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IS INTERNATIONAL LAW IMPARTIAL?

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The last decade has seen a resurgence of interest among philosophers in the core questions of ethics and justice on the international plane. Issues once discussed primarily in the response to the major global debates of the 1960s and 1970s—the Vietnam War and the North-South economic imbalance—have returned to the domain of philosophers. This engagement has taken place in two distinct but related debates. First, philosophers have devoted attention to the ethical significance of nationality and patriotism, asking whether an impartial morality permits disparate treatment of an individual's co-nationals. Second, scholars have revisited issues of international justice in great detail, including works on human rights as well as just war theory. These works ask, as Brian Barry put it, "given a world that is made up of states, what is the morally permissible range of diversity among them?"[1] One impetus for renewed work on these ideas was the publication of John Rawls's *The Law of Peoples*.

While in many ways asking and answering different questions, these two bodies of work are related in that they focus on what constitutes a just world and what role the individual should play in furthering it. They correspond, in rough terms, to the interactional versus institutional conceptions of morality and justice identified by Thomas Pogge.[2] That is, works on the ethical significance of nationality tend to focus on moral conduct of the individual; works on international justice tend to focus on interstate arrangements that promote a particular version of moral conduct.

Theorizing about transnational duties must, however, take proper account of the structure of the international legal order. As Rawls recognized, in order to propose a "realistic utopia" for the world, we must "proceed . . . from the international political world as we see it."[3] That world, along with the legal structure that forms part of it, is characterized by legal institutions.

*I greatly appreciate comments from Eyal Benvenisti, Allen Buchanan, John Deigh, Brian Leiter, David Wippman, and one anonymous reviewer.

1. Brian Barry, *International Society from a Cosmopolitan Perspective*, *in* INTERNATIONAL SOCIETY: DIVERSE ETHICAL PERSPECTIVES 144, 154 (David R. Mapel & Terry Nardin eds., 1998).

2. Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 50–52 (1992); *see also* Barry, *supra* note 1, at 144–145.

3. JOHN RAWLS, THE LAW OF PEOPLES 83 (1999).

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Institutions can be variously defined, of course, to include the conceptual building blocks of world order (e.g., statehood, global commons, or human rights) and more formal international organizations involving specific rights and responsibilities for those actors. Ethical discourse must understand these institutions, for they both place constraints upon and offer opportunities for carrying out the solutions to ethical problems that philosophers derive.

Equally important, as Allen Buchanan has noted, is that institutions matter not only because they affect the feasibility of proposals for ethical conduct but because they affect the underlying moral justification for the principles:

> Principles that may be plausible for an isolated case often prove inadequate or even counter-productive if institutionalized to govern a practice that covers many cases . . . To the extent that proposed principles are to implemented through the actions of persons in institutional roles, the moral justification of principles must take into account institutional structures, and especially the incentives to which those in institutional roles will be subject.[4]

Failure to understand global institutions has pernicious consequences, as philosophers derive "principles . . . not suitable for institutionalization because they are inconsistent with existing institutional arrangements whose abandonment would be morally prohibitive . . . or because institutionalizing them would generate incentives that undermine the realization of other important principles."[5]

International law is at the center of these institutions; it is the normative lifeblood within them and the normative force between them. It encompasses a system of norms and processes for resolving competing claims among international actors—states, individuals, and others—in a manner both legitimate to them and effective among them. As Andrew Hurrell has put it:

> the ethical claims of international law rest on the contention that it is the *only* set of globally institutionalized processes by which norms can be negotiated on the basis of dialogue and consent, rather than being simply imposed by the powerful. . . . The unavoidability of process again separates law as an ethical enterprise from other forms of normative enquiry and debate.[6]

4. ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW 22–23 (2004).

5. Allen Buchanan & David Golove, *Philosophy of International Law, in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 869, 870 (Jules Coleman & Scott Shapiro eds., 2002). *See also* Andrew Hurrell, *Norms and Ethics in International Relations, in* HANDBOOK OF INTERNATIONAL RELATIONS 137, 139–141 (Walter Carlsnaes, Thomas Risse, & Beth A. Simmons eds., 2002).

6. Andrew Hurrell, *International Law and the Making and Unmaking of Boundaries, in* STATES, NATIONS, AND BORDERS: THE ETHICS OF MAKING BOUNDARIES 275, 277–278 (Allen Buchanan & Margaret Moore eds., 2003).

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International lawyers, for their part, analyze and seek the construction of an international order with a normative component. The norms and processes that they appraise, just like those of the domestic legal system, cannot be set aside in asking about personal duties and justice. Such attention is key not only to making international ethics stronger within philosophy but to making it convincing to those concerned with operationalizing ethical theory—political scientists, legal academics, governmental and nongovernmental elites, and the educated public.

How to describe and appraise international law in a way that contributes to debates among philosophers presents a challenge for both the international lawyer and the philosopher. To date, the philosophers have done little to take the law and legal institutions into account. Many cosmopolitan ethicists, for example, condemn aspects of the international order without even discussing the legal norms governing it, let alone examining whether those norms have an underlying moral basis.

Even when political and moral philosophers purport to take account explicitly of the structure of the international legal order, their vision is often limited, misconceived, or anachronistic. For example, customary international law, the law that emerges as states accept a repeated practice as legally required, is sometimes described as if international relations had been frozen over the last sixty years. For instance, David Mapel has written that "under customary international law each state has a right to order its own domestic affairs as it sees fit,"[7] a position at odds with developments in international human rights, international environmental law, and even much older principles like a state's responsibilities to protect aliens on its territory from mistreatment (unless Mapel is limiting the meaning of "domestic" to the point where the statement is a tautology).

More recently, Eric Cavallero wrote in these pages that "states enjoy the sovereign power to undertake policies that can impose detrimental externalities on those outside their borders," an assertion inconsistent with international environmental law as manifested in numerous treaties and customary law.[8] Most tellingly, Rawls, in *The Law of Peoples,* grounds much of his work on an unargued summary of international law based on a selective reading of a forty-year-old treatise. These "familiar and traditional principles of justice among free and democratic peoples," as he calls them, gloss over some of the most important issues in international law, including the centrality of states to the international legal order, the increased role of individuals as

7. David R. Mapel, *Justice, Diversity, and Law, in* INTERNATIONAL SOCIETY, *supra* note 1, at 239, 250.

8. Eric Cavallero, *Popular Sovereignty and the Law of Peoples*, 9 LEGAL THEORY 181, 198 (2003). *See also infra* note 72 (on Stockholm Declaration principles). Later he writes that international law "should recognize" a set of political freedoms meant to instantiate deliberativeness, such as freedom of speech and assembly (*id.* at 200, 192), when nearly every international lawyer would say it already does.

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holders of rights and duties, and the norms for participation by "peoples" (his principal subject of the law) in international society.[9]

Indeed, the fault lies not only with moral and political philosophy. Relatively few of those writing in international jurisprudence—Fernando Teson, Martti Koskenniemi, and Hurrell are among the handful—have sought to bridge the gap between the disciplines. This tendency remains despite the frequency with which international legal theorists write about legitimacy or justice. I hasten to add, with regret, that even fewer in mainstream jurisprudence have taken on this task. Instead, following Hart's example in *The Concept of Law*, they have mostly confined themselves to the ontological questions about whether international law is "really law," an issue fine for an introductory international law class but past which international law scholars (and practitioners) moved long ago.

This paper offers one approach to bringing international legal theory and moral and political philosophy together. It analyzes the ethics of international law by casting it as a system of general and special duties, with particular attention to the latter as understood in debates over impartiality in moral philosophy. It does so on the understanding that making a just world under law turns on (1) whether relevant international actors should owe the same or different duties to all other such actors; and (2) whether the international system is constructed according to some coherent vision of this problem. What emerges is a set of spheres of general and special duties, and special duties to vastly different sets of actors. The patterns suggest that certain ways of morally justifying those special duties are more persuasive than others; indeed, I believe any special duties can and should be justified from an impartialist perspective. My goals, then, are threefold: first, to place the basic norms of international law within a structure of duties that is both meaningful to philosophers and fairly reflects contemporary developments in the field; second, to explain how those duties are consistent with an impartialist perspective on ethics (though not any particular impartialist theory); and third, to demonstrate the analytical advantages of this construct for the understanding of international ethics, including by demonstrating the shortcomings of other approaches to the subject.

In Section I, I explain the advantages of constructing international law in terms of general and special duties by situating those duties within current debates among moral and political philosophers. In Section II, I rather quickly identify the principal actors in international law and the fundamental claims of each that the international legal process seeks to resolve. This task permits identification of the duty-holders and to whom their duties extend. Section III then organizes the most significant obligations in

9. RAWLS, *supra* note 3, at 37; *see also* the critique of Rawls in FERNANDO TESON, A PHILOSOPHY OF INTERNATIONAL LAW 109–122 (1998).

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international law into general duties and various sorts of special duties; it also offers a vision of these duties as impartial in nature. In Section IV, I offer a critique of two main approaches to international justice. I conclude with some reflections for further work in the area.

I. SITUATING GENERAL AND SPECIAL DUTIES

Why view general versus special duties as the most—or, at a minimum, a particularly—significant organizing principle of international law? My justification lies in philosophical work that highlights the importance of such concerns for ethics and demonstrates their relevance to international law.

My discussion of general and special duties begins with H.L.A. Hart's *Are There Any Natural Rights?*[10] Hart makes two key insights relevant for my analysis. First, he distinguishes between someone who holds a right corresponding to another's duty and someone who is the beneficiary of that duty. As Hart notes:

> while the person who stands to benefit by the performance of a duty is discovered by considering what will happen if the duty is not performed, the person who has a right . . . is discovered by examining the transaction or antecedent situation or relations of the parties out of which the "duty" arises.[11]

I will return later to this important distinction later.

