

“GLOBALISING SOVEREIGNTY”? PETTIT’S
NEO-REPUBLICANISM, INTERNATIONAL LAW,
AND INTERNATIONAL INSTITUTIONS

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ABSTRACT. This article explores Philip Pettit’s recent attempts to extend his republican theory of justice and legitimacy to the international sphere in accordance with his ideal of “globalised sovereignty”, with a specific focus on his treatment of international law and institutions. It uses the practice of international law and institutions, with examples largely drawn from international economic law, to test the assumptions built into Pettit’s theory. It then considers whether and how some of those assumptions might need to be revised in light of the legal, institutional, and practical constraints of the international domain.

KEYWORDS: republicanism, Philip Pettit, domination, public international law, international institutions.

I. INTRODUCTION

Republican political and legal theory has for some time largely focused on questions of justice and legitimacy associated specifically with the modern state. Recently, however, a number of republican theorists have turned their gaze to the international and transnational spheres. This is as it should be, as states, their peoples, and the individuals that comprise them have long found their freedom subject to external forces. Greece has found its policy autonomy severely curtailed in its negotiations with the European Commission, the European Central Bank, and the International Monetary Fund. The climate in any given state is affected by every other state’s carbon emissions. Decisions about matters ranging from the kinds of weapons that a state’s military may use, to how a state may regulate cigarette packaging within its borders, are now made in the shadow of international law and institutions. Even for those whose primary focus is legitimacy and justice at the domestic level, what takes place at the international level cannot be ignored.

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Philip Pettit, one of the world's most eminent political theorists and a leading figure in the contemporary republican revival,¹ has recently sought to extend his distinctive theory of republicanism to the international sphere.² Just as he frames his republican theory as an alternative to prevailing liberal approaches to domestic justice and legitimacy, he frames his "republican law of peoples" as a desirable alternative to prevailing liberal accounts of international justice and legitimacy. His reconfiguration of republicanism for the international sphere allocates a prominent role to international law and institutions which demands careful scrutiny. As such, this article assesses Pettit's attempts to extend his republican "theory of freedom and government" to encompass the international order, with a specific focus on his treatment of international law and institutions. In doing so, it seeks to connect the nascent political theory literature on international and global forms of republicanism with the practice of international law, thereby continuing the conversation started by Pettit.³

The article begins by briefly situating Pettit's contribution within the broader republican tradition. From there, it sets out the basic tenets of Pettit's republican theory of freedom as non-domination as applied to both the state and the international order. The article then uses the practice of international law and institutions to test the assumptions built into Pettit's theory, and to consider whether and how some of those assumptions might need to be revised in light of the legal, institutional, and practical constraints of the international domain. Overall, the article concludes that although the central strands of Pettit's republican vision hold some promise to counter prevailing liberal accounts of international legitimacy and to enhance the critical potential of international law, this is undermined by many of the assumptions that Pettit makes about the international order. These include assumptions about the ontology of the international order, the capacity of international institutions for domination, and how well equipped international law and international institutions are for countering domination. In making these assumptions, Pettit paradoxically ends up

¹ See especially P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford 1997); P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge 2012).

² P. Pettit, "A Republican Law of Peoples" (2010) 9 *Eur.J.Polit.Theory* 70; P. Pettit, "Legitimate International Institutions: A Neo-Republican Perspective" in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford 2010), 139; P. Pettit, *Just Freedom* (New York 2014). See also P. Pettit, "Democracy, National and International" (2006) 89 *Monist* 301; P. Pettit, "Rawls's Peoples" in R. Martin and D.A. Reidy (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford 2006), 38; Pettit, *Republicanism*, pp. 150–53, 179. Cf. John Rawls, *The Law of Peoples* (Cambridge MA 1999).

³ In an early conference paper on these matters, Pettit opens by emphasising "I am no expert on the institutions of the international domain. My hope is, at best, to sketch a line that those who have a professional knowledge of this domain may find useful in considering the common complaint that international institutions inevitably erode democracy": P. Pettit, "Two-Dimensional Democracy and the International Domain", conference presentation, NYU Law School (4 October 2012), 1, available at <<http://www.iilj.org/courses/documents/HC2004.Pettit.pdf>>.

replicating many of the pathologies that made liberal approaches so problematic in the first place.

II. REPUBLICANISM BEYOND THE STATE

The republican tradition is long, rich, and comprises many disparate strands. Samantha Besson and José Luis Martí, for a start, identify “[c]ivic republicanism, Aristotelian republicanism, neo-Roman republicanism, neo-Athenian republicanism, socialist republicanism, communitarian republicanism, and even liberal republicanism”.⁴ Writers as diverse as Polybius,⁵ Cicero,⁶ Machiavelli,⁷ Harrington,⁸ Montesquieu,⁹ Rousseau,¹⁰ Blackstone,¹¹ and Madison¹² have been associated with the republican tradition in various forms. These writers shared a common concern with the idea of the *res publica* (or “the commonwealth” in the traditional English rendition¹³) which Pettit describes as being “understood in this tradition to mean, roughly, a shared political system in which there is no direct personal rule of some people by others, but rather a condition of equal citizenship governed by the rule of law”.¹⁴ That said, many early incarnations of republicanism took a severely exclusionary approach to citizenship (whether on the grounds of gender, race, property ownership, or otherwise), thereby justifying terrible inequality between citizens and non-citizens.

These writers, to varying degrees, emphasised civic virtue, public participation, the benefits of a mixed constitution and the rule of law, all held together and enabled by a complex set of interlocking laws and institutions. As such, many of them saw republican ideals as working best on a small scale.¹⁵ Trying to extend these versions of republicanism (several of which take the Athenian, Florentine, or Genevese city-state as the ideal

⁴ S. Besson and J.L. Martí, “Law and Republicanism: Mapping the Issues” in S. Besson and J.L. Martí (eds.), *Legal Republicanism: National and International Perspectives* (Oxford 2009), 3, 5.

⁵ See Polybius, *The Histories* (London 1889).

⁶ See Cicero, *The Republic and the Laws*, translated by N. Rudd (Oxford 2008).

⁷ See N. Machiavelli, *Discourses on Livy* (Oxford 2008); G. Bock, Q. Skinner, and M. Viroli (eds.), *Machiavelli and Republicanism*, new ed. (Cambridge 1993); J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton 1975).

⁸ See J. Harrington, *The Commonwealth of Oceana and a System of Politics*, J.G.A. Pocock ed. (Cambridge 1992).

⁹ See C. de Montesquieu, *The Spirit of the Laws*, translated by A.M. Cohler, B.C. Miller, and H.S. Stone (Cambridge 1989). See also K. Long, “Civilising International Politics: Republicanism and the World Outside” (2010) 38 *Millennium* 773.

¹⁰ See J.J. Rousseau, *The Social Contract and Other Later Political Writings*, translated by V. Gourevitch (Cambridge 1997).

¹¹ See e.g. W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford 1765), 122 (“laws, when prudently framed, are by no means subversive but rather introductive of liberty”).

¹² See e.g. A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers*, C. Rossiter ed., No. 10 (London 1961), 56–65 (“*Federalist No. 10*”).

¹³ F. Lovett and P. Pettit, “Neorepublicanism: A Normative and Institutional Research Program” (2009) 12 *Annu.Rev.Polit.Sci.* 11.

¹⁴ *Ibid.*, at pp. 11–12.

¹⁵ Although cf. Madison, who viewed the scalability of representative republicanism as preferable to direct democracy: see Hamilton et al., *Federalist No. 10*.

republican polity) to the international or global levels would seem an impossible project.

