Positing the contractarian conception of "justice" proposed by John Rawls,¹ Professor Beitz has attempted to explore the moral obligations of people to assist weaker members of the world community—the disadvantaged of other states.² This exploration has the strengths and weaknesses of a derivative work. It adopts the vocabulary and assumes the fundamental acceptability of Rawls's model, and then adds to the model a superstructure and modifications to make it applicable to the external as well as to the internal moral policies of states. Those persons to whom the Rawls model is unacceptable will find Beitz equally off the mark. Those to whom the Rawls model seems useful will have their horizons usefully broadened.

To agree with Beitz the reader must accept "justice" as a major aim of society and the concept of "justice" as not being directly related to the concept of law. In other words, despite the contractarian language, we are in the world of natural law, not of positive law—the world of Jeremy Bentham³ rather than John Austin.⁴ "Justice" in this conception does not relate to common law and statutes or, in the sphere of international law, to practices accepted as law and general principles of law accepted by pertinent national legal systems. Instead, for the purposes of this analysis, "justice" is the ideal global distribution of rights (including property rights) resulting from the acceptance and application of particular a priori principles.

Beitz and Rawls envision a group of "rational persons" meeting in an "original position" to decide upon a "social contract" that will reflect the principles of justice that the advantage of their po-

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¹ Professor of International Law, Fletcher School of Law and Diplomacy.

² C. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979) [hereinafter cited without cross-reference as BEITZ].

³ See, e.g., J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALITY AND LEGISLATION (1780-1789).

⁴ See, e.g., J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).
sition permits them to discover. One condition of this “original position” is that a “veil of ignorance” prevents any of the participants from learning the identities of the persons who would gain or lose by any specific rule. Rawls asserts, and Beitz assumes, that certain fundamental “moral” rules would emerge from such a meeting. Chief among them is the principle that “all social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored.”

Beitz concludes, not surprisingly, that this model could be quite useful for those who would act internationally to promote “justice.” Some of his analyses do indeed contain insights of general applicability, such as his conclusion that to do justice one must focus on individuals as the ultimate recipients of goods rather than on states, because distributing advantages to the already-advantaged elites of unjust states does not work to the advantage of the least favored in any meaningful way. Other conclusions, however, such as his rather elusive declaration that “self-determination” is “just” for any group when it is “the only way for the oppressed group to secure conditions supportive of just institutions” seem less incisive.

As with all internally consistent systems, it is impossible to criticize Beitz’s analysis except perhaps for peripheral inconsistencies. Such inconsistencies, however, would not in any case detract from its utility as a clarification of the contractarian-naturalist approach for those internationalists who find that approach a useful guide of moral policy. The better criticism must be directed toward the insularity of the approach itself.

I

Rawls and Beitz assume that a policy based on “justice” as they define it will be perceived as “just” by those whose perceptions matter to the policy-makers. This assumption underlies their preoccupation with distributive justice at the expense of other types of justice no less deserving of consideration. The fairness of

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* See Beitz at 130; Rawls at 118-30.
* See Beitz at 130; Rawls at 136-37.
7 Beitz at 130 n.6 (quoting Rawls at 303).
* See Beitz at 152-53.
9 Id. at 115.
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an exchange as between the parties to it, the core of commutative justice, for example, is dependent upon the perceptions of the parties. Rawls and Beitz, however, concentrating solely on distributive elements of justice, must assume that the parties to the redistribution scheme that the authors propose share their evaluation of its commutative justice. Were this not so, then policymakers, pursuing a "just" policy with a warm glow of self-satisfaction, could be surprised to find their best efforts regarded as cultural imperialism, paternalism, or worse. Such dissent would make no difference to the moral judgment of the policy-maker himself, but it would certainly reduce his ability to pursue the "just" policy his moral sense dictates, and would necessarily raise doubts about the comprehensiveness of his ideal conception of "justice."

My point is not that the ideal is never attainable, or that the equal right of all societies to determine their own moral codes should lead us to reject the search for a moral guide either for ourselves or for a universal society; Beitz has properly rejected those arguments. My point is that particular actions that impact on other persons must be perceived by those other persons as "just," whether or not those recipients of action accept the entire system. Failure to include the objects of charity or the other party to a bargain in the equation by which the "justice" of the gift or bargain is measured violates principles of commutative justice.

