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Neo-Kantian Cosmopolitanism and International Law: Modest Practicality?

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This article explores the relationship between cosmopolitan ethics and principles of international law. It is part of a more general engagement with the question of the relationship between moral theory and the ‘Practise’ of international politics (where the Practise is constituted in significant part by the legalized nature of the institutional order). In my early engagement with the questions this topic throws up I thought that the neo-Kantian tradition offered more in the way of an idealist critique of existing practise rather than a practical engagement with international law and politics as it exists. It was, it seemed to me, a principled rejection of those ‘sorry comforters’ of the law of nations. However there has been a growing trend towards making cosmopolitanism practical – to pursuing cosmopolitan goals within the contemporary international system. Every theoretical tradition that harbours this ambition (and critical theorists, social constructivists, historicists and particularists in political, legal and IR theory are concerned with this issue) soon faces the question of the relationship between law and morality, between description and prescription, sociology and normative theory and pursuit of these questions appear to drive theoretical innovation in all traditions. In what follows I am searching for insight into how cosmopolitans approach this issue in their bid for practicality (a concept I unpack throughout the paper).

This article looks at three high profile liberal cosmopolitan scholars all of whom came to prominence in the aftermath of Rawls's *Theory of Justice*, *Political Liberalism* and his related *Law of Peoples*. Thomas Pogge, Allen Buchanan and Charles Beitz all criticized Rawls for not seeing the full cosmopolitan implications of his political liberalism. As a deeper cosmopolitanism came to be associated with liberal IPT all three of these scholars began, in different ways, to rely on principles inherent in the existing international legal order, rather than principles drawn directly from their cosmopolitan political theory, to ground their moral and political claims. This trend, beginning with Pogge's claim that articles 25 and 28 of the UDHR give cosmopolitanism all the purchase necessary to ground reformist political and moral demands and further developed in the more recent work of Buchanan and Beitz captures, it is argued in this paper, a trend towards a practical approach to cosmopolitan justice. This article asks what each of these three scholars is doing and why, what differences and similarities exist in their reliance on the law and explores the strengths and weaknesses of this trend.

Part 1: Setting the Scene

Cosmopolitan international political theory has, rather unsurprisingly, always had a fascination with international law. Kant, in *Towards Perpetual Peace: A Philosophical Sketch* (1759,) argues for a law of nations founded on a federation of republican states augmented by a *Ius Cosmopoliticum* or a law of world citizenship (Definitive Articles 2 and 3). A typical cosmopolitan position is to use the power of Kant's argument to critique international law as we know it and to challenge the legitimacy of our existing state-based international order and promote moral and legal concern for the individual in global affairs. Fernando Téson's *A*

Philosophy of International Law (1998) can serve as our starting point. Opening the book he writes,

This book defends the view, first developed by Immanuel Kant, that international law and domestic justice are fundamentally connected. Despite the recent prominence of the international law of human rights, the dominant discourse in international law fails to recognize the important normative status of the individual. Traditional international legal theory focuses on the rights and duties of states and rejects the contention that the rights of states are merely derivative of the rights of the individuals that reside within them.... International law thus conceived, however, is incapable of serving the normative framework for present international relations...A more liberal world needs a more liberal theory of international law. Liberal theory commits itself to *normative individualism*, to the premise that the primary normative unit is the individual, not the state; thus it can hardly be reconciled with the statist approach. (Téson 1998:1)

Each of the scholars I examine in this paper published prominent articles that echo this position and that established their credentials as cosmopolitan political theorists. In each case their starting point was a thorough going critique of Rawls's extension of his liberal political theory to the international realm. The core cosmopolitan critique of Rawls's position argued that starting with a law of *Peoples* rather than a law of *Persons* is a fundamental error that undermines liberalism. Indeed the contributions of Thomas Pogge in 'An Egalitarian Law of Peoples' (1994), Charles Beitz in 'Rawls's Law of Peoples' (2000) and Allen Buchanan in 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World' (2000) can all lay claim to a foundational role in the early debates between cosmopolitans and communitarians that played

such an important role in developing international political theory as a sub-discipline. Over the quarter-century or so since those early debates each of these scholars has, I argue, placed more emphasis on the existing international legal order and its cosmopolitan potential. Each maintains a critical perspective and acknowledges the shortcomings of the international legal order. Nevertheless, each author argues that we can, or ought to, work with the law to pursue global justice often focussing on human rights law. In doing so they are pursuing a practical approach to human rights. Mathias Risse (2012) usefully contrasts a practical approach to an orthodox approach to human rights. The orthodox approach holds that individual rights exist as moral rights independently of the rules of the global order. A practical approach looks to the ways that human rights play a role in the international legal order. A practical approach is consistent with (and attractive to) the constructivist and political liberalism of the Rawlsian tradition. Yet the initial challenge to Rawls's *Law of Peoples* was very critical of his limited account of the role of human rights. What is it, I ask, in the practical approaches adopted by these scholars that gives them the confidence to pursue a cosmopolitan politics from within the state-based order?

Pogge, Beitz and Buchanan are not representative of all cosmopolitan scholarship and not all cosmopolitans have turned to international law. Nevertheless, I think that these scholars are sufficiently influential that most cosmopolitan scholars will be familiar with (perhaps even influenced by) at least some of their work. There is also a growing tendency to rely on the promise of human rights or other individual-focused community norms in IPT. It was Pogge's argument in *World Poverty and Human Rights* that suggested that we had the institutional resources necessary to demand cosmopolitan outcomes on the basis of human rights law. The papers that constitute that 2002 collection were written between 1990 and 2001 and the key underlying theme was that international law, while 'talking the talk' really was not 'walking

