



# Cosmopolitanism in Context

**Perspectives from International Law and Political Theory**

EDITED BY

Roland Pierik and Wouter Werner

CAMBRIDGE

## COSMOPOLITANISM IN CONTEXT

Is it possible and desirable to translate the basic principles underlying cosmopolitanism as a moral standard into effective global institutions? Will the ideals of inclusiveness and equal moral concern for all survive the marriage between cosmopolitanism and institutional power? What are the effects of such bureaucratization of cosmopolitan ideals?

This book examines the strained relationship between cosmopolitanism as a moral standard and the legal institutions in which cosmopolitan norms and principles are to be implemented. Five areas of global concern are analyzed: environmental protection; economic regulation; peace and security; the fight against international crimes; and migration.

ROLAND PIERIK is Associate Professor in Political and Legal Philosophy at the University of Amsterdam, where he researches political and legal philosophy and public policy.

WOUTER WERNER is Professor in Public International Law at VU University, Amsterdam, where his main fields of interest are international legal theory; the interplay between international law and international politics; and conflict and security law.



COSMOPOLITANISM IN  
CONTEXT: PERSPECTIVES  
FROM INTERNATIONAL LAW  
AND POLITICAL THEORY

ROLAND PIERIK AND WOUTER WERNER



CAMBRIDGE  
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS  
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,  
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press  
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org  
Information on this title: www.cambridge.org/9780521191944

© Cambridge University Press 2010

This publication is in copyright. Subject to statutory exception  
and to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without the written  
permission of Cambridge University Press.

First published 2010

Printed in the United Kingdom at the University Press, Cambridge

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*  
Cosmopolitanism in context : perspectives from international law and  
political theory / [edited by] Roland Pierik, Wouter Werner.

p. cm.

Includes bibliographical references.

ISBN 978-0-521-19194-4

1. Cosmopolitanism. I. Pierik, Roland H. M. II. Werner, W. G.  
(Wouter G.), 1966– III. Title.

JZ1308.C678 2010

306–dc22

2010014630

ISBN 978-0-521-19194-4 Hardback

Cambridge University Press has no responsibility for the persistence or  
accuracy of URLs for external or third-party internet websites referred to in  
this publication, and does not guarantee that any content on such websites is,  
or will remain, accurate or appropriate.

## CONTENTS

- 1 Cosmopolitanism in context: an introduction**      *page 1*  
ROLAND PIERIK, *Legal Theory and Legal Philosophy*,  
*University of Amsterdam*  
WOUTER WERNER, *International Law*,  
*VU University Amsterdam*
- Part I Environmental protection**
- 2 Human rights and global climate change**      **19**  
SIMON CANEY, *Political Theory*, *Oxford University*
- 3 Global environmental law and global institutions:  
a system lacking “good process”**      **45**  
ELLEN HEY, *International Law*,  
*Erasmus University, Rotterdam*
- Part II World Trade Organization**
- 4 The WTO/GATS Mode 4, international labor migration  
regimes and global justice**      **75**  
TOMER BROUDE, *Law*, *Hebrew University of Jerusalem*
- 5 Incentives for pharmaceutical research: must they exclude  
the poor from advanced medicines?**      **106**  
THOMAS POGGE, *Philosophy*, *Yale University*
- Part III Collective security and intervention**
- 6 Cosmopolitan legitimacy and UN collective security**      **129**  
NICHOLAS TSAGOURIAS, *Law*, *University of Bristol*
- 7 Enforcing cosmopolitan justice: the problem of  
intervention**      **155**  
KOK-CHOR TAN, *Philosophy*, *University of Pennsylvania*

### Part IV International Criminal Court

#### 8 Rawls's Law of Peoples and the International Criminal Court 179

STEVEN C. ROACH, *Government, University of South Florida*

#### 9 An ideal becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice 195

VICTOR PESKIN, *The School of Global Studies, Arizona State University*

### Part V International migration

#### 10 Is immigration a human right? 221

JORGE M. VALADEZ, *Philosophy, Our Lady of the Lake University*

#### 11 A distributive approach to migration law: or the convergence of communitarianism, libertarianism, and the status quo 249

