Rawls's Law of Peoples

I contend that this scenario is realistic – it could and may exist. I say it is also utopian and highly desirable because it joins reasonableness and justice with conditions enabling citizens to realize their fundamental interests.

John Rawls, *The Law of Peoples*, p. 7

Rawls's Law of Peoples

A Realistic Utopia?

Edited by

Rex Martin and
David A. Reidy

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For my mother, Cecelia Reidy, and in memory of my father,
David Reidy, Sr.

Contents

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Preface

Citizens and officials within contemporary liberal democracies face innumerable practical political problems every day. These include familiar issues of domestic economic, educational, cultural, environmental, and social policy. Of course, within liberal democracies citizens and officials disagree, often reasonably, over these matters. But their disagreements are, at least when reasonable, typically framed by a generally shared, even if also abstract and indeterminate, liberal and democratic moral vision. This vision makes possible between them a politics of public reasons.

But what about matters of foreign policy? Citizens and officials within contemporary liberal democracies daily face the practical political problem of whether and how to interact as corporate agents, through their states or governments, with individual persons as well as other corporate agents, states and governments, economic corporations, and so on, beyond their borders. Of course, citizens and officials within liberal democracies, and between them, will again disagree over these matters. Within and between the United States, France, Denmark, Australia, Costa Rica, and so on, citizens and officials disagree over many current matters of foreign policy. These disagreements often lead to different and sometimes conflicting foreign policies between liberal democratic states. This much is obvious.

What is less obvious is whether and how these disagreements, like those over matters of domestic policy, might be aired and resolved by the citizens and officials of liberal democracies within a politics, domestic and international, of public reasons. In liberal democracies, public discussion of the general principles of a liberal democratic moral vision has been rather robust for the last several decades. But it has been largely an inward-looking discussion focused on matters of domestic policy.

Only recently has a vigorous public discussion erupted over the general principles of a liberal democratic moral vision for matters of foreign policy. The 1989 transformation of the geopolitical landscape carried in its wake a wide range of new foreign policy challenges and opportunities for liberal democracies. These

have perhaps come too fast. Citizens and officials in liberal democracies still find themselves without much of a shared moral vision, even at the level of abstract and indeterminate general principles, when it comes to matters of foreign policy. Accordingly, disagreements are generally resolved not through a politics of public reasons, but simply through politics. The suspicion and distrust that follows is a substantial cost to effective international action, whether unilateral or multilateral.

Meanwhile, the practical political problems of foreign policy faced by liberal democracies continue to mount both in number and severity. Desperate poverty around the world and international terrorism are just the two most obvious problems. Global environmental degradation, growing economic inequalities, the absence of transparency, stability and nondomination within many global markets, the nonproliferation of nuclear and other weapons of mass destruction, and systemic and regular human rights violations are problems perhaps less visible but equally pressing. All these are made more difficult by the fact that they arise within a larger context within which liberal democracies must determine how to interact with states either illiberal or undemocratic or both. And these states are a pretty diverse lot. They range from Afghanistan, Brunei and China through Cuba, Iran, Jordan and Nigeria to North Korea, Sudan, Venezuela and Zimbabwe. It's literally from A to Z.

What moral vision ought to guide the citizens and officials of liberal democracies as they take on the many practical political problems of foreign relations in a world that includes all these states? For what kind of world can liberal democratic peoples reasonably hope, and thus purposefully and rationally work?

These are demanding questions. Among the leading contemporary philosophers, John Rawls has attempted to outline an answer to them. In a series of important books he attempted to lay out a moral vision appropriate both to liberal democratic societies and to their place within the international community. Rawls's overall contribution is so ambitious and so important and his international theory is so contested, even by sympathetic readers, that David A. Reidy and Rex Martin organized two panel sessions: one for the World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR) in Lund, Sweden, in 2003; the other for the Conference on Global Justice held in conjunction with the American Philosophical Association, Pacific Division, meeting in Pasadena, California, in 2004.

Because the public response to these sessions was so enthusiastic, a volume of papers focusing on Rawls's international theory, a volume that was both critical and balanced, seemed a good idea. Such a volume would carry the conversations begun in Lund and Pasadena to a much wider audience. Many of the papers from these sessions, all of them considerably revised after several drafts, are included in the present volume. In addition, the volume includes papers from a number of additional people – scholars and thinkers who would be numbered among the most distinguished political philosophers and theorists of international relations and international law working today. Taken together the papers here should serve

those, beginners and experts alike, working in philosophy, law, political science, international relations, government, and advocacy and with a serious interest in issues of global justice, human rights, and the nature and content of a proper liberal democratic foreign policy.

We appreciate the help provided to our editorial efforts by Dusan Galic, Donna Martin, Walter Riker, and Jeppe von Platz.

David A. Reidy and Rex Martin

List of Abbreviations used for Rawls's Books

CP	*John Rawls: Collected Papers*
JasF	*Justice as Fairness: A Restatement*
LoP	*The Law of Peoples*
PL	*Political Liberalism*
TJ	*A Theory of Justice*

Full bibliographical details of the books are provided in the notes in each chapter, along with any additional comments individual authors may wish to make regarding editions used.

Part I

Background and Structure

1

Introduction: Reading Rawls's *The Law of Peoples*

Rex Martin and David A. Reidy

Background

The post-Second World War international order has not been a peaceable one. However, the great powers for the most part did avoid direct military confrontation, and for the last sixty years or so the world has been free of the scourge of world war that so troubled the first half of the past century.

After the Second World War a number of important changes occurred in the international state system, a system that had, by 1945, been in existence for about three hundred years. Among the most important of these changes were: (1) the gradual but increasing international recognition of human rights; (2) changing attitudes about war (with a growing recognition that wars are justifiable only in a limited number of cases – in self-defense, including collective defense, and, in extreme cases, in the protection of human rights); (3) the establishment and development of the United Nations and of other supranational organizations, such as the European Union (EU); and (4) concomitant with these developments, the demise of colonial rule.

One of the greatest challenges posed by this new international order has been that of providing appropriate standards of justice for this emerging system (including, of course, the attempt to characterize and to justify human rights). The theory of political justice developed by John Rawls, whose work has been enormously influential in the last thirty years or so, has been the source of one of the main lines of reflection on developing a solution, or at least the beginnings of one, to the problem of standards of international justice. However, as we shall see, there has been a good deal of controversy as to how, exactly, Rawls's theory is best to be applied and set out in an international or global context.

