decent’ goals pursued
by existing norms, directly to indicating that further reform projects should give priority to these same values, without making any intermediary normative claims in support of the desirability of pursuing similar justice standards. There is no obvious moral ground for reforms of international law to seek only to pursue those goals already best served by international law, rather than opening up to other, underrepresented ‘pillars’ of justice. On the contrary, consideration for all possible aspects of justice appear, _prima facie_, to be morally commendable.⁴⁶

Regarding the feasibility of reforms, likewise, the past achievements of international law can only give a very rough notion of political opportunities for further developments. What international law has done best in the past is not necessarily what it could do best in the future. To the contrary, it might be that many of the low-hanging fruits have already been picked up for advancing peace or respecting human rights, while more opportunities for some ‘decent’ ethical reforms lie elsewhere—say, economic development and environmental sustainability.⁴⁷ Geopolitical circumstances are changing, and so are global expectations. One might suggest, for instance, that the displacement of the world’s trade and economic centers of gravity toward Asia may lead Western values—such as a greater emphasis on civil and political rights—to lose weight in favor of ‘Eastern’ values—such as, possibly, economic development. Rather than international law, international relations theories (in particular the theory of norm entrepreneurship) would be helpful in assessing which ethical arguments are more likely to have a positive impact on the future of international law.⁴⁸ In the absence of such an analysis, Ratner’s statement that ‘[i]nternational law lacks the capacity to guarantee the equality of individuals’,⁴⁹ and hence to engage in global redistribution, relies entirely on pre-theoretical assumptions which, one might as well think, are increasingly likely to be challenged.

As a sketch of an agenda for the reform of international law, the framework of a thin justice is thus obstructed by a rather arbitrary determination of constants (e.g. the state-centeredness of international law, the impossibility of global redistribution) and variables (peace and human rights). Robert Howse criticized this dimension of Ratner’s work by questioning ‘the theoretical or practical value of simply assuming certain constraints on international legal normativity or ideal justice as immovable’.⁵⁰ Some of Ratner’s proposed reforms to advance the thin justice of international law—most obviously the reform of the five permanent members of the Security Council—would face formidable political obstacles. On the contrary, ongoing evolutions (ranging from the progressive recognition of non-state actors, to the adoption of sustainable development goals) show the possibility of incremental changes in what Ratner considers as constants.

Way beyond the ‘thin’ nature of a non-ideal theory, the limitations of this theoretical framework results in a narrow view of what international law is trying to achieve, and in truncated consideration for possible and desirable reforms. The standards of peace and basic human rights are certainly relevant goals pursued through international law, but they do not provide a comprehensive picture of what is really at stake through international law. More is arguably lost than gained when the moral pursuit of international law is reduced to only two considerations, eclipsing

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hard-fought argumentative battles and opportunities for desirable reform beyond peace and (basic) human rights.

NOTES
1. Steven Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford: Oxford University Press, 2015), 6 (emphasis added).
2. Ibid., 2.
3. Ibid., 155, 216, 291 et passim.
4. Ibid., 90, citing Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994), 4–19.
5. Ratner, *The Thin Justice of International Law*, 90.
6. Ibid., 2.
7. Ibid., 65 and 408. Ratner claims to draw the thin justice principle from ‘[his] own set of observations about fundamental ideas permeating the normative structure of international affairs that includes international law’, but it is far from clear how the ‘normative structure of international affairs’ differs from the ‘core norms’ of international law.
8. Anne Peters, ‘Thin is beautiful—or are international lawyers anorectic?’, *Blog of the European Journal of International Law*, http://www.ejiltalk.org/thin-is-beautiful-or-are-international-lawyers-anorectic/ (accessed June 2, 2015).
9. Yet, debates exist about the existence of this blanket prohibition, some international lawyers arguing that humanitarian intervention is permitted without the Security Council’s authorization under exceptional circumstances.
10. Ratner, *The Thin Justice of International Law*, 65.
11. See Frédéric Mégret, ‘A Comment on Ratner on International Justice’, *Blog of the European Journal of International Law*, http://www.ejiltalk.org/a-comment-on-ratner-on-international-justice/ (accessed June 4, 2015); and Robert Howse, ‘Response to Ratner’, *Blog of the European Journal of International Law*, http://www.ejiltalk.org/response-to-ratner-an-international-lawyer-has-got-to-dream-it-comes-with-the-territory/ (accessed June 4, 2015).
12. Ratner, *The Thin Justice of International Law*, 166.
13. Ibid., 406.
14. See Howse, ‘Response to Ratner’, second point.
15. Ratner, *The Thin Justice of International Law*, 73 (emphasis added).
16. Ibid., 306.
17. The relevance of ascribing a distinct pillar to peace was also critically discussed in Howse, ‘Response to Ratner’ (fourth point); and David Lefkowitz, ‘Reflections on The Thin Justice of International Law: Peace, Justice, and Secession’, *Ethics & International Affairs*, http://www.ethicsandinternationalaffairs.org/2015/reflections-on-the-thin-justice-of-international-law-peace-justice-and-secession-2/ (accessed June 3, 2015).
18. See Mégret, ‘A Comment on Ratner on International Justice’, suggesting an alternative first pillar consisting in ‘an abiding concern with stability and order’. Yet, such concerns with stability and order might have less ethical than political value.
19. Ratner, *The Thin Justice of International Law*, 67.
20. Ibid., 322, 351.
21. Ibid., 383.
22. Ibid., 2.
23. See ibid., 268.
24. Thus, Ratner relies heavily on documents adopted or published decades ago, including the UN Charter, the writings of Hersch Lauterpacht, and a 1953 speech by UN Secretary General Dag Hammarskjöld. See ibid., 66, 107, 408. Despite their historical or legal
importance, it is unlikely that any of these three sources would be expressed in exactly the same way today.