the walk'. Drawing on our responsibilities as seen through the prism of human rights was intended to push us to close the gap between theory and practise. Pogge's critique argues that an 'historic transformation of our moral norms has mostly produced cosmetic rearrangements' (Pogge 2002:5). His solution was to reformulate his cosmopolitan political theory to make cosmopolitanism more attractive to and effective within the international legal order. In doing so, I argue below, he set the scene for a trend in contemporary cosmopolitan political thought (even though, I argue, he must be seen as offering a semi-practical approach). A decade or so on from this intervention the search for a practical approach continues. Cosmopolitans pursuing distributive or environmental justice, revisionists pursuing a less conventional just war theory, legal theorists pursuing the evolution of international community norms or global constitutionalism see potential in key aspects of the international legal order and often rely on that potential – on already agreed and institutionalized norms – to ground their arguments. Among the most enlightening interventions are Buchanan's pursuit of 'institutional moral reasoning' in *Justice, Legitimacy and Self-Determination* (2004) and later in *The Heart of Human Rights* (2013) and Beitz's pursuit of a 'practical conception' in *The idea of Human Rights* (2009). IPT has drawn inspiration from legal theorists thinking about the evolution of the international community and the move from bilateralism to community interest norms (Simma 1994). It is now quite commonplace to see political theorists relying on the power of *jus cogens* norms, *erga omnes* obligations and non-derogable human rights to point to the ways that international law is becoming more receptive to and more fertile for cosmopolitan ideas. However most legal theorists working in this vein, while clearly cosmopolitan or solidarist in their political sympathies, are relying upon social constructivist theory to ground their arguments. The sociology of the international community provides a promising context but arguments about the morality of the international community still needs to be developed in ways that genuinely connect with the power of solidarist international legal principles.

There is, of course, an entire philosophy of human rights industry. Yet the ‘practical’ approach employed by Beitz and Buchanan is distinct within it and the ambition to link the work being done in the practise of international politics, particularly in international law, to normative debates is the key to this distinctiveness. We can learn much about the turn to law in general from a critical exploration of their engagement with the fundamental questions such a move entails. Each theorist, I shall argue, does something quite different in their turn to law yet the ambition and broad direction of travel is relevantly similar. Each, I argue, offers an argument that consists of three crucial features. The first is a description of the practise itself. Each, in significantly distinct way, sees the practise as an international legal-institutional order and each describes the place of human rights as being significant to the constitution of that order. The second crucial feature is a claim to justificatory modesty. Each, again in distinct ways, argues that the moral claims that they make are modest enough to make the task of moral critique and prescription accessible to all participants in the practise and by doing so they gain the third crucial feature of the practical approach – institutional traction. These three features of the argument combine to argue that a plausibly modest moral argument must allow the practise some authority over the moral argument in order to achieve the institutional traction required for cosmopolitanism to become practical. Here the relationship between practical and moral becomes the key to the success or otherwise of the ambitions of our scholars. The differences in the arguments presented by these three scholars (who share a lot of intellectual and political ground) is as enlightening as their shared ambitions. A comparative exposition of their search for a more practical ethics through an engagement with international law can, therefore, help us evaluate the relationship between cosmopolitanism and international law. A focus on their claims to practicality necessarily means I pass over much of the very rich scholarship that

informs their work. However, I view the claim to practicality as the central feature of their ambition and unpacking this becomes the focus of the exposition that follows.

As legal theorists grapple with questions of global constitutionalism, the normative superiority of humanitarian and human rights rules and of universal obligations for violations of community norms (i.e. on the very idea of an international community) the thought that cosmopolitan or solidarist aspiration did not have to stand outside the positivist legal order but could operate within it and lead to significant change has become more popular. The frameworks that led to ‘a richer view of law and politics’ drew on the sociological claims of social constructivism in IR. But normative IPT not only draws inspiration from the constitution of more individualist world order it adds to it by rethinking the relationship between law and morality. In an important sense the ‘political not metaphysical’ approach adopted by many liberal theorists promised to avoid the age-old natural law vs positivist debates in legal theory and to link constructivist social theory (championed in legal circles by scholars such as Finnemore, Toope, Brunée and Sikkink) with questions of global justice. The complex metaphysics of Kant’s categorical imperative that underpinned the claim that peace required an international law developed beyond that of the sorry comforters had already given way to the arguments (*contra* Rawls) that a reasonable law of peoples requires a more complete regard for individuals as the subjects of justice in a global basic structure. The practical approach, however, argues that we can achieve a law for persons within the international order. If a state-based international legal order was no longer the enemy of moral thinking in general and normative individualism in particular the opportunity to work with already existing normative systems becomes very attractive. It is attractive because it ascribes the power of consent to those frameworks that champion and often privilege individual well-being.

Part 2: A comparative exposition.

2:1 Thomas Pogge: A Semi-Practical Approach

The first step of my argument relies on the argument that Pogge, Beitz and Buchanan were critical of Rawls's decision to cast the extension of his political liberalism to the international order as a law of Peoples rather than a law for persons. As this will not be news to anyone who has followed the debates I move quickly to an exposition of the ways in which they can be seen to move towards a practical approach to global justice. The first focus is on Pogge who, in my view, made the move towards a practical approach much earlier than other cosmopolitans (although for reasons I specify below he is best seen as offering a semi-practical view).

That Pogge is critical of Rawls's international theory is evident in the early *Realizing Rawls* (Pogge 1989) and, after the extended *Law of Peoples* was published, in articles including "An Egalitarian Law of Peoples" (Pogge 1994). Throughout his career he has consistently argued that the state-system is itself a cause of serious injustice – chiefly, but by no means solely, in that it sustains massive socio-economic inequalities. In "An Egalitarian Law of Peoples" he points to the fact has been an advocate of a global original position rather than an original position where representatives of Peoples consider principles of international justice which is Rawls's strategy. A global original position deals not with a world of peoples but 'with the world at large, even asking, as Rawls puts it (somewhat incredulously?), "whether, and in what form, there should be states, or peoples, at all"' (Pogge 1994:197). Yet, despite a thoroughgoing

critique of the ways that Rawls reaches his starting point and of the consequences this has, Pogge consistently moves to put this to one side to engage with a world of states. This, I claim, is the first move towards a practical approach. Pogge refers to this move as a ‘self-imposed triple handicap’. For the sake of argument he writes,

I accept the assumption that global justice is addressed in the second session of the original position, featuring representatives of peoples who take the nation state system as a given; I accept Rawls’s fantasy that the world’s population divides into peoples cleanly separated by national borders; and I waive any support my egalitarian view could draw from the role that massive crimes have played in the emergence of current national borders. (1994:199)