John Rawls

During the period since the original publication in 1971 of his book *A Theory of Justice*, John Rawls (1921–2002) has been the dominant theorist of justice in the English-speaking world and in much of Western Europe. *A Theory of Justice* has been translated into twenty-seven languages, and Rawls has come to have a worldwide audience.[1]

The heart of *A Theory of Justice* is Rawls's idea that two principles of justice are central to a liberal and democratic society, arguably to any society: (i) the principle of equal basic rights and liberties; and (ii) a principle of economic justice, which stresses (a) equality of opportunity and (b) mutual benefit and egalitarianism. This latter principle – of mutual benefit constrained by egalitarianism – Rawls calls the difference principle; it indicates when differences (inequalities) are acceptable. The difference principle, assuming a continuing conscientious effort at achieving equality of opportunity as backdrop, is designed to reach an optimum goal point at which no further mutually improving moves are possible; at this point the difference in income and wealth between the topmost and bottom-most groups would be minimized, and those least well off would here have their greatest benefit (without making any group worse off in the process).

What is distinctive about the arguments Rawls develops for his two principles of justice is that he represents them as taking place ultimately in an ideal arena for decision making, which he calls the "original position." The features of the original position (in particular, the so-called veil of ignorance and the requirements of publicity and unanimity) taken together provide a setting for structuring the competition between potential governing principles (for example, the Rawlsian two principles versus various forms of utilitarianism) in a fair and objective way and then for determining a preference, if possible, for one of the candidate principles of justice over the others. Rawls maintained in *A Theory of Justice* that his two principles of justice not only would be unanimously chosen over alternatives in such an original position, but in time would also be universally or near universally endorsed by real persons in a real society governed by those two principles.

In time, Rawls came to feel considerable dissatisfaction with this approach and he began to reconfigure his basic theory in new and interesting directions. Rawls loosened things up in two distinct ways. First, he moved the focus away from his own two principles and toward a "family" of liberal principles (which included his two principles as one possible option). And, second, he developed for this family of principles a background theory for justifying them that did not require people to come to any sort of unanimous foundational agreement. In short, people didn't have to hold one and the same basic moral theory or profess one and the same religion in order for the family of liberal principles to be conclusively justified; rather, the issue of background justification (by moral or religious principles) could be approached from a number of different angles, and this would

work out all right, he argued, if a sufficient overlapping consensus developed over time among such principles. Rawls thought that this new theory (which he developed in his second book, *Political Liberalism*) solved the main problem he had seen in his own earlier theory of justice.[2] It did so by taking account of the fact that in a free and open society, such as one governed by his two principles, there is very likely going to be an irreducible and continuing pluralism (a reasonable pluralism, Rawls called it) of ultimate moral and religious beliefs as well as reasonable disagreement over the precise demands of justice itself.

In his third book, *The Law of Peoples*, Rawls then took this new theory (which he called political liberalism, with its important idea of reasonable pluralism) and tried to outline a constructive place for it in the international order that has emerged since the Second World War.[3]

History of *The Law of Peoples*

In his teaching at Harvard Rawls began a course (Spring Term, 1969) on "Problems of War," which was concerned with issues of *jus ad bellum* and *jus in bello* in reference to the Vietnam War, but "the last quarter of this course was cancelled due a general strike of the Harvard student body."[4] In *A Theory of Justice*, section 58 included a brief discussion of just war and other principles of the "law of nations."

Rawls says in the Preface to his *The Law of Peoples*, "Since the late 1980s, I have thought occasionally of developing what I have called 'The Law of Peoples' . . . In the next years I devoted more time to the topic, and on February 12, 1993 – Lincoln's birthday – I delivered an Oxford Amnesty Lecture entitled 'The Law of Peoples'" (*LoP*: v).[5]

Two brief asides here are in order. Rawls had included an independent section (called Part VI, about forty pages in typescript) on the Law of Peoples in his Harvard political philosophy lectures of 1989; this material was not included in the published version of those lectures.[6] And, though it is not widely known, Rawls published under the same title that year another version of his 1993 lecture.[7] It is described in this second version (*Critical Inquiry*, p. 36n) as "excerpted from" the Amnesty Lecture; but in fact it is full length and differs only slightly, in phrasing and in footnoting, from the better-known Amnesty version. Internal evidences suggest that the *Critical Inquiry* version is the later of the two, and thus constitutes a slight revision of the better-known version of the Amnesty Lecture, published in the book, *On Human Rights*, edited by Shute and Hurley.

Rawls continued his account, in the *Law of Peoples* Preface, by saying, "I was never satisfied with what I said or did with the published essay" (of 1993). Accordingly, he set to work on what became the book *The Law of Peoples.* "The present version, completed during 1997–1998 (a rewriting of three seminars I gave at Princeton in April 1995), is fuller and more satisfactory" (see *LoP*: v, for both quotes).

Rawls's Law of Peoples

The post-Second World War order, like the international orders that came before it, is a world of disparate peoples and of often conflicting and apparently incommensurable values; but it also exhibits much more *worldwide* economic and even political integration than was ever the case before. One notable example of this is the widespread human rights culture that has emerged since the UN's *Universal Declaration of Human Rights* (1948).

The law of peoples, about which Rawls's third book is written, includes the traditional international relations view of states – that they are independent and autonomous, have supreme political authority over the respective domestic area subject to them, exercise control over a particular territory and have responsibility for it, can make treaties with other states, and are formally equal with them as members of the international state system. (This all adds up to something like the old Westphalian world order, in short.) But the law of peoples adds to this traditional content certain conditions or constraints on it. These derive from the post-Second World War settlement (as outlined earlier in this introduction). The most important are the prohibition on waging war except in self-defense (or in collective defense) and the idea that human rights are to be respected (and even enforced by international action in the case of grave violations); to this Rawls adds that nations have a duty to provide economic and development aid to "burdened societies."

In Rawls's view both decent liberal democratic societies and what he calls "decent" nonliberal or nondemocratic ones can accept the *same* international law of peoples: they can accept the same short list of fundamental human rights, can accept a policy of nonaggression toward neighbors, and, finally, can accept a duty to assist societies that are not well ordered, desperately poor societies that are so ill ordered that the great bulk of their populations are condemned to extreme poverty, disease, and often early death. This last duty (of assistance to burdened societies), interestingly, was not included in Rawls's original article version of "The Law of Peoples."[8]

The Importance of *The Law of Peoples* and its Reception

Rawls's *The Law of Peoples* has attracted significant attention for several reasons. The first and most obvious is that it is a carefully set out position on international justice, one intended to guide and inform practical judgment, by perhaps the most important twentieth-century political philosopher in the English-speaking world. It merits close attention for this reason alone. Nevertheless, this is perhaps the least compelling reason for the attention it has attracted. A second and more

compelling reason is that Rawls claims that the book is meant in the first instance to complete his domestic theory of liberal democratic justice; it is meant to set out the moral principles by which a liberal democratic people is to conduct its foreign policy. This means that understanding *The Law of Peoples* is, by Rawls's own account, vital in understanding his domestic theory of justice, and vice versa. Given the deep and serious interpretive and evaluative debates surrounding Rawls's domestic theory of justice, especially as it has developed over time, similar debates over *The Law of Peoples* were perhaps inevitable. Rawls himself offers no easy recipe for resolving such debates, insisting only that any inconsistencies between his theories of international and domestic justice must be resolved in a manner that brings the two into equilibrium with one another.