25. Ratner, *The Thin Justice of International Law*, 4.
26. Ibid., 292–312.
27. Ibid., 315–79.
28. Ibid., 414.
29. See Mégret, ‘A Comment on Ratner on International Justice’: ‘one cannot help thinking that international law is being evaluated from the point of view of a standard of justice that is precariously thin because it is in fact conveniently derived from itself’.
30. See Ratner, *The Thin Justice of International Law*, 218 (‘Sovereign equality thus turns out to be by and large thinly just—more just than many of its critics, whether from states or the academy, might think’); and ibid., 414 (‘International law has indeed played a significant role in creating a more just world’).
31. See Howse, ‘Response to Ratner’ (fourth point): ‘[e]ntire spheres of normativity are simply excluded ab initio by Ratner from the “thin” theory of justice’.
32. Ratner, *The Thin Justice of International Law*, 417.
33. Ibid., 417.
34. See Steven Ratner, ‘A Response to the Discussants’, *Blog of the European Journal of International Law*, http://www.ejiltalk.org/a-response-to-the-discussants/ (accessed June 5, 2015).
35. See Ratner, *The Thin Justice of International Law*, 405.
36. Ibid., 322.
37. Ibid., 379.
38. See Mégret, ‘A Comment on Ratner on International Justice’: ‘the vast majority of Ratner’s sources are taken from the aristocracy of (notably male) Anglo-American jurisprudence’.
39. See Prabhakar Singh and Benoit Mayer, eds., *Critical International Law: Postrealism, Postcolonialism, and Transnationalism* (Oxford: Oxford University Press, 2014); B.S. Chimni, ‘Third World Approaches to International Law: A Manifesto’, *International Community Law Review* 8 (2006): 3; and Hilary Charlesworth, Christine Chinkin, and Shelley Wright, ‘Feminist Approaches to International Law’, *American Journal of International Law* 85 (1991): 613.
40. See Howse, ‘Response to Ratner’, noting that Ratner’s monograph ‘is a technique of making the tension [between progressive ideals and the reality of international law] go away, rather than facing it squarely’.
41. Ratner, *The Thin Justice of International Law*, 407.
42. The normative conclusions are central to Ratner’s project. See Ratner, ‘A Response to the Discussants’: ‘I agree that it is possible to develop a one-pillar model based on human rights; I just think it’s less convincing in terms of what global justice should entail and what standard of global justice should be used to appraise international law’. (emphasis added).
43. Ratner, *The Thin Justice of International Law*, 309.
44. Ibid., 142 (emphasis added).
45. See David Hume, *A Treatise of Human Nature* (Oxford: Oxford University Press, 1739) III.1.i.
46. Yet another element to consider, in a comprehensive normative theory of international law reform, is the need for international law to pursue particular goals. Some goals are more or less likely to be pursued by other means. Prima facie, states’ individual interests might push them to avoid wars and protect human rights even in the absence of a clear international legal structure, while it is perhaps more difficult to imagine effective measures of global redistribution and protection of the global environment (e.g. climate change mitigation) without international law.
47. Thus, two kinds of normative arguments are typically made by international lawyers: productivist arguments, which suggest to extend international norms by essentially prolonging existing lines, and the bandwagon arguments, which put emphasis on would-be precursory signs of new tendencies. These two arguments, however, are often in contradiction. See discussion in Benoit Mayer, ‘Realizing Whose Utopia? The Structure of Normative International Law Arguments’, *Leiden Journal of International Law* 27 (2014): 543.

48. On the theory of norm entrepreneurship, see in particular Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’, *International Organization* 4 (1998): 887; and Ian Johnstone, ‘The Secretary-General as Norm Entrepreneur’, in *Secretary or General: The UN Secretary-General in World Politics*, ed. Simon Chesterman (Cambridge: Cambridge University Press, 2007), 123.

49. Ratner, *The Thin Justice of International Law*, 419.

50. Howse, ‘Response to Ratner’, (fifth point).