Nonetheless, many of the forerunners of contemporary international law were also clearly informed and influenced by republican terminology and values. Looking back over history, Nicholas Onuf argues that “international thought bears the legacy of republican ways of thinking”.¹⁶ Mortimer Sellers goes further to argue that “[r]epublican principles provide the ultimate foundation for international law and legal doctrine”.¹⁷ Francisco de Vitoria, as part of his project to place the American Indians within the reach of the *ius gentium*, drew on and rejected the medieval idea of the *res publica Christiana* in favour of a unifying agglomeration of political communities constituting the “*totius orbis, qui aliquo modo est una respublica*” – the whole world, which is in a sense a republic.¹⁸ Christian Wolff wrote of the *civitas maxima*,¹⁹ which Vattel in turn described as “the idea of a kind of great republic of nations”.²⁰ Kant, too, famously noted the possibility of a “world republic”²¹ or a “republicanism of all states, together and separately”.²²

In referencing these authors, I am not trying to claim that they share a common vision of “the republic”. That would be too great an anachronism. For each, their references to the idea of a republic were all part of much larger and more complex tapestries interweaving distinctive understandings of the state, the divine, authority, the good, etc. That said, each of them was in some sense committed to or intrigued by the idea of the republic beyond the confines of the state or nation. This consistent connection to at least some part of the republican tradition, broadly conceived, was largely to drop out of not only the law of nations and international law, but also Western legal thought more generally. The ubiquity of republicanism in

¹⁶ N.G. Onuf, *The Republican Legacy in International Thought* (Cambridge 1998), 3.

¹⁷ M.N.S. Sellers, “The Republican Foundations of International Law” in Besson and Martí, *Legal Republicanism*, p. 187.

¹⁸ Vitoria considered the exercise of political power (*potestas civilis*) at the domestic level to be inextricably related to the commonwealth (*res publica*). He argued that the norms of *ius gentium* were inextricably tied to a commonwealth of all the world – the *res publica totius orbis* – from which authority (*auctoritas*) they derive their normative validity: see A. Wagner, “Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth” (2011) O.J.L.S. 1. See also P. Zapatero, “Legal Imagination in Vitoria: The Power of Ideas” (2009) 11 J.Hist.Int.L. 221. See also discussion of the *res publica Christiana* in C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden 2005), 173–75.

¹⁹ C. Wolff, *Jus gentium methodo scientifica pertractatum*, translated by J.H. Drake (Oxford 1934), Prolegomena. See discussion in Onuf, *The Republican Legacy in International Thought*, pp. 60–75. See also S. Besson, “*Ubi Ius, Ubi Civitas*: A Republican Account of the International Community” in Besson and Martí, *Legal Republicanism*, p. 205.

²⁰ E. de Vattel, *The Law of Nations*, new ed. (London 1797), xv.

²¹ I. Kant, “Perpetual Peace: A Philosophical Sketch” in H.S. Reiss (ed.), *Kant: Political Writings*, 2nd enlarged ed. (Cambridge 1991), 93.

²² I. Kant, *The Metaphysics of Morals*, M. Gregor ed. (Cambridge 1996), at [6:354]. Although cf. para. [6:311], in which Kant notes: “Because of its form, by which all are united through their common interest in being in a rightful condition, a state is called a *commonwealth* (*res publica latius sic dicta*). In relation to other peoples, however, a state is called simply a *power* (*potentia*) (hence the word *potentate*)”.

the eighteenth century gave way in the nineteenth century to an ascendant liberalism.²³

Nevertheless, in the last few decades, the republican tradition has undergone something of a revival among historians, political theorists, and lawyers. Contemporary republicanism tends to be far more egalitarian and progressive in orientation than its antecedents. Quentin Skinner²⁴ and John Pocock²⁵ have done much to excavate republican theory for present-day consideration. In political theory, both Michael Sandel²⁶ and Pettit²⁷ have presented book-length and distinctive treatments of contemporary republican ideals. In US constitutional law, a republican approach has been spearheaded by Frank Michelman²⁸ and Cass Sunstein,²⁹ while John Braithwaite has pioneered the application of republican ideals to criminal law.³⁰ The turn to the international realm, however, has been much more recent,³¹ and very few contemporary international lawyers have engaged in any sustained way with republican thought.³² Pettit's foray into the international sphere is thus timely, welcome, and merits further attention.

III. TESTING PETTIT'S VISION FOR INTERNATIONAL LAW AND INSTITUTIONS

A. Freedom as Non-Domination

At the domestic level, Pettit's republican vision is generally pitted as an alternative to prevailing liberal visions of justice and legitimacy. The beating heart of Pettit's vision lies in his conception of freedom as non-domination. He contrasts freedom as non-domination with freedom as non-interference, which he considers to provide the basis for the liberal tradition. Consider, for example, John Stuart Mill's claim that "the only freedom which deserves the name, is that of pursuing our own good in our own way, so

²³ See Q. Skinner, *Liberty before Liberalism* (Cambridge 1998), ix–x, 96–98.

²⁴ See e.g. Q. Skinner, "The Paradoxes of Political Liberty" in S.L. Darwall (ed.), *Equal Freedom: Selected Tanner Lectures on Human Values* (Ann Arbor 1995), 15; Q. Skinner, "Pre-Humanist Origins of Republican Ideas" and "The Republican Ideal of Political Liberty" in Bock et al., *Machiavelli and Republicanism*, pp. 121, 239, respectively; Q. Skinner, *Hobbes and Republican Liberty* (Cambridge 2008).

²⁵ See especially Pocock, *The Machiavellian Moment*.

²⁶ M. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge MA 1996).

²⁷ Pettit, *Republicanism*.

²⁸ See e.g. F. Michelman, "Law's Republic" (1988) 97 Yale L.J. 1493.

²⁹ See e.g. C.R. Sunstein, "Beyond the Republican Revival" (1988) 97 Yale L.J. 1539.

³⁰ See e.g. J. Braithwaite and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford 1990); J. Braithwaite, "Inequality and Republican Criminology" in J. Hagan and R. Peterson (eds.), *Crime and Inequality* (Stanford 1995); J. Braithwaite, "Republican Theory and Crime Control" in K. Bussman and S. Karstedt (eds.), *Social Dynamics of Crime and Control: New Theories for a World in Transition* (Oxford 2000); J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford 2002).

³¹ See e.g. L. Quill, *Liberty after Liberalism: Civic Republicanism in a Global Age* (New York 2006); S. Slaughter, *Liberty beyond Neo-Liberalism: A Republican Critique of Liberal Governance in a Globalising Age* (New York 2005); D.H. Deudney, *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton 2008).

³² Cf. M.N.S. Sellers, *Republican Principles in International Law: The Fundamental Requirements of a Just World Order* (New York 2006); Besson, "Ubi Ius, Ibi Civitas".

long as we do not attempt to deprive others of theirs"³³ or Jeremy Bentham's understanding of the relationship between law and freedom, that "[e]very law is an evil, for every law is an infraction of liberty".³⁴ To be free of domination, by contrast, means to be free of *arbitrary* interference or control, the flipside of which is that certain non-arbitrary forms of interference or control are permissible. Much thus turns on what is considered arbitrary interference and what is considered non-arbitrary. The standard response, as formulated in relation to domestic republicanism, is that control is not arbitrary so long as it serves the common good.

The common good is itself a highly nebulous term and contemporary republicans tend to define it in one of two ways. Substantive visions define the common good by reference to particular substantive standards or values, pointing to specific ideals of justice or the realisation of political community.³⁵ Procedural visions emphasise the importance of mechanisms such as elections and deliberation in generating how the common good should be understood. Pettit's approach mixes both substantive and procedural elements – the common good is that which reflects collective rationality as manifested through representative and deliberative democratic processes which "track the interests" of citizens.³⁶ Put another way, the common good is served when ultimate control over political decisions is exercised "by those on the receiving end".³⁷ Pettit also acknowledges the need for certain "basic liberties" to be respected to enable citizens to effectively contest public decisions.³⁸

Pettit commonly invokes two images to illustrate these points. The first focuses on the nature of freedom as non-domination by considering the position of a slave relative to a master. It may be that the master is, relatively speaking, well intentioned: he³⁹ refrains from physically abusing his slaves, allows them some leisure time, and so on. The non-interference view suggests that the slave has a degree of freedom. The non-domination view, however, focuses on the fact that the slave is nonetheless a slave, and is still subject to the control and whims of the master – and, as such, cannot

³³ J.S. Mill, *On Liberty*, 2nd ed. (London 1859), 27.

³⁴ J. Bentham, *Principles of Legislation*, 2nd enlarged ed. (Boston 1830), 259. This sentiment has recently been echoed in *The Guardian* by Tom Stoppard, who claims that "[e]very act of regulation by authority is an erosion of liberty": "On Liberty: Edward Snowden and Top Writers on What Freedom Means to Them", *The Guardian*, 21 February 2014.