A third compelling reason *The Law of Peoples* has attracted so much attention is that it did not meet the already well-developed expectations or predictions of many careful readers of Rawls's earlier works. In the latter half of his seminal 1979 book, *Political Theory and International Relations*, Charles Beitz drew on Rawls's domestic theory of justice to develop what he regarded as a Rawlsian liberal cosmopolitanism, one with radical implications, especially with respect to global economic justice. Thomas Pogge's influential 1989 book, *Realizing Rawls*, unfolds in its final chapters in a similar spirit.[9] Together these books (*inter alia*) served to generate within the world of political philosophy a strong expectation that when Rawls did finally speak to issues of global or international justice, he would deliver something like a globalized or international version of his own familiar domestic theory of liberal democratic justice, complete with a robust conception of human rights and a global or international difference principle to regulate economic inequalities worldwide. Of course, Rawls did not deliver such a theory of international or global justice at all in *The Law of Peoples*. And this produced much consternation and disappointment in many readers who thought they had correctly understood the structure, spirit, and implications of his earlier work. That Rawls failed to deliver such a theory in 1999 after receiving significant criticism on a first article-length draft, published in 1993 and delivered as an Oxford Amnesty Lecture, only exacerbated the confusion and disappointment experienced by many of his readers, since it left no doubt that Rawls indeed meant what he said.

A fourth, and for present purposes final, compelling reason Rawls's *The Law of Peoples* has attracted so much attention is that it seeks middle ground on a hotly contested and deeply divided battlefield. Like Beitz and Pogge, Rawls rejects so-called realism in international relations. But at the same time he endeavors to set out the principles governing a "realistic utopia," as he calls it, one that takes human nature as we find it. Unlike Beitz and Pogge, Rawls rejects liberal cosmopolitanism. But at the same time he characterizes his theory of international justice as fully faithful to liberal democratic commitments and as both universal in scope and objective in justification. Naturally enough, Rawls's position has attracted critics from all sides. Some have accused him of endorsing realism with a human face.

Others have attacked his view as a kind of dangerously naïve moralism. Some have seen in his view simply a more tepid version of the overly ambitious liberal cosmopolitanism advanced by Beitz and Pogge. Others have accused him of a retreating to an indefensible relativism (a charge leveled by some critics against his second book, *Political Liberalism*, as well). And, finally, some have seen *The Law of Peoples* as an exercise in liberal imperialism (as a form of old-style colonialism). They see it as a present-day incarnation of the Enlightenment project, and as an attempt to impose modern Western values worldwide. Whether the middle ground Rawls seeks to occupy exists and whether he in fact successfully articulates and defends his own position from within it remains a central and divisive issue among political philosophers working on issues of justice.

For all these reasons, and many others, *The Law of Peoples* has become something of a North Star, or a series of several moving North Stars, within many debates central to contemporary political philosophy. In matters of international justice, whatever your understanding of Rawls's position, and whether you're with it or against it, it is one of the pole stars by which you set the course of your argument.

So *The Law of Peoples* has already generated or reshaped numerous important debates. It is not, as a text, likely to put an end to any of these debates in the near term. It is, first of all, a sketchy book; it also presupposes real familiarity with Rawls's domestic theory of justice and is accordingly difficult to interpret. Further, its method, that of political constructivism, challenging enough to philosophers when applied to relations between peoples taken as corporate moral agents, is generally foreign to many working in traditional international relations theory. Rawls's commitment to reciprocity, at once substantive and methodological, is also a source of difficulty. Reciprocity requires, for Rawls, that moral agents be prepared to settle practical issues regarding how they act toward one another in terms of principles each might accept from a common human reason. As Rawls puts it, practical political justification is public justification and public justification is not simply valid argument from given premises. It is justification addressed to others; it thus aims at premises and conclusions acceptable to others, as well as oneself, in light of their considered convictions.[10] This is, on Rawls's view, a core liberal democratic commitment. In Rawls's view, however, it demands of liberal democratic peoples that they act only on principles of international justice acceptable not merely to other liberal democratic peoples but also to decent nonliberal peoples as well. This has generated significant confusion for many readers since Rawls appears to be claiming simultaneously, first, that it is unreasonable from within a common human reason for liberal democratic peoples to insist on the liberalization or democratization of other not yet liberal or democratic peoples (even though he regards liberal societies as more reasonable and more just than merely decent ones; see *LoP*: 83), and, second, that it is reasonable from within a common human reason for liberal democratic peoples to insist on liberal democratic institutions internally as binding on their own members (for how else could they

enforce their own domestic conceptions of justice?). Rawls's position here is not necessarily incoherent. But it is complex and difficult.

Political philosophers, theorists of international relations and international law, and others engaged in scholarship and debate over issues of international justice thus find themselves in something of a pickle at present. It is nearly impossible to engage in any serious debate over these matters without taking a view with respect to Rawls's *The Law of Peoples*. And it is nearly impossible to arrive at a cogent and well-grounded view merely by reading *The Law of Peoples* itself or a small sample of secondary literature. The early secondary literature was generally quite dismissive and critical of *The Law of Peoples* – but often overly and wrongly so, as even some early critics now admit. The current secondary literature is more balanced, with several strong sympathetic voices rising in defense of Rawls. To the nonexpert and even to some experts, this is all quite confusing.

A collection of original essays, both sympathetic and critical, seemed called for. Such a collection needed to be carefully and well balanced in order to engage the main elements of Rawls's book *The Law of Peoples*: its substantive doctrines of human rights, of global economic justice, and of liberal foreign policy and humanitarian intervention. It should also be a book that takes account of the historical background of *The Law of Peoples*, its methodology, and its commitment to navigating the narrow straits between an overly ambitious (in Rawls's view) liberal cosmopolitanism and an underambitious (again in Rawls's view) cultural relativism or international realism – a book, in short, that gives due measure to Rawls's distinctive view of an ideal global order under conditions of reasonable pluralism.

How the Book is Organized

The essays in this volume are designed to meet this challenge. They are arranged in five sections. The sections track neither Rawls's general division in *The Law of Peoples* between ideal and nonideal theory, nor his division within ideal theory between the law of peoples as binding only between liberal democratic peoples and as extended to all decent and well-ordered peoples, even those that are neither liberal nor democratic. Instead, the sections track what we suppose to be a standard and sound approach to reading and teaching *The Law of Peoples*. Issues of ideal and nonideal theory (and their relationship) are taken up in each section as appropriate. So too are issues concerned with how liberal democratic peoples ought to relate to nonliberal and nondemocratic peoples.