This is more than a merely academic objection. As Beitz himself seems to acknowledge, the United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources focused primarily on an issue of commutative justice. The impetus for that resolution was the perceived inadequacy of compensation from multinational corporations and their sponsoring governments to less affluent governments for access to their natural resources, and the belief that such access had on occasion been granted improvidently or under "unjust" economic or political pressures. The concern that a transaction regarding natural resources be fairly negotiated and equitable is a commutative concern wholly distinct from the question whether those natural resources were justly distributed in the first instance. Many statesmen brought up in the

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11 See, e.g., Beitz at 181.
12 Id. at 142 n.31.
Anglo-American and European legal traditions, as well as many raised in Islamic, Chinese, and other influential and sophisticated legal and moral traditions, do not regard a lack of distributive justice as the sole complaint against an allegedly unjust international moral order.\(^{14}\)

Of course, the authors have provided a partial answer to this objection. Rawls's fundamental rule that permits only those unequal bargains that advantage the least favored\(^{15}\) includes a conception of commutative justice, although it requires a departure from commutative justice when, in the particular case, that departure is in the interest of distributive justice.\(^{16}\) But that is not a complete answer, since Rawls's formulation, and Beitz's use of it as a moral rule, are directed not toward individual bargains but toward legislative policy. Furthermore, part of the Rawls-Beitz elaboration of this rule posits each person having "an equal right to the most extensive total system of equal basic liberties [including, presumably, the liberty to enter into a disadvantageous contract] compatible with a similar system of liberty for all."\(^{17}\) When a jurisprudential model includes exceptions as large as its rules and leaves individual analysts free to come to any conclusion at all in particular cases, it is difficult to discern the model's utility as a guide to policy.

II

What is needed as a guide to enlightened policy is a different framework that includes conceptions of justice not arrived at by the application of \textit{a priori} principles, but by the perception of rules accepted by losers as well as winners in real cases. That is the
genius of the Anglo-American common law and of the general system of international law so badly misunderstood by Beitz and, to our universal detriment, by our political leaders.

The extent of Beitz's misunderstanding is evident from his adoption\(^\text{18}\) of a segment of Rawls,\(^\text{19}\) which both authors contend to be based on sections of Brierly's *The Law of Nations*.\(^\text{20}\) Beitz seems to assert the existence of five basic moral principles from which all substantive international law flows: self-determination, nonintervention, the sanctity of treaty commitments, the right of self-defense, and limits to the direction of force in armed conflict. Yet these five concepts in fact are not *a priori* "principles" of the international legal order; they exist on widely different levels of generality and are used with greatly varying degrees of persuasiveness as justifications for conduct.\(^\text{21}\) Moreover, large areas of international law, including perhaps the bulk of rules regularly applied in practice, such as those of diplomatic immunity, do not derive from these so-called principles in any way. They derive instead from the needs of society rationalized as "just" by governments as the occasion demands through public statements and diplomatic correspondence, much as Anglo-American principles of tort law derive from the perceptions of lawyers arguing for "justice" before each other (and occasionally before judges) as the occasion demands.

This is not the place to explore the analogy in great detail, but once it is grasped that Anglo-American common law and even constitutional law are, despite the written American Constitution, fundamentally customary law systems in which reference to third-party adjudication is the exception rather than the rule, the glib assumption that lack of criminal-law-type enforcement techniques differentiates international law from domestic law must fail. Thus Beitz's finding of a key distinction between the international order and "domestic" orders—the lack of a reliable way of enforcing compliance with international redistributive policies\(^\text{22}\)—seems

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\(^\text{18}\) *Beitz* at 134.

\(^\text{19}\) *Rawls* at 378-79.


\(^\text{21}\) More is required for meaningful discussion of "basic principles" than recitation of cliches. Regarding the principles of nonintervention and self-determination, see text at IV *infra* and text and note at note 40 *infra*.