Second, and most pertinent for now, Hart introduced the notion of special and general *rights*. Special rights "arise out of special transactions between individuals or out of some special relationship in which they stand to each other"; thus "the persons who have the right and those who have the corresponding obligation are limited to the parties to the special transaction or relationship"; general rights "are rights which all men capable of choice have in the absence of those special conditions which give rise to special rights [, with] correlative obligations . . . to which everyone else is subject and not merely the parties to some special relationship or transaction. . . ."[12] Robert Goodin relied on this analysis to distinguish between special and general *duties* as follows:

> In contrast to the universality of general moral law, some people have special duties that other people do not. In contract to the impartiality of the general moral law, we all have special duties to some people that we do not have

10. Hart, *Are There Any Natural Rights?* 64 PHIL. REV. 175 (1955).
11. *Id.* at 181.
12. *Id.* at 183, 188.

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to others. Special duties, in short, bind particular people to particular other people.[13]

At least two significant debates within ethics generally, and international ethics in particular, point to the analytical payoff of distinguishing between general and special duties in international law. Those debates also show how any ethical theory of international law must be able to find a moral justification for special duties.

A. The Partiality Debate

First are debates between partialists and impartialists.[14] At its most fundamental level, impartiality describes a way that individuals and institutions decide and act, one based on disinterestedness, consistency, and fairness and not merely personal motives.[15] Lawrence Becker has categorized these debates as concerning (1) whether personal interests can play a role in determining moral duties; (2) whether it is possible to adopt a standpoint for moral deliberation that is independent of ourselves; and (3) whether we can take into account personal relationships in assessing moral duties.[16] Most of the impartiality debate—and certainly its analysis of special duties—concerns the last issue.

Some of the differences between partialists and impartialists have been narrowed through the notion of orders (or levels) of impartiality. Under this view, one can remain impartial while accepting the morality of special duties as long as one can justify those duties from an independent moral perspective such that all individuals owe those special duties to all persons in that special relationship to them. This sort of reason undergirds the impartialist defense of special duties put forth by Pettit and Goodin, who argue that such duties derive from special responsibilities of an agent.[17] An impartialist could thus defend an individual's patriotic ties if he were convinced that there were a moral basis for all such ties. Barry and Marcia

13. Robert E. Goodin, *What Is So Special about Our Fellow Countrymen?*, 98 ETHICS 663, 665 (1988). As Philip Pettit and Goodin note, these special duties can arise by virtue of agents' "identities, relationships or histories." Philip Pettit & Robert Goodin, *The Possibility of Special Duties*, 16 CAN. J. PHIL. 651 (1986).

14. I am not here equating these terms with moral particularism and moral universalism, whose differences turn on whether all ethics is situation-specific. *See* Lawrence Blum, *Against Deriving Particularity*, *in* MORAL PARTICULARISM 205, 205–211 (Brad Hooker & Margaret Olivia Little eds., 2000).

15. It is in this sense that Barry and Terry Nardin define justice as impartiality. *See* BRIAN BARRY, JUSTICE AS IMPARTIALITY 20–27 (1995); TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 258–259, 265 (1983).

16. Lawrence C. Becker, *Impartiality and Ethical Theory*, 101 ETHICS 698 (1991).

17. Pettit & Goodin, *supra* note 13.

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Baron have deployed the notion of "second-order impartiality" to describe this approach.[18]

Because international law is a regime prescribing the rights and duties of international actors (as described more fully below), any appraisal of the morality of that system must address its impartiality in Becker's third sense. Just as the notion of special duties provides an important complement to general duties, so, too, the notion of special duties helps complement the universalist notion in international law that all states are sovereign equals with identical rights and duties.[19] It is critically important to ask, for instance: What duties do all states have to all others? Can states have duties to some states but not others? If special duties exist, how does or should the law justify them? These questions need to be asked for international actors other than states too.

Indeed, the gap in conceptualizing is not that international ethics has failed to address these issues, for it has in the debates over the duties to co-nationals as opposed to foreigners, including debates on global economic redistribution. The problem is that those debates have not made sufficient reference to the extant system of rights and duties under international law. By asking these questions of international law, we can help to bridge this gap. I do not suggest that the divide between general and special duties is the only way to organize international law for ethical analysis; one might, for instance, distinguish between traditional interstate duties and those emanating from individual human rights.[20] But just as the impartiality debate has shown the general/special duty distinction helpful for appraising interpersonal ethics, so that same divide has a payoff for international ethics.

The partiality/impartiality debate has sometimes been cast in terms of whether special duties are morally justified based on personal relationships per se—what Rawls calls "relations of affinity"[21]—or some other grounds. As David Miller writes, one position says that "only general facts about other individuals can serve to determine my duties towards them," while the other sees relations between individuals as so central to ethics that "fundamental principles may be attached directly to these relations."[22] Christopher Wellman has characterized the different stances toward special duties as "reductionist" and "associativist" (or "nonreductionist").[23]

Within these two general outlooks are a variety of justifications for special duties, with the line between the two approaches sometimes not very clear. Thus Goodin offers a consequentialist account of special duties toward

18. *See, e.g.*, BARRY, *supra* note 15, at 191–195; Marcia Baron, *Impartiality and Friendship*, 101 ETHICS 836 (1991); *see also* SUSAN MENDUS, IMPARTIALITY IN MORAL AND POLITICAL PHILOSOPHY (2002).

19. U.N. CHARTER art. 2, para 1.

20. I appreciate this point from Allen Buchanan.

21. RAWLS, *supra* note 3, at 112.

22. DAVID MILLER, ON NATIONALITY 50 (1995).

23. *See* Christopher Heath Wellman, *Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun "My"?* 110 ETHICS 537 (2000).

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co-nationals whereby states represent the most efficient means of allocating general duties among all individuals.[24] Alan Gewirth offers a Kantian perspective emphasizing individual autonomy as the ethical lodestar of special relationships.[25] Oldenquist and Samuel Scheffler defend the patriot whose allegiance is based on loyalties or special ties alone.[26]

An inquiry into the morality of the international legal order should both incorporate and contribute to these debates as well. For if international law does have special duties, we need to ask if they are justified based on morally significant "relations of affinity" or on characteristics other than the relationship per se. Thus, for example, states are constantly confronted with whether and why their duties to their members, whether based on ethnicity, citizenship, or residency, might differ from their duties to nonmembers, whether ethnic minorities, aliens, or those abroad.

B. Cosmopolitanism and International Justice

Special duties are also at the heart of debates over international justice between cosmopolitans and noncosmopolitans. Strong cosmopolitans see nations and national identities as morally irrelevant or nearly irrelevant for constructing a just world. Nonetheless, cosmopolitans need not deny that special duties by citizens to co-nationals are inconsistent with cosmopolitanism; they simply insist that proponents of such duties offer a defense from an impartialist perspective.[27]

The questions asked in the cosmopolitanism debates further undergird the need for seeing international law in terms of general and special duties. The debates over cosmopolitanism are effectively debates over general and special duties to (and by) individuals. It is thus important to ask, in the context of international law, whether states and other international actors owe equal duties to all individuals or just to some. Does international law, as it were, play favorites? These issues already reverberate in international law circles. International lawyers who emphasize human rights and the impartial application thereof are making strong cosmopolitan arguments insofar as they focus on the worth of the individual regardless of nationality. They may also propose institutional models to put individuals, wherever situated, first. Some international lawyers ask whether a state's territorial integrity can be sacrificed to allow for humanitarian intervention to rescue oppressed peoples.

24. ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES (1985); Goodin, *supra* note 13.

25. Alan Gewirth, *Ethical Universalism and Particularism*, 85 J. PHIL. 283, 294–296 (1988).

26. Andrew Oldenquist, *Loyalties*, 79 J. PHIL. 173 (1982); Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189 (1987); for other defenses of the moral significance of community, see MICHAEL WALZER, SPHERES OF JUSTICE 33 (1983); YAEL TAMIR, LIBERAL NATIONALISM 95–116 (1993).

27. Barry, *supra* note 1, at 145.

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II. CLAIMS AND DUTIES IN INTERNATIONAL LAW

Before constructing my model of international law as based on general and special duties, it is first necessary to explain international law's approach to duties generally. I do so by clarifying the nature of both the duty-holders and the targets of those duties. This brief exposition also serves to show that international law is a much richer process than most contemporary moral and political philosophers have acknowledged.

A. The Actors

As a general matter, six major actors participate in the international legal process: states, individuals, peoples, international organizations, nongovernmental organizations (NGOs), and business entities. I do not wish to offer here any sort of international law definition of each group. Obviously, some of the terms are hard to define without wrongly excluding or including some entities; others overlap at the margins (e.g., NGOs and business entities). Moreover, the legal process includes other participants, such as organized religions, sports entities, and transnational criminal groups.

Some traditional international legal scholars prefer to label these participants, or at least some of them, international "persons" based on the old concept of "legal personality," that is, the capacity to be subject to legal rights and duties.[28] My listing does not rely on this notion because I see it as either circular in its usage or unhelpful in contributing to any understanding of whether an entity has rights and duties. In a similar vein, Brent Fisse and John Braithwaite, as well as Peter Cane, have rejected the notion that an actor can only be blameworthy if it is previously determined to have "philosophical personality."[29]

I will also assume, without arguing, that the six classes of actors are not merely the principal legal participants but that they are moral actors in that they can make moral claims and that one can prescribe appropriate ethical behavior for them. I ground this assumption in the sense, which others have argued better than I can, that if these entities are a legitimate way for persons to organize themselves and exhibit some cohesiveness in structure, they are also moral actors. Barry took a similar position in his Tanner Lectures, and Rawls accepts the idea in calling peoples the actors in the society of peoples.[30]

28. *See, e.g.*, Nkambo Mugerwa, *Subjects of International Law, in* MANUAL OF PUBLIC INTERNATIONAL LAW 247, 249 (Max Sørenson ed., 1968).

29. Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 483–488 (1988); PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 143–150 (2002).

30. Brian Barry, *Do Countries Have Moral Obligations?: The Case of World Poverty, in* 2 THE TANNER LECTURES ON HUMAN VALUES 25, 41 (1981) ("[J]ustice . . . is concerned with the way in which rights and powers are allocated. And rights, powers, or resources may be attributes of

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I recognize, however, that this is a contested notion, certainly among cosmopolitans. Many insist that only the claims of individuals should matter on the international (and domestic) plane, including with it a skepticism of international law.[31] The purpose of this paper, however, is to describe and evaluate some core aspects of international law. Although it is not an apologia for the existing international order, neither does it shirk from finding an ethical basis for aspects of that order, even if others may disagree with it and wish to reconstruct it. I cannot overcome the objections of those who embrace only the claims and moral standing of individuals. Instead, the paper speaks to philosophers who are willing to use international law—at least its basic structure and norms—as part of an approach to both interactional and institutional morality and seek a normative assessment of it. It thus assumes the moral relevance of these six actors.