The essays in Part I take up general background and methodological issues. David Boucher places Rawls's approach to international morality in historical context by examining its various relations to the last several centuries of normative theorizing of international relations. Philip Pettit focuses specifically on Rawls's

social ontology, emphasizing the key notion of a people and its methodological centrality to Rawls's project in *LoP*.

The essays in Part II examine Rawls's internationalism against two classes of alternatives, the first more starkly local or ethnic or even relativist, the second more robustly cosmopolitan. Catherine Audard inquires into whether Rawls's law of peoples is little more than old-fashioned Western imperialism repackaged for a new day. Kok-Chor Tan inquires into whether it is not in the end too closely bound up with a nationalist or relativist ideal of toleration in the international order. Leif Wenar defends Rawls's thinly cosmopolitan internationalism against the charge that it is not cosmopolitan enough.

Parts III and IV take up Rawls's positions in *LoP* on human rights and on global economic justice. Wilfried Hinsch and Markus Stepanians begin Part III with a sympathetic and careful reconstruction of Rawls's doctrine of human rights. Alistair Macleod challenges Rawls's human rights minimalism, arguing that it is not consistent with his domestic commitments to liberal democratic justice. Allen Buchanan surveys several arguments suggested or given by Rawls for his human rights minimalism and concludes that it cannot be justified; it is simply the unhappy result of Rawls trying too hard to avoid charges of Western imperialism or parochialism. David Reidy draws Part III to a close by following up on some suggestive references by Rawls regarding political authority and arguing that Rawls's human rights minimalism is both justified and consistent with more robustly liberal democratic commitments regarding domestic justice.

With respect to global economic justice, the essays in Part IV all affirm and emphasize the substantial demands imposed by Rawls's duty of assistance. The main point of contention concerns not Rawls's commitment to a global economic minimum, but rather his lack of commitment to a global difference principle or any other substantial distributional constraint on international or transnational economic inequalities. David Miller begins this section with a general, if not yet conclusive, defense of Rawls's position regarding the collective responsibility of well-ordered peoples for their own levels of wealth. Thomas Pogge rejects Rawls's permissive stance toward global economic inequalities and the explanatory nationalism upon which it apparently rests. Rex Martin carefully reconstructs and sharply criticizes the arguments Rawls gives in *The Law of Peoples* against a global difference principle, though he does not himself endorse a global difference principle. And Samuel Freeman brings the section to conclusion by arguing that advocates of a global difference principle misunderstand the nature of both Rawls's domestic difference principle and the international economic order to which it is purportedly to be extended.

The volume closes, in Part V, with a more focused discussion of the implications of Rawls's *The Law of Peoples* for the foreign policies of, and the contemporary practice of international relations by, liberal democratic peoples. Jim Nickel argues that by virtue of adopting an overly simplistic account of toleration and intervention Rawls missed an opportunity to inform and guide the ongoing development

of international human rights law and practice. Alyssa Bernstein argues that Rawls correctly refuses to endorse democratization of all polities as a foundational foreign policy aim for liberal democratic peoples. And, finally, Andreas Follesdal assesses the guidance Rawls's law of peoples provides to liberal democratic peoples seeking to federate into a more substantial union, for example, the European Union; such federations lie at the center of Rawls's hopes for the emerging world order.

Some Areas Still to Be Addressed

It has not been possible in this volume to take up all the issues raised by *The Law of Peoples* deserving of serious and extended discussion. Four issues in particular merit mention. The first concerns Rawls's constructivist methodology; the second concerns the moral principles governing just war; the third concerns the global struggle for women's rights and gender equality; and the fourth concerns the various empirical premises Rawls deploys throughout his argument.

1. Rawls's constructivist methodology

In *Political Liberalism* (in Lecture III) Rawls cast justice as fairness, his preferred conception of domestic justice, as a constructivist conception of justice. A constructivist conception of justice represents the principles of justice not as part of some timeless and mind-independent moral order known through theoretical reason, but rather as "the outcome of a procedure of construction" rooted in practical rather than theoretical reasoning.[11] Practical reason concerns the production of objects in accord with a particular conception of them. If our practical task is to produce a just society, we need practical principles to guide us in this undertaking. These we construct through a procedure that models both the noncontroversial empirical facts that constrain our undertaking as well as our shared understandings of the ingredient ideals of persons, fair social cooperation, well-orderedness, and so on. These ideals we draw from our moral and political self-understanding as practical moral agents. Whether the outcome of our procedure of construction, our tentatively selected conception of justice, is correct or not is not a function of its truth theoretically assessed, but rather of its reasonableness practically assessed. We have correctly identified the principles of justice if after due reflection they are in wide reflective equilibrium with our other considered convictions. If they are, they mark the practically correct way for us to make together the just society we jointly desire. There is no further court of appeal beyond our shared practical reason.

Rawls extends this constructivist methodology in *The Law of Peoples*. As corporate moral agents, liberal democratic peoples desire a just international order. The production of such an order is a task that belongs to their practical reason.

Rawls's eight principles set out the basic content of the law of peoples and thus constitute the blueprint or fundamental charter of just such an order. This blueprint or charter is the outcome of a procedure of construction that models both the noncontroversial empirical facts that constrain liberal democratic peoples in their practical undertaking as well the ingredient ideals of peoples, fair international cooperation, a well-ordered international society of peoples, and so on, that they share. Whether this blueprint or charter is correct or not is a function of its reasonableness practically assessed. The test is not whether it conforms to some standard of justice given antecedently to and known by theoretical reason. The test is whether after careful reflection it is in wide reflective equilibrium with our considered convictions and thus can reasonably guide liberal democratic peoples in their practical undertaking. In this way, Rawls's law of peoples is quite unlike traditional theories of natural law that root first principles of international morality in an independent moral order known to theoretical reason. Had we had unlimited space for this volume, we would have included an essay addressing the constructivist methodology Rawls deploys in *The Law of Peoples* and its relationship to his conceptions of practical reason and autonomy.

2. *Just war*

The continuing reflection on and incremental growth of the theory of just war has been an important feature of the post-Second World War international order. One important gap in our section on liberal foreign policy and the limits of intervention is a more or less comprehensive discussion of Rawls's contribution to that theory.

Perhaps the simplest way to deal with this lack is, briefly, to compare Rawls's theory of just war in *The Law of Peoples* with that of Michael Walzer.[12] Their theories are enough alike to warrant being treated together, as constituting something like a unified view of the subject. What makes them especially interesting is that each theory has made the notion of human rights central as the ground of justification (or justifiability) in just war theory. But the theories are sufficiently divergent to make fruitful a quick examination of their differences.

Both theorists argue that a country can justifiably go to war for two reasons: it can do so in self-defense or collective defense against aggression or in response to serious and unamendable human rights violations. In traditional just war theory these two grounds are called "just cause." An important unifying idea undergirds these two grounds. For Rawls and Walzer, the ultimate justification here is the defense of the human rights, of the inhabitants in a country, to life and liberty.

