

# Thin is beautiful – or are international lawyers anorectic?

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## Thin and thick and the two-pillar test

Steven Ratner's book measures international core norms against a standard of "thin justice". That justice is thin, because it is less demanding than the standard we would use to judge domestic law and domestic institutions, "it is a justice that reflects the thinness of the community in which it operates" (p. 90, see also p. 416). The distinction between domestic thickness and international thinness is inspired by and parallels Michael Walzer's thick and thin morality. Ratner does not espouse a radical cosmopolitanism which claims that the standards of justice need to be independent from state boundaries, and which would not allow for distinctions based on the nationality of involved persons or on the territoriality of situations.

In the book, Ratner undertakes three operations: First, he identifies and fleshes out the thin-justice-standard. Importantly, "thin" does not mean "procedural" only, but has some substance. The standard consists of two principles or "pillars", as Ratner calls them. The first pillar is the advancement of international and intra-state peace, the second pillar is the respect for basic human rights. In addition to a norm's capacity to further peace and/or human rights, Ratner (at some places) employs two additional criteria: procedural fairness, as an expression of internal morality vis-à-vis participants and as an outgrowth of the rule of law (p. 409), and/or the prospects of such a norm for compliance.

Second, Ratner measures core norms of international law against that standard, finding that some are just, others not. Third, Ratner concretely suggests in which direction to revise the unjust ones. The last step gives a very practical twist to the study. One of the book's objectives is to guide law reform, seeking to give international actors "good reasons to change some norms, as well as guideposts for that change" (p. 3). Ratner even concretely spells out the revisions of the norms which he found to be "unjust" (pp. 424 et seq.). For example, he suggests to grant an international right to autonomy of groups within states; to create mechanisms to facilitate the participation of poor states within international organisations; to extend the participatory rights of non-state actors in international decision-making processes; and to make universal jurisdiction over gross violations of human rights mandatory as opposed to just allowing it.

## What if the two principles point in opposite directions?

The problem of the two-pillar approach is how to judge a norm which might further peace but risks to undermine human rights, or – inversely – which protects human rights but threatens peace. When the two principles, the peace-pillar and the human rights-pillar, stand in conflict, a balancing exercise is warranted. For this constellation, Ratner gives a kind of flowchart (German law students would say "*Prüfungsschema*", p. 84). The general principle is that "if a norm is unjust under one of the pillars, it must be adjusted so that it can pass muster under that pillar with minimal damage to the other." (p. 188). This goes for both pillars: When a norm does not further peace, it needs to be especially beneficial to human rights (and must at the same time only "minimally" disrupt peace). When, inversely, the norm interferes with human rights, it must be especially suited to further peace, while at the same time not violating "basic" human rights. So the non-violation condition functions as a kind of stop-gate.

The flowchart shows that the second pillar, the human rights pillar, is stronger than the first. It is actually the bearing pillar. A norm – even if it furthers peace – will nevertheless be considered unjust if it "interferes with *basic* human rights." (p. 84). Note that Ratner here bases the reasoning on a distinction between normal human rights and the most important, "basic" ones. The "basic" human rights are roughly those which are normally qualified as *jus cogens*: protection against torture, slavery, genocide, and crimes against humanity. Beyond this very small group, Ratner considers as "basic" human rights also non-discrimination, the freedom to form or not to form a family, freedom of religion, "some" freedom of political expression, self-determination, "some" type of representative government, primary education, and a safe workplace (p. 76). So Ratner's list of "basic" human

rights is not too short, and it comprises both “liberal” and “social” rights. It does not have a basis in the law as it stands (except for hooking onto non-derogable norms), and is also not justified further by Ratner.

In Ratner’s model, a norm of international law is unjust as soon as it violates “basic” human rights. This surely applies to a strict norm of non-intervention which shields a government torturing and killing members of the opposition or other minorities, as it is the case in Syria right now. We must therefore “explore alternatives” to the strict norm of non-intervention in order to (better) protect human rights, but do so in a way that causes “minimal disruption” (p. 84) to the protection of peace. The sought norm is a norm which tolerates humanitarian intervention in case of mass atrocities, and this is what Ratner then defends (in chapter 9).

The example of the prohibition on delivering weapons to rebels illustrates the conundrum of the two principles pointing in opposite directions. Under the law as it stands, such a delivery is an unlawful violation of the prohibition on intervention, and in some constellations even a violation of the prohibition of the use of military force. (The current Syrian crisis has somewhat weakened that norm, because the delivery of weapons from all sides to all sides seems to be tolerated). Ratner now finds that this strict ban undermines human rights protection, because allowing assistance to rebels would in some cases help them to terminate governmental human rights abuses. So allowing (not requiring) the delivery of weapons might, under some circumstances, be warranted and even required by the human rights pillar. (That has been one of the current US-government’s arguments for delivering weapons to rebels in Syria).