³⁵ See discussion of "instrumental republicanism" in A. Patten, "The Republican Critique of Liberalism" (1996) 26 *Brit.J.Polit.Sci.* 25.

³⁶ See especially P. Pettit, "Deliberative Democracy, the Discursive Dilemma, and Republican Theory" in J.S. Fishkin and P. Laslett (eds.), *Debating Deliberative Democracy* (Oxford 2003), 138. See also Besson and Martí, "Law and Republicanism", p. 24. Cf. R.A. Epstein, "Modern Republicanism – Or, the Flight from Substance" (1988) 97 *Yale L.J.* 1633.

³⁷ Pettit, "Legitimate International Institutions", p. 143. See also P. Pettit, "The Common Good" in K. Dowding, R.E. Goodin, and C. Pateman (eds.), *Justice and Democracy: Essays for Brian Barry* (New York 2004), 150.

³⁸ Pettit, *Just Freedom*, pp. 61–63; Pettit, *Republicanism*, pp. 185–200.

³⁹ The example given is almost inevitably a "he".

be considered free. Its emphasis is thus on the threat to freedom posed by the structural relationship between the dominated and the dominating, rather than on contingent violations of freedom.

The second image, of Odysseus tied to the mast, demonstrates how control can be non-arbitrary, by being self-authored and in service of the common good.⁴⁰ In the course of his long journey home, Odysseus's ship draws near the rocky shores of the sirens. Curious to hear their song, but not wishing to be so lured to a calamitous death, Odysseus asks his men to tie him to the mast (while they make judicious use of beeswax earplugs to save themselves). Although Odysseus is subjected to control here, it is not arbitrary because it is at his own request – he is the author of his own constraints (the freedom of his shipmates is more questionable). Moreover, his constraint in being tied to the mast, and his shipmates' in their use of earplugs, serves the common good of not dashing their ship to pieces.

This republican vision of freedom as non-domination thus differs from a liberal vision of freedom as non-interference in four crucial ways. First, it admits that some form of interference or control may be desirable, and even necessary. Republicanism is thus far less sceptical of, say, governmental regulation of the market in the public interest.⁴¹ Second, it incorporates and emphasises an idea of the common good as a central precondition to the realisation of freedom, as distinct from the more atomised liberal approach in which collective decision-making is at best a process of aggregating individual, otherwise disconnected preferences (or a neo-liberal insistence on the protection of individual economic rights).⁴² Third, its advocates argue that, whereas the liberal conception of freedom as non-interference only addresses contingent forms of control, the republican conception of freedom as non-domination addresses structural forms of control. This is because, instead of merely responding to incidents of actual interference, freedom as non-domination is also sensitive to the *possibility* of interference even when it is not clearly manifested. Fourth, republicanism recognises the fundamentally political nature of economic and legal decision-making, providing a useful counterbalance to contemporary liberalism's often technocratic outlook.

This ideal of freedom as non-domination provides the basis for Pettit's articulation of the requirements of neo-republican justice and legitimacy for the state. Neo-republican domestic *justice* demands that the citizens of a state "should each have sufficient resources not to be subject to personal domination by other agents".⁴³ Neo-republican domestic *legitimacy*

⁴⁰ See Lovett and Pettit, "Neorepublicanism", p. 16.

⁴¹ See Pettit, *Republicanism*, p. 148.

⁴² See e.g. R. Dagger, "Neo-Republicanism and the Civic Economy" (2006) 5 *Polit.Philos.&Econ.* 151.

⁴³ Pettit, "Legitimate International Institutions", p. 142.

requires that a state both guards its citizens against private domination (*dominium*) and itself avoids public domination (*imperium*) in the pursuit of public goods. In particular, Pettit argues that the "core concern" of legitimacy at the state level is whether state coercion is justifiable.⁴⁴

With these requirements in mind, Pettit seeks to construct a strong normative programme with significant implications for legal and institutional design.⁴⁵ Indeed, Pettit and Lovett argue that "the aim of the neorepublican program is to rethink issues of legitimacy and democracy, welfare and justice, public policy and institutional design, from within the framework that these basic ideas provide".⁴⁶ Lovett nonetheless views this project as being at a very early stage. He describes republicanism as a "still underdeveloped political doctrine" and notes that there are many central issues that have only begun to receive attention in contemporary republican thought, especially as regards international relations, global justice, and distributive justice.⁴⁷

B. Pettit's Vision of the International Realm

In explicating the idea of non-domination, Pettit makes regular use of specific, individualistic accounts of domination – including, for instance, the images of the slave–master relationship and Odysseus and his shipmates outlined above. It is no straightforward task to move from these stories to stories about how domination may take place on a global or international scale,⁴⁸ or to what relevance actors on the international plane may have for localised incidents of domination. To do so, Pettit builds up a very specific vision of the international realm in which the principle of non-domination is reconfigured to be addressed to *peoples*,⁴⁹ not just individuals. It is this that inspires Pettit to name this approach a "republican law of peoples", drawing on Rawls's famous phrase.⁵⁰ Pettit argues that

⁴⁴ See P. Pettit, "Legitimacy and Justice in Republican Perspective" (2012) 65 C.L.P. 59.

⁴⁵ Ibid. See also Lovett and Pettit, "Neorepublicanism".

⁴⁶ Ibid., at p. 12. The "basic ideas" include non-domination, the non-dominating state which promotes its citizens' freedom, and an ideal of good citizenship as committed to preserving this role for the state.

⁴⁷ F. Lovett, "Republicanism" in *The Stanford Encyclopedia of Philosophy*, E.N. Zalta ed. (Winter 2014), available at <<http://plato.stanford.edu/archives/win2014/entries/republicanism/>>. Similarly, Pettit is keen to stress that republicanism "presents us with a programme for developing policy, not with a policy blueprint": Pettit, *Republicanism*, p. 147.

⁴⁸ J. Bohman, "Critical Theory, Republicanism, and the Priority of Injustice: Transnational Republicanism as Non-Ideal Theory" (2012) 43 J.Soc.Philos. 97, making a related point about Pettit's emphasis on the "bilateral case".

⁴⁹ Cf. Rawls, *The Law of Peoples*, p. 4, in which Rawls divides the world into reasonable liberal peoples, decent peoples, outlaw states, societies burdened by unfavourable conditions, and benevolent absolutisms.

⁵⁰ Pettit argues, however, that he goes beyond Rawls, in that non-domination "supports the Rawlsian proposal that representative states ought to live in mutual respect but it focuses attention, unlike Rawls himself, on the pre-conditions that must be fulfilled to make such a regime of respect possible": Pettit, "Republican Law of Peoples", p. 73. See also Pettit, "Rawls's Peoples".

his peoples-based ontology is preferable to the cosmopolitan alternative, which he views as “utopian”.⁵¹

Moreover, whereas, at the domestic level, Pettit contrasts freedom as non-domination with freedom as non-interference, at the international level, he contrasts non-domination with, in his terminology, the Westphalian principle of non-intervention. He argues that is not sufficient that states be free from intervention at a given moment; at a structural level, they must not be arbitrarily beholden to other states or international agencies. As with the domestic level, this differentiates the neo-republican approach from a liberal approach to the international order on the grounds that it allows for interference in the affairs of states so long as such interference is non-arbitrary and it confronts structural rather than just contingent forms of control. Pettit further argues that, contrary to the “Westphalian orthodoxy”, “[e]very people has a right under the international order to claim assistance from other states in dealing with impoverishment and oppression”.⁵² This reconfiguration of republican liberty, in which peoples are “entrenched against domination by other states and from the various non-state actors”, is labelled the ideal of “globalized sovereignty”.⁵³

These changes lead Pettit to reformulate the neo-republican requirements of justice and legitimacy for the international order. The requirement of international *justice* is that peoples “have sufficient resources as a group not to be subject to collective domination by agents such as states, multinational corporations or international organizations”.⁵⁴ International *legitimacy* then focuses on the less well-defined “international order”,⁵⁵ ensuring that the international order guards against the domination of peoples while in itself avoiding dominating any individuals or peoples. These reformulations, however, include a series of problematic assumptions about how the international order is and should be organised.