THOMAS SPIJKERBOER, *Law, VU University Amsterdam*

### Part VI Conclusion

#### 12 Can cosmopolitanism survive institutionalization? 277

ROLAND PIERIK, *Legal Theory and Legal Philosophy, University of Amsterdam*

WOUTER WERNER, *International Law, VU University, Amsterdam*

*Index* 290

---

## Can cosmopolitanism survive institutionalization?

ROLAND PIERIK AND WOUTER WERNER

*Today, the question is not whether to be cosmopolitan or not but what kind of cosmopolis one should prefer, against what particularity should one be poised today.<sup>1</sup>*

This book has examined the relationship between cosmopolitanism as a moral standard and the (legal) institutions in which cosmopolitan norms and principles are to be implemented. The several chapters have analyzed five areas of global concern: environmental protection, economic regulation, peace and security, the fight against international crimes, and migration. The question regarding the relation between moral cosmopolitanism and legal institutions has gained renewed attention in the past few decades, mainly for two reasons.

In the first place, cosmopolitan norms affect many areas of contemporary life. As Jeremy Waldron has argued, these cosmopolitan norms have penetrated daily life as “a dense thicket of rules that sustain our life together, a life shared by people and peoples, not just in any particular society but generally on the face of the Earth.”<sup>2</sup> Cosmopolitan ideals have also found their way into international legal documents and have inspired the establishment of international institutions. Increasingly, international law has incorporated notions such as “the common bonds” and the “shared heritage” of all peoples,<sup>3</sup> the idea of human dignity, or the notion that environmental protection is a “common concern of humankind.”<sup>4</sup> Of course, this is not to say that all international institutions and regimes are now founded upon cosmopolitan principles or moving progressively towards ideals of global justice. Cosmopolitan values are not incorporated by all international legal institutions,

<sup>1</sup> Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), p. 515.

<sup>2</sup> Jeremy Waldron, “Cosmopolitan Norms,” in *Another Cosmopolitanism*, ed. Robert Post (New York: Oxford University Press, 2006), p. 83.

<sup>3</sup> Preamble of the Rome Statute establishing the International Criminal Court.

<sup>4</sup> Preamble of the 1992 Convention on Biological Diversity (Biodiversity Convention).



as Tomer Broude's analysis of the GATS regime on labor migration demonstrates. In his contribution to this volume, Broude sets out how the GATS labor mobility regime fails to meet criteria derived from theories of global justice, including cosmopolitanism. This shows that it is not possible to uncritically assume that Waldron's "dense thicket of cosmopolitan rules" extends to all aspects of institutional life. Even where institutions incorporate cosmopolitan values, these values generally have to compete with values derived from competing theories of (global) justice and national interest.

Neither is it to say that the rise of cosmopolitanism is entirely new to international law. On the contrary, the history of international law can be read as a constant wavering between more cosmopolitan-oriented and more state-centric readings of international law, up to present-day discussions about the constitutional or consensual nature of international law.<sup>5</sup> Yet, although debates on cosmopolitanism are far from novel, the unprecedented scale on which cosmopolitanism ideals have become institutionalized nowadays has given them renewed meaning and force. The proliferation of cosmopolitan elements in positive international law has confronted international lawyers and political philosophers with some of the age-old questions in relation to cosmopolitanism. Can cosmopolitanism retain its critical potential when it becomes part of the world of institutions, diplomacy, and power politics? In what ways, if any, does cosmopolitanism affect legal reasoning and the exercise of power? What happens when ideals of moral cosmopolitanism are incorporated in positive international law?

The second reason why the relation between moral cosmopolitanism and legal institutions has gained renewed attention lies in recent developments in political philosophy. A defining moment in this respect was the publication of Rawls's *Law of Peoples* in 1999. In this book Rawls presented his theory of international justice as an alternative for, and a critique of the cosmopolitan attempts to globalize his domestic *Theory of Justice*. Rawls's attempt to set out rules for international cooperation between peoples (or better: states) raised many objections, especially from liberal cosmopolitan thinkers. The

<sup>5</sup> See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument, Re-issued with Epilogue* (Cambridge: Cambridge University Press, 2005). For an analysis of state sovereignty and international constitutionalism see Wouter Werner, "The Never Ending Closure: Constitutionalism and International Law," in *Transnational Constitutionalism: European and International Perspectives*, ed. Nicholas Tsagourias (Cambridge: Cambridge University Press, 2007).

publication of the *Law of Peoples* generated a thriving debate on global justice and, consequently, a renewed political–philosophical interest in – liberal – cosmopolitanism.