But would a relaxation of the prohibition of arms delivery really help protect human rights? Not if the supported rebels themselves commit human rights atrocities. Ratner must admit that “shaping a norm that improves overall respect for human rights will require multiple conditions that may not be feasible in practice.” (p. 135). “[T]he calibration is extraordinarily difficult, and I do not claim to be able to describe in detail a norm that meets both pillars” (p. 135). In the case of Syria, huge (factual) uncertainties persist about the consequences for overall regional stability, and there is also the danger that transnational groups will commit atrocities themselves, with weapons they receive. So there “are strong arguments against aiding the rebels even if advocates for it could devise a norm to make it legal.” (p. 136). One wonders which kind of arguments would that be? It seems that these would be arguments of prudence, of political strategy, or of common sense – not of “pure” justice. The two-pillar test, and the “just” norm which it generates, does not necessarily offer a prescription of how the law-applier should act in a concrete case.

## **The bias of the norm-evaluator**

This brings us to the difference between making suggestions for law-makers (Ratner’s addressees), and for law-appliers. Ratner does not problematize the question of “who decides”. It is of course him, a US law professor, who critically scrutinizes and assesses the “justice” of some international norms. But it would be unfair to criticize this as arm-chair philosophy. Ratner nowhere claims to be anything else than a scholar whose job it is to make arguments which might have an impact on the law-making (and indirectly also on the law-applying) institutions – or not.

He would not deny that the identification of the justice-standard, its application to the law as it stands, and the suggestion of new norms conforming to the standards require a number of value-judgments which he makes (or implies) in his book, where others might come to different conclusions. The standard which he applies to the law has been to some extent “invented” by him, but it is not taken out of the skies but derived from principles the author found in the law as it stands, again – as interpreted by him. So that standard is “objective” or “neutral” only to the extent that it can be, both with legal and with philosophical arguments, explained and defended according to rules of both disciplines.

To some extent, this intellectual operation is a parallel to the typical lawyerly identification of a legal rule, and its application to facts. It is only a parallel, because Ratner is not concerned with the application of the legal rules in concrete cases in order to determine whether a State’s behaviour is illegal or not. Rather, his exercise relates to the sphere of abstract and general rules, and to their quality of justness. The application of those rules to facts only comes into the analysis when Ratner asks whether there is a good chance of compliance. So the entire exercise is situated on a level “above” the everyday business of the legal practitioner who applies the legal rules

(whatever their “justice”-contents”). Still, the *Vorverständnis* of the observer, his possibly Western bias, seems to be an issue on this more abstract and general level, too.

## Thin justice and global constitutionalism

For this reason, the question can be asked where the proposed justice-standard actually springs from. I submit that it stands in a constitutionalist tradition. Ratner does not engage with global constitutionalism (both as an academic heuristic device and as an agenda of legal policy). He merely remarks that constitutions are deliberately drafted so as to be difficult to change, and that this does not fit the international system (p. 421). My response would be that in fact, all international agreements are more difficult to amend than most domestic constitutions. But this only shows that the formal properties of some state constitutions (entrenchedness and status as “higher” law) are less relevant for international law than their substantive elements. Of course, there is no (and there need not be a) formal international constitutional document called Constitution, with a capital C.

Rather, what matters from the perspective of global constitutionalism are legal elements (both substantive and procedural) such as the rule of law, protection of fundamental rights, and democracy. In fact, Ratner discusses many of the important building blocks of global constitutional law: the centrality of the individual as a subject of international law, legal (“constitutional”) limits to the activities of international organisations, accountability and review against their measures which risk to infringe fundamental rights, and fairer, more inclusive, and more transparent law-making processes so as to approximate or substitute democratic forms of law-making.

All these topics pop up in Ratner’s book, although he explicitly writes that “thicker justice does not require constitutionalism” (pp. 420-21). Ratner finds that “justice will be achieved through norms and institutions, not through some constitutional features of them.” This is of course correct. However, although the quest for a just international order *need* not be formulated in terms of constitutionalism, it is hard to see why lawyers should renounce exploiting a vocabulary (and the legal mechanisms, institutions, and procedures to which that vocabulary points) which already exists.

I submit that identifying and highlighting the constitutional features (and the absence of such features) in international norms, institutions, and procedures, first, facilitates to uncover potential justice-deficits of those norms, institutions, and procedures. Second, examining international law through a constitutionalist lens will help to formulate reform proposals without having to reinvent the wheel.