1. Categorising states on the bases of effectiveness and representativeness

Although peoples comprise the basic ontological units for Pettit’s neo-republican approach to the international order, states remain a primary focus. Pettit claims that he is “[t]aking states as they are” to ask how “the

⁵¹ Pettit, “Republican Law of Peoples”, p. 73. See also Lovett and Pettit, “Neorepublicanism”, p. 22. Pettit does expand briefly on why he finds the cosmopolitan alternative unattractive in Pettit, *Just Freedom*, pp. 184–85. There are, however, a much broader range of criticisms of Rawls’s ontology of peoples which Pettit has yet to address directly: see e.g. the criticisms summarised in G. Brock, *Global Justice: A Cosmopolitan Account* (Oxford 2009), ch. 2.

⁵² Pettit, *Just Freedom*, p. 183.

⁵³ *Ibid.*, at p. 153.

⁵⁴ Pettit, “Legitimate International Institutions”, pp. 142–43.

⁵⁵ *Ibid.*, at p. 143. The “international order” is here only briefly defined as involving “the actions of many states and perhaps many individuals”.

international order ... might be".⁵⁶ To begin, Pettit divides states on the basis of two qualities, of effectiveness and representativeness.⁵⁷ Pettit treats these as binary qualities (effective/ineffective and representative/non-representative), rather than as gradated axes. Effective states have "the capacity to provide basic services to their populations", while ineffective states do not and are thus likely to descend into "civil war, unchecked famine, continuing genocide, a class of warlords, and general lawlessness".⁵⁸ Pettit initially defined representative states as those which have sufficiently well-developed institutional mechanisms to provide citizens with a genuine measure of control over the decisions of the state, through mechanisms of "election, contestation and accountability".⁵⁹

This latter requirement has recently been loosened. On the one hand, Pettit still argues that "nothing less than full democracy can be normatively satisfactory".⁶⁰ On the other, he claims that it is "reasonable" to extend the category of representative states to include those run by authorities which "may not be elected in a meaningful way, yet the effective, non-oppressive manner in which they operate may show that they can reasonably claim to be indicative representatives of their subjects".⁶¹ At this point, the division between the concepts of representativeness and effectiveness would seem to break down somewhat. Pettit has tried to clarify this further by defining a state as being "oppressive" (i.e. non-representative) "just to the extent that it offends against the human rights of its subjects".⁶² Indeed, at one point, Pettit claims that "[t]o establish that a state has [violated the human rights of its citizens] is to show that the state is oppressive".⁶³ This again requires further refinement: given the human rights records of every existing state, without further qualification, this claim would appear to categorise all states as oppressive.

2. *The requirements of a legitimate international order*

The distinctions between representative/non-representative and effective/ineffective states become central to Pettit's normative project at the international level, which he sees as concerned with two problems. The first is to identify the basis on which the international order may legitimately facilitate and constrain the policy preferences of *representative and effective*

⁵⁶ Pettit, "Republican Law of Peoples", p. 70.

⁵⁷ It is unclear whether Pettit acknowledges the possibility of representative but ineffective states; at one point, he refers to "representative and therefore effective states": Pettit, *Just Freedom*, p. 208.

⁵⁸ Pettit, "Republican Law of Peoples", p. 71. Cf. Raymond Aron's notion of "satisfied peoples" in R. Aron, *Peace and War: A Theory of International Relations*, translated by R. Howard and A.B. Fox (Garden City NY 1966), 160ff., as also used in Rawls, *The Law of Peoples*, pp. 46–48.

⁵⁹ Pettit, "Republican Law of Peoples", p. 71.

⁶⁰ Pettit, *Just Freedom*, p. 156.

⁶¹ *Ibid.*, at pp. 156–57.

⁶² *Ibid.*, at p. 179. How this fits with the otherwise binary distinction between representative and non-representative states is unclear.

⁶³ *Ibid.*

states (again, as representative shells for their respective peoples).⁶⁴ Not surprisingly, for Pettit, that basis is the pursuit of non-domination. However broadly “representative” is understood, Pettit frames an effective, representative state as representing a single, distinctive people. Such states are broadly considered to serve republican ideals, as they, apparently without qualification, “will be effective in protecting members against private domination and will be representative in doing this in an undominating way”.⁶⁵ Thus a legitimate international order is required to minimise the domination of representative and effective states, and to serve their interests by way of networks and agreements between similarly representative and effective states.⁶⁶

This is reminiscent of the vision of the democratic peace,⁶⁷ in both its descriptive assumptions and normative orientation. Indeed, Pettit and Lovett argue that “the foreign policy of the neo-republican state naturally supports the promotion of what is now called the ‘democratic peace’ as the most viable means for protecting republican institutions and values”.⁶⁸ The notion of the democratic peace as the basis for a normative/institutional programme at the international level has been extensively criticised elsewhere.⁶⁹ Suffice to say for present purposes that its descriptive aspect tends to overstate the extent of the “peace” existing between and within democratic states,⁷⁰ and (at best) ignores conflict between democratic and non-democratic states.⁷¹ It does not provide a promising start for a republican law of peoples that claims not to be utopian.⁷²

The second issue that Pettit identifies is how to address “the problems suffered by members of ineffective and non-representative regimes”,

⁶⁴ Pettit, “Legitimate International Institutions”, p. 153.

⁶⁵ Pettit, “Republican Law of Peoples”, p. 71.

⁶⁶ Pettit, “Legitimate International Institutions”, p. 155. See also Pettit, “Republican Law of Peoples”, p. 72. Pettit argues that the domination of states is problematic in its own right as states are corporate agencies through which individuals both act together and may be subjected to alien control, at p. 76; Pettit, *Just Freedom*, p. 154. See also generally C. List and P. Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford 2011).

⁶⁷ See e.g. Rawls, *The Law of Peoples*, pp. 44–54; M.W. Doyle, *Liberal Peace: Selected Essays* (New York 2011). Francis Cheneval argues that “[t]he theory of international relations owes to the republican tradition the so-called theory of democratic peace”: F. Cheneval, “Multilateral Dimensions of Republican Thought” in Besson and Martí, *Legal Republicanism*, pp. 238, 250; see also C. Lynch, “Kant, the Republican Peace, and Moral Guidance in International Law” (1994) 8 *Ethics & Int. Aff.* 39. Cf. A. Shiller, “Why Kant Is not a Democratic Peace Theorist” in A. Follesdal and R. Maliks (eds.), *Kantian Theory and Human Rights* (New York 2014), 175.

⁶⁸ Lovett and Pettit, “Neorepublicanism”, pp. 21–22.

⁶⁹ See discussion in S. Marks, *The Riddle of All Constitutions* (Oxford 2000), 47–48. See also S. Rosato, “The Flawed Logic of Democratic Peace Theory” (2003) 97 *Am.Polit.Sci.Rev.* 585; cf. D. Kinsella, “No Rest for the Democratic Peace” (2005) 99 *Am.Polit.Sci.Rev.* 453.

⁷⁰ By contrast, Rawls engages more directly with the idea that a “more precise” form of democratic peace survives the practice of “actual democracies”, which are marked by “considerable injustice, oligarchic tendencies, and monopolistic interests”, intervening in other countries: Rawls, *The Law of Peoples*, pp. 48–51.

⁷¹ Pettit, “Republican Law of Peoples”, p. 89.