The quite ambitious program of liberal cosmopolitanism in political philosophy, however, raised an important question: is it feasible to elaborate ideas derived from moral cosmopolitanism into the world of international law and politics? Would that not turn cosmopolitanism into a pie in the sky or a justification for the exercise of imperial power? That is, political philosophers were confronted with questions similar to those that occupied the minds of international lawyers: what is the relation between cosmopolitanism as an abstract moral standard and cosmopolitanism as an institutional practice?

The chapters in this book have examined the questions identified above on the basis of three approaches, which may be called (i) the normative deductive approach (ii) the critical reconstructivist approach and (iii) the critical deconstructivist approach. Below, we will explain the basic characteristics of the three approaches and set out how each approach has dealt with the relation between moral cosmopolitanism and its institutional implementation. It should be clear, however, that these approaches do not exhaust the possible ways in which moral and institutional cosmopolitanism can be studied.<sup>6</sup> Moreover, it should be kept in mind that the approaches are not necessarily mutually exclusive; the critical reconstructivist and the critical deconstructivist approaches especially, may overlap in their analysis of the effects of cosmopolitanism in specific contexts. Finally, it should be noticed that it is possible to find combinations of approaches within one and the same text. The categorization, in other words, is meant as an analytical tool to identify methods and modes of reasoning, not to label authors as belonging to one school or another.

### *The normative deductive approach*

Characteristic of the normative deductive approach is that it starts out from some basic and rather abstract normative assumptions, e.g. the assumption that all human beings deserve equal moral concern.<sup>7</sup>

<sup>6</sup> It is also possible, for example, to use an “inductive method” that tries to identify valid norms and principles based on their actual acceptance by states. For a more elaborated and nuanced discussion of the inductive method see Georg Schwarzenberge, “The Inductive Approach to International Law,” *Harvard Law Review* 60 (1947).

<sup>7</sup> Sometimes, cosmopolitan authors attempt to ground this assumption on more basic arguments. Such attempts tend to oscillate between two main types of justifications. The first

Subsequently, it deduces more concrete moral criteria for the guidance and evaluation of conduct from these general assumptions.

The normative deductive approach is predominant in contemporary cosmopolitan political theory and can be found in the work of leading authors such as Buchanan, Pogge, Caney, or Tan.<sup>8</sup> In this volume, the most articulated expression of this position can be found in Caney's chapter on global climate change. Caney starts out from three basic premises regarding the foundation of individual rights, the nature of global climate change, and the proportionality of measures that protect individuals against the ill-effects of global climate change. Subsequently, he tries to invalidate competing normative foundations and sketches the consequences of the adoption of his basic premises. The strength of the normative deductive approach is its analytical rigor and the precision with which the arguments are made. This makes it possible to articulate and critique systematically the normative assumptions underlying legal institutions and international legal discourse. As Rawls famously argued: "The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp of these more pressing problems."<sup>9</sup> As was already set out in the introduction to this volume, the normative deductive approach is also helpful in order to identify the structural injustices that are sustained by the international legal system. Caney's analysis, for example, helps to think through the often-made argument that we owe obligations towards future generations and the problem of how the burdens of global climate change should be distributed.

are justifications based on the existence of certain social facts, such as an overlapping global consensus on human rights (see for example Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004)) or a global structure of interaction and interdependence, see *inter alinea* Thomas Pogge, *World Poverty and Human Rights* (Oxford: Polity Press, 2002), p. 20. The second are justifications based on naturalistic arguments, such as the existence of a natural duty to contribute to the creation of just institutions (Buchanan, *Justice, Legitimacy, and Self-Determination*; Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004)). It goes without saying that the factual and the naturalist foundations of cosmopolitanism are difficult to reconcile.

<sup>8</sup> Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics* 110, no. 4 (2000); Buchanan, *Justice, Legitimacy, and Self-Determination*; Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989); Pogge, *World Poverty and Human Rights*; Tan, *Justice Without Borders*; Simon Caney, *Justice Beyond Borders: A Global Political Theory* (Oxford: Oxford University Press, 2005).

<sup>9</sup> John Rawls, *A Theory of Justice Review* (ed.) (Oxford: Oxford University Press, 1999), p. 8.