B. Their Claims

Having identified the most important international legal actors, I now sketch their principal claims and upon whom they are making them; I will then translate this set of claims into a simple matrix of duties and duty-holders. For the sake of space, I will focus on the three entities given the greatest consideration by philosophers—states, individuals, and peoples—though the analysis can be extended to the other three actors as well.

1. *The State*

The state's fundamental claim in the international order is to its *sovereignty*, a mystical term encompassing several key concepts: territorial integrity—the claim not to be invaded and conquered; political independence—the claim not to be subservient to another state; and recognition—the claim to be treated as an equal player on the international plane. It has also tended to include the claim to be left alone in a broad sense of opting out of emerging international norms or, more insidiously for international lawyers, of seeking to opt out of established international norms.[32]

Against whom does the state make these sovereignty claims? Principally against other states—states seeking to dominate it through political or economic strong-arming, intervention, nonrecognition, or, rarely, aggression. But the state can make the claim against other participants as well. Russia and China are making sovereignty claims against peoples—Chechen and Tibetans, respectively—and Israel against Palestinians. The current United States opposition to the International Criminal Court (ICC) is essentially a

collectivities as well as individuals."); RAWLS, *supra* note 3, at 23. *But see* Pogge, *supra* note 2, at 73–75.

31. *See, e.g.*, Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, *in* GLOBAL JUSTICE 12 (Nomos XLI, Ian Shapiro & Lea Brilmayer eds., 1999).

32. *Compare, e.g.*, LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8–10 (1995), *with* STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999).

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sovereignty claim against an organization of states as well as against pro-ICC NGOs around the world; the attempts by the developing world to regain control of their natural resources after decolonization were sovereignty claims in part against transnational business entities.[33]

2. *The Individual*

The individual's rise as a participant in the international legal process has ancient origins but gained some momentum in the nineteenth century in the antislavery movement; it stood on its own after World War I, as states agreed to protect ethnic minorities in the new states emerging after the war and to protect some workers through international labor law. The era after World War II saw the rise of individual human rights and the codification of numerous treaties to advance them.[34] Any description of international law that does not consider human rights and the accompanying duties is, quite simply, fatally flawed. As David Held has noted, through these developments, "a bridge is created between morality and law where, at best, only stepping stones existed before."[35]

The individual's fundamental claim is one of *dignity*, which encompasses negative claims (to be free of governmental abuse) and positive claims (to attain a certain standard of living for himself and his family). The individual principally makes these claims on the state, usually his own, for it generally has the readiest capacity to grant that which the claimant seeks. An individual can assert a claim against a people, as when a member of an indigenous group seeks to opt out of a practice that the group mandates, or against business entities, as when an individual accuses such entities of not providing proper conditions of labor.

3. *Peoples*

The Charter of the United Nations recognizes the principles of "equal rights and self-determination of peoples," but each of those terms, including the definition of a people, is subject to disagreement. Many ethnic minorities call themselves a people, but my own sense is that international law generally views peoples as having something beyond ethnic kinship—some sort of territorial claim, affiliation, or attachment (e.g., the Finnish, Corsican, or Sioux people).[36] Despite these definitional difficulties, the central claim of

33. *See generally* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 452–459 (2001).

34. As stated by the UN's International Criminal Tribunal for the Former Yugoslavia, "A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. . . . [T]he maxim of Roman law *hominum causa omne jus constitutum est* . . . has gained a firm foothold in the international community." Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 97, *available at* http://www.un.org/icty.

35. David Held, *Law of States, Law of Peoples: Three Models of Sovereignty*, 8 LEGAL THEORY 1, 13 (2002). Held's grasp of international law, rare for a political theorist, is evident in *id.* as well as HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (1995).

36. *See* THOMAS MUSGRAVE: SELF-DETERMINATION AND NATIONAL MINORITIES 148–179 (1997).

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peoples is to *self-government*. This includes a claim to recognition as a distinct actor and not a mere loose group of individuals and, most significantly, claims to control its future through political arrangements ranging from self-administration within states up to creation of its own state. (Minority groups typically make more modest claims, e.g., to assert their identity through various linguistic, educational, cultural, and other practices.) The primary target of these claims is the state or, in some cases (like secession), a community of states, as these entities have generally have the power to act on these claims. Peoples also make claims against their members, in seeking to constrain their behavior, including by seeking to prevent exit.

C. From Claims to Duties

The resolution of claims through law is principally carried out through rules and processes that allocate to different persons, entities, and institutions various rights, duties, and powers, including the power to make the rules. For my purposes here, I need not take a position in favor of a rights-based or duty-based morality or legal order; I need posit only that much moral philosophy, like law, is about duties in a broad sense. The common language of duties makes a discussion of special duties in ethics relevant to understanding international legal duties, and vice versa.[37] I do not mean to discount the role of rights, in particular individual rights, in the international legal order. Indeed, as discussed below, the law's clear recognition of human rights shows that rights are critical to the legal order. Those rights ground the duties of states and other actors with respect to human dignity.

What follows is what I see as the core duties that international law has recognized in response to the claims of the three actors above.[38] For purposes of this section, I identify the duty and the target of that duty. Later I will consider whether the particular duty is directed to all or only some of the targets in that class.

1. *States*

States owe legal duties to other states, to peoples, and to individuals. Their principal duty to *other states* is the obligation under the United Nations Charter not to use force against them.[39] But they have manifold other duties that they have accepted in customary international law and countless more defined by treaties. Customary law duties include honoring treaties, respecting each other's diplomats, accepting the immunity of a state from suit in other states' courts for official acts, and aspects of the law of the sea.

37. I share Nardin's view of law and ethics as "parallel but not identical ways of conceiving and judging international conduct." NARDIN, *supra* note 15, at 250; *see also id.* at 233–253.

38. I organize these duties in the same order as the discussion above, though obviously the duty of one actor emanates from the claims of other actors.

39. U.N. CHARTER art. 2, para. 4.

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The state's principal duty to *individuals* is to respect human rights. Some are accepted as custom (e.g., the duty not commit torture, slavery, or genocide) and others have been agreed only through treaty. States generally have fewer obligations to protect human rights during armed conflict, in which case the more minimal protections of international humanitarian law apply. States have duties to protect the individual from abuses by their agents; and various UN and regional human-rights bodies have found that states also must provide protections from or responses to abuses by private actors.[40]

The state's principal duty to *peoples* is to allow them self-determination. The scope of self-determination varies depending on the characteristics of a people, for example, colonial peoples, indigenous peoples, or territorially concentrated groups within states. States have a duty to grant political independence to colonial peoples they control (if the people want it); duties toward groups within states are significant less, though their violation in extreme cases can permit secession.[41] As a general matter, with coerced colonialism effectively over, self-determination today requires the state to grant participatory rights and act without discrimination to the peoples within its borders.[42]

2. *Individuals*

International law does not recognize an expansive list of duties for individuals. This is historically contingent, in that the law's focus on states until the early twentieth century made the notion of individual duty-holders as unlikely as the notion of individual right-holders. International law was a law of state responsibility—the state might be responsible for harms caused by individuals, even private ones, but the individuals themselves had no duties under international law.[43]

The clearest duties on individuals today are those under international criminal law, which provides for individual criminal responsibility for certain harms. Thus treaties address crimes such as genocide, torture, slavery, harm to diplomats, war crimes, various offenses against aircraft, and drug

40. *See, e.g.*, Velásquez Rodriguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988); D. v. United Kingdom, 1997-III Eur. Ct. H.R. 777; General Comment 31, para. 8, *in* Report of the Human Rights Committee, U.N. GAOR, 59th Sess., Supp. No. 40, at 175, 176–177, U.N. Doc. A/59/40 (Vol. I) (2004).

41. Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations, GA Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, 123–124, U.N. Doc. A/8028 (1970) [hereinafter Friendly Relations Declaration].

42. *See, e.g.*, Reference re Secession of Quebec, [1998] 2 S.C.R. 217. Although the Canadian court held, and I agree, that peoples living within states have a right to self-determination—not a right to secession—some might simply identify such groups as ethnic minorities to whom self-determination does not even apply.

43. *See, e.g.*, Nyugen Quoc Dinh, Droit International Public 649 (Patrick Daillier & Alain Pellet eds., 7th ed. 2002) (state as "screen" between individual and international law, though law is undergoing change).

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trafficking.[44] Some treaties directly state that the offense is a crime; others require states to punish under domestic law those who commit the offense; both types of treaties, at least in my view, create duties on the individual under international law not to commit the act.[45] And in most cases, the individual has duties whether he is acting at the behest of a government or in a private capacity.[46]

The full scope of individual duties may be larger in three senses. First, as noted, international courts are recognizing obligations on states to prevent and punish a range of abuses committed by individuals (beyond those crimes mentioned immediately above); in doing so, they are, at least indirectly, recognizing duties on individuals not to commit them. Second, international law recognizes notions of complicity and vicarious responsibility. Thus individuals are responsible for aiding and abetting the above crimes; and persons in authority are, under some circumstances, responsible for the offenses of subordinates.[47] Third, some NGOs have attempted to galvanize international attention on accepting numerous individual responsibilities, and not just rights, in international law.[48]

To whom are these duties directed? International legal theory has generally not focused on the targets of duties beyond the duties of states. Again, much of the reason lies in the historic limitation of law to the duties of states. Even the advent of concepts of human rights and self-determination in the twentieth century addressed only two new permutations of duty-holders and targets—the duties of states to individuals (human rights) and the duties of states to peoples (self-determination). Nonetheless, the international criminalization of certain human rights abuses suggests that for those offenses, an individual's duties extend to other individuals, though in criminal cases it is the state or the United Nations that actually brings a case against the offender.[49]

3. *Peoples*

Although peoples are the beneficiaries of the duty of states to provide for self-determination, the duties of peoples themselves are not much part of international law's vocabulary. Insofar as the norms of self-determination do

44. *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2nd ed. 2001).

45. *Id.* at 11–12. For a contrary view, see Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 308 (1999).

46. Torture is an exception under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, para. 1, 1465 U.N.T.S. 85, 113–114 (severe pain "by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity.")