This move is more than the rhetorical flourish of a scholar who believes their argument will win even under restricted conditions. Pogge often refers to his baseline argument and to the institutional proposals that flow from it as ‘modest’. The moral argument is modest in that it is political rather than metaphysical and in that it is institutional rather than interactional (something that, as we shall see, has important links to his reliance on human rights to give voice to his moral position). The institutional proposals are modest in the sense that their feasibility stems from his choice to set aside his well-founded arguments for a vertical redistribution of sovereignty (away from the state) to focus on modest economic redistributive justice that would have a minimal impact on global economic inequalities while having a major impact on the suffering of the impoverished portion of the planet. Such modesty, we are told, ‘is important if the proposed institutional alternative is to gain the support necessary to implement it and is to be able to sustain itself in the world as we know it’ (Pogge2002:205).

Here I want to focus on the ways in which the moral argument is made modest as it is here that we find the rationale for working within a state-based legal order and for invoking human rights. Pogge chooses to rely upon what he terms an institutional moral cosmopolitanism where that is contrasted with an interactional legal cosmopolitanism. It is moral rather than legal because in Pogge's usage a legal cosmopolitanism is committed to a concrete political ideal of a global society where all humans are fellow citizens of a universal republic (Pogge 2002:169). It is institutional because it develops principles of justice rather than ethics. He writes,

Interactional cosmopolitanism assigns direct responsibility for the fulfilment of human rights to other (individual and collective) agents, whereas institutional cosmopolitanism assigns responsibility to institutional schemes. On the latter view, the responsibility of persons is then indirect – a shared responsibility for the practises that one supports: one ought not to participate in an unjust institutional scheme (one that violates human rights) without making reasonable efforts to aid its victims and to promote institutional reform. (Pogge 2002:170)

This approach is, we are told, compatible with the Kantian notion of an obligation to create a comprehensive institutional scheme. Note too the way that injustice is described as that which violates human rights. Pogge acknowledges that there can be many arguments about how best to construct a comprehensive institutional scheme but opts to formulate his argument in terms of human rights partly because it captures what most other variants see as essential and because it provides a shortcut to the meat of his argument. The shortcut is significant not just because it draws on the power of a socially constituted discourse but because it too is modest in that it

‘indicates a reorientation of the sort for which Rawls has coined the phrase “political not metaphysical”’ (Pogge 2002:57). The word human in human rights is different from the word natural in natural rights in that it does not imply an ontological commitment to human rights beyond the context of the practise he wants to examine. Nevertheless, his description of the practise – of human rights – produces a contextual moral universalism that goes much further than that of Rawls and provides the motor of his argument. The practise, as he describes it, is neutral among comprehensive moral doctrines, confirms that all human beings have the same and equal rights and focuses our attention on the obligations of official agents (primarily but not only the state) to respect, protect and fulfil those rights and, in this, it is a moral universalism that arises in a world of states (Pogge 2002:57-8). Yet this modest, institutional moral cosmopolitanism has the power to demand (by virtue of the negative injunction that we are not to collaborate in the upholding of coercive institutions) that we reform international legal institutions that cause avoidable and foreseeable harm. Pogge’s modest reference to article 28 of the UDHR suggests an urgent need to reform the international legal order from the WTO and the UN to the very idea of state-centred sovereignty.

But just how modest and hence practical is his thesis? In other words, how likely is this to garner the support necessary for its implementation (the stated purpose of such modesty - above). The modest institutional view coupled with the contextual moral universalism of his account of human rights takes us a long way but there is a problem, I think, with his account of the relationship between the international institutional-legal order and his moral theory. I think he underestimates the intransigence of the international legal order (even while being a severe critic of that order) and it hinges on his view of the relationship between moral and legal human rights (something both Beitz and Buchanan attempt to remedy (below)). Pogge recognizes the important (but in his view rarely drawn) distinction between moral and legal

human rights and states his intention to explicate a moral notion of human rights. In a move criticized by Buchanan Pogge adopts what Buchanan calls the mirroring view that human rights law is meant to give effect to pre-existing moral rights (Pogge 2002:53, Buchanan 2013:14-23). Pogge cites the language of the preamble to the UDHR to substantiate the view that states accept the existence and primacy of pre-existing moral rights (something Buchanan challenges as a misleading declaratory flourish). I will pick up on Buchanan's injunction that a practical approach should focus on legal human rights without believing they mirror moral human rights below. Here, however, I want to work within Pogge's argument to explore why his position is impractical in that it confronts but does not overcome the intransigence of international law to this moral view.

Pogge's critique of the international legal order as it has developed since 1945 is in stark contrast to the promise that Rawls saw in the restrictions on a traditional account of sovereignty (Rawls 1999:27). Rather ironically it is Pogge's historical sense of the ways that colonialism and conquest ground contemporary international law that drives this critique. His description of the diplomats who negotiated the structure of the Bretton Woods institutions as 'hunger's willing executioners, committing a rather large-scale crime against humanity in our name' (Pogge 2008:551) links directly to our shared obligation to reform the institutions that sustain global poverty while facilitating our global economic benefit. Here Pogge's theory of international law appears to be compatible with critical legal scholarship. Given that the major critique of normative IPT levelled by legal theorists is its lack of historicity (see for an overview Simpson 2018) this might seem promising. However, he does not follow through with this promise. His clear grasp of the existing problems of the international legal order should command a greater scepticism about the force a moral argument that rests on the moral agreement implied by the existence of legal human rights can muster. If human rights law is