However, the normative deductive approach also has a (potential) downside: its rather abstract character. Cosmopolitan political theory generally operates in the realm of “ideal theory,” which deals with the basic moral principles that a just society has to satisfy, on the assumption that members of a society actually live up to these principles.<sup>10</sup> While such thinking may be helpful in identifying and critiquing existing injustices,<sup>11</sup> it has limited value when confronted with actually-existing social contexts in which normative principles are to be applied. More specifically, it generally lacks a focus on the role of institutions, on the question of what it means if moral principles are institutionalized so as to govern a practice that covers many cases.<sup>12</sup>

Several chapters in this volume have sought to answer this question by addressing the problem of how institutions should be designed so as to ensure the realization of cosmopolitan ideals. The chapter by Pogge, for example, contains elaborate proposals for reforms of the international legal regime protecting intellectual property, taking into account cosmopolitan ideals *and* the realities of the global market. The chapter by Valadez provides another attempt at bridging the gap between ideal and non-ideal cosmopolitan theory. Based on principles of moral equality and fair participation, his chapter formulates desiderata for international and domestic immigration policies that do justice to the right of self-determination of peoples and the human rights of individuals.

What lessons can be learned from these attempts of linking cosmopolitan theory to institutional practice? In the first place, they show that cosmopolitan theory can be used in such a way that idealism is coupled with realism: cosmopolitanism can retain its critical potential vis-à-vis real existing institutions and inspire the development of concrete proposals for institutional reform. Pogge’s chapter provides the clearest example of concrete recommendations, while other chapters have moved in varying degrees from ideal towards non-ideal theory. The second lesson is that the move from ideal to non-ideal theory quite often results in recommendations that could also have been defended on the basis of overlapping theories of justice. Tan himself,

<sup>10</sup> *Ibid.*, pp. 308–09.

<sup>11</sup> As Rawls has put it, ideal theory should provide “some guidance in thinking about non-ideal theory, and so about difficult cases of how to deal with existing injustices. It should also help to clarify the goal of reform and to identify which wrongs are more grievous and hence more urgent to correct.” See: *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Mass.: Harvard University Press, 2001), p. 13.

<sup>12</sup> Buchanan, *Justice, Legitimacy, and Self-Determination*, p. 23.

for example, admits that his criteria for the use of armed force in international relations “do not derive specifically from liberal [cosmopolitan] morality but from more widely shared views about the morality of war.”<sup>13</sup> Another example is Valadez’s defense of self-determination, which is easily reconcilable with a moderate statist approach towards international relations. Of course, the fact that concrete proposals can be defended on the basis of different moral theories does not discount cosmopolitanism as such – it merely shows that cosmopolitan theory can be used to arrive at conclusions that are also acceptable for those who work on the basis of alternative moral theories. Yet, it does raise the question of whether it makes any practical difference whether one starts out from the cosmopolitanism position or from a competing theory of justice. While the majority of contributors to this volume have argued that it *does* make a difference, others have voiced skepticism in this regard.<sup>14</sup> The third lesson is that the best way to serve the ideals of cosmopolitanism may very well be an institutional design that is much more state-oriented.<sup>15</sup> Some contributions to this volume have questioned the wisdom of building international institutions (solely) on cosmopolitan principles. The chapter by Roach, for example, argues that the cosmopolitan ideals that underlie the International Criminal Court can only be realized via institutions that operate on the basis of a more cautious, Rawlsian approach towards international relations. A similar cautious approach towards the codification of moral cosmopolitanism can be found in the chapter by Valadez, who speaks out against an individual right of immigration.

### *Critical reconstruction*

The starting point of this approach is the adoption of cosmopolitan values and ideals in international legal documents and political parlance. A critical reconstruction starts out, for example, from the observation that environmental treaties recognize the existence of “common concerns for mankind” or the observation that the International Criminal Tribunal for the Former Yugoslavia has claimed that, within international law “... a State-sovereignty-oriented approach has been

<sup>13</sup> See Tan chapter, p. 17

<sup>14</sup> For a more elaborate discussion see *Critical deconstruction*, p. 283.

<sup>15</sup> For a discussion see also Thomas Pogge, “Cosmopolitanism and Sovereignty,” *Ethics* 103 (1992).

gradually supplanted by a human-being-oriented approach.”<sup>16</sup> By contrast to the normative deductive approach, however, it does not aim to deduce more concrete rights and duties from such abstract normative propositions. Neither does it use such observations inductively to identify the existence of rules of customary law or broader trends in international society.<sup>17</sup> Rather, it studies how the promises of cosmopolitanism work out in practice; in a world characterized by power differences and a still pivotal role for sovereign States. An important question in this regard is who has the power to decide in concrete circumstances on the applicability, meaning, and enforcement of cosmopolitan principles. In this context, the contributions to this volume have focused on two possible enforcers of cosmopolitan principles: States and international – or global – institutions.