47. RATNER & ABRAMS, *supra* note 44, at 129–135.

48. *See* INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, TAKING DUTIES SERIOUSLY: INDIVIDUAL DUTIES IN INTERNATIONAL HUMAN RIGHTS LAW (1999); INTER-ACTION COUNCIL, DRAFT UNIVERSAL DECLARATION ON HUMAN RESPONSIBILITIES (1997).

49. For an argument that duties of individuals to other individuals flow directly from human rights treaties, see ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).

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not create a duty on states to allow all peoples to create their own state—as noted above, only colonial peoples have this unqualified right—one might suggest that peoples living in, for instance, democratic states have a duty *not* to secede. However, the absence of a right to secede on their part does not, as a matter of logic or positive law, equate with a duty not to secede.[50]

Peoples have two key sets of duties, both directed at individuals. First, under international humanitarian law, peoples fighting an armed conflict—whether a civil war or a war of independence—must respect basic principles of humanity, including nontargeting of civilians, respect for prisoners, and nonuse of particularly deleterious weapons.[51] The state against (or in) which the people is engaged in conflict is also a beneficiary of these duties. Second, there is an increasing sense that peoples have a duty to respect the human rights of their members, including the right against discrimination on arbitrary grounds.[52]

• • •

International law's process for the resolution of claims among international actors has resulted in clear duties on them. The centrality of the state to the international political and legal order for most of the past 350 years has meant that the law recognizes the most elaborate set of duties as those of *states* toward other *states*, but states also have important duties in the area of human rights and self-determination toward individuals and peoples. The asymmetries among the nine possible permutations of duties of states, individuals, and peoples toward each other justify a shortcut that I take from this point on. Without denying the importance of obligations of individuals and peoples, I limit my inquiry here to duties of states toward other states, individuals, and peoples. This permits a more streamlined analysis of special duties that nonetheless captures the bulk of them; it also still takes account of the key transformations in international law by discussing duties of states to peoples and individuals.

III. A SCHEME OF GENERAL AND SPECIAL DUTIES

I now offer a scheme of international legal obligations based on the distinction between general and special duties. The result of this conceptualization is a set of spheres of duties of different breadths and with different

50. *See, e.g.*, JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 268 (1979).

51. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, December 12, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, December 12, 1977, 1125 U.N.T.S. 609.

52. *See* Lovelace v. Canada, *in* Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40 (1981).

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beneficiaries in each sphere. In each case, I believe these duties can be justified from an impartial perspective.

Before beginning, it is worth pointing out that a duty's characteristic as general or special is distinct from two of its other significant traits: First, it differs from a duty's strength in terms of its overall importance to the international legal order or the burden it places on the state. A general duty, one owed to all states, may be strong or weak, just as may a duty to few.[53] Second, it is distinct from the norm's "hardness" or "softness," that is, the extent to which it creates a true legal obligation on the state. Some norms are softer insofar as they are less precise in terms of the action demanded of the duty-holder; or they emanate from processes whose lawmaking capability is open the question; or their compliance is less certain due to ineffective enforcement mechanisms.[54]

A. General Norms: First-Order Impartiality in International Law

Most of international law's core state-to-state duties are general: they are held by all states and not merely some; and they are owed to all states and not merely some. Among the most significant are the norms on recourse to force (*jus ad bellum*) and the conduct of hostilities (*jus in bello*); treatment of another state's diplomats; treatment of states based on juridical or sovereign equality; carrying out of treaties in good faith; immunity of other states in one's courts for most official action; basic respect for aliens domiciled or setting up business in one's territory; respect for other states' control over their natural resources; the nonreturn of refugees to their place or persecution (*non-refoulement*); and much of the law of the sea. Many of these norms resemble what Thomas Franck has called the "ultimate canon," obligations that "attach to all states by virtue of their status as validated members of the international community."[55] Indeed, the principle of sovereign equality might be said to be a sort of *Grundnorm* for general norms, in that it regards all states as juridically equal and thus equally entitled to be both duty-holders and beneficiaries.[56] The core duties upon states to individuals are also general duties; these include the ban on torture, slavery, genocide, and other serious human rights abuses.[57] To say that someone has a human

53. A good example, mentioned by Walzer, is the global norm prohibiting states from sending refugees back to their place of persecution. However, and not remarked upon by Walzer, the international norm under the UN's 1951 refugee convention does not require states to grant asylum to refugees. WALZER, *supra* note 26, at 48–51.

54. For more on this idea, see Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, *in* ESSAYS IN HONOR OF JUDGE TASLIM OLAWALE ELIAS 135, 135–136 (E. Bello & Bola Ajibola eds., 1992).

55. THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 45 (1995).

56. For a defense, see Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599 (1998).

57. International law recognizes one particular category of general norms as unique—those it calls *erga omnes*. Not only does the state have such an obligation to all other states, but all other states may invoke the obligation in the event of a breach, not merely those specially affected

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right not to be so mistreated means that all states have a duty not to engage in such conduct against anyone.

These general duties create spheres or orbits around the states populated by all other states (or individuals). The breadth of these spheres is a function of the strength of the norm and its hardness. Core norms such as the ban on the use of force result in dense spheres, where the pull between a state and those to which it has a duty is strong; weaker general norms create larger orbits, though still populated by all states.

General norms easily fit within the basic notion of impartiality discussed above. All states have these duties to all other states regardless of size, location, domestic system of governance, or other differences. San Marino is just as obligated not to invade other states as is China; and each is obligated not to invade both Russia and Tonga. Most significant for purposes of impartiality, special relationships, such as historical or other ties between the states, are irrelevant to the duties. The United States is just as obligated not to invade Côte d'Ivoire or Burma as it is not to invade Canada or Britain, and it must treat the diplomats from distant or disliked states just as it treats those from its closest allies.

Which impartialist theory justifies these general duties? I have no need to choose here. Utilitarianism is obviously the easiest grounding for these principles if the unit for utilitarian calculations is the state; a Kantian or Rawlsian contractualist justification centered on the state as moral actor could also yield some of these duties. Clearly, some Kantian or utilitarian calculations focusing on individuals as moral actors would reject some of these norms, as Kantian attempts to exempt humanitarian intervention from the ban on the use of force demonstrate.[58]

B. Special Duties: A Nonproblematic Case

International law recognizes numerous special duties as well. One situation raises no significant moral questions for purposes of impartiality analysis, so it is important to clear this ground first.

When two or more states agree to a treaty, they create a set of special duties, explicitly agreeing to treat each other differently from the way they treat other states. Hart recognized promises as "the most obvious cases of special rights."[59] International law generally permits such disparate treatment provided (1) any general duties under customary international law dealing with the subject of the treaty are default rules rather than trumping

by it. *See, e.g.*, Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3, 32 (Judgment of Feb. 5) Under my definition, the set of general duties is broader than the set of *erga omnes* obligations, although some have used the term *erga omnes* more broadly in a way that essentially equates it with general duties.

58. *See* Allen Buchanan, *From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform*, 111 ETHICS 673 (2001).

59. HART, *supra* note 10, at 183–184.

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(or "peremptory") rules; (2) the treaty does not contravene the UN Charter, a treaty that trumps all others; and (3) the states are not violating any earlier treaties on the subject (unless the parties to the earlier and later treaties are the same).[60] Thus two states could divide a river to give one state most of it as long as no rule of customary law mandated division down the middle in all cases (there is, in fact, no such rule) or those states had previously signed a treaty with other states mandating such a division.

As the number of states to such any treaty increases, it becomes increasingly difficult to label the duties under it special. Thus, for instance, the Vienna Convention on Diplomatic Relations, which has 180 parties, creates duties on the treatment of diplomats among the states parties, but its near-universal ratification makes the duties effectively general ones. They move from being merely contractual treaties to something akin to a legislative treaty generating duties for all to all.[61] Indeed, widespread acceptance of a treaty is evidence that its duties are now part of customary international law, binding even nonratifying states.

The range of special duties created by treaties is enormous: states agree to treat each other specially with regard to economic ties; they establish mutual defense arrangements such as the North Atlantic Treaty Organization (NATO); they cooperate in law enforcement or on scientific matters; and so on. In the sphere analogy, we might then picture each state surrounded by orbits of treaty partners, with the breadth of the orbit based on the strength or importance of the treaty, and the number of other states in the orbit a function of the scope of the treaty (and thus, of course, many states appearing in multiple orbits). The links between the states with these special duties can be equally varied—that is, the relations between the states range from thick to thin.[62]

Yet these duties do not raise the difficult moral questions addressed in the debates over impartiality. Rather, they are prima facie morally justified on the basis of voluntarism, a ground accepted by both partialists and impartialists as a basis for special duties. Individuals can always take on special duties by choice; but the—or at least one—key issue over which partialists and impartialists differ is whether there are special duties *not* based on choice. As for the idea, again accepted by impartialists and partialists, that not all voluntary obligations are morally justifiable—that is, that voluntarism is only a prima facie justification—as noted, international law provides that some treaties are void if they violate peremptory norms. It also has various rules to invalidate treaties that are not based on a truly voluntary choice of states, though those grounds are rather limited. They do not, for instance, include unequal bargaining power by the sides but only clearly egregious behavior such as fraud, corruption, coercion of a state's representative,

60. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 30, 53, 1155 U.N.T.S. 331, 339, 344; U.N. CHARTER art. 103.

61. I appreciate this insight from David Wippman.

62. *See* AVISHAI MARGALIT, THE ETHICS OF MEMORY 7–8 (2002).

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or aggression; moreover, they do not include lack of participation of the population of the country in the making or ratification of the treaty.[63]

Voluntarism and Customary International Law

If voluntarism provides a moral justification for treaties freely arrived at, one risks having proved too much. For not only is the treaty grounded in voluntarism, but so, to a certain extent, is all international law. The other main form of international law, customary international law, is the law that develops over time as states act in a certain way out of a sense that the behavior is not merely good policy but legally required (the notion of *opinio juris*). A rule requiring states to undertake a particular act "crystallizes" when some critical mass of states engage in the behavior with the sense of obligation.[64] The process of creating customary international law is voluntary in the sense that states may choose to opt out of an emerging rule by publicly and persistently objecting to it.[65] (For instance, the United States has rejected what many states believe is a rule of custom requiring states to ban all racist propaganda.)