Accordingly, both urge that civilians (that is, noncombatants) can never be directly targeted and killed, certainly not as a matter of government or of military policy. To this very stringent doctrine of civilian immunity both Rawls and Walzer allow for one significant exception, that of "supreme emergency." Such an

emergency would arise, to use Walzer's formulation, when a severe threat was both immediate and profound; here a deviation from the doctrine of civilian immunity would be absolutely necessary in order to save a political community from annihilation, or its citizens from wholesale massacre or enslavement.[13] Even so, one main theme of Rawls's endorsement of the supreme emergency exemption is that it can be invoked only when doing so is absolutely necessary to the survival of a liberal constitutional democracy (or presumably of a decent nonliberal body politic), fighting in self-defense.[14] Rawls's restriction of the exemption to such societies as these is one not found in Walzer's account.

On the question of the moral status of combatants, Rawls's and Walzer's positions are again similar. Each argued for the mutual vulnerability of combatants on *both* sides in time of war. Walzer tried to rationalize this mutual vulnerability with the idea that combatants temporarily forfeit their human rights to life and liberty. Rawls, to the contrary, emphasized the idea of mutual self-defense against attack as the grounding justification for this mutual vulnerability. Soldiers on each side are protecting themselves, in combat, from attacks by soldiers on the other side; and since the attacks from either side can be deadly, each side may use lethal force in self-defense.[15]

In sum, then, Rawls and Walzer differ on the justification of the equal vulnerability of the combatants on both sides and, by extension, differ on the justified scope and extent of that vulnerability. And, too, they differ on the justifying conditions of the "supreme emergency" exemption.

One of the most important new ideas in just war theory is the idea that governments and others can justifiably respond forcibly to serious and unamendable human rights violations that are wholly internal to another country. This idea, though it is not universally held today, represents a growing international consensus. As such it is another important feature of the post-Second World War international order.

There is, however, a considerable variety of views as to who has legitimate authority, as it is called in traditional just war theory, to authorize an armed military intervention to protect human rights from grave violations. Some say that only the United Nations (UN) can legitimately authorize such interventions. Others say that either the UN or some regional international political authority (for example, the EU) can legitimately so authorize. And some (most notably Walzer, in his earlier writings) have argued the virtues, in extreme cases, of unilateral intervention (of forcible intervention by *one* nation within the borders of another to prevent or stop grave violations of human rights). Examples usually cited (from the last thirty years or so) are India in East Pakistan (now Bangladesh), Vietnam in Cambodia, Tanzania in Uganda, and (most recently) Nigeria in Sierra Leone.

More recently, though, Walzer has suggested, as an ideal, the value of what he calls "global pluralism." He conceives such pluralism as including a number of alternative centers (such as the UN and the EU), a dense web of social ties that

cross state boundaries, and finally a number of institutions (such as the World Bank, the World Trade Organization [WTO], various NGOs [nongovernmental organizations]) that reflect these alternative centers and social ties. Global pluralism "maximizes the number of agents" who might engage in humanitarian interventions, but at the same time it identifies no single assigned agent that makes or must make the basic decision to intervene.[16]

Rawls and Walzer differ on the appropriate or proper agent(s) of humanitarian intervention. Even when we factor in Walzer's recent turn in a more internationalist direction, a difference remains on this front between Rawls's emphasis on rather formal and pacific regional confederations (or societies of peoples, as he often calls them) and Walzer's advocacy of a decentered and overlapping array of international agencies.

There are, in the end, differences of some significance between the two theorists. And Rawls's version of just war theory marks an improvement on Walzer's version at several points. Even if we regard what Rawls has contributed to just war theory as a mere amendment to Walzer, it is important to see its significance and to take it, or much of it, on board.

There's little merit to the view that just war theory is now obsolete. The kinds of wars it traditionally and principally envisioned, between aggressor armies and defending forces, still occur. But there are cases of deadly conflict besides these. Terrorism and secession come readily to mind. Walzer has addressed the former question at length (especially in his new book *Arguing About War*), using the stratagems of just war theory. Neither Rawls nor Walzer has had much of value to say about secession or regional autonomy. But careful discussions of this issue, for example by Allen Buchanan, are available.[17] Perhaps the simplest point to make here is that traditional just war theory must be expanded to deal with the issues posed by terrorism and secession, but the best discussions of these matters build on just war theory; they do not set it aside.

3. *The global struggle for women's rights and gender equality*

Both of Rawls's earlier books, *A Theory of Justice* and *Political Liberalism*, were subjected to searching criticisms on the issues of women's rights and gender equality. The critics argued that, since the family was one of the main institutions in what Rawls called the basic structure of society, the standards of justice (as given in the two principles and the arguments that support them) should apply to it directly. But Rawls seemed to the critics to have inappropriately bracketed the family off from the wider concerns of social justice. As a result of this bracketing, they argued, his conception both of the citizen and of the human person was male-oriented, and beyond that was modeled almost exclusively on the fully formed and "normal" adult. One important further feature, then, of Rawls's

focus was his relative neglect of what might be called dependent status (children, the old, the sick, the permanently disabled) and of those (largely women) who are their main caregivers.[18]

Rawls's main attempt to deal with these criticisms is to be found in section 50 of *Justice as Fairness* and in section 5 of "The Idea of Public Reason Revisited" (1997). Though drafted in the early 1990s, section 50 was not published until *Justice as Fairness* was itself published in 2001. Rawls's main defense of his overall approach was that, though his theory did not deal directly with issues of race or those of the family and gender, "once we get the conceptions and principles right for the basic historical questions [concerned with such matters as basic rights, freedom and equality, the constitution], those conceptions and principles should be widely applicable to our own problems also." And here Rawls cites the problem of the "inequality and oppression of women," in particular.[19]

The problem of the status of women and their oppression is probably more pronounced and even more dire when we look at things on a global scale. A. K. Sen, for example, speaks of the problem of "missing women": the number of women born and the number who reach adulthood in some of the poorer and less developed regions is far less proportionately than is the case with men. This suggests not only a devaluing and severe neglect of female children in these parts of the world but even an alarming degree of infanticide.[20] Internationally, in many places, women are denied equal citizenship and in some places are denied basic political participation and civil rights altogether. Moreover, the traditional division of labor in these same places is unfair and even oppressive.

In *The Law of Peoples*, Rawls did address some of these problems directly. He argued that the debased status of women could be regarded as a human rights issue. Thus, as respect for human rights gains support worldwide, the status of women will be improved and that in turn will relieve population pressures within burdened societies. However, there's nothing, or very little, in his account of human rights that speaks specifically and explicitly to the status of women. And the relationship he does cite between human rights (giving women the vote and other political participation rights) and relieving population pressures within burdened societies is somewhat indirect.[21]

We had hoped to include an essay on Rawls's *The Law of Peoples* and women's rights and gender equality in this volume. But we were unable to get exactly the essay we were seeking. Some important work on this subject is being done and we refer the reader to it.[22]

4. Rawls's empirical premises

Throughout his argument and analysis, Rawls relies on various empirical premises. A thorough study of *The Law of Peoples* would have to address these. While several empirical issues are raised and discussed in this volume, others are not. Two examples should suffice to make the point.