The relationship between cosmopolitanism and State sovereignty is complex and somewhat paradoxical. On the one hand, cosmopolitanism seeks to go beyond the boundaries of sovereign States, as to include rights and interests of individuals and global society as a whole. In international law, this has found expression in what Simma has labeled “community interests”; interests that transcend the interests of individual States such as the protection of the global environment, human rights, or collective security.<sup>18</sup> In political philosophy the same idea has been voiced in theories that seek *Justice Beyond Borders*, *Justice Without Borders* or “Rules for a post-Westphalian world.”<sup>19</sup> On the other hand, sovereign States remain the primary entities that are supposed to act upon and enforce cosmopolitan values. The idea of a world government is rejected by the vast majority of political philosophers, while international treaties that embrace cosmopolitan values tend to endow States with the primary task of guarding the interests of individuals and global society as a whole. States, in other words, are supposed to act as agents of the global community, with the primary responsibility to determine in concrete cases what cosmopolitan justice requires.

Several contributions in this volume illustrate the paradoxical relationship between cosmopolitanism and State sovereignty. Tan’s chapter,

<sup>16</sup> Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

<sup>17</sup> For the inductive method see above, supra note 6.

<sup>18</sup> Bruno Simma, “From Bilateralism to Community Interest in International Law,” *Recueil des Cours* (1994).

<sup>19</sup> Caney, *Justice Beyond Borders*; Tan, *Justice Without Borders*; Buchanan, “Rawls’s Law of Peoples.”

for example, shows the still pivotal position of State sovereignty in liberal cosmopolitan political theory. His chapter starts out from the need to restrict the powers of States in order to protect basic human rights. At the same time, however, it advocates a right of humanitarian intervention for other States in case of gross violations of human rights. States thus simultaneously appear as threats to and guardians of human rights. Other chapters illustrate how international law has dealt with the paradoxical relation between cosmopolitanism and State sovereignty. The contribution of Hey, for example, shows how international (or global) environmental law has moved beyond the inter-State paradigm, *inter alia* via the codification of moral cosmopolitanism in substantive legal provisions. Yet, global environmental law still regards States as the primary guardians of the rights and interests of individuals, future generations, and mankind as a whole. Similarly, Tsagourias' chapter shows how the UN system of collective security seeks to go beyond the interests of individual States, yet remains highly dependent upon the cooperation of sovereign States to counter threats to international peace and security. Another example is provided in Peskin's chapter, which demonstrates how strongly the realization of the International Criminal Court's promise of global justice depends on the capabilities and goodwill of States.

The effectiveness of cosmopolitanism, in other words, largely depends on the ability and willingness of States to act as agents of the global community. However, such "cosmopolitan self-disciplining" cannot be lightly presumed, as the different chapters in this volume attest. States often refuse to act upon the promises of cosmopolitan justice laid down in substantive legal provisions, or end up in political struggles on the meaning and force of such provisions in concrete circumstances. Cosmopolitanism then becomes the continuation of world politics with the inclusion of universalistic arguments.

One of the responses to the unresolved tension between cosmopolitan justice and State sovereignty is a turn to international institutions. Since 1945, international law has witnessed a proliferation of international organizations and supervisory bodies that aim to protect cosmopolitan values and foster the disciplining of sovereign States. While such attempts have certainly produced beneficial effects in different areas (see e.g. the European Convention on Human Rights), several contributions in this volume caution against too optimistic a view on global institutions. In the first place, as was set out above, the effectiveness of global institutions still heavily depends on the cooperation of the

very same States they seek to discipline. Secondly, global institutions themselves may help to sustain power-structures that run contrary to the cosmopolitan values they claim to protect. An example of the latter can be found in Hey's contribution to this volume, that shows how the lack of procedural fairness in global environmental institutions tends to marginalize developing countries, thus reflecting and reinforcing power inequalities in the world.