Yet at the same time, if a state has not engaged in this process of objection, the rule nonetheless binds it. Although this outcome might be viewed as merely a form of voluntarism—tacit consent—in practice it can amount to a nonconsensual obligation. First, in the case of former colonies, states emerging from secessions (like Bangladesh or Eritrea), or the dissolution of states (like the former Soviet Union or Yugoslavia), the new state is bound by customary law even though it was not even a state when the rule emerged—and thus had no opportunity to object to the rule.[66] Second, most states have other, more pressing issues for their foreign ministry and thus lack the resources to participate actively in the formation of customary law, whether by saying that a certain act is or is not legally required or by affirmatively objecting to it. As a result, custom emerges in a method quite distinct from the overt voluntarism seen in the case of treaty. Third, some scholars and international judges have simply rejected voluntarism as a basis of obligation for international law.[67] Thus, if we discover that customary law recognizes some special duties, we will have to find some other justification.[68]

63. Vienna Convention on the Law of Treaties, *supra* note 60, arts. 49–52, 1155 U.N.T.S. at 344; a treaty could be terminated by one side if the other materially breached it.

64. Thus the views of landlocked states over the width of a state's territorial sea would not have counted for much when the law of the sea was governed only by customary law.

65. 1 OPPENHEIM'S INTERNATIONAL LAW 29 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

66. *Id.*

67. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 66 (Adv. Op. of July 8) (diss. op. Shahabudeen).

68. International law may also be viewed as nonconsensual insofar as the UN Security Council can under the UN Charter make decisions legally binding on states. Although this power originates in the consent of states in ratifying the Charter, the Council clearly exercises it today without the contemporaneous consent of states.

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C. Special Duties Based on Noncontractual Ties

Having dispensed with one case of special duties as relatively unproblematic ethically, I now turn to several that raise the most important set of concerns.

1. *Duties Based on Proximity*

International law also recognizes that states owe duties to their neighbors based on physical proximity. For example, states that share a river, in particular upstream and downstream states, must respect the concept of "equitable and reasonable utilization," a rather loose standard under which each must take the other's interests into account in using it.[69] In addition, the law of the sea creates duties on neighbors sharing waters and submerged offshore areas. States opposite each other (e.g., Spain and Morocco across the Straits of Gibraltar) are to divide equally any overlapping areas of their territorial sea—the waters within twelve miles of shore—with only a weaker obligation to negotiate over how to divide up the continental shelf off their shores.[70]

In this case, the physical accident of geography creates a relationship between the states giving rise to special duties. Two states so close to each other will inevitably need to cooperate on various issues regarding utilization of the shared resource; and each may well have a bona fide territorial claim to water used by its neighbor, for example, in the case of two states, normally entitled to a twelve-mile territorial sea, who stand on opposite sides of a twenty-mile strait. If its neighbor were not there, each state would have a property right to the water, but no duty at all; the presence of its neighbor means it has a duty to that neighbor alone to take the latter's interests into account. They might become co-owners, they might split the water, or they might have a duty to cooperate, but all reflect special duties, in that only the neighbor has the corresponding right.

These special duties should be distinguished from a case that appears to be a special duty but in fact is not one. For many years, international environmental pollution was seen as a problem concerning neighboring states, for example, where pollutants from a power plant caused damage across a border. States were said to have duty not to seriously pollute other states, which meant their neighbors.[71] Yet the only reason one state's duty might be said to be limited to its neighbors was because it was assumed that other states were unaffected by the first state's pollution. A comparable case would be my duty not to play loud music in my home at three in the morning. I clearly have this duty to my next-door neighbors and, indeed, to others on my street within earshot of the music. But in fact I have this duty even to those who cannot hear my music, whether a few blocks away or in

69. Convention on the Law of Non-Navigational Uses of International Watercourses, art. 5, GA Res. 51/229, U.N. GAOR, 51st Sess., Supp. No. 49, at 7, 9, U.N. Doc. A/51/49 (Vol. III) (1997).

70. United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 15, 83, 1833 U.N.T.S. 3, 403, 431.

71. *E.g.*, *Trail Smelter Case* (U.S. v. Can.), 3 Rep. Int'l Arb. Awards 1938, 1965 (1941).

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Fiji. It is a general duty, but it is only are *discharged* in limited situations. In the case of international environmental law, as science has demonstrated that pollutants may travel to the other side of the planet, the targets of the state's duties have expanded beyond neighbors—there is now clear recognition of a general duty at play here. The contemporary embodiment of that understanding is Principle 21, adopted in a declaration concluding a 1972 UN conference in Stockholm, which says that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States"[72] but does not specify any relationship of proximity.

2. *Duties Based on Territorial Control*

International law recognizes a second set of special duties, those that require the state to act a certain way only to individuals on its territory or under its control. Most prominently, the duties of states to respect and protect human rights generally extend only to persons under their jurisdiction. For instance, State A has a duty to guarantee a fair trial only to all persons accused of crimes living in State A. Indeed, were it to provide a fair trial to those similarly situated in State B without State B's consent, it would violate other, general norms, including those banning extraterritorial assertion of sovereign powers; if it used forcible means, it would be committing aggression against State B.[73] Recently, for example, Hungary passed a law to provide educational and welfare benefits to ethnic kin in neighboring states and elicited criticism from international lawyers in Europe.[74]

But is there a potential conflict here with my statement above that some international human rights give rise to general duties by states—that the state has a duty not to torture anyone, regardless of where they are? On the one hand, the key global and regional human rights treaties state explicitly that their obligations (and presumably those under customary law) extend only to those within a state's territory or (or and) subject to its jurisdiction.[75] The European Court of Human Rights rejected a suit against some NATO states by victims of NATO's 1999 bombing of Belgrade by asserting that the European Convention on Human Rights imposed duties on states parties only with respect to those under their jurisdiction (or other effective control

72. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/CONF.48/14, princ. 21, 11 ILM 1416, 1420 (1972). I appreciate this point from John Deigh.

73. Even if international law accepted a right of humanitarian intervention, advocates of such a right propose it as a response to serious atrocities, not lesser abuses such as absence of due process rights at trial.

74. *See* European Commission for Democracy Through Law (Venice Commission), Report on the Preferential Treatment of National Minorities by Their Kin-State, Oct. 22, 2001, Council of Europe Doc. CDL-INF (2001) 19.

75. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2, 999 U.N.T.S. 171, 173 ("all individuals within its territory and subject to its jurisdiction") [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 1, 213 U.N.T.S. 221, 224; American Convention on Human Rights, Nov. 22, 1969, art. 1, 1144 U.N.T.S. 123, 145.

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such as occupation), and residents of Serbia were not under the jurisdiction of any party to the Convention.[76] This result clearly suggests that even the most core duties flowing from human rights, such as the right to life, extend only to those under a state's effective control.

Moreover, the European Court of Human Rights long ago enunciated the doctrine of the "margin of appreciation," under which each state is given some discretion in interpreting certain provisions of the European Convention to reflect local cultural and political realities.[77] These include duties regarding freedom of expression (e.g., with regard to laws against blasphemy) and privacy. Thus the Convention does not create identical duties for all states parties to it but requires only that each state act within the margin of appreciation and without discrimination toward those under its jurisdiction; its neighbor may carry out the same textual duty in a very different way.

On the other hand, the UN's Human Rights Committee, set up under the International Covenant on Civil and Political Rights (ICCPR), the key global human rights treaty, to monitor states' compliance with that treaty, has issued rulings holding that Uruguay violated the ICCPR when its agents engaged in extraterritorial kidnapping (in Argentina) in the 1970s. The committee held that it would be "unconscionable" to interpret the spatial limitation of the duties "to permit a State party to perpetrate violations of the Covenant on the territory of another state, which violations it could not perpetrate on its own territory."[78]

The tension between general and special duties with respect to human rights can be addressed—and perhaps resolved—in a number of ways.

First, one might dispute my initial assertion that some key human rights duties are general duties. One might assert that they are all special duties, so that a state owes no human rights obligations—even core duties such as the duty not to torture—to those outside its jurisdiction.[79]

Second, one might choose to see them as both special *and* general duties.[80] They are special in that they *benefit* only those on a state's territory, but they are general in that the states' obligation is to all other states.[81] This solution rests on Hart's distinction between beneficiaries and right-holders—only individuals on the state's territory are beneficiaries, while all other states are the right-holders. Analogizing from Hart has a shortcoming

76. Banković and Others v. Belgium and Others, 2001-XII Eur. Ct. H.R. 333. The suit was against the 17 NATO states party to the European Convention on Human Rights. *See also* Ilascu and Others v. Moldova and Russia, No. 48787/99, July 8, 2004, paras. 313–319.

77. *See, e.g.*, Handyside Case, 1976 ECHR Ser. A, No. 24.

78. Celiberti de Casariego v. Uruguay, *in* Report of the Human Rights Committee, *supra* note 52, at 185, 188; *see also* General Comment 31, *supra* note 40, para. 10, at 177. (extending ICCPR's scope to activities of a state's contingent in a multinational peacekeeping operation).

79. The European Court hints at this in *Banković*, paras. 59, 65, and 75, 2001-XII Eur. Ct. H.R. at 351–353, 356–357.

80. I owe this insight to Eyal Benvenisti.

81. This is particularly true with respect to *erga omnes* obligations, *supra* note 57.

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in that individuals are today as seen as more than Hart's case of the aging parent whom one person agrees to take care of in exchange for a payment from another, but rather as a bona fide right-holder vis-à-vis the state. Instead, the dual character could be grounded in the idea that there are essentially two sets of right-holders—the individuals on the state's territory (who have special rights) and other states (who have general rights).

Third, one might say that states have certain human rights obligations to all people, wherever situated—general duties—but that the global and regional treaties put only some of those obligations in a treaty form as special duties to those under a state's jurisdiction. Under this view, the European Court did not address the broader question of NATO states' duties to those in other states because its competence is limited to alleged violations of the European Convention.

Fourth, and not inconsistent with the previous idea, one might stick with the initial position that at least some human rights duties are general duties but that they are general duties like the duty not to pollute, in that they can be *discharged* only in certain circumstances, namely when the state has jurisdiction over the individual. At other times, the duty is still there, but the state lacks capacity either to carry it out or to violate it. The difficulty with this position, however, is that international law does not merely limit a state's duties to those under its jurisdiction because the state cannot protect others but because it *must* not protect others (absent the permissibility of humanitarian intervention, lawful at best under highly limited circumstances). In other words, State A is legally prohibited, not physically precluded, from securing human rights for people in State B. This leads to a fifth possible reconciliation.