⁷² *Ibid.*, at p. 86.

including human rights abuses, systemic poverty, etc.⁷³ These are then expressly framed as "issues that the international order has to address",⁷⁴ as the peoples of ineffective and non-representative states, too, are entitled to freedom from domination. Pettit even acknowledges that his conception of non-domination may, "at the limit", require representative and effective states to "organize humanitarian intervention",⁷⁵ although he does not otherwise explore the specific policy implications of how such problems are to be addressed by the international order. Presumably, consistently with the principle of non-domination, the international order could only take action in a way that is sensitive to representational concerns of the peoples inhabiting non-representative and ineffective states. The ultimate aim would then be to "establish conditions under which all populations can form legitimate states to act for them as peoples".⁷⁶

Critically, Pettit only considers human rights abuses to be of concern to the international order when they have taken place in ineffective and non-representative regimes. He assumes that representative and effective states will "in normal circumstances" have sufficient mechanisms of "contestation and correction" as to be self-correcting with respect to any such failings.⁷⁷ This is fully consistent with Pettit's approach to non-domination at the national level; Bohman argues that, for Pettit, "constitutional democracy not only minimizes domination, but brings it to an end".⁷⁸ This raises at least five problems. First, it reinforces the normative divide between representative/effective and non-representative/ineffective states – a normative divide which is alien to the international law principle of sovereign equality.⁷⁹ Second, it substantially reduces the critical potential of the international realm, whether expressed through international law or otherwise, with respect to purportedly representative and effective states.⁸⁰ Third, it underestimates the extent to which the preferences of states and their citizens are constituted by international/global factors, including in relation to international rather than domestic human rights norms. Fourth, it ignores the tendency of purportedly representative and effective states to undermine the effectiveness (in terms of maintaining peace, a stable economy, human rights, etc.) and representativeness of other states. Finally, it ignores the capacity of an

⁷³ Ibid., at p. 72.

⁷⁴ Ibid.; see also Pettit, "Legitimate International Institutions", p. 154. Cf. Rawls, *The Law of Peoples*, pp. 106–07.

⁷⁵ Ibid., at p. 89.

⁷⁶ Pettit, "Legitimate International Institutions", p. 153.

⁷⁷ Pettit, "Republican Law of Peoples", p. 72; see also Pettit, "Legitimate International Institutions", p. 143.

⁷⁸ Bohman, "Critical Theory", p. 101. This is of a piece with Pettit's assumption that "the representative state will act with the required authorization of its members": Pettit, "Republican Law of Peoples", p. 77.

⁷⁹ Cf. G. Simpson, *Great Powers and Outlaw States* (Cambridge 2004).

⁸⁰ Pettit has not yet addressed the issue of what happens when a representative and effective state has been held to violate international human rights norms in a way that may not be considered a violation of domestic human rights norms: cf. Pettit, *Just Freedom*, pp. 179–80.

effective/representative state to dominate those who are not considered to belong to its “people”, whether within or beyond its borders.⁸¹

This optimism about the corrective capacity of effective/representative states also sits oddly with several aspects of the international order. Consider, for example, investor-state dispute settlement (ISDS), which allows for private actors to bring claims directly against states in international tribunals, seeking large awards,⁸² and often bypassing domestic judicial mechanisms. At first, Pettit’s neo-republicanism may appear to suggest that there will be no need for ISDS when the host state satisfies the requirements of representativeness and effectiveness, or even that ISDS would be harmful in such cases as it has the potential to allow multinational corporations and investment arbitration tribunals to dominate domestic representative structures. Indeed, ISDS would seem to undermine the republican principles of equality⁸³ and authorship as nationals of the host state are jurisdictionally excluded from utilising ISDS mechanisms.⁸⁴ These problems are only exacerbated by the use of nationalities of convenience by investors to obtain the benefits of specific bilateral investment treaties,⁸⁵ and by the very limited options for contesting the determinations of investment arbitration tribunals.⁸⁶ As such, ISDS may enhance opportunities for domination of representative/effective states by either foreign investors or even arbitral tribunals.⁸⁷

On the other hand, republicanism may provide additional arguments for a strong ISDS system in relation to states that are non-representative and ineffective. If a state’s judicial system does not measure up to an externally defined standard of the rule of law, this makes it all the easier for investors to claim the necessity of turning to international tribunals to adjudicate disputes to avoid domination, at least until one considers that the investment tribunals

⁸¹ Cf M. Benton, “The Problem of Denizenship: A Non-Domination Framework” (2014) 17 *Crit.Rev.Soc. & Polit.Philos.* 49; A. Sager, “Political Rights, Republican Freedom, and Temporary Workers” (2014) 17 *Crit.Rev.Soc.&Polit.Philos.* 189; J. Bohman, “Nondomination and Transnational Democracy” in C. Laborde and J. Maynor (eds.), *Republicanism and Political Theory* (Oxford 2007), 190.

⁸² The combined damages awarded in the three related Yukos arbitrations under the Energy Charter Treaty amounted to over US\$50 billion: see *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, Final Award, PCA Case No. AA 226 (18 July 2014); *Yukos Universal Limited (Isle of Man) v The Russian Federation*, Final Award, PCA Case No. AA 227 (18 July 2014); *Veteran Petroleum Limited (Cyprus) v The Russian Federation*, Final Award, PCA Case No. AA 228 (18 July 2014).

⁸³ Unless equality here were to refer to the understanding that a local investor would have a reciprocal right to access ISDS in the event that they invested in the other state.

⁸⁴ See e.g. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (“ICSID Convention”) Article 25.

⁸⁵ See R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford 2012), 52–54; see also *Agua del Tunari SA v Bolivia*, Jurisdiction, ICSID Case No. ARB/02/3 (21 October 2005), at [328]–[332].

⁸⁶ See ICSID Convention Article 52(1).

⁸⁷ The foreign investor may seek to argue that it is they that require protection from domination by the host state – in which case, however, it is not clear that ISDS is the preferable solution, as the investor could also seek to have their claim espoused by their home state.

claims to representation are not necessarily any better.⁸⁸ Furthermore, if certain states are a priori considered not to represent their peoples, this may even suggest that investment tribunals need not pay much heed to their regulatory choices. The non-reciprocal nature of such a justification for ISDS then raises charges of hypocrisy and makes for tricky diplomacy. Moreover, it has the potential to replicate and reinforce the implicit liberal division between established democracies which purportedly live up to the rule of law, and the “developing” world in need of administrative, bureaucratic, and judicial reform to live up to internationally defined standards of good administration.⁸⁹ This is all the more problematic when considered against the history of international economic law, which is strongly marked by colonial and postcolonial exploitation.⁹⁰ Pettit does not address these issues: indeed, Pettit declares that his theory of international justice “ignore[s] issues of historical justice”.⁹¹

Notably, Pettit declines to identify which specific states would be classified as representative and/or effective, noting that such identification is bound to raise “tricky issues”.⁹² Without a more rigorously defined standard of what would constitute effectiveness and/or representativeness, and whether these serve some kind of minimalist threshold or represent aspirational ideals, it is difficult to determine just how many states would fall within the representative and effective category.⁹³ This has serious implications for the role of the international order and international law in this context. If only a handful of states are taken to be both representative and effective, then the international order comes to serve a very limited set of interests, while simultaneously granting those few states a sort of immunity from international attention to their internal affairs. If the thresholds are set lower, then this makes for a potentially more inclusive international order, but simultaneously appears to undermine the critical capacity of international law in relation to its members. It also strikes at the very heart of how control is classified as arbitrary in the international sphere. There are thus political and legal implications of how these distinctions are applied which require further attention.

⁸⁸ See generally Corporate Europe Observatory and Transnational Institute, “Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom” (November 2012), especially chs. 4–6 on conflicts of interest, third-party funding, and independent research, available at <<http://www.tni.org/sites/www.tni.org/files/download/profitfrominjustice.pdf>>.

⁸⁹ James Bohman’s republican cosmopolitanism, by contrast, emphasises the anti-colonial legacy of republican thought: Bohman, “Nondomination and Transnational Democracy”, pp. 191–96.

⁹⁰ See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge 2005); K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge 2013).

⁹¹ Pettit, *Just Freedom*, p. 153.

⁹² Pettit, “Republican Law of Peoples”, p. 71. See also Pettit, *Just Freedom*, p. 157.

⁹³ It would seem that these states must at least fall short of fulfilling republican ideals, as “the republican ideals of justice and democracy far outrun anything that has been achieved in national politics anywhere”: *ibid.*, at p. 155.