First, Rawls invokes the so-called "democratic peace" thesis, describing it as the closest thing we have to an empirical law in international relations. There are two components to this thesis, one descriptive and one explanatory. Each has been contested and needs to be verified. Is it true that established democracies do not go to war with one another? And if it is true as a descriptive matter, what explains this phenomenon? Is it because democratic peoples are satisfied by their liberal political cultures, material conditions, and so on? Or is it because they are internally ordered so as always to give decisive institutional weight to the interests in preserving peace? In either case, is the explanation one that supports the idea that there is some special connection between democracies per se and international peace?

Second, Rawls posits that the main causes of any nation's level of wealth are its political culture and the civic virtues of its citizens, and that there is virtually no significant territory on Earth lacking sufficient material resources to support a well-ordered and decent people. Again, these are complex and contested empirical claims in need of careful and thorough examination, informed by economists, geographers, and other social scientists. To the extent that Rawls's argument and analysis turns on these and other empirical premises, this volume is intended to constitute just one part of a thorough and complete critical evaluation.

Notes

[1] John Rawls, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971. (Oxford University Press published the book in the UK in 1972. The first translation of *A Theory of Justice* was published, in a revised version, in German in 1975. A revised edition, based largely on the German edition of 1975, was published in English by Harvard University Press in 1999.)

[2] John Rawls, *Political Liberalism* (hereafter *PL*), New York, NY: Columbia University Press, 1996. (This paperback version is unchanged in content from the hardback version of 1993, except that it has a second [paperback] introduction, pp. xxxvii–lxii, and adds Rawls's "Reply to Habermas," *Journal of Philosophy*, 92 [1995]: 132–80, as Lecture IX.)

Columbia University Press recently issued (in 2005) an "expanded edition" of *PL*, which includes Rawls's "The Idea of Public Reason Revisited" as well. This essay, "The Idea of Public Reason Revisited," originally appeared in the *University of Chicago Law Review*, 64 (Summer 1997): 765–807. It has been reprinted several times.

[3] See John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited,"* Cambridge, MA: Harvard University Press, 1999 (hereafter *LoP*).

[4] See Thomas Pogge's brief biography of Rawls in *The Philosophy of John Rawls*, eds. Henry S. Richardson and Paul J. Weithman, New York, NY: Garland, 1999, vol. 1, pp. 1–15, at p. 9.

[5] This lecture was published in *On Human Rights: The Oxford Amnesty Lectures, 1993*, eds. Stephen Shute and Susan Hurley, New York, NY: Basic Books, 1993, pp. 41–82.

[6] Rawls's lectures in political philosophy at Harvard have recently been published in *Justice as Fairness: A Restatement*, ed. Erin Kelly, Cambridge, MA: Harvard University Press, 2001. See the Editor's Foreword, on p. xii, for a brief discussion of Part VI of the lectures.

The book *Justice as Fairness* is based on the lecture set of 1989, as revised by Rawls in the early 1990s. The book constitutes, then, a sort of bridge between Rawls's *Theory of Justice* (1971), and his *Political Liberalism* (1993).

[7] See *Critical Inquiry*, 20 (Autumn 1993): 36–68.

[8] The main articles – eight in all – of Rawls's charter for the law of peoples are set out in short order in *LoP*, p. 37. Rawls's essay "The Law of Peoples" (1993, cited in n. 5 above) has been reprinted in *John Rawls: Collected Papers*, ed. Samuel Freeman, Cambridge, MA: Harvard University Press, 1999, pp. 529–64. See p. 540 for Rawls's short list of the "principles" of the law of peoples in his article (comprising in this case only seven short points, not the eight found in *LoP*, p. 37). There are other changes – changes in the order of the points or in the verbal content – of the seven points that the article and the book (*LoP*) have in common, but the addition of the duty to assist is the only substantive change that the book makes on the list in the article.

[9] The books mentioned are Thomas Pogge, *Realizing Rawls*, Ithaca, NY: Cornell University Press, 1989; Charles Beitz, *Political Theory and International Relations*, 2nd edition, Princeton, NJ: Princeton University Press, 1999. 1st edition. 1979. (The second edition contains a new "Afterword" by Beitz, pp. 185–216.)

[10] See *Justice as Fairness*, p. 27.

[11] Constructivism has become a term of art within international relations theory in recent years. While there are some points of contact between Rawls's use of the term, with its connection to Kant's moral constructivism, and the use of the term within recent international relations theory, the two uses are distinct in both content and genesis. For discussion of constructivism in international relations theory, see, e.g., Maja Zehfuss, *Constructivism in International Relations*, Cambridge: Cambridge University Press, 2002; and Stefano Guzzini, "A Reconstruction of Constructivism in International Relations," *European Journal of International Relations*, 6.2 (2000): 147–82.

[12] See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edition, New York, NY: Basic Books, 2000. (1st edition 1977; 2nd edition 1992.)

[13] See Walzer, *Just and Unjust Wars*, ch. 16, for the discussion of supreme emergency (esp. p. 254); also pp. 268 and 326. See also Walzer's paper, 'Emergency Ethics', printed in *The Leader's Imperative: Ethics, Integrity, and Responsibility*, ed. J. Carl Ficarrotta, West Lafayette, IN: Purdue University Press, 2001, pp. 126–39.

[14] See Rawls, *LoP*, pp. 98–105, esp. pp. 99, 102, 104–5.

[15] See Rawls, *LoP*, pp. 95–96.

[16] See Walzer's "Governing the Globe" (2000) as reprinted in *Arguing About War*, New Haven, CT: Yale University Press, 2004, pp. 171–91, at pp. 186–7, 189. This particular piece originated as Walzer's Multatuli Lecture (of 1999) at Leuven.

[17] See Allen Buchanan, *Justice, Legitimacy, Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004, Part 3.

[18] One of Rawls's most compelling critics was Susan Okin in her book *Justice, Gender and the Family*, New York, NY: Basic Books, 1989. See also her critique of *PL* in "*Political*

Liberalism, Justice and Gender," *Ethics*, 105 (1994): 23–43. A good overview of main issues is Martha Nussbaum's chapter, "Rawls and Feminism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman, Cambridge: Cambridge University Press, 2003, pp. 488–520. The subject of dependency and caregivers has been explored most thoroughly in Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency*, New York, NY: Routledge, 1999, chs. 2–4.

[19] See Rawls, *PL*, p. xxxi, for the passage quoted; see also *PL*, p. liii.