\(^\text{22}\) *Beitz* at 154-55.
superficial indeed. If all he means is that there is no overt taxing authority in the international order to redistribute earnings and inheritances, he has chosen a very small issue, considering how ineffective taxing policies in most countries actually are in working any redistribution comparable to what Beitz implies is demanded by justice.

When political theorists begin to build jurisprudential distinctions on the supposed possibility of a thoroughgoing redistribution system in domestic society as contrasted with a supposed impossibility of creating such a system in international society, the error is even greater. The obstacle to effective redistribution of goods in both societies is the refusal of those having goods to agree to such a reform—indeed, to agree that such a reform would be "just"—and if their agreement could be obtained, there would be no greater obstacle to a redistribution of wealth in international society than there is in domestic societies. To the extent that Beitz uses the factor of coercive enforcement to distinguish his proposed international moral order from the existing international legal order, his contentions must be questioned for their accuracy as well as the "justice" of their goals.

III

The failure to recognize international law as a customary-law system dependent on the perceptions of its participants for its means of enforcement can also lead to misunderstanding regarding the legislative process of international law. Beitz at one point refers to the General Assembly Declaration on the Establishment of a New International Economic Order, but he later maintains that without "coercive global institutions," the redistribution policies he proposes could not be adequately enforced. Beitz and others appear to assume that because instruments such as the New International Economic Order Declaration lack coercive enforcement mechanisms to support them, they are ineffective as legislation. But they were never intended to be legislation; legislation as such is beyond the legal authority of the General Assembly. Those who expect such instruments to be respected as legislation are not only likely to be disappointed, but also reveal their confusion re-

24 See Beitz at 174.
25 See J. Brierly, supra note 20, at 110.
garding the purposes of such documents. These resolutions serve not as laws, but as exercises in persuasion aimed at encouraging legislation through the usual legislative mechanisms of a customary-law system. They are useful in part because the conviction of international actors that a particular international program is just helps to create the conviction of legal, as distinguished from political, compulsion that is a prerequisite for its binding force. In this case, the New International Economic Order Declaration seeks to create a conviction of legal force to underlie practices originally begun as a matter of grace. In asserting the necessity of a coercive regime to enforce international objectives, Beitz misunderstands the importance of the actors' perceptions presented by the very existence of such documents as the New International Economic Order Declaration.

IV

This loss of touch with commutative justice, misunderstanding of the international order, and confusion between the moral imperatives of "justice" and the legislative process of international law, are three distinct but interrelated examples of a fundamental misconception at the root of Beitz's work—that externally enforced a priori models of moral justice could become a persuasive force in the determination of international law. This basic misunderstanding, as well as the insularity of Beitz's outlook, is evident in such minor matters as his discussion of self-determination. Beitz deals with the problem of how to determine which groups are entitled to claim the right of self-determination by addressing elaborate—and irrelevant—constructs such as "nationality" and "ethnicity," and in the process ignores the writings of authors with some direct insight into the true dynamics of self-determination.

Two Eastern Nigerian scholars, for example, presumably inspired by the Biafra crisis, have written lucid essays on self-determination as the concept derives from the practice of states and convictions of law and "justice" evidenced by international correspondence and political needs. U.O. Umozurike presents an argumentative work, originally completed as a doctoral dissertation at Oxford, that illustrates the kind of data and logic that statesmen find convincing for purposes of an adversary confrontation. Chris

26 Beitz at 114-15 & 115 n.93.
N. Okeke's more subtle analysis\textsuperscript{28} reaches the same conclusions, supporting self-determination as a "right" of any self-defined group. Okeke argues that the law requires states to treat as "belligerents" some groups not yet able to act as "governments" of states but sufficiently cohesive to establish a collective identity requiring international status. His basic viewpoint is sound and could be helpful in resolving the question of who is entitled to "self-determination" without recourse to the irrelevancies that trouble Beitz. Okeke's type of argument, supporting new conclusions that seem to be required by the impact of new facts on a traditional system, is totally lacking in Beitz's work. Statesmen who feel impelled to lead their states along the paths of the law are far more likely to be persuaded by such an argument than by the \textit{a priori} models of moral suasion used by Beitz.