indeed premised on antecedent moral rights I still doubt that we have the motivation required. I think there is evidence that international law does not, as a matter of practice, rest on a moral consensus that international law ought to be driven by an egalitarian concern with individual human flourishing. International human rights law maybe so motivated but not international law in general. If we accept, for the moment that human rights law is intended to give effect to antecedent moral rights (and I will explore Beitz's and Buchanan's argument on why a rejection this premise is better from a practical point of view below) we still need to think about the relationship between the human rights regime and other elements of international law. Pogge himself, while writing on the subject of the aspiration and reality of international law notes that it is 'divided against itself' (Pogge 2012:373-397). In that essay he points, among other things, to the challenge of the fragmentation of the international legal order something that 'prevents the use of log-rolling tactics by the less powerful to achieve equitable reforms and allows the more powerful the opportunity to engage in forum shopping for the most advantageous rules' (Pogge 2012:374). The proliferation of legal regimes, the ways that these regimes protect their jurisdictional boundaries and generate issue specific institutions is, Pogge accepts a real threat to institutional reform allowing the affluent states to continue to act in ways that fail to help the poor. His only riposte is that international institutional reform is likely to be 'easier to achieve than equally effective unilateral changes in the conduct of states, corporations and individuals' (Pogge 2012:392). But if fragmentation is a barrier to institutional reform it is not simply a bureaucratic inhibition. Fragmentation can, and often does, imply competing value systems. For every regime that could be said to have a normative individualism at its heart we can point to others that have (eg) the maintenance of state sovereignty at their core. Here we might think of Christian Tomuschat's account of the 'world order treaties' that provide the global constitution (Tomuschat 1993) or Robert Jackson's critique of global constitutional arguments in *The Global Covenant* (Jackson 2000). Pogge's

moral claim is going to have to be immodest enough to demand that antecedent moral human rights ought to inform all of international law. His description of the practise is going to have to sufficiently immodest to claim that states (by virtue of the preambular clauses of the international bill of human rights) do accept this claim. His claim to the practicality necessary to garner the will to make these reforms resides in these arguments and they lack the compelling modesty he sought.

I will return to some of these thoughts in the final section but here I wish to turn to Beitz and Buchanan who both attempt to engage more fully with the practises of human rights law to address the gap between moral theory and political and legal practise. Both pick up themes that we have explored thus far, and both add much to our critical approach to the broader question explored in this paper.

2.2 Beitz's Fresh Start

Beitz opens his 2009 *The Idea of Human Rights* with the claim that '[t]he doctrine of human rights is the articulation in the public morality of world politics of the idea that each person is the subject of global concern'. He continues, quoting Rorty, to assert that human rights have become a fact of the world and goes on to claim that 'if the public discourse of peacetime global society can be said to have common moral language, it is that of human rights' (Beitz 2009:1). Beitz's intention is 'to exploit the observation that the human rights enterprise is a global practise' (Beitz 2009:10) and it quickly becomes apparent that he believes that in order to do this we need to adopt a distinctively practical approach to the subject. In doing so he argues that,

[a] practical conception takes the doctrine and practise of human rights as we find them in international political life as the source materials for constructing a conception of human rights. (Beitz 2009:102)

Such an approach is distinct from naturalistic and agreement theories of human rights and Beitz makes this clear writing,

[both] (naturalistic and agreement theories) seek to understand international human rights as expressions of one or another more abstract idea already on hand. Each has been thought by many to express the intuitive core of the idea of a human right, but I shall argue that both views distort our perception of the human rights of international doctrine. We do better to approach human rights practically, not as the application of an independent philosophical idea to the realm, but as a political doctrine constructed to play a certain role in global political life. (Beitz 2009:48-9).

Immediately we learn that Beitz thinks that putting aside philosophical orthodox approaches in favour of a practical approach enables us to exploit the existence of international human rights law and the public discourse it constitutes. A practical approach must, he argues, do ‘more than notice that the practice exists; it claims for the practise a certain authority in guiding our theorizing’ (Beitz 2009:10). In order to achieve his goals, we need to recognize that a practical approach is more modest (Beitz 2009:212) than orthodox approaches – seeking to understand the moral import of human rights as they emerge in the practise of international politics rather

than as an independent moral idea. It is this that separates Beitz from Pogge. He is determined to construct a conception of human rights from the practise.

To return to my original framing of the practical approach we have a claim to justificatory modesty, a description of the practise that has some authority in an appropriately modest account of human rights in a manner that gives us the ability to exploit the existence of the practise. The reason he thinks ‘a fresh start’ is needed in the political theory of human rights is because he is not sanguine as Pogge that human rights represent the articulation of a shared, pre-existing moral commitment to normative individualism and egalitarianism. Human rights practise, he argues,

Is in important respects historically novel. It was intended from the outset to afford common grounds for political action to persons situated in cultures with different moral traditions and political values. It was explicitly agreed by the framers, as a general matter, that international doctrine should not embrace its own justification and in particular that it should not presuppose that human rights are ‘natural’. (Beitz 2009:72)

This pushes him further than Pogge to embrace a more fully practical approach and to a more historical satisfying reading of the moral basis of the major human rights instruments. But grasping this feature of the practise does not cut us off from moral reflection or commit us to a descriptive rather than a normative project. Indeed, done properly a practical approach allows us to harness the power of an enormous normative and institutional framework that is ‘regarded with great seriousness’ to a practise we have ‘*prima facie* reason to regard as valuable’ insofar

as it ‘offers the hope of constraining one of the two main perils of a global political order comprised of independent states’ (Beitz 2009:11).

Let me begin with Beitz’s account of the practical approach he endorses. Beitz finds his practical approach implicit in Rawls’s *Law of Peoples* where human rights are key element of a conception of public reason of international society (Beitz 2009:96). Here human rights perform a special role in qualifying rights respecting states as members in good standing in the society of peoples as a special class of urgent rights that are indispensable to any common good conception of justice. (Beitz 2009:97-8).

Human rights constitute a “political doctrine” constructed for certain political purposes. The discursive function of human rights (their “special role”) in the public reason of the Society of Peoples is basic...There is no appeal to any independent philosophical conception of human right. (Beitz 2009:99)

The discursive function that human rights practise is intended to fulfil in the public discourse of international society is a function of how and why it arose. Beitz describes human rights as ‘revisionist appurtenances of a global political order; (Beitz 2009:197). Human rights ‘are the constitutive norms of a global practise whose aim is to protect individuals from threats to their most important interests arising from the acts and omissions of their governments (Beitz 2009:197). They are standards for domestic institutions whose satisfaction is of international concern (Beitz 2009:128). This is how participants in the practise understand human rights. So how do we get from the descriptive to the critical or normative?