[20] See Amartya Sen, *Development as Freedom*, New York, NY: Alfred A. Knopf Division of Random House, 1999, ch. 4. (Published in paperback by Anchor Books, 2000.)

[21] See *LoP*, pp. 109–10.

[22] For example, Martha Nussbaum, "Women and Theories of Global Justice: Our Need for New Paradigms," in *The Ethics of Assistance: Morality and Distant Needy*, ed. Deen K. Chaterjee, Cambridge: Cambridge University Press, 2004, pp. 147–76. (An earlier version of this chapter appeared in *Politics, Philosophy and Economics*, 1 [2002]: 283–306.) See also the book version of her Tanner Lectures, *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge, MA: Harvard University Press/Belknap, to be published in 2006.

2

Uniting What Right Permits with What Interest Prescribes: Rawls's Law of Peoples in Context

David Boucher

Among the many criticisms of Rawls's *The Law of Peoples* is the charge 'that some of his arguments rest on a very shaky historical understanding – or at least on a very incomplete portrayal of the relevant history'.[1] The purpose of this chapter is to place Rawls in his appropriate context by exploring the relation of his ideas to those of the thinkers and traditions he invokes. This will entail, first, sketching the principal criteria in terms of which the conduct of states, or nations, have been appraised, condemned or recommended. Second, I will show that Rawls rejects both realism and natural law as foundations for his Law of Peoples. Third, I will show how Rawls agrees with Kant in rejecting the traditional natural law reliance upon conscience, at least in so far as he wants to replace conscience in an international state of nature with the rule of law. Fourth, I will show how Rawls follows Rousseau's attempt to formulate a criterion of conduct that incorporates the positive elements in realism and natural law, while trying to overcome their defects.

1 The Criteria of State Conduct

There are many references in *The Law of Peoples* to those in the history of international relations theory to whom Rawls feels indebted. Principally, the whole project is inspired by Kant's *Perpetual Peace* of 1795 and Rawls consciously sets himself the task that Rousseau clearly articulated in *The Social Contract* (1762), of bringing together what right permits with what one's interests prescribe, so that justice and utility are neither opposed nor divided.[2] There are three major criteria in terms of which the conduct of states has been appraised. First, there is the

dominant tradition whose lineage goes as far back as Thucydides and to which the label 'realism' has become firmly attached. Both Machiavelli and Hobbes later came to epitomise this tradition of *realpolitik* with which the doctrine of *raison d'etat* has become inextricably associated. Within this tradition there is a tendency to separate politics and morality (Machiavelli), or to equate morality with expediency (Hobbes), or equate right with might (Treitschke). If thinkers in this tradition invoke the state of nature it is of the descriptive rather than prescriptive kind. The second criterion is the antidote to 'realism' which, like realism, recognises the propensity for human nature to degenerate to ever-increasing depths of depravity, but which nevertheless remains optimistic about the human capacity for redemption in conformity with a higher moral law, discoverable by right reason, or inferred *a priori* from 'indubitable' data. We find such a criterion invoked throughout Greek, Roman and Christian political thought and often manifest in the complex relations between the law of nature and the law of nations, expressed in the writings of such thinkers as Vitoria (*c.* 1483–1546), Suarez (1548–1617), Gentili (1552–1608), Grotius (1583–1645), Pufendorf (1632–94), Locke (1632–1704), Wolff (1679–1754) and Vattel (1714–67). In modern international relations theory E. H. Carr has most famously labelled these two traditions 'realism' and 'Utopianism' in response to the failure and collapse of liberal internationalism between the two world wars.[3]

E. H. Carr is undoubtedly the doyen of English realism in international relations, to the extent that he has become emblematic, almost a caricature, of that tendency, but he is also intellectually associated with the 'English School' represented by Martin Wight, Hedley Bull and, more recently, Adam Watson. Carr's most famous book, *The Twenty Years' Crisis, 1919–1939: An Introduction to International Relations* (1939), is often seen as the most systematic and incisive demolition of the illusory aspirations of liberal internationalism.[4] Charles Jones attempts to qualify the view of Carr as an arch realist by amplifying intimations that are to be found elsewhere. Jones persuasively maintains that Carr's famous categories of Utopianism and realism in international relations serve somewhat to distract the reader from Carr's own position. It steers a course between the two in favour of what Jones calls a modern or pragmatic realism, one which bears very little resemblance to the classical realism of Machiavelli and Hobbes – Carr does not, for example, posit a universal human nature as Thucydides and his successors did.[5]

Rawls explicitly rejects both the realist and Utopian traditions in his *Law of Peoples*, and clarifies his own position with reference to E. H. Carr. Carr's criticism of Utopianism (sometimes referred to as idealism, which should not be confused with philosophical idealism) was against the self-delusion of influential politicians, and not against philosophy. Contrary to the views of critics of Carr, he was not a blatant advocate of unconstrained realism. There was a role for moral judgement, and in his view reasonable political opinions are a compromise between power, which is associated with realism, and moral judgement and values, which he equates with Utopianism. Rawls makes clear that his form of 'realistic'

Utopianism 'doesn't settle for a compromise between power and political right and justice, but sets limits to the reasonable exercise of power. Otherwise, power itself determines what the compromise should be, as Carr recognized'.[6]

An alternative philosophical criterion to realism and Utopianism (or idealism) was self-consciously formulated in an attempt to avoid the obvious capriciousness and arbitrariness of 'realism', and the apparent disregard of interests that abstract criteria such as natural law and Kantian ethics exhibit. This third criterion, although historically evolving in response to changing circumstances, is not arbitrary. It is the result of social interaction and reasonable negotiation in which moral constraints are formulated, and which accommodate the interests of those who constitute the same society, whether a society made up of individuals or of nations, and who wish to coexist and cooperate for mutual benefit. This recognition of a historically emerging criterion of individual and state conduct finds expression in the work of Rousseau and Hegel, but elements of it are nascent in the writings of both Burke and Kant, whose primary affinities in many respects may appropriately lie with the second of the three traditions. Rawls's explicit rejection of Thucydides' 'realism' and the Utopianism and cosmopolitanism of Natural Law in favour of what he calls a 'realistic utopia', one based upon reasonable agreement and overtly indebted to both Rousseau and Kant, intimates that his view should be explored in relation to the third of the traditions that I have briefly mentioned.[7] Even though Kant rejected the derivation of moral obligation from the preferences and desires of human agents, from human authorities and communities, and from God, preferring instead to derive it from reason, he nevertheless posits what R. G. Collingwood called a regularian ethic, of action according to rule, and therefore offered an abstract criterion of conduct, as natural law and natural rights theorists had done.[8]

It is Rawls's rejection of both realism and Utopianism and the aspiration to unite justice and utility that firmly locates him in the third of the traditions exhibited in the classic theory of international relations literature.