V

Beitz's misunderstanding of the international legal order is most evident in his emphasis on enforcement as an essential element of law and his exaggeration of the legal effect of article 2(4) of the United Nations Charter,\textsuperscript{29} under which the members of the United Nations undertook in their international relations generally to refrain from the threat or use of force.\textsuperscript{30} Not only is it not self-evident that the realistic threat of external enforcement is a necessary ingredient to a legal order, but it is simply not true that the international legal order lacks a background threat of coercive enforcement or that article 2(4) in any significant way curtails the actual enforcement mechanisms of the international legal order.

A

Regarding the first point, there is no threat of external coercion enforcing judicial decisions limiting governmental power under the British constitutional system, or, for that matter, under

\textsuperscript{28} C. OKEKE, \textsc{Controversial Subjects of Contemporary International Law} (1974).

\textsuperscript{29} "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. \textsc{Charter} art. 2, para. 4.

\textsuperscript{30} \textit{See} Beitz at 93. Beitz seems to regard article 2(4) as somehow enshrining self-determination as a "main principle of international law," \textit{id.}, and notes that the General Assembly repeatedly cites self-determination "as if it were a self-evident first principle," \textit{id.} at 94.
the American constitutional system.\textsuperscript{31} Yet we routinely acknowledge that it is their unwritten and written constitutions that enable us to characterize the governments of the United Kingdom and the United States as governments based on law. Furthermore, recourse to tribunals, even where theoretically possible in tort, contract, or property disputes, is only rarely considered in day-to-day practice by knowledgeable lawyers; the vast bulk of business and neighborly disputes is settled by negotiation in the light of the law with no party remotely contemplating appeal to any court.

Moreover, even in domestic legal systems and in international law the pressure for compliance comes, in the overwhelming number of situations, not from outside the actor but from within him. In domestic systems, extralegal social pressures, the internal pressure of conscience, the desire to seem righteous, or the mere apprehension of reciprocal behavior (not necessarily by those with capacity to retaliate in kind), suffices to assure that individuals generally comply with the law. Similarly in international affairs, the pressures from internal elites and their external friends (not necessarily those with official positions in foreign governments) provide a social pressure on prospective policy-makers that, coupled with deeply felt traditions of righteousness and theoretical apprehensions of reciprocity, serve to keep most governments generally law abiding. The United States did not invade Cuba in 1961 or 1962, although it had overwhelming military power in the Caribbean area and Soviet intervention was most unlikely either at the time of the Bay of Pigs or the Cuban Missile Crisis. The Soviet Union has not prevented American vessels from entering its claimed Northern Sea Route, but has prevented them from drilling core samples of the Soviet continental shelf and from using certain straits in the route for which the Soviet claim to a right to stop them was legally strong.\textsuperscript{32} Both the Soviet Union and the United States, when using force in pursuit of their respective national interests, have attempted to justify particular interventions in legal terms; the Soviet attempts to justify their occupation of Afghanistan are patently unconvincing, but the Soviet attempts to justify

\textsuperscript{31} It is true that the political-question doctrine might be viewed as resulting from the realization that the judiciary lacks the coercive power to enforce certain decisions against other branches of the federal government or the states, but the Supreme Court is relatively free to disregard the doctrine when it so chooses.

\textsuperscript{32} See V. Livada, The Legal, Political, Strategic, Technical, and Environmental Implications of Arctic Basin Resources 430-36 (Sept., 1977) (unpublished Ph.D. dissertation at the Fletcher School of Law and Diplomacy).
their occupation of Czechoslovakia bear an unfortunate resemblance to American explanations for our armed intervention in the Dominican Republic.\textsuperscript{33}

Undeniably, the enforcement of international law rests to a certain extent on political evaluations and pressures. Normally the law is observed, but occasionally it is not; when it is not, political enforcement mechanisms create countervailing pressures and other effects that diminish the advantage gained by the illegal act. Very rarely, an illegal act goes without protest or other reaction, in which case the party acting illegally "gets away with it." But is not the enforcement of municipal tort and criminal law influenced by political and discretionary factors as well? To argue that because the enforcement mechanisms of international law are political, there is no evidence that the law as such exists outside of political calculations, is to reduce municipal law as well as international law to mere politics. This political view of law may seem appealing to some analysts, but it is not a basis for distinguishing international law from domestic law.