The critical reconstructive approach thus reveals one of the basic tensions in cosmopolitanism: that between the presumed moral unity of the world and the decentralized and dispersed structures of authority that are supposed to protect that unity. By focusing on questions of authority, interpretation, and enforcement, a critical reconstructive approach is able to indicate the borders of cosmopolitan justice in practice. It helps to identify obstacles to the realization of cosmopolitan ideals and to expose the potential dangers of the use of cosmopolitan arguments in world politics. In that way, it can also be used to formulate immanent critiques of cosmopolitanism; to confront the promise of global justice with the actual practices to which this promise gives rise. Moreover, it can point at alternative ways of looking at questions of global justice, e.g. by emphasizing the role of procedural fairness, by cautioning against the institutionalization of moral cosmopolitanism, or by advocating a more dynamic perspective on the way in which cosmopolitanism works in international practice.<sup>20</sup>

### *Critical deconstruction*

Roughly put, the term "deconstruction" stands for a series of techniques that can be used to conceal the contingency, fluidity, instability, and incoherence of structures of social meaning.<sup>21</sup> Within international law, insights borrowed from deconstructivism were popularized by scholars such as David Kennedy and Martti Koskenniemi.<sup>22</sup> Both argued that international legal argument lacks a stable and determinate foundation

<sup>20</sup> The issue of procedural fairness figures prominently in Ellen Hey's contribution. Valadez's chapter warns against the translation of moral cosmopolitanism into institutions in the area of migration policies. The chapter by Roach advocates an evolutionary perspective on cosmopolitan justice, while Tsagourias sets out how cosmopolitan principles and ideals are constantly reinvented in the search for legitimacy.

<sup>21</sup> Jack M. Balkin, "Deconstruction's Legal Career," *Cardozo Law Review* 27, no. 2 (1994), pp. 101, 102.

<sup>22</sup> David Kennedy, *International Legal Structures* (Baden-Baden: Nomos Verlag, 1987); Koskenniemi, *From Apology to Utopia*.



as it constantly oscillates between opposing positions: a consensual and a non-consensual foundation for the validity of rules, an emphasis on sovereignty and world order, a factual and a normative foundation for the existence of States, etc. In similar fashion, it would be possible to deconstruct cosmopolitan theories of justice. As the contributions to this volume have demonstrated, cosmopolitanism too rests on potentially conflicting and underdetermined foundations: global justice and State sovereignty, self-determination of peoples and individual freedom, naturalist and sociological underpinnings of basic duties of individuals, etc.

The question is, however, why one would want to engage in such an exercise, what is the point of revealing contingency, indeterminacy, or a lack of coherence. For some, the whole point of deconstruction is just that: to destabilize established concepts, to demonstrate the absence of solid foundations of knowledge and normative theories. However, there is no need to limit the purpose of deconstruction to an entirely negative task. It is equally possible to deconstruct established meanings with a more critical, “constructive” purpose: to identify injustices, to give voice to suppressed narratives, and to open up our mind to alternative ways of acting and thinking.

In this context, it is useful to recall Balkin’s idea that conceptual opposites (e.g. sovereign prerogatives and world order) can be understood as being “nested”; as containing both differences and similarities, “which manifest themselves in different contexts of judgment.”<sup>23</sup> Analyzing legal categories of theories of justice in terms of nested opposites has an important consequence. It requires attention for the specific context in which the conceptual opposites receive their meaning: in certain contexts concepts may appear to be radically opposed, while in others they may look quite similar. An example is the relation between cosmopolitan justice and the pursuit of national interests. In some contexts, notions of cosmopolitan justice set limits to and are opposed to what States perceive to be in the furtherance of their national interest, e.g. when cosmopolitan justice requires States to take a fair share of the burdens of climate change. In other contexts, however, notions of cosmopolitan justice may foster the pursuit of what States perceive

<sup>23</sup> Jack M. Balkin, “Being Just With Deconstruction,” available at: [www.yale.edu/lawweb/jbalkin/articles/beingjust1.htm](http://www.yale.edu/lawweb/jbalkin/articles/beingjust1.htm) (accessed March 11, 2009), at p. 6. An edited version of the same text was published in: *Social and Legal Studies*, 3, 393 (1994). For a more extensive analysis of nested oppositions see also from the same author: “Nested Oppositions,” (1990) *Yale Law Journal* 99: 1669–1705.

to be in their interest, e.g. where issues of national security are mixed with imperial agendas to re-model enemies after the imagery of decent liberal States.<sup>24</sup> This shows once more that the fluidity and indeterminacy of concepts such as “cosmopolitan justice” or “national interest” preclude any grand generalizations. Arguments made in the name of cosmopolitanism can be “inclusive and humane”<sup>25</sup> but also function as the “normative gloss of globalized capitalism at its imperial stage”<sup>26</sup>; depending on the context in which the arguments receive force and meaning. A contextualized approach makes it possible to engage more critically and more constructively in debates on the role of cosmopolitanism, acknowledging both its critical potential and the ever-looming danger that universalism is used to foster imperial ambitions.