Ratner is probably reluctant to rely on a constitutionalist vocabulary because he finds it analytically unhelpful and/or in normative terms dangerous. He maybe belongs to the sceptics who deem global constitutionalism to embody false domestic analogies, suggesting a world state which nobody wants, and to be moreover Western-biased and hegemonic. Although these worries are not totally unfounded, I think that Ratner’s book (excellent as it is in itself) illustrates that eclipsing the constitutionalist tradition (as he does) also has some drawbacks.

Granted, presenting a “naked” model such as Ratner’s, stripped of constitutionalist baggage, may be perceived as being more “neutral” and less burdened by cultural, political, and regional idiosyncrasies which might render a global reception of the ideas more difficult. On the other hand, this (seeming) neutrality makes the model vulnerable, too. A principal objection against Ratner’s justice standards might be that these standards have been “invented” by a US-American scholar without any foundation in a broader legal (and political) tradition. The fact that the two-pillar model corresponds and mirrors classic constitutionalist revendications, namely the rule of law and fundamental rights protection, actually suggests to espouse that tradition in order to contextualize the model, and make it palatable in that way. But overall, and I concede this, such a contextualization might cut both ways.

As mentioned, the most challenging, but at the same time frequent constellation is that of the two-pillar principles pointing in opposite directions. The balancing exercise recommended by Ratner will immediately remind any constitutional lawyer of balancing in the area of fundamental rights, for example balancing a teacher’s right to express her religious conviction through wearing a headscarf against the need for protecting order at school, and against the students’ negative right not to be confronted with a religious symbol.

Again, the difference is that Ratner engages in this balancing not in order to decide – as a Constitutional or a Human Rights Court would do – whether a norm (let us say a law on schools) is in conformity with some

fundamental rights guarantee, expressed in a state constitution or in an international human rights covenant, but in order to assess whether a given norm is “just”. Nevertheless, the structure of the argument is identical: the “proper” rule of behaviour will be identified by taking into account conflicting interests of various individuals or groups involved, and by seeking to do least harm to them. Under the premise that this type of balancing is a typical “constitutional” technique, the entire two-pillar scheme can be seen as a constitutionalist approach.

## Appetite for more

Steven Ratner’s great merit is that he distils, from the law as it stands and considerations of fairness, a “justice”-standard which is both appealing and commonsensical, then applies it in earnest to the most salient issues of international law, and finally makes suggestions for reforming the law so as to satisfy that standard. In doing so, Ratner displays a deep knowledge of the law as applied and of the state of the legal discussion.

Beyond this, the book does an admirable job in bridging the gap between two disciplines, namely international legal scholarship and ethics. This is a welcome exception in the current academic landscape, in which philosophers merrily speculate about international law but without any connection to the law as it stands (and often without any connection to reality either), and where international legal scholars shy away from reflecting about the morality of the rules they are discussing or proposing, and usually treat the philosophers with disdain. Steven Ratner is philosophically-minded enough to digest philosophical writing, all the while fully mastering international law from the inside, based not only on his long publication and teaching record, but also on his practical experience with international law.

No reader will accuse Ratner of being too utopian. But is he too apologetic? He makes the fundamental point “that international law has indeed played a significant role in creating a more just world, and that, regardless of its origin in power politics or in historical contingencies, a large set of its norms have a significant moral stature. Those norms ... are *not only victories of the strong over the weak ...*, but also *morally justifiable* rules for addressing globally significant claims.” (p. 414). But does not the (non-)flowchart, the two-pillar scheme, and the three-prong test (p. 84), which generates an ultimately overwhelmingly positive assessment of international law, only deliver obvious or even banal and Western-biased results?

Not quite. Some (few) norms of the law as it stands (or is presumed to stand by most observers), when scrutinized in the three-prong test, turn out to be “unjust”, for example the total ban on (humanitarian) intervention, the total ban on secession, and the rule on state sovereignty as defined by the ICJ in the case *Germany v. Italy*. But actually, exactly that *lex lata* is not completely clear. With regard to the mentioned norms, state practice is interpreted differently by different observers, and there is no unanimous view on what the law really says. For example, quite a few scholars opine that international law does (in extreme case) allow humanitarian interventions, and that it does (in extreme cases) allow for a secession. From that perspective, Ratner’s justice-analysis again confirms the law (as they think it already stands). Exactly in this state of legal uncertainty, Ratner’s analysis is particularly valuable, because it offers a normative argument for interpreting the extant practice and documents in one direction.

Overall, Ratner’s book shows that international legal scholars should not worry too much about obesity.