C. International Domination, International Law, and International Institutions

Pettit is primarily concerned with peoples as the potential subjects of international domination: whether the peoples of effective and representative states, as represented by their states, or the peoples of ineffective and non-representative states alone.⁹⁴ By contrast, he sees the potential *sources* of domination in the international sphere as far more varied, including “first, and most prominently, other states; second, non-domestic, private bodies that compare in resources to many states, such as corporations, churches, terrorist movements, even powerful individuals; and third, non-domestic, public bodies that are often created by states, such as the United Nations, the World Bank, the International Monetary Fund, the European Union, or the North Atlantic Treaty Organization”.⁹⁵

The focus on international domination provides an important point of departure from Rawls’s law of peoples, which assumed an essentially cooperative relationship between states in the international order, rather than the potential for domination and control.⁹⁶ Pettit’s primary focus in his writings to date has been on the dominating potential of states. Nonetheless, his express identification of corporations and other non-state actors as potential sources of ongoing, structural domination provides a useful counterbalance to many liberal assumptions. What the above quote appears to be missing, however, is the potential for domination to manifest in a way that is not necessarily attributable to any one agent – as with, say, domination that manifests through the accumulated practices of members of Foucauldian disciplinary networks,⁹⁷ even in the absence of direct intent. Mark Rigstad argues that this undermines republicanism’s critical potential to address structural forms of domination.⁹⁸

The other aspect of international domination that requires further attention is the question of what constitutes the common good with respect to the international order, and what therefore defines the limits of non-arbitrary control at the international level. The common good for Pettit is inextricably tied to the idea of the interests of a given public, rather than the net aggregate of the interests of the members of that public. Presumably, each of the “peoples” in Pettit’s approach would have their own publics with distinctive visions of the common good. What is less clear is whether Pettit considers there to be an equivalent to “the public” for the international sphere, in the same way as the ontology of individuals is substituted for one of peoples and the ideal of freedom as non-domination is replaced by the ideal of globalised

⁹⁴ Pettit, “Republican Law of Peoples”, pp. 75–77.

⁹⁵ *Ibid.*, at p. 77.

⁹⁶ R. Forst, “Towards a Critical Theory of Transnational Justice” (2001) 32 *Metaphilosophy* 160, pp. 163, 165–67.

⁹⁷ See e.g. M. Foucault, *The History of Sexuality: The Will to Knowledge* (London 1998), 92–96.

⁹⁸ M. Rigstad, “Republicanism and Geopolitical Domination” (2011) 4 *J.Polit.Power* 279.

sovereignty. In the absence of such a global public, the scope for non-dominating international action is profoundly reduced. Indeed, it would seem to only permit action where it is the subject of overlapping consensus between different national publics. As this goes to the very definition of what constitutes domination at the international level, it is not a question that can continue to be glossed over.

What Pettit does identify as domination would nonetheless seem to permit a more satisfying range of regulatory constraints than the liberal non-interference or non-intervention approaches – and particularly their neo-liberal incarnations, with their deep suspicion of governmental intervention in the market. For instance, Pettit expressly identifies economic coercion and dependency as sources of domination.⁹⁹ He also identifies more subtle forms of domination, such as through invigilation or intimidation,¹⁰⁰ in which the dominated state or person may find themselves “second-guessing its wishes and adjusting its behaviour”¹⁰¹ to suit the wishes of the dominator. Indeed, Pettit describes this as “the most powerful sort of alien control. It may enable the corporation to secure a favourable tax rate, easy regulatory conditions, or an easing of environmental standards without the corporation being exposed to a danger of whistle-blowing”.¹⁰² Continuing with the example of ISDS, this broad understanding of domination helps to articulate the problem with the “regulatory chill” that some argue the investment regime has cast over various states.¹⁰³ For instance, in 1997, the Canadian Government imposed restrictions on the fuel additive methylcyclopentadienyl manganese tricarbonyl (MMT) on public health grounds, pointing to potential risks of nerve and brain damage to humans. Ethyl Corp, a US investor, challenged the restrictions under NAFTA Chapter 11, seeking US\$347 million in compensation. The Canadian Government instead chose to settle the claim, lifting the ban on MMT and paying US\$13 million in compensation.¹⁰⁴ More recently, multinational tobacco companies have been accused of trying to use both ISDS and the World Trade Organization (WTO) dispute settlement system to discourage states from implementing “plain packaging” cigarette laws.¹⁰⁵

⁹⁹ Pettit, “Republican Law of Peoples”, pp. 77–78.

¹⁰⁰ This more subtle approach to domination is reminiscent of Steven Luke’s third face of power, as a means of keeping “potential issues out of politics, whether through the operation of social forces and institutional interactions or through individual decisions”: S. Lukes, *Power: A Radical View* (London 1974), 24.

¹⁰¹ Pettit, “Republican Law of Peoples”, p. 79.

¹⁰² Ibid.

¹⁰³ Although cf. C. Côté, “A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment”, PhD thesis, The London School of Economics and Political Science (2014).

¹⁰⁴ *Ethyl Corp v Canada*, Jurisdiction, NAFTA/UNCITRAL (24 June 1998).

¹⁰⁵ See e.g. the ongoing litigation in *Australia – Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging (Complainant: Ukraine)*, WT/DS434 (Panel composed 5 May 2014) and *Philip Morris Asia Ltd. v Commonwealth*

Pettit's disregard for the dominating potential of international institutions, however, is more problematic. Indeed, he comes to international institutions with a deep optimism about their republican potential, not least because of the dispersal of power they represent in relation to individual states.¹⁰⁶ Although he acknowledges their theoretical potential for domination, overall he claims that it would be perverse to focus on them because states' relative capacity for domination is so much greater.¹⁰⁷ Pettit's argument here can be broken down into two components: first, whether or not international institutions are capable of exercising sufficient control over states or other actors to be worthy of concern; and, second, whether international institutions are or can be designed in such a way as to ensure that what control they do exercise is non-arbitrary, and hence non-dominating.

1. Do international institutions exercise sufficient control?

As regards the degree of control, Pettit argues that global institutions such as the UN, the WTO, and the World Bank are unable to "achieve a high degree of discipline in relation to member states".¹⁰⁸ As evidence, he cites the reaction of the US Ambassador to the UN following the US's withdrawal from the compulsory jurisdiction of the International Court of Justice (ICJ) in the wake of the *Nicaragua*¹⁰⁹ dispute in 1986 – that, at the time, the ICJ was merely a "semi-legal, semi-judicial, semi-political body, which nations sometimes accept and sometimes don't".¹¹⁰

This is not the place to take issue with this particular characterisation of the post-*Nicaragua* ICJ. Three points, however, are worth mentioning. First, few states possess the US's political and economic clout; other states feel the discipline of international institutions far more keenly. Second, the ICJ's complex compliance history is hardly representative. There is, for instance, a very high compliance rate for the WTO's dispute settlement system,¹¹¹ and awards by international investment tribunals are consistently and effectively enforced through national courts.¹¹² Third, considering Pettit's acknowledgment of the invigilatory and intimidatory forms of control, his focus on the immediate context of coercive enforcement proceedings by international courts seems unnecessarily limited. International

of *Australia*, PCA Case No. 2012–12. See also D. Schneiderman, *Constitutionalizing Economic Globalization* (Cambridge 2008), 120–29 (on regulatory chill and plain packaging in Canada).

¹⁰⁶ Pettit, *Republicanism*, p. 179.

¹⁰⁷ Pettit, "Republican Law of Peoples", p. 86.

¹⁰⁸ *Ibid.*, at p. 81.

¹⁰⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits, Judgment [1986] ICJ Rep 14.

¹¹⁰ Pettit, "Republican Law of Peoples", p. 82.

¹¹¹ See B. Wilson, "Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date" (2007) 10 J.I.E.L. 397.

¹¹² See ICSID Convention Articles 53–55; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959) Articles III–VI; UNCITRAL Model Law on International Commercial Arbitration Articles 34–36.

institutions and regimes have a much broader array of norm-generating and enforcement mechanisms available to them.

In addition, Pettit’s focus on the exercise of control by international institutions acting in a purely autonomous sense ignores how these institutions are used instrumentally, especially by powerful states. International institutions are worthy of attention not only in their own right, but precisely because they have the capacity to alter the context in which, and forms through which, control may be exercised.¹¹³

2. *Is control by international institutions non-arbitrary?*

As to the second element of Pettit’s dismissal of the dominating potential of international institutions, Pettit exhibits a simultaneously heartening (for an international lawyer) and baffling optimism about the non-arbitrary structure of decision-making in international institutions. He argues that, “despite the democratic deficits on which critics have seized”, “[s]tates normally appoint to the crucial positions on these bodies; appointments come with specific, restricted briefs; there are usually high bars of accountability to cross; global civic movements – non-governmental organizations – often exercise a significant degree of oversight; and decisions are routinely subject to objection and review by the states affected”.¹¹⁴ As such, he is broadly satisfied that international institutions are constructed and operated in a way that respects the condition that those subject to rules exercise some form of control over their creation.