Threads of a deconstructive approach can be found in Tsagourias’s chapter, especially where he shows how attempts to “constitutionalize” the United Nations are likely to reinforce the pivotal role of sovereign States. A more outspoken example is provided by Thomas Spijkerboer’s deconstruction of cosmopolitanism. Spijkerboer takes as his starting point the opposition between State sovereignty and cosmopolitanism in the context of migration. He argues that both positions agree on how the problem of migration is to be defined (as one of admission) and end up defending more or less the same status quo policies. The aim of Spijkerboer is not to deconstruct State sovereignty or cosmopolitanism as such. Rather, he seeks to lay bare the consequences of a particular way of defining the problem of migration, to set out the role of theories of justice in upholding the status quo, and to search for alternative ways of understanding the issues involved. Contextualized analysis of cosmopolitanism can thus contribute to the never-ending debates on the relation between positive laws, moral conventions, and the pursuit of justice. Valadez’s highly critical response to Spijkerboer’s arguments constitutes a good example of such an ongoing debate in the area of migration. It shows that theories of justice and existing institutional

<sup>24</sup> A prime example can be found in the 2002 US National Security Strategy, which aims to combine issues of national security with an imperial agenda framed in terms of universal and allegedly globally-shared values. Available at: [www.acq.osd.mil/nbcdp/nm/docs/Relevant%20Docs/national\\_security\\_strategy.pdf](http://www.acq.osd.mil/nbcdp/nm/docs/Relevant%20Docs/national_security_strategy.pdf) (accessed 11 march, 2009).

<sup>25</sup> Anne Orford, “A Jurisprudence of the Limit,” in *International Law and its Others*, ed. Anne Orford (Cambridge: Cambridge University Press, 2006), p. 3.

<sup>26</sup> Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, 2007), p. 176.

legal frameworks are to be treated as provisional, open to further critique and deconstruction.

*Cosmopolitanism and institutionalization:  
the never-ending story*

The chapters in this book have underlined the multi-faceted nature of cosmopolitan thinking in relation to legal institutions. Some chapters have used cosmopolitan theories as a tool for critiquing existing institutional frameworks and as a source of inspiration for international legal reform. Other chapters have focused more on the practical effects of institutionalizing cosmopolitan values in international law. Generally speaking, these approaches take a more critical stance towards cosmopolitanism, while emphasizing the paradoxical relation between State sovereignty and cosmopolitanism, the importance of procedural fairness, and the danger of abuse of cosmopolitan ideals. Yet others have questioned whether, in specific concrete contexts, it really matters whether one adheres to a cosmopolitan position or a more State-oriented position.

Taken together, the chapters aim to contribute to the never-ending debates on the relation between positive laws, moral conventions, and the pursuit of justice. These debates escape definite answers, because, as Balkin has argued, the relation between legal and moral conventions and the idea of justice is of an inherently dialectical nature: "Human law, culture, and convention are never perfectly just, but justice needs human law, culture, and convention to be articulated and enforced. There is a fundamental inadequation between our sense of justice and the products of culture, but we can only express this inadequation through the cultural means at our disposal ... Hence, our laws are imperfect not because they are bad copies of a determinate Form of justice, but because we must articulate our insatiable longing for justice in concrete institutions, and our constructions can never be identical with the longings which inspire them."<sup>27</sup>

This means that it is not only impossible, but also undesirable to close the gap between moral cosmopolitanism and actual institutions, ideal and non-ideal theory, cosmopolitan justice and positive

<sup>27</sup> Balkin, "Deconstruction's Legal Career," p. 11. For a more elaborate analysis see from the same author Jack M. Balkin, "Transcendental Deconstruction, Transcendent Justice," *Michigan Law Review* 92 (1994).

law. Cosmopolitanism is always also a “cosmopolitanism to come”<sup>28</sup>, a never-fully-realizable promise of global justice. Rather than searching for closure, the promises, gaps, blind spots, and actual effects of cosmopolitanism should be constantly revealed, discussed, and re-examined. Such an endeavor requires multidisciplinary cooperation and openness to insights from different fields. We hope that the chapters in this book have contributed to this enterprise.

<sup>28</sup> Douzinas, *Human Rights and Empire*.