Beitz argues that questions of normative import arise at 3 levels. First,

we have before us an existing practise and...considered in general and as part of a larger global normative order, we want to know if...we have reason to endorse and support...Stepping down a level, we want to know whether the norms of the practise as we find it make up a justifiable instantiation of the practise's general kind...At a third level, the problems involve the related questions of the types and identities of the agents who might be called upon to defend and advance the norms...[that] belong to the practise. (Beitz 2009:126)

Beitz constructs a two-level model that understands human rights as institutional protections from 'standard threats' to urgent interests. It is a two-level model in that it recognizes that human rights apply in the first instance to the political institutions of states but that they are, as a secondary matter, of international concern (Beitz 2009:119). Urgent interests are distinct from universal human interests. They, he argues, would be 'recognizable as important in a wide range of typical lives that occur in contemporary societies (Beitz 2009:110). A 'standard threat' is 'one that is predictable under the social circumstance in which right is intended to operate' (Beitz:2009:111). In other words, human rights protect individuals from the predations and failures of their state.

Importantly Beitz thinks that Rawls's account of human rights is narrower than that we observe in the existing practise. But it is a descriptive narrowness rather than a conceptual one. Beitz

looks to the ways that human rights are enforceable in national, regional and international fora and at the many ways in which non-coercive political and economic measures can influence human rights compliance, at how human rights reasons might impel social and political reform and so on (Beitz 2009:101). But even with this broader view of human rights as a practise Beitz's approach seems very conservative from a cosmopolitan point of view something he acknowledges.

Human rights are often described...as the entering wedge of a more comprehensive cosmopolitan concern, as an expression of "individual" as opposed to "international" justice, or as evidence for the proposition that individuals are or should be regarded as subjects of international law in their own right. There is no question that human rights have a cosmopolitan purpose in the limited sense that they represent certain aspects of the internal structure and conduct of governments as properly the subjects of international concern. Perhaps it is illuminating to think of them as imposing conditions on the permissible exercise of the prerogatives associated with the norm of sovereignty. But I do not believe it is accurate or constructive to adopt a view of the justifying purposes of the practise that requires a commitment to one or other larger conception of global justice. (Beitz 2009:133)

In making this argument Beitz appears to be flirting with the outer-boundaries of a theory that might be considered cosmopolitan. In describing the practise, he argues that human rights are more than the sum of IHRL. In the global normative order some norms are legal norms and others like human rights,

are better conceived as background norms or principles – they are widely although not unanimously accepted as publicly available, critical standards to which agents can appeal in justifying and criticizing actions and policies proposed or carried out (or not) by governments. (Beitz 2009:210)

The real question surely concerns the weight that an appeal to human rights as a background norm carries in practise and hence what sort of institutional traction that appeal might be expected to generate. Examining the application of his practical approach in chapter 7 ‘International Concern’ it appears to have little critical edge. Beitz examines debates over anti-poverty rights, the right to political participation and the human rights of women but really does not do much more than show that despite contestations about whether these ‘hard cases’ are properly to be considered matters of international concern they really are and that we ought to do something about it. In respect of anti-poverty rights, for example, Beitz shows that we have good reasons to think that poverty is a standard threat to an urgent interest. He can argue that by virtue of this it is of international concern when states cannot or will not meet their obligations to ameliorate poverty. He even goes so far as Pogge when considering the institutional barriers to the exercise of effective international responsibility to argue that ‘[t]o the extent that the features of the international structure enable or facilitate patterns of interaction that are objectionable...those in a position to benefit may come under pressure from an additional kind of reason for action, requiring them to reform the structure or compensate for its undesirable effects’ (Beitz 2009:172). Nevertheless (and accepting the complexity of the causes of poverty) pointing out that there are, in the system, reasons for action available, doesn’t really say much about the weight that competent participants in the practise will attach to them. Beitz concludes,

In a world lacking institutions capable of determining and enforcing responsibilities, it must be left to individual agents alone or in coalitions, to recognize their eligibility [to act]...often...without knowledge or assurance about the plans of others. (Beitz 2009:174)

Beitz appears to derive the normativity of his practical approach from the argument that human rights are more than law – the weight of our reason to act is not settled in reference to the formal sources of law but on the idea of human rights operating as a background norm. But having divested himself of the immodesty of Pogge’s moral philosophy he does not avail himself on the empirical work that goes a long way to elaborating the soft law and political function of human rights discourse. Work on the evolution or ‘humanization’ of ‘humanities law’ in works by scholars such as Ruti Teitel, Theodore Meron, Bruno Simma or work on norm formation and the impact of human rights on practise in social constructivist literature goes a long way to providing confirmation of the background influence of human rights practise and offers some optimism on the ways that this enables human rights claims to operate in the wider global normative order as a special class of urgent reasons for action. Even then the descriptive seems little augmented by the normative modesty of the practical approach. Beitz recognizes that human rights practise occurs not in the abstract but in the context of a broader normative order and in the context of international politics. The first context demands that we see human rights background norms in the context of a broader range of background norms pertinent to international law and politics. The second demands a greater engagement with the political forces that have historically informed and even dominated international politics and the human rights practise. On the latter Beitz does engage with questions of the systemic misuse of

international norms (including humanitarian and human rights norms) but avers that what is true in practise is not true in principle and thus may not always be true in practise. (Beitz 2009:202-9) It does not follow, he argues, from 'the fact that law is often bent to the advantage of stronger powers....that there is no basis for regarding some interpretations of legal rules as more reasonable than other' (Beitz 2009:211). Without a more powerful normative claim we need more confidence that human rights as an emergent practise is likely to oblige international actors to deliver on the urgent rights they describe. This is something that Buchanan believes he can supply by focusing on the social function of international legal human rights system in the broader context of the international legal order in a manner that is more forcefully prescriptive.