Fifth, the duty of a state to protect certain human rights can be seen as a general duty, but one that is overridden by another duty in extraterritorial situations, namely, a duty not to engage in governmental acts on another state's territory without its permission. Under such a view, the duties of states regarding human rights law are special duties that result from the clash of two general duties—to protect human rights generally, flowing from the notion of *human* rights, and to refrain from exercising extraterritorial jurisdiction. Those general duties are similar to what Pettit and Goodin call "non-conclusive duties" in that nonfulfillment of them is not itself wrong;[82] the special duties result from the balancing of those general duties. (Of course, those special duties themselves might be nonconclusive if they in turn must be balanced against other duties, e.g., a state's duty to preserve domestic public order.) I find this view appealing in that it captures the notion of general duties in the area of human rights while recognizing that the duties actually recognized by the law are special.

If governmental obligations in the area of human rights are special duties as a matter of custom or only under the treaties, this still leaves open the *range*

82. Pettit & Goodin, *supra* note 13, at 654–655.

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of special right-holders, or how far the jurisdiction of the state extends. The European Court found a narrow scope, and the Human Rights Committee found a broad scope, namely, that once a state exercises some authority in another state, it thereby puts certain people in that other state under its jurisdiction and has duties toward them. The latter position is troubling in that it suggests, for instance, that NATO states might have had other obligations—such as the right to guarantee a fair trial—once they used force against Serbia, an obligation they were in no position to carry out from military aircraft in the skies above Serbia. This objection could be overcome by a final reconciliation.

Sixth, one could distinguish among certain duties regarding human rights. Some duties might be special and limited to those on a state's territory; others might be general. Scholars have sought to distinguish between positive duties, for example, the duty to provide food, and negative duties, for example, the duty not to torture. One might say that only the former are special, whereas the latter are general.[83] Thus NATO states have a duty not to inflict certain harms on individuals anywhere, regardless of any question of jurisdiction or control; but they have a duty to provide a fair trial only to those on their territory. While appealing in one sense, this solution suffers from two flaws. First, the line between positive and negative obligations is not clear: the (positive) duty to provide a fair trial is part of a (negative) duty not to treat someone arbitrarily; and the (negative) duty not to torture requires the carrying out of the (positive) duty to train police. Second, the correlation of one set of rights with territoriality and the other with universality is hardly clear; for example, the (positive) duty to provide food has been said by at least one prominent UN body to extend to a duty to assist those in other states in need of food.[84]

If one adopts the notion that at least some of a state's duties to residents in the area of human rights are special duties (consistent with the second to sixth explanations above), can one ethically defend this position? Several persuasive, impartial, reductionist accounts are available. At a rather simple level, a utilitarian calculation would weigh the good of requiring states to guarantee many human rights abroad against the costs. It would likely find the costs overwhelming—in terms of increased tensions as states involve themselves in issues that other states consider domestic or in terms of neglect of other priorities. Likewise, the benefits might be relatively small for overall welfare; for example, how welfare-enhancing is full realization of the right of those accused of crimes to a fair trial through investment in

83. Hart suggests a notion to this effect when he talks of general rights being those possessed by all people against unwarranted interference in their autonomy. HART, *supra* note 10, at 187–188.

84. General Comment 12, para. 36, *in* Committee on Economic, Social and Cultural Rights: Report of the Twentieth and Twenty-First Sessions, U.N. ESCOR, 2000, Supp. No. 2, at 102, 109, U.N. Doc. E/2000/22 (2000). For a sophisticated attempt to link jurisdiction to the rights violated, see Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17 (2004).

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effective judiciaries—given that most people never are so accused? Indeed, this utilitarian calculation undergirds the opposition of international law to the exercise of jurisdiction by one state on another state's territory. A utilitarian might find the benefits outweighing the costs with respect to some duties related to human rights, for example, the duty to provide food to the needy.[85] But for many human rights, the net benefits seem small.

A richer explanation for the special duty of a state to its residents would rely on Goodin's notion of efficiency.[86] Humans created states because they represent an efficient way of dividing up the globe to provide certain benefits (or guarantee certain rights) to individuals. States with effective control over the right-holders, rather than other states, have the duties because they are in the best position to ensure respect for the rights. This position can also be contested; perhaps effective control over a population does not put the state in the best position to guarantee the right, for example, in the case of impoverished states.[87] In these cases, we might want to give other states a right to help the territorial state. But at least as an initial matter, we will place the duties to protect human rights only on the territorial states. This approach finds further evidence in the statute of the new International Criminal Court, which will hear a case of human rights abuses only if the state that would normally prosecute is unwilling or unable to do so.[88]

A third possible justification for these special duties is sketched out briefly by Michael Walzer in *Spheres of Justice*. He argues, based on an individual's "right to place," that "the state owes something to inhabitants simply, without reference to their collective or national identity."[89] He claims to derive a theory of justice that accepts the reality of the territorial state. He echoes Goodin's efficiency rationale in noting that "so many critical issues . . . can best be resolved within geographic units."[90] His emphasis on territoriality extends to a claim that the state has a duty to grant political asylum to oppressed people from other lands who make it to the state, though he cautions against extending this principle to requiring the grant of asylum to all those oppressed abroad, as the state "might be overwhelmed."[91] Walzer's argument seems to derive from impartial principles; while the bond between a state and an individual is special, it is only special because it provides the

85. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 11, 993 U.N.T.S. 3, 7 (right to "adequate food") [hereinafter ICESCR]; General Comment 12, *supra* note 84, para. 15, at 105 (interpreting ICESCR to require provision of food to those unable to obtain it on their own).

86. *See* Goodin, *supra* note 13.

87. Wellman makes a similar criticism and offers his own appealing impartialist account to show why rich citizens of a state might owe more to their poor compatriots than to poorer foreigners. Wellman, *supra* note 23, at 545–549.

88. Statute of the International Criminal Court, art. 17, *available at* http://www.un.org/law/icc/statute/romefra.htm.

89. WALZER, *supra* note 26, at 43.

90. *Id.* at 44.

91. *Id.* at 51.

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individual with a place to develop himself or herself, and utilitarianism or efficiency grounds ultimately determine the scope of the state's duty.

A partialist, on the other hand, would need to argue in terms of a special bond between the state and those on its territory—a relationship special enough *alone*, and without recourse to other universalist goals like utility or freedom, to justify duties to them only. The argument would have to define that special bond in terms of territory—not citizenship or ethnicity—because, as a general matter (subject to a few exceptions discussed below), the state may not discriminate on these ground in protecting human rights of those on its territory.[92] In that sense, the state's duties regarding human rights are not special in the sense of the preferential treatment often considered in the context of impartiality debates, that is, benefiting only family, friends, or fellow citizens.

Andrew Mason addresses this problem in the course of his effort to justify an individual's special duties to fellow *citizens* (not residents). Mason seeks to demonstrate the shortcomings of various impartialist and partialist accounts of such duties and then to offer his own partialist version based on the idea of citizenship as an intrinsically valuable good. Mason demonstrates the difficulty of justifying special ties to co-citizens; he finds that impartialist stances (in particular those of Goodin and Gewirth) justify duties only to residents, and partialist stances justify one's duties only to members of the nation, both of which are distinct from citizens. Put another way, in Mason's view, most partialist theories can justify ties at best to nationals; *his* partialist theory can justify ties to co-citizens; but impartialist theories are more persuasive at justifying ties to residents, our goal here.[93] Mason's partialist defense of duties to *co-citizens* ends up as an indictment of partiality for justifying duties to *residents*, which is, after all, the special duty recognized by international law. His and others' embrace of the need to justify special duties to compatriots is based on their perceived need to find a moral basis for a commonsense pull on citizenry; presumably its only response to the existing legal order under international human rights law, which is territorially based, is to find it irrational or immoral.

3. *Duties Based on Citizenship*

Yet Mason may be right with regard to a limited set of duties, for the territorial nature of special duties is subject to some interesting exceptions: (1) a state's duty to allow individuals to participate in public affairs is limited to citizens; (2) its duty to allow guaranteed entry to the state is also limited

92. ICCPR, *supra* note 75, art. 2, 999 U.N.T.S. at 173; General Comment 31, *supra* note 40, para. 10, at 177. International law defines some special duties based on ethnicity, but the rightholders are persons of a *different* ethnicity from the majority. Thus states have special duties to allow minorities to speak their own language and to send their children to the school of their choice. *See, e.g.*, Conference on Security and Cooperation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, 29 ILM 1305 (1990).

93. Andrew Mason, *Special Obligations to Compatriots*, 107 ETHICS 427 (1997).

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to citizens;[94] and (3) a state's duties to respect an individual's economic, social, and cultural rights—duties that are rather weak in that they generally require states to undertake efforts more than guarantee outcomes—allow developing countries to opt out of granting such rights to nonnationals.[95] International human rights law thus seems to accept in some sense that the core membership of a state consists of those sharing a bond of citizenship.

How might these special duties be defended? The partialist arguments regarding special duties to fellow countrymen and women are stronger here than they are for other human rights, in that at least they seek to ground special duties in citizenship rather than residency. But impartialist accounts are not difficult to imagine. Goodin's efficiency rationale is an appealing justification for the special duty to citizens regarding immigration; it would say that because states are efficient at granting certain benefits to individuals, a system that permits the state to set the basic rules of participation is ethically acceptable. To allow any foreigner to enter the state risks undermining the efficiencies states create.[96] It is less effective at limiting the right to political participation to citizens unless one holds that such participation would somehow undermine those efficiencies; and it would also have some difficulty at justifying the exemption of nonnationals from the state's duties to grant economic rights, in particular with respect to nonnationals who are unlikely to leave. But other impartialist perspectives might fill in any gaps. For example, if citizens alone incur certain obligations in a state, such as service in the military or paying of taxes even when resident abroad, a social-contract view would justify the state's granting only citizens the right to vote or run for office.