Turning again to ISDS, we can see that there are good reasons for maintaining a rather more pessimistic outlook. Many states have only consented to international investment agreements in the most anaemic and formal sense, with little appreciation of the potential consequences of ratification.¹¹⁵ States do appoint arbitrators, but generally only with the agreement of the investors making the claim against them, and the pool of potential arbitrators is very small. The vague wording of the substantive standards in bilateral investment treaties, especially as regards fair and equitable treatment and indirect expropriation, have enabled investment tribunals to conceive of their briefs in extremely broad terms, ensuring that tribunals may be called upon to pronounce on anything from the validity of sovereign

¹¹³ See generally K.W. Abbott et al. (eds.), *International Organizations as Orchestrators* (Cambridge 2015).

¹¹⁴ Pettit, “Republican Law of Peoples”, pp. 81 (citation omitted) and 85–86. See also Pettit, *Just Freedom*, pp. 168–70.

¹¹⁵ Consider the UN Conference on Trade and Development (UNCTAD)-organised, week-long mass bilateral investment treaty negotiation rounds of the early 2000s: see e.g. UNCTAD, *Round of Negotiations of Bilateral Investment Treaties for English-Speaking African Least Developed Countries: Final Report* (Geneva 2003), available at <http://unctad.org/sections/dite_pccb/docs/dite_pccb_ias0012_en.pdf>. See also generally G. Van Harten, “Five Justifications for Investment Treaties: A Critical Discussion” (2010) 2 Trade, L. & Dev. 19; and L.N.S. Poulsen, “Bounded Rationality and the Diffusion of Modern Investment Treaties” (2014) 58 Int.Stud.Quart. 1.

debt restructuring¹¹⁶ to the validity of national attempts to phase out nuclear power.¹¹⁷ As far as global civic movements are concerned, although there are some non-governmental organisations that keep an eye on the investment regime, these are few in number. Moreover, publication of investment awards generally requires the consent of the parties,¹¹⁸ and the hearings themselves are usually closed. Finally, there are only very limited grounds for reviewing the decisions of investment tribunals. All of the above suggest that the design of the international investment regime, far from ensuring non-arbitrary control, encourages domination. Although this suggests that a republican approach could provide a powerful basis for critiquing ISDS as currently structured and practised, it also highlights just how arbitrary control by international institutions can be. Their dominating potential should not be underestimated.

D. International Law and Institutions as Countering Domination

Pettit's optimism about the potential of international law and institutions to limit domination provides the flipside of his view that international law and institutions have little capacity for domination. In particular, he sees international institutions as valuable instruments for blocking the domination of states by other states.¹¹⁹ Pettit argues that such institutions help to counter domination in three ways: through facilitating deliberation, through enabling weaker states to enter into coalitions with one another, and through entrenching "sovereign liberties".

As regards deliberation, Pettit argues that the very existence of international law and institutions helps to generate a:

currency of common global reasons and the valorization of those reasons as the terms of debate and exchange between countries ... [which] is of importance in making it possible for countries to relate to one another in a reasoned manner, seeking a non-alien influence on one another's positions and holding out the possibility of an unforced, cooperative solution to many problems.¹²⁰

Pettit further argues that deliberative capacity, whether of international or domestic institutions, is strengthened through the adoption of a republican outlook. This is because, for classical liberal approaches, "the language of non-interference does not reach beyond the sector of opinion and interest with which it was in the first place associated" – that is, the "early days

¹¹⁶ See generally UNCTAD, "Sovereign Debt Restructuring and International Investment Agreements", IIA Issues Note No 2 (July 2011).

¹¹⁷ See *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12.

¹¹⁸ ICSID Convention Article 48(5); although note that Rule 48(4) of the Rules of Procedure for Arbitration Proceedings now requires the Centre to promptly publish excerpts of the Tribunal's legal reasoning regardless of such consent. See also UNCITRAL Arbitration Rules (2010), r. 34(5).

¹¹⁹ Pettit, "Republican Law of Peoples", p. 81.

¹²⁰ *Ibid.*, at pp. 82–83.

of industrial capitalism" in which this idea "articulated an indispensable condition for competitive success".¹²¹ As such, they ignore the problems of "insecurity, ... lack of status, and the need to tread a careful path in the neighbourhood of the strong".¹²² Non-domination, by contrast, apparently provides a narrative capable of addressing these problems in a way that escapes the prejudices and preoccupations of its founders as it "transcends its origins".¹²³ Here again we see the contrast between a liberal characterisation of the political realm as a site for the aggregation and competition of pre-established rational interests, and a republican vision which focuses on communal self-authorship and the common good.

Yet the extent to which international law and institutions facilitate deliberation in practice should not be overstated. While international law does provide a common professional grammar for international lawyers, its very commonality has long been undermined by processes of functional differentiation and concomitant legal and institutional fragmentation.¹²⁴ Moreover, international law itself is the product of a long history of inequality and exploitation¹²⁵ – it should not be presumed that it provides some kind of neutral language for deliberation. To this extent, the grand promise of international law as contributing to a "currency of common global reasons" seems chimerical in the face of the fractured and unequal historical development of international law. The language of non-domination may transcend its origins, but the language of international law does not.

Institutionally speaking, most international institutions have limited mandates and limit the opportunities for public participation, thereby ruling out the possibility of genuinely open deliberation. Moreover, even within international institutions interaction often takes the form of bargaining rather than deliberation in any strong sense,¹²⁶ and what is more that bargaining takes place between grossly unequal parties. Whether state interactions within even established institutions such as the UN General Assembly, the WTO, or the Codex Alimentarius Commission could be meaningfully classified as deliberative is questionable at best. Republicanism may provide a useful normative framework against which to criticise international institutions' current norms and practices in this respect, but the history and practice of international institutions to date suggests that there is little cause for optimism that these criticisms can be overcome.

¹²¹ Pettit, *Republicanism*, p. 132.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ See M. Koskenniemi, "The Fate of Public International Law: Between Technique and Politics" (2007) 70 M.L.R. 1.

¹²⁵ See Anghie, *Imperialism*; M. Byers, *Custom, Power and the Power of Rules* (Cambridge 1999).

¹²⁶ See C. Ulbert, T. Risse, and H. Müller, "Arguing and Bargaining in Multilateral Negotiations", paper presented at "Empirical Approaches to Deliberative Politics", European University Institute, Florence, 21–22 May 2004.

Others have suggested that international deliberation may be facilitated specifically by international courts and tribunals. At the domestic level, Christopher Zurn¹²⁷ and Jürgen Habermas¹²⁸ have argued that judicial review serves deliberative democratic ideals to the extent that it helps to maintain the procedural conditions for deliberative processes to flourish elsewhere. Pettit has also argued that judicial review should be valued for its “editorial” function in democratic decision-making.¹²⁹ By contrast, Richard Bellamy, who expressly adopts a republican approach to freedom as non-domination, questions both the legitimacy and effectiveness of rights-based judicial review by constitutional courts.¹³⁰ Although he has not directly extended this analysis to review by international courts and tribunals, Bellamy’s concerns about the threat to democratic decision-making posed by domestic judicial review are all the more powerful at the international level. ISDS,¹³¹ for example, provides a forum in which investors can directly challenge state regulatory action, and in which there is almost no opportunity for the citizens affected by the decision to have a say about its validity, either during the course of the arbitration or in its aftermath. Moreover, at a structural level, as it is investors who invariably bring ISDS claims, it is they who have the opportunity to keep pushing the interpretation of the law to serve their interests, combining with other factors to suggest a distinct structural bias. Matters are less problematic in the WTO, which among other things allows only for state-to-state dispute settlement, allows for third-party WTO Members to make submissions, and includes a well-regarded mechanism for appeal in the form of the Appellate Body.¹³²

Pettit does acknowledge that “in a world of grossly unequal power, deliberation is not going to be enough; it will have to be matched by the groupings that enable the weak to deliberate from a position of strength”.¹³³ Properly multilateral institutions do have the capacity to facilitate the formation of such coalitions. This effect has been particularly obvious in the WTO, where developing and developed countries alike have banded together in multiple regional, sector-specific, and issue-specific coalitions

¹²⁷ C.F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge 2007).