2.3 Buchanan on institutional moral reason.

Buchanan takes the focus on international law as a practise further still than Beitz. He has long been interested in matters of international law and his *Justice, legitimacy and Self Determination* (Buchanan 2004) and a fruitful partnership with Robert Keohane certainly sharpened his institutional focus. His later work – *The Heart of Human Rights* (Buchanan 2013) is intended, in purposeful contrast to a moral philosophy of human rights, 'to try and make sense of the practise, and especially its legal core, and to do so in a critical way' (Buchanan 2013:5). He argues that while it is correct to say that human rights are a global moral *lingua franca* it is more accurate to say that international human rights law is the universally authoritative version of the global moral *lingua franca* (Buchanan 2013:7). Buchanan's turn to law is, he claims, modest in two ways. First in the way it sees the relationship between orthodox philosophical treatments of human rights and his practical

approach and second in the way he draws critical normative power from his analysis of international human rights law. Given his insistence on the centrality of legal human rights practise to his task clearly his description of the practise is of vital importance, but he is confident that in abjuring orthodox moral philosophy for a practical approach he will gain a distinct advantage. Drawing on the power of international human rights law we are able' to make appeals to moral motivation without having to engage in foundational controversies or justify substantive moral norms from the ground up (Buchanan 2013:9). In his earlier work Buchanan describes this benefit as one of moral accessibility.

The requirement of moral accessibility signals that...ideal theory's principles can be satisfied or at least seriously approximated through a process that begins with the institutions and culture that we now have. (Buchanan 2004:38)

This requires that the practise has a significant authority in the construction of arguments about the normative character of human rights. His approach 'is not a once-and-for-all feat of abstract philosophical reasoning but an ongoing process in which institutionalized, public discourse plays an ineliminable role (Buchanan 2010:91).

Buchanan's emphasis on human rights law as the core of the practise is a central to his work as it was to Beitz's search for practicality. He is also clear, there is no 'folk' pretheoretical or philosophical theory of moral human rights that enjoys this authoritative status in the practice (Buchanan 2013:7). He writes,

International legal human rights are not the embodiment of a subset of moral human rights. Rather, they are what they are: *legal rights and legal rights need not be the embodiment of corresponding moral rights. Nor need legal rights be justified by appealing to moral rights.* (Buchanan 2013:11)

His purpose is to seek a justification for the practise – to ask, ‘whether having such a system is permissible or that there is sufficient reason, all things considered, or a moral obligation, to create such a system or to sustain it if it already exists...Is the *actual* international legal system justified and, if so, in which senses?’ (Buchanan 2013:12). He also clear that he seeks a genuinely moral justification (rather than a *modus vivendi* justification and as he does so clearly set himself on track to pursue a project that is similar to that of Beitz (rather than that of Pogge or others who adopt what he calls a mirroring view of human rights). In rejecting the mirroring view he notes that the preambular rhetoric of the major human rights instruments implies that IHRL are intended to realize pre-existing moral rights but argues that

The best interpretation of the international legal human rights system – the interpretation that that achieves the best balancing of fidelity to the content of that law and the strongest justification for it – will reject this suggestion. (Buchanan 2013:21)

The task is to determine, on the basis of an understanding of that characteristics of the system of IHRL, what function it fulfils and then assess ‘the moral propriety of those functions, the

systems efficiency in performing them and the means by which it does so (Buchanan 2013:21-2). Here then we have, in outline, the three features of a practical approach I outlined in the introduction. He claims a justificatory modesty in which the practise has authority. He relies on a description of that practise to ground his search for moral motivation and thus gain institutional traction. Buchanan claims a greater and more nuanced engagement with the law than Beitz and, as we shall see, more prescriptive force.

In turning to an assessment of Buchanan's practical approach we must begin with his description of the practise picking out a few of the more salient features. Buchanan picks up on the same features as Beitz – pointing to the role IHRL has in limiting sovereignty, the ascription of duties to the state (and as a secondary matter, the international community). As an important preface to a later argument he notes that IHRL 'exists within a context of legal pluralism with respect to its own status vis-à-vis domestic law (Buchanan 2013:26). This is so because of the many different constitutional arrangements for incorporating international law into the many domestic legal systems. He notes that a human rights system in which ratification led to immediate domestic effect would 'differ significantly' from the status quo and goes on to invite us to consider 'a more radical' alternative.

One can conceive of an international legal system in which the duties that correspond to the legal rights in human rights conventions are legally binding even on states that do not ratify the conventions, if a supermajority of legitimate states ratify them. (Buchanan 2013:27)

He recognizes that this is not a description of the system but notes (referencing the *jus cogens* prohibitions on torture and slavery) that not all existing law is binding on states only if they have consented to it. This is a theme he immediately returns to. Describing the basic idea of the system of IHRL as the development of ‘*a regime of international law whose primary function is so to provide universal standards for regulating the behaviour of states towards those under their jurisdiction, for the sake of those individuals themselves, conceived as social beings*’ (Buchanan 2013:27) Buchanan claims that this description fits the ‘most accurate information about what the system is like and about its origins, while at the same time construing the system in a morally attractive way’ and continues,

It is crucial to understand that the basic idea of the system as I have just formulated it is noncommittal on two basic issues. First it does not speak to whether such regulation is to be achieved voluntarily, that is through the consent of all states subject to it, or otherwise. It may be true that at the founding of the system of international human rights law, there was no practical alternative to the reliance on the consent of states, that is, to create this law primarily through the making of treaties. But if circumstances changed sufficiently, it might become feasible to take a less voluntary approach. And it would be a mistake to assume that doing so would be morally unacceptable or deprive international human rights law of legitimacy. Second, the basic idea leaves open the question of whether, and to what extent, the standards must take the form of norms that assert individual legal rights. The point here is that other types of norms – for example mere duty norms – might be capable of performing the distinctive function of this type of law. (Buchanan 2013: 28)

Two further features of Buchanan's account of the system are especially important. The first is that the system has a status-egalitarian function and the second is that it has a well-being function and thus the system is anchored in the thought that the state must perform a basic welfare state function for all. It is these features of the system that come to occupy centre-ground in Buchanan's argument.