D. Corporate Special Duties

My analysis above is taken principally through the example of states' duties, but it is worth at least brief mention that the framework sheds light on current debates over the duties of corporations regarding human rights. One of the major questions among international organizations, NGOs, corporations, and scholars is how to conceive of the universe of right-holders corresponding to a corporation's duties to protect human rights (assuming such duties exist). Various commentators have posited that the corporation has special duties to those within its spheres of influence, with the spheres enlarging from employees, to citizens of a locality, to even larger populations.[97]

94. ICCPR, *supra* note 75, art. 25, 999 U.N.T.S. at 179 ("Every citizen . . . ").

95. ICESCR, *supra* note 85, art. 2, para. 3, 999 U.N.T.S. at 5.

96. *See also* WALZER, *supra* note 26, at 39 ("The distinctiveness of cultures and groups depends on closure. . . . [T]he sovereign state must . . . claim the authority to make its own admissions policy, to control and sometimes restrain the flow of immigrants.")

97. *See* U.N. Comm'n on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Norms on the responsibilities of transnational corporations

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The above analysis helps ground the justification for such special duties. First, some special duties will turn out to be in the relatively unproblematic categories noted above. Thus some duties to employees will stem from contractual relationships, akin to the treaties in Section III.B above—if the contract says the employee gets x days off, then the corporation must grant it. And many apparently special duties of the sort advocated by NGOs are akin to those noted in Section III.C.1 above—they are really just general duties that are discharged only when the potential victim is within physical range of being harmed by the corporation. The universe of beneficiaries might be those harmed by toxic emissions of the company or consumers harmed by dangers in its products.

Yet some of the corporation's duties are genuinely special. Two obvious candidates are duties to employees that are not based on the terms of the contract but on some special relationship between employer and employee; and duties to those living in the neighborhood of the company that are not based on any potential of the company to harm those neighbors. Here advocates of corporate responsibilities would hold that those ties justify special duties on the corporation.

Yet these special duties can be derived quite persuasively from an impartial stance. For example, the relationship between an employer and an employee is indeed intimate in some sense, but assigning to employers a special responsibility to care for employees flows quite quickly from a utilitarian calculation about the best way to protect workers. (It is in some way analogous to Goodin's views on a state's duties to its residents.) It is also easily consistent with a broadly contractarian notion of what workers and companies would agree on from the original position. Indeed, it seems odd to suggest that the mere fact that someone is a company's employee (regardless of the actual work they do) entitles him or her to special benefits in the way partialists make this argument about familial relationships. The same point can be made about a corporation's ties to the community irrespective of its actual harm to it. One could derive a set of responsibilities to the community not from the ties per se but from the corporation's relative power and access to resources in the community. Thus while I remain an advocate of the idea of special responsibilities of corporations to those specially affected by their activities, it turns out that this sort of stance does not require any partial favoritism toward those groups.

IV. IMPLICATIONS FOR THEORIES OF INTERNATIONAL ETHICS

My analysis so far has made four broad points: First, international law recognizes various rights and duties that respond to the claims of the six major

and other business enterprises with regard to human rights, Aug. 26, 2003, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2; Ratner, *supra* note 33, at 506–111.

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actors in the international legal process. Second, the law can be productively viewed as a set of general and special duties. Third, each duty on an actor (I have focused on duties of states) creates a sphere around that actor composed of the right-holders; for general duties those right-holders are all other states, peoples, or individuals, and for special duties they are a smaller category. Fourth, the major duties can be justified from an impartialist stance, that is, without recourse to arguments based only on some special tie between duty-holder and right-holder. These propositions aim both to correct current misconceptions among philosophers about international law and to construct a new conception for them.

I now consider the implications of these propositions for two sorts of theories of international justice: first, theories that distinguish between liberal and nonliberal states; and second, the stronger forms of cosmopolitanism.

A. Rawls and the Liberal/Illiberal Divide

The most significant example of the former is Rawls's *Law of Peoples*, though similar critiques could be made of international law scholarship to this effect.[98] As an initial matter, Rawls's work begins from a flawed premise. The international legal process comprises claims by at least six different sets of actors. Rawls instead attempts to derive a theory of international justice in a vision of international law dealing exclusively with the obligations of *peoples* to other *peoples*. In so doing he makes two critical errors: (1) he uses international law norms applying to states to advance a moral theory regarding a wholly different entity, namely peoples;[99] and (2) by focusing on peoples alone (or by equating them with states), Rawls ignores the multiple entities—most important, states and individuals—that can and do have rights and duties.

Second, and compounding this error, Rawls's law of peoples does not encompass principles acceptable only to what he calls liberal or decent peoples. His original statement of the law describes these principles as "familiar and traditional principles of justice among free and democratic peoples."[100] He is thus characterizing these principles as special duties insofar as they bind only certain peoples toward certain other peoples. But they are not: these principles are not limited to free and democratic peoples and states. Six of the eight—political independence, observation of treaties, sovereign equality, nonintervention, the ban on aggression coupled with the right to self-defense, and limitations on the conduct of war—are clearly accepted in

98. *See, e.g.*, Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); and the effective response in Jose E. Alvarez, *Do Liberal States Behave Better?: A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2001).

99. Allen Buchanan has raised similar concerns. *See* Allen Buchanan, *Rawls's Law of Peoples: Rules for a Vanished Westphalian World*, 100 ETHICS 697, 716–720 (2000).

100. RAWLS, *supra* note 3, at 37.

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principle by all states.[101] They are precisely part of the canon of general duties (justified from first-order impartiality). Indeed, Rawls himself states that his eight principles simply reflect customary international law,[102] but customary law regarding these principles derives from the practice of a great variety of states—liberal, illiberal, and worse—so it is very difficult to see why only liberal states would or do accept them. As for his requirement to "honor human rights," Rawls admits that his construction of human rights is a very limited one, focusing on basic rights that are not "peculiarly liberal or special to the Western tradition."[103] Such a conception is also one of a general duty rather than a special one.

Thus, insofar as Rawls circumscribes certain rights and duties, his theory strays far from the supposed "international political world as we see it."[104] Rawls claims, for instance, that any society that is nonaggressive and honors human rights has the right of self-defense.[105] By this he includes "well-ordered peoples"—"liberal peoples" and "decent peoples"—as well as the (hypothetical) benevolent absolutist society, but excludes both the outlaw state and the burdened society. However, international law clearly gives all states, however brutal or poor, this right, and all other states are under a duty to respect it, so Rawls is describing a world quite far from the status quo.

More important for his or any other theory of international justice, it is difficult to see why the world would be better off if states such as Burma or North Korea (presumably what Rawls would consider "outlaw states") or Honduras, Sri Lanka, or Laos (presumably what he would consider "burdened") could simply be invaded *for whatever reason* and not be allowed to defend themselves. Is the assumption that an invasion will make the victims of nondecent governments per se better off? Or that it will make the world better off? The impartiality of the general duties such as the ban on aggression serves a purpose of public order that Rawls seems to downplay.

Lastly, while mischaracterizing certain general duties as special duties, he simultaneously neglects—or at least glosses over—the key special duty I have outlined above—the duty of states to protect at least some human rights only vis-à-vis individuals on their territory or under their jurisdiction. The scope of the duty to protect human rights seems ripe for any theory of international justice, especially one such as Rawls's, which he claims is focused on "the foreign policy of a reasonably just liberal people."[106] Perhaps Rawls's views on the need for states to respect the choices made

101. I concede that they are not uniformly practiced, though the distinction is not along liberal/illiberal lines. Alvarez, *supra* note 99, at 194–210.
102. RAWLS, *supra* note 3, at 41 ("These familiar and largely traditional principles I take from the history and usages of international law and practice.")
103. *Id.* at 65.
104. *Id.* at 83.
105. *Id.* at 91–92.
106. *Id.* at 10 (italics omitted).

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by certain other peoples (liberal and decent ones) is a way of saying that the duties in human rights law ought to be territorially confined at least in some cases. If so, his failure to take proper account of extant international law only weakens his argument.

On the other hand, his derivation (or at least acceptance) of a clear duty on well-ordered peoples to assist burdened societies suggests he sees some duties in the area of human rights as extraterritorial. Although that special duty is not, I think, yet recognized in current international law, it has the virtue of being consistent with some general trends in international law suggesting that wealthier states—though not just liberal ones—should help out the less fortunate. Rawls properly points out that this special duty is not partial in the sense of being grounded in any special relations of affinity; rather, he calls for "mutual caring" whereby the decent peoples see a connection with the burdened ones.[107] For either of his key points, use of the framework of special duties would have made his arguments stronger.

B. Strong Cosmopolitanism's Challenge to the Status Quo

Cosmopolitans were disappointed with Rawls for his refusal in *The Law of Peoples* to rely upon the individual as the unit of concern and derive a global difference principle from an original position populated by individuals. Though I share their concern that Rawls downplays the need for a theory of international justice that takes account of the claims of individuals, my critique and construct suggest some problems with current cosmopolitan arguments as well.

First, international law clearly grapples with the claims of more than just individuals. It does not countenance a cosmopolitan view of the world insofar as that term means that the individual is the sole unit of concern and all individuals, regardless of location or nationality, are treated equally. As Mapel and Nardin write, the tradition of international law is quite different from those moral theories that focus solely on the rights and duties of individuals in its "weight to the claims of particular communities."[108] Attempts to ignore the claims of those other entities based on some additive theory of individual duties leave a gap between the two disciplines: international lawyers will find them unconvincing and ultimately marginal to their enterprise; and international ethicists will be shining their light of reason on only one set of critical international actors.[109] As noted, I recognize that some moral philosophers will simply find this beside the point. But cosmopolitans engaging in nonideal theory will need to take account of this reality.

107. *Id.* at 112–113.
108. David R. Mapel & Terry Nardin, *Convergence and Divergence in International Ethics*, *in* INTERNATIONAL SOCIETY, *supra* note 1, at 297, 298.
109. *See* CANE, *supra* note 29, at 42–43.