¹²⁸ J. Habermas, *Between Facts and Norms* (Cambridge 1996), 167–68.

¹²⁹ Pettit, “Democracy, National and International”. More generally, Pettit argues that the dispersal of power to multiple institutions of government generally serves the cause of non-domination, and that such dispersal is to be welcomed, including to international institutions: Pettit, *Republicanism*, ch. 6.

¹³⁰ See R. Bellamy, *Political Constitutionalism* (Cambridge 2007); cf. L. Vinx, “Republicanism and Judicial Review” (2009) 59 U.T.L.J. 591.

¹³¹ G. Van Harten and M. Loughlin, “Investment Treaty Arbitration as a Species of Global Administrative Law” (2006) 17 E.J.I.L. 121; F. Ortino, “The Investment Treaty System as Judicial Review” (2013) 24 Am.Rev.Int’l Arb. 437.

¹³² See also J. Scott, “European Regulation of GMOs: Thinking about ‘Judicial Review’ in the WTO”, Jean Monnet Working Paper 04/04 (New York 2004); E. Ceva and A. Fracasso, “Seeking Mutual Understanding: A Discourse-Theoretical Analysis of the WTO Dispute Settlement System” (2010) 9 W.T.R. 457.

¹³³ Pettit, “Republican Law of Peoples”, p. 84; Pettit, “Legitimate International Institutions”, pp. 158–60.

(including, for example, the Friends of Fish).¹³⁴ There is, however, only so much that can be done to elevate the weak in this respect. In some cases, especially in relation to majoritarian voting institutions such as the UN Conference on Trade and Development and the UN General Assembly, major powers have simply turned away after concluding that their interests were not being served. Although Pettit acknowledges this possibility, he frames it as occurring when coalitions of weaker countries manage to "implement a regime that is unduly favourable to them",¹³⁵ ignoring the possibility that it may also happen as such coalitions attempt to push for a regime which is simply a little less unduly favourable to the major powers. Moreover, Benvenisti and Downs have pointed to how the fragmentation of international law may be taken advantage of by states in a way that is precisely intended to limit weaker states' opportunities to turn to coalitions.¹³⁶ Thus, not only does the deliberative capacity of specific regimes seem limited, but the structure of the international legal order can act to undermine the opportunities for weaker states to guard against domination through forming coalitions. Pettit does not engage directly with such issues. Rather, he argues that he is not being "excessively optimistic" about such international deliberation, on the grounds that states that spurn such deliberation would be subject to "ignominy and ostracism" at the international level and "shame" at the national level.¹³⁷

Finally, Pettit envisages international law and institutions as means¹³⁸ for both negotiating and entrenching a roughly defined set of "sovereign liberties" for representative states, which are "co-enjoyable" by all states.¹³⁹ These sovereign liberties are the international counterparts of the "basic liberties" central to Pettit's theory at the domestic level. Sovereign liberties are not considered to be natural rights of representative states, but are rather the product of a "negotiated articulation".¹⁴⁰ "Clear candidates" would include "liberties of speech, expression, and association" for states rather than individuals, with other liberties, regarding the exploitation of natural resources and organising mutual trading privileges, declared "more problematic" for the moment.¹⁴¹ The protection of sovereign liberties in this respect would

¹³⁴ See S.E. Rolland, "Developing Country Coalitions at the WTO: In Search of Legal Support" (2007) 48 *Harv.Int'l L.J.* 483.

¹³⁵ Pettit, "Legitimate International Institutions", p. 159.

¹³⁶ E. Benvenisti and G.W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law" (2007) 60 *Stan.L.Rev.* 595.

¹³⁷ Pettit, "Republican Law of Peoples", p. 83. Cf. O.A. Hathaway and S.J. Shapiro, "Outcasting: Enforcement in Domestic and International Law" (2011) 121 *Yale L.J.* 252; A.T. Guzman, "Reputation and International Law", UC Berkeley Public Law Research Paper No. 1112064 (2008).

¹³⁸ Indeed, as the "only hope of institutionalizing the ideal of globalized sovereignty among representative states": Pettit, *Just Freedom*, p. 170.

¹³⁹ *Ibid.*, at p. 208.

¹⁴⁰ *Ibid.*, at pp. 164–66.

¹⁴¹ *Ibid.*, at pp. 163–64.

help establish the conditions for meaningful inter-state deliberation and to entrench representative states against domination.

How such sovereign liberties might relate to international law remains unexplored. Whether such liberties would have a quasi-constitutional status, and whether they would be enshrined in specific rules or treated more as guiding principles, is unclear. As things stand, although some may argue that liberties of speech, expression, and association for states may be derived from the principle of sovereign equality, the “clear candidates” that Pettit suggests for the sovereign liberties tend not to be specifically enumerated in international law. Attempts to formulate lists of the fundamental rights and duties of states in treaties have rather focused on, among other things, matters such as the right to sovereign equality, respect for territorial borders, the prohibition of the use of force, and the right to exercise jurisdiction.¹⁴² The “negotiated articulation” of sovereign liberties may also be more difficult than assumed. In 1947, for instance, the General Assembly tasked the International Law Commission with formulating a Declaration on the Rights and Duties of States. Once the Declaration was drafted, however, the General Assembly declined to adopt it on the grounds that “at the present time it has encountered some difficulties in formulating basic rights and duties of States in light of new developments of international law and in harmony with the Charter of the United Nations”.¹⁴³ No state has requested that the matter be taken up again with the UN since.¹⁴⁴

IV. CONCLUSION

Pettit’s republican vision of globalised sovereignty makes an important contribution to how concepts such as freedom, justice, and legitimacy may be conceptualised at the international level. It allocates a central role to international law and institutions in generating and entrenching these ideals. The concept of freedom as non-domination, in particular, has the potential to provide a powerful critical tool for revealing arbitrary exercises of power in the international order. Nonetheless, Pettit’s approach is also afflicted by a number of problematic assumptions and raises issues that require further clarification. Pettit’s peoples-based ontology sits uneasily with various aspects of international law and practice, and opens his theory up to

¹⁴² See e.g. Convention on the Rights and Duties of States (Montevideo Convention), adopted 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934); Charter of the Organization of American States, opened for signature 30 April 1948, 119 UNTS 51 (entered into force 13 December 1951) ch. IV; Constitutive Act of the African Union, opened for signature 11 July 2000, 2158 UNTS 3 (entered into force 26 May 2001) Article 4.

¹⁴³ International Law Commission, “Draft Declaration on the Rights and Duties of States”, in General Assembly Resolution 375(IV), UN GAOR, UN Doc. A/RES/375(IV) (6 December 1949), Annex.

¹⁴⁴ S.M. Carbone and L.S. di Pepe, “States, Fundamental Rights and Duties” in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online, January 2009), at [14].

many of the same cosmopolitan critiques that were made of Rawls’s law of peoples.¹⁴⁵ The substantive implications of the division between effective and representative states and others mean that these categories require further definition and a clearer picture of which states they would apply to in practice. How the common good is to be understood at the international level similarly requires further clarification. Moreover, Pettit’s abstract vision of a republican law of peoples run by representative and effective states is intentionally dismissive of questions of historical injustice, but is unable to banish the spectres of colonialism and imperialism that have long haunted the international order. Finally, Pettit maintains a fairly extravagant optimism about the non-dominating potential of international law and international institutions which does not appear to be borne out by current practice. That said, these issues do not seem to be necessary implications of republican thought. Rather, they are traceable to the supplementary assumptions that Pettit makes about the international order, including its ontology and its detachment from history. Whether his account can be modified – or alternative republican accounts of international freedom, justice and legitimacy can be articulated – in a way which addresses these concerns is worthy of further consideration.

¹⁴⁵ Cf. Pettit, *Just Freedom*, pp. 184–85.