Before I get to them it is worth looking at the approach that Buchanan adopts for his task. His goal is, he writes, the modest one of providing a framework for the neglected task of justifying the international legal core of human rights (Buchanan 2013:42). He adopts a 'pluralistic justificatory methodology' which essentially rejects the mirroring view and proceeds in three stages.

(1) Characterizing the system type, that is, specifying the type of system of international legal rights of individuals and making a moral case for having such a system; (2) articulating arguments for the conclusion that various particular rights ought to be...in a system of that type; (3) showing that a system of that type, including those rights, can be legitimately institutionalized/ (Buchanan 2013:44)

In taking up the first element Buchanan, like Beitz, shows that IHRL arises to deal with one of the morally unacceptable consequences of the existence of a system of sovereign states. However, in direct reference to Beitz, he argues that he makes a much stronger point here. Beitz is characterized as merely describing this feature of the system. Buchanan, on the other hand frames it as the moral justification of the system (Buchanan 2013:45).

Having a system of international legal human rights is a necessary condition for the existing international order to be justifiable, because without a system of international legal human rights the strong rights of sovereignty that the international order confers on states would be morally unacceptable. (Buchanan 2013:44).

This is the core of Buchanan's argument and provides the authority to make the strong claims he goes on to make. If we skip, briefly to his conclusions, we get a sense of what his justification is intended to carry. Having made his case Buchanan returns to the theme of consent and legitimacy and points to the limitations that a state's right to withhold consent or to consent with reservations can have on the system (Buchanan 2013:280). He explores ideas of an expanded category of *jus cogens* norms, supermajority ratification imposing universal obligation and points to innovations such as a proposed EU constitution allowing for supermajority voting and the attempt to make the Responsibility to Protect (R2P) a required response to humanitarian wrongdoing (Buchanan 2013:282). He recognizes that the international order as it exists is resistant to such moves and that the system lacks the institutional safeguards to prevent predation by the powerful. Here he makes perhaps the most ambitious argument of all. Buchanan argues that a more expansive conception of state's duties under human rights is morally mandatory so that it becomes morally required that we develop 'institutional resources that would make a more expansive conception of duties not only feasible but morally acceptable' (Buchanan 2013:283). The moral power of the justification for human rights law drives a further argument that demands that we make the institutional infrastructure such that it can more effectively meet our obligations. Here what Buchanan calls an 'ecological view of institutional legitimacy' demands that we deprive states of what,

elsewhere, he calls a legitimacy veto (Buchanan 2010). This clearly outstrips Beitz's modest proposal by some distance.

The key to this is to be found in Buchanan's justification of the status-egalitarian element of IHRL. This happens in the third part of the first stage of Buchanan's justificatory scheme. He writes, 'we need to determine whether achieving the social recognition of every person's basic equal status is of such importance that international law should be harnessed to help achieve it' (Buchanan 2013:134). His is firstly a moral claim about the Principle of Equal Status – that all humans have the same and important basic moral status – and partly a claim about what the purpose of the law is (Buchanan 2013:135). On the first issue he writes

I believe that the Principle of Equal Status is correct, but I am not sure how to provide and argument to support it. A commitment to acknowledging equal basic status for all is so fundamental to my moral outlook that...because I believe that the Principle of Equal Moral Status is a genuine moral principle and an extremely basic one, not merely a parochial preference, I see no reason why it should not be affirmed by every legal system, whether domestic, regional or international. (Buchanan 2013:135)

He does, however, argue for the principle rather than presuming it and he does so in unmodified Kantian terms (Buchanan 2013:136-9). In his earlier work Buchanan rests his case on what he terms a natural duty of justice argument (Buchanan 2004:85) or a 'modest objectivist view' (Buchanan 2010:51) and it is here that we need to explore the claim to modesty. There is a curious mix of empirical and moral claims in play in all these instances of Buchanan's argument. In the 2004 work we learn that his argument relies 'on the premise that there is a

natural duty of justice even if there were no global basic structure, or any interaction whatsoever among individuals across borders....the natural duty of justice is not a rock-bottom basic moral principle, though it is close to it' (Buchanan 2004:86-7). In the later work he writes of the Equal Status Principle, 'it is simply an expression of the increasing salience of the idea that is arguably one of the most momentous improvements in human morality, the abandonment of various forms of tribalism in favour of a genuinely cosmopolitan outlook' (Buchanan 2013:137). But it is not the increasing salience of the idea just as it is not the existence of the global basic structure that lend Buchanan's position its authority. In both cases there is a foundational commitment to a moral premise described in the 2004 work in the language of Kant's second formulation of the Categorical Imperative and in the later work as simply Kantian.

I do not intend to dispute the modesty or otherwise of Kant's moral philosophy (and I grant Buchanan's arguments against those who think that human rights as understood here do a violence to a reasonable moral pluralism). However, I do want to ask about the relationship between Kantian morality and the practicality of Buchanan's project. Buchanan's position in *The Heart of Human Rights* does see the Principle of Equal Status as a basic moral principle – about as rock-bottom as it gets. A greater realisation of this principle is required insofar as we can create institutions that restrict abuse of the system by the powerful either through predation or by establishing parochial interpretations of norms as universal. To a large degree the sovereign and consent-based state system arose precisely to limit this sort of abuse just as human rights law arose to restrict one key potential downside of having such a system. The problem is that most attempts to push the boundaries of IHRL towards a fuller instantiation of the Principle of Equal Status founder on fears of this type of abuse. The fears are not ungrounded. In *The Heart of Human Rights* Buchanan's examples of potential progress are a