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Second, an appreciation for international law undermines some of the reasoning for proposals to fix what they regard as flaws in the international system. For instance, Wellman, Barry, and Daniel Philpott have derived various rights to secession without carefully considering the existing norms on this issue. Wellman uses an efficiency model of the functions of the state to conclude that "[i]f both the seceding group and the remainder state would be able to perform the functions a state must, then the secessionist party has the right to the territory and the remainder state has a duty not to interfere with the political divorce."[110] Barry, as part of a broad assault on international law, asserts that cosmopolitans should support secession by any group if the outcome would maintain liberal institutions at least as easily as the status quo and if the move has the support of the whole population of the seceding territory.[111]

Both cosmopolitan positions are clearly more prosecession than is international law, which generally permits secession from existing states only where a territorially confined group is facing severe persecution that prevents the state from being representative of all peoples in it.[112] Yet the failure to discuss international norms (in the case of Wellman) or the eagerness to attack them as protecting only the status quo (in the case of Barry) results in a certain obliviousness to the institutional consequences of their position and its dangers. International law's presumption against secession is not, in my view, just about protecting states, even if it may have developed at first to protect them. It is also, far more importantly, about protecting individual welfare as well. Who is to say that individual welfare or freedom is enhanced by secession? The erection of new barriers between states, the losses of economies of scale, and the possibilities of new frictions are all costs that affect individual well-being. The downplaying of factors that international law has taken into account leads to endorsement of potentially very disruptive proposals.

Philpott, to his credit, has undertaken a more careful review, so although he begins with a defense of self-determination as a matter of justice, he ends up, after considering all the risks, with a multifactored formula in which "secession . . . truly becomes a last resort; it should be endorsed only when a people would remain exposed to great cruelty if left with a weaker form of self-determination [e.g., autonomy within the state]."[113] The problem here

110. Christopher H. Wellman, *A Defense of Secession and Political Self-Determination*, 24 PHIL. & PUB. AFF. 142, 164 (1995).

111. Barry, *supra* note 31, at 56; *see also id.* at 25–26 (equating international law with "statism" as "endors[ing] the status quo among states, almost regardless of what that is" as well as with "blood and soil nationalism," in that they share "a kind of moral collectivism").

112. Friendly Relations Declaration, *supra* note 41, at 124; ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 119–120 (1995). I leave aside the possibility that states will, in the end, accept a secession that does not meet these criteria. If these post hoc acts of recognition have a legal valence, then the law is even more favorable to secession that these critics admit.

113. Daniel Philpott, *In Defense of Self-Determination*, 105 ETHICS 352, 382 (1995).

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is that despite his appeal for international law to recognize his position,[114] it leaves him very close to, if not exactly, where international law already is.[115] In a later article he more directly discusses international law and importantly asks how a right to self-determination—by which he means secession or internal autonomy within an existing state—could be institutionalized within it. But again his complaint that the law does not recognize such a right fails to take account of legal instruments and doctrine that accept it as a possibility in limited circumstances.[116] Rather, international law clearly accepts self-determination broadly speaking (not secession or autonomy *simpliciter*) as a right of peoples, with different remedies depending upon the situation of the people. It has institutionalized this concept through manifold and ongoing decisions of states and international bodies, even if there is not some formal tribunal to adjudicate claims.

Third, my concept of international law as comprising general and special duties challenges the cosmopolitan tendency to see the world in terms of equal obligations to peoples no matter where they are located. With regard to self-determination, international law places a special duty on a state to grant peoples within its own territory (and only those peoples) self-determination, which, as noted, typically means a representative and nondiscriminatory government within the state. Other states have a general duty to accept these arrangements; they cannot seek to dismember such states even if that seems to be what some of the peoples within it may want.[117] We accept that states have a special duty to peoples on their territory because a general duty would lead to too much cross-border interference in the name of self-determination; this position parallels the justification for special duties in the human rights field discussed earlier.

Whether the general/special duty dichotomy helps us resolve the most vexing issue in the self-determination debate—namely exactly what groups constitute "peoples" and at what point the state's failure to grant them their right to self-determination triggers a right to secede—I will leave for another day. The idea of special duties may do more legwork in some areas of international law than others. For now, it would seem that the critical task is to define the people (ethnically? territorially? self-identification?) and the special duty of the state toward the people in a way that can be justified from an impartial perspective.

Lastly, to the extent others may share Barry's strong cosmopolitan attack on international law, the position is troublesome; he is essentially opposing

114. *Id.* at 385.

115. Even Barry's position ends up being fairly timid insofar as the prospects of the whole population of a territory supporting secession are virtually zero, and Barry himself uses numerous examples to show the dangers of secession in the real world.

116. Daniel Philpott, *Should Self-Determination be Legalized?* 12 TERRORISM & POL. VIOLENCE 106, 118–119 (2000).

117. Friendly Relations Declaration, *supra* note 41, at 124 (no authorization to dismember states respecting self-determination of peoples).

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both the general and special duties in international law: the general duties are immoral because they treat all states equally when their populations or economic status demand different treatment (for the weak and poor); the special duties are immoral because they are driven by atavistic nationalism. This approach is flawed in at least two respects. First, the special duties are clearly defensible from a second-order impartialist stance. Indeed, special duties arising out of the territorial nature of human rights law are not, in my view, inconsistent with a cosmopolitan structure of the world. Cosmopolitans who favor greater duties abroad will need to demonstrate why their impartialist account is better than the ones just offered; they will not be able to dismiss is as merely a partialist account that relies on bonds of nationality.[118] Second, an attack on the system of interstate obligations merely because some of the general duties seem inconsistent with the promotion of individual welfare above all seems to cut with far too dull a blade.

Barry is right in his unexceptionable assertion that "the possibility that some alternative [to statism] could do better can scarcely be ruled out."[119] I would not presume to rule it out. My characterization and justification of a state's duties regarding human rights as special does not preclude criticism of the existing international legal order. The real question is why one should rule out so much of international law. Surely it is at least possible that the state system may well be the best system possible for advancing individual dignity.[120]

A better course of conduct for cosmopolitans, one taken by both Allen Buchanan and David Held, is to examine the existing structure and carefully consider whether each of the general and special norms promotes or undercuts individual welfare or freedom, rather than to assume—often based on a few spectacular cases convenient to one's own view of world politics—that they do not. Held, for instance, argues for a "political cosmopolitanism" where the state system is complemented by political organization at both lower (substate) and higher (multinational) levels—a concept that international lawyers who study domestic autonomy regimes and international organizations (regional and global) would find quite familiar.[121] The process of seeking to justify general and special duties in international law from an impartialist perspective will prove important to cosmopolitans evaluating the morality of the existing legal order. Not all impartialist defenses will satisfy cosmopolitans. But because impartiality is the lodestar of cosmopolitanism—and of law—it cannot be neglected by moral theorists.

118. Barry, *supra* note 31, at 41 ("my complaint is that those sympathetic to nationalism, while talking a different language, are in fact acting as a front for blood and soil nationalism").
119. *Id.* at 38.
120. For defenses of sovereign equality from a decidedly non-"statist" perspective, see Kingsbury, *supra* note 56; Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 578–579 (2002).
121. Held, *supra* note 35, at 34–35. Held also recognizes that his basic principles of cosmopolitanism need to be interpreted in real-life contexts that give weight to "special ties and other practical-political issues." *Id.* at 31.

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V. CONCLUSION

To prescribe an individual's duties to others at home and abroad and develop institutions to promote them, we need to understand the world order we have. My argument shows that states, individuals, and peoples have a broad range of duties composed of general duties and special duties. States have some obligations to all other states, all other individuals, or all other peoples, but they also have many obligations limited to particular categories of states, individuals, or peoples. Thus, although international law presumes the juridical equality of states, it in no way requires states to have only equal duties to all other states.

Both sets of duties are best viewed as fundamentally impartial. The general duties are first-order impartial and easily justifiable from a utilitarian, deontological, or contractarian perspective. As for the special duties, one of these—treaty-based obligations—turns out to be relatively unproblematic ethically. The more challenging categories are special duties a state owes to its own residents and nationals—cases where the law recognizes first-order partiality. Yet the analysis above shows that these special duties can be defended far more convincingly from a second-order impartial stance.

Wellman's insights about special duties in the personal arena apply at the international plane as well: only certain special relationships justify special duties, and those duties vary in important ways.[122] A state's special relationship to its ethnic kin does not generate special duties; even its relationship to its own nationals justifies only some special duties. And its special relationships with many other states do not create special duties towards them inconsistent with the general duties towards all. In short, there does not seem to be so much significance to the magical pronoun "my"—or "our"—when it comes to international law.[123] International law plays favorites in some sense, but in ways that we can justify morally.

Whether this state of affairs is good for international law or bad for it depends on one's views of impartiality. As an international lawyer and not a philosopher, I find it a more persuasive basis for justifying special duties—not just those in international law, for sophisticated impartialist accounts, of whatever variety, have a clear advantage. Without having to deny that certain relationships are valuable or good, they do a far better job at answering the more important question for ethics: whether the goodness from those relationships is a *sufficient condition* for special duties among those in the relationship—*duties* in the obvious sense that the agent *must* perform a certain way for the benefit of someone, and *special* in the sense that the agent performs that way *for some but not all*. Their answer is that special duties are better justified from more universalist notions, whether individual autonomy or overall utility. As Wellman has pointed out, those

122. Wellman, *supra* note 23, at 552.
123. *Id.* at 539.

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partialist accounts most faithful to partiality risk becoming excuses for all sorts of injustices, while those most convincing at answering the core ethical question above fall into the trap of making quite impartialist claims.[124]

At the same time, I do not seek in this paper to defend a single impartialist theory, and further work will be needed to see which theory of second-order impartiality best justifies various aspects of the international legal order and, if necessary, how other orders may be more impartial overall. I recognize that this may lend a certain formalism to my construct without putting the true ethical meat on the bones of the international legal order. I tend to favor a conception of impartiality that combines the efficiency rationale elaborated by Goodin with a notion of justice centered on respect for basic human dignity.

Finally, the construct of general and special duties is inextricably linked with the question of borders. To talk about the duties of one international actor to another is to assume that the identities of those actors are fixed. In the case of states, identities are fixed in terms of borders; but that still begs the questions of whether the borders of a state are just ones, and whether other borders might better advance the interests of various actors.[125] As Barry's, Buchanan's, and Cavallero's work makes clear, in the end those justifying special place of the state will have to deal with the justice of these borders.[126]

The future will bring more claims for general and special duties, whether they are owed by states, individuals, peoples, corporations, or others. For international actors to make the right decisions, they will need to examine the ethical basis of each of these claims. It is hoped that the analysis offered here will provide a framework for the ethical and legal evaluation of those claims.

124. *Id.* at 552–555.
125. *See* Steven R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AM. J. INT'L L. 590 (1996) (arguing against automatic conversion of intrastate borders to international borders after secessions and dissolutions of states).
126. *See, e.g.*, Cavallero, *supra* note 8, at 193–198.

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