B

Furthermore, international law has, in the United Nations Charter, the substance of an enforcement system closely analogous to even domestic criminal law in many respects. The proscription in article 2(4) of the threat or use of force\textsuperscript{34} cannot be fully understood without first examining the enforcement provisions of article 2(6) and Chapter VII\textsuperscript{35} of the Charter. Article 2(6) requires the Organization to "ensure that states which are not Members of the United Nations act in accordance with these Principles [the principles set out in article 2 of the Charter] so far as may be necessary for the maintenance of international peace and security." By signing the Charter, all 152 member-states of the Organization have consented to an enforcement system under which a Security Council of fifteen members has the authority, through article 39,\textsuperscript{36} to

\textsuperscript{33} See, e.g., T. Franck & E. Weissband, Word Politics 96-113 (1971) (branding the similarity as "The Echo Phenomenon"). Nor should the capacity of small powers to harass great powers in their own right be underestimated; American diplomats are being held hostage in Iran, patently illegally, as this is written.

\textsuperscript{34} See text and note at note 29 supra.

\textsuperscript{35} U.N. Charter arts. 39-51.

\textsuperscript{36} "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security." Id.
decide on measures to be taken whenever they collectively perceive any threat to the peace. Under article 25, the members must carry out those decisions, and article 42 explicitly permits such decisions to incorporate the use of force. It would thus appear that article 2(4)'s prohibition of force does not impose such absolute constraints on the coercive power of the international legal order as Beitz seems to believe.

Of course, it is highly unlikely that the Organization itself would use force acting under either authority, article 2(6), applying to nonmembers, or Chapter VII, applying to members. Nevertheless, there have been instances in which some forcible action by the Organization as a whole has been considered and member states have been authorized to take something approaching enforcement action. Furthermore, it is difficult to condemn the use of political discretion in enforcement, and impossible to argue rationally that political discretion in the United Nations enforcement system deprives that system of the characteristics of a legal order. The use of political discretion in enforcement is a problem common to all coercive legal orders. The pardon of President Nixon, the failure to use the criminal justice system to probe the Kent State killings of 1970, and the plea bargain that saved Vice President Agnew from imprisonment in 1973, are clear American examples of the use, if not the abuse, of such discretion. Moreover, where effective enforcement of even the frankly coercive aspects of our domestic criminal justice system is impossible, as in many American cities, the system is still regarded as law. Adjustments are made by the subjects of the system, particularly in urban areas, through the formation of individual and collective defense arrangements parallel to but outside the formal enforcement mechanisms of the system. And whereas domestic legal systems look with disfavor on those extra-system safeguards of legally protected interests, and may even in some cases label them illegal, the international legal order

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27 "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Id. art. 25.

28 Should the Security Council consider that measures [previously] provided for . . . would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id. art. 42.
seems more realistic. Through article 52,\textsuperscript{39} the United Nations Charter accepts a defense role for regional organizations, and article 51\textsuperscript{40} permits action in collective self-defense as part of the enforcement machinery of the system itself.

The closest analogy to international law in domestic law relates to systems of constitutional, contract, tort, and property law, and the international legal order already contains an enforcement mechanism that cannot easily be distinguished from the enforcement mechanisms of those branches of domestic law. The conclusion drawn from the purported distinction between the domestic and international orders, that a coercive international moral order must be established since the present international legal order lacks effective means of enforcement, must therefore fall. Of course, in many ways the international legal order is different from domestic legal orders of the coercive sort, but generalities about “justice” in any way pertinent to international law do not, and from the very nature of international law cannot, flow from those differences.

In sum, Beitz, building on Rawls, has proposed a model of the international moral order that he distinguishes from the international legal order by use of a false analogy, and in its own terms seems to ignore the issues of commutative justice that many would regard as the essence of today’s widely felt dissatisfaction with the international legal order.

\textsuperscript{39} Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

\textit{Id.} art. 52, para. 1.

\textsuperscript{40} “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.” \textit{Id.} art 51.