global constitution with provision for a super majoritarian law-making and a strong R2P. In other works, he has proposed reform of the United Nations Security Council – and where this proves impossible the establishment of a committee of rights-respecting states (Buchanan and Keohane 2004), the weakening of the prohibition on the use of force, and a unilateral right to intervene in the face of humanitarian atrocity (Buchanan 2010, 2004). In theory all might prove to be positive steps towards a greater protection of human rights if accompanied by institutional reform and the sorts of *ex ante* and *ex post* accountability frameworks he imagines as part of his institutional moral view. However, the structural and political challenges to such reform belie his assertiveness. The international legal order is conservative in its nature. Humanitarian interventions breed reasonable suspicion of trojan horse politics; EU constitutionalism provokes nationalist reaction; *jus cogens* norms link only very weakly to prescribed responses to violations of those norms and those are themselves limited by key sovereignty-respecting norms. All this because the international legal order is, at its heart, an ‘equalitarian regime’ (Reus-Smit 2005), one that does not admit of hierarchy. Human rights restrict the challenges this presents but to claim that the justification for the human rights legal system is such that the heterarchical international legal order must give up the protections of sovereignty seems unlikely to gain the institutional traction being sought. The doctrine of sovereign equality is centre stage in a legal order that is designed to be more morally acceptable than its predecessor in that it refuses to recognize the old distinction found in the law of Nations between civilised and uncivilised peoples. Buchanan’s proposal threatens to reinstate that distinction with human rights being the justification for an expanded right to the use of force, removal of consent, the destruction of the UN charter institutions. Despite the frustrations of states having a ‘legitimacy veto’ over progressive human rights policies it strikes me that the tools of reform are too deadly to be practical.

The problem lies, I think, in the relationship between description, moral justification of the Principle of Equal Standing as part of a justification of human rights and the prescription that human rights discipline all of international law. The status egalitarian element of human rights may be its justificatory essence but what is the justificatory essence of international law in general? What, in the context of the practise as we find it. Is the relation between the two justificatory principles? It may well be that under ideal conditions (where we can realize a non-coercive order that lives up to the Principle of Equal Standing) that human rights do trump international law. But existing threats to peace, let alone justice, from powerful states suggests that we are far from ideal conditions and so practicality demands a different balance be struck

3. conclusions

How ought we to view the practical turn as a contribution to the neo-Kantian cosmopolitan tradition? The cosmopolitan tradition in political theory was already distanced from Kant's political thought through Rawls's engagement with Kant and through the cosmopolitan's engagement with Rawls. Sean Molloy (2017) gets to the heart of the issue showing how cosmopolitanism, in rejecting Kant's complete system, offers 'a clear account of how politics "is" and how politics "ought to be" but no account of how to get from the former condition to the latter' (Molloy 2017:Epilogue). Kant can show how 'nature's secret plan' means the tragedies of contemporary politics ultimately hold the promise humanity's salvation but, absent his political theology, cosmopolitans

confront the ultimate problem facing contemporary cosmopolitanism i.e. that the reform of the international political system would have to be carried out by the

politically motivated and morally indifferent human beings who maintain and benefit from the global system of inequality. (Molloy 2017: 166)

In one sense the practical turn is an attempt to bridge this gap – the gap between ‘the idea of a universal history and empirical composition’ (Kant 1991: 53). The search for practicality rests on a claim to modesty– a modesty that will provide institutional traction by drawing on norms already in use. This still involves the project of ‘writing a history in accordance with an idea’ (Kant 1991:51) but it is an idea found in practise itself. The success of the claim that the moral justification is indeed found in practise and that it is thus accessible to all actors seems to be the key to claiming a link to the ‘morally good disposition’ that might help us work our ‘way out of the chaotic conditions of international relations’ (Kant 1991:48). The confidence required for such a move has some precedent but I not certain that it is any more warranted than the ‘wild and fanciful’ idea of an imminent move to perpetual peace put forward by the Abbe St Pierre and Rousseau (Kant 1991:47-8). Pogge, I argued, in insisting that legal human rights ‘mirror’ pre-existing human rights goes on to argue that all international law ought to reflect the pre-existing rights and that participants, by virtue of the preambular sections of the international bill of human rights, have accepted this. In this, I believe, he loses the claim to modesty he makes. Beitz seeks to correct this failure by seeking to remain with the normative bounds of the practise but in abjuring the moral loses critical purchase – a failure not, I think, of his approach but of an analytical treatment of a socially constructed constitutive framework. Beitz wrestles with the relationship between the practise and moral critique in a way that stays faithful to his modest aspiration but appears too modest. Buchanan offers to remedy this shortcoming by doing more to draw the moral from the legal. Ultimately, however, he relies on an unreconstructed Kantianism to make such radical claims on the institutional ecology of the world order that, even if it is a moral position found in practise, it is hard to imagine anyone

ever taking the sorts of risks needed. More generally each rests significant weight on the progress of history, particularly in the progress of international human rights law. There is real merit to the ways that each points to the broad normative reach of human rights law and it challenges the minimalist accounts of human rights in important ways. However, the same modesty that underpins the practicality of their moral argument has to be applied to their historical/legal claim. Without the certainty provided by nature's secret plan that we find in the eighth thesis of Kant's *Idea for Universal History* it seems overly ambitious to think that human rights law contains within it the essence of global justice.

The modest search for practicality is an important quest. Lawyers, as Hillary Charlesworth has recently noted, regard justice as their province but the concept 'appears as a fluffy cloud of aspirations hovering over the international legal system' (Charlesworth 2018:143). Yet law is often very resistant to attempts to theorize justice from outside the system and then to assert some discipline over the system. The first promise of the practical approach is the promise of engagement – the recognition of the need to let the practise have a place and even exert some authority in the theory. The second promise is the promise of moral critique and of critical purchase on the system. The latter depends on the recognition, found plainly in the work of Beitz and Buchanan, that the law is a system with its own internal social logic. But forging a path between allowing that logic to discipline moral critique and allowing moral critique to require reform of the system is an exceptionally challenging undertaking. Even as we acknowledge the broad normative reach of human rights both as law and as the articulation of public morality, the extent to which human rights and justice are co-extensional, or the power of a practical approach to push the idea of human rights towards a fuller account of justice remains controversial especially if we find reason to believe, as Pogge does, that international law is itself a site of severe moral deficit.

There is much of significance and originality in the argument that cosmopolitanism should confine itself to the cave of international law rather than seek the sun of philosophy. If, as I believe, it is a path worth pursuing the Kantian background of those pursuing justice through a practical approach is likely to become less and less significant to that enterprise. If, however, the opportunity to pursue a greater respect for individual rights at a domestic and international level is real then a practical, political cosmopolitanism has ambition enough to at least be considered an ally of the Kantian project.

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