2 Against Realism and Natural Law

Rawls's project is clearly designed to overcome the shortcomings of realism in the theory and practice of international relations. Many of these he attributes to the centrality of the state as the subject of international law for three centuries after the Peace of Westphalia. Throughout the later Middle Ages and the early modern period the state gradually became discussed conceptually in abstract terms, quite distinct from the private person of the ruler, and from the power of the people whose absolute allegiance the state demanded.[9] The two treaties that comprise the Peace of Westphalia (1648) blocked the aspirations of hegemony of the Holy Roman Emperor by acknowledging the right of over three hundred political units to make alliances and conduct their own foreign affairs with notional autonomy.

The peace sanctioned the formal equality and legitimacy of an array of state actors. At the same time it postulated the principle of balance as the mechanism to prevent a preponderance of power.[10] It presaged the prominence of sovereignty as the most important concept in the modern state system. Instead of abolishing the right to war it provided criteria for the legitimate resort to war. The balance of power was to be the mechanism by which hegemonic expansionism would be prevented.[11]

Although the participants were not conscious of establishing a new system or state-centred international society, the Thirty Years War (1618–48) and the Peace of Westphalia brought to the fore the conceptual issues of sovereignty that the political philosopher was compelled to address. The Peace of Westphalia has taken on emblematic significance as shorthand for the occasion that heralds the emergence of the modern system of states and the sovereign integrity of its members enshrined in the international law of the succeeding three centuries.[12] It is this system and its consequent emphasis upon state sovereignty that Rawls identifies as the source of many of the 'realist' assumptions that underpin the practice of modern international relations, and which his 'Law of Peoples' is designed to avoid. In *A Theory of Justice* Rawls had been content to use the term 'law of nations', suggesting that principles of justice had to be formulated in an original position in which representatives of nations, 'deprived of various kinds of information', choose political principles for justice between states.[13] There he used the terms 'nations', 'peoples' and 'states' interchangeably.

In *The Law of Peoples* Rawls acknowledges that realism is the predominant manner of conceiving international relations. He does this by arguing that it is not always reasonable to be rational – in contrast with, for example, Machiavelli, who maintained that it is not always rational to be moral. Against the realists, who believe with Thucydides that human nature is everywhere and always the same and that international relations is an ever ongoing struggle for wealth and power, Rawls chooses to avoid the term 'state', and instead makes 'peoples' the subject of his international law, or 'Law of Peoples'.[14] Unlike states, 'liberal' peoples limit their rational self-interest to what is reasonable.[15] The Law of Peoples sharply restricts their (and all) peoples' rights to independence and self-determination, eliminating the propensity for the subjugation of other peoples.[16] This constitutes an explicit attack on sovereignty, which Rawls wants to limit in both its external and internal dimensions.

For Rawls, peoples, unlike states, do not possess sovereignty as traditionally conceived in the body of positive international law. They lack the right of war in pursuit of state policy and the right to autonomy within their own borders: 'We must reformulate the powers of sovereignty in the light of a reasonable Law of Peoples and deny to states the traditional rights to war and to unrestricted internal autonomy'.[17] This means that Rawls, in line with Kant and Walzer, wants to restrict the right of forcible intervention for all but a few extreme cases. Exceptions may include outlaw, or rogue, states that constitute a significant

threat to the Society of Peoples, or where grave violations of human rights are being perpetrated. Furthermore, peoples have a duty to assist other peoples, especially in those cases where adverse conditions inhibit the attainment of a just or a decent political regime.[18] Rawls, then, self-consciously departs from the Westphalian model of international relations by acknowledging that sovereignty is constrained by having to respect basic human rights, and by prohibiting aggressive war.[19] Liberal and decent peoples 'are not moved solely by their prudential or rational . . . interests, the so-called reasons of state'.[20] Rawls, then, does not wish to associate himself with realism or realists, rejecting both the strong version represented by Thucydides and the weaker version proposed by E. H. Carr.

Rawls also, by implication, rejects the second criterion in international ethics. For Rawls, Christian natural law is a 'reasonable comprehensive doctrine', and like other such doctrines it is not precluded by, but is nevertheless rejected as foundational to, the Law of Peoples.[21] The term 'law of peoples', Rawls suggests, relying upon John Vincent,[22] derives from the idea of *jus gentium*. The phrase, '*jus gentium intra se*' indicates what all laws have in common. Rawls's use of the term 'law of peoples' does not, however, have the same meaning. Aquinas, for example, whom Rawls takes as his exemplar of natural law theorists, concurs with the definition of *jus gentium* offered by Gaius in the *Institutes*: 'Whatever natural reason decrees among all men is observed by all equally and is called right common among nations'.[23] Rawls uses the term 'Law of Peoples' to refer to those principles that regulate mutual political relations among peoples, not among individuals or states as such, as was traditionally the case with natural law and law of nations theorists.[24]

It should not be assumed that the strengthening of the state and state sovereignty, which Rawls deplores, were exclusively associated with the realist position in the philosophy of international relations. Pufendorf, Locke, Wolff and Vattel strengthen the inviolable nature of the state as the principal subject of the law of nations and as a collective 'moral person', or actor, in international relations. Like Hobbes, they believe that individuals are free and equal in the state of nature, but unlike Hobbes the natural equality of which they speak is not physical or mental. It is a moral equality in so far as their obligations and rights are the same. As moral and not artificial persons, states are related to each other as individuals are in the state of nature. There is a presumption of natural equality in relation to the possession of rights.[25] On moral grounds both giants and dwarfs are equally persons, and in Vattel's view the same principle applies to small and large republics; they are equally sovereign states.[26] P. P. Remec tells us that it was Pufendorf who first applied the idea of the juristic moral person to the state and hence made it subject to the moral law of nature. His successors Wolff and Vattel extended the idea to designate states the moral subjects of the law of nations.[27]

As free and independent moral persons, nations are at liberty to make their own decisions about what their consciences demand in the fulfilment of their duties to other nations, without at the same time failing to discharge their duties

to themselves. The obligations that individuals owe to humanity become the responsibility of the state of which they are citizens. We see a clear shift away from individuals as the subjects of the law of nations, towards states that are to act on their behalf in international relations. This simply reflects the growing centralisation in the state of diplomatic, treaty- and war-making powers during the early modern period.

Even though the state becomes privileged over the individual, in modern natural law theory there is no suggestion, as there was among realists, that right in the state of nature, either between individuals or nations, is based on might or force. Wolff contends that: 'Just as might is not the source of the law of nature, so that any one may do what he can to another, so neither is the might of nations the source of the law of nations, so that right is to be measured by might'.[28] While a nation has a duty to provide security for its people and develop the strength to discharge its obligations, it 'may not subject [the people] to its control by force of arms simply for the sake of increasing its own power'.[29]

Rawls compares his doctrine of the Law of Peoples with traditional natural law. He argues that their similarity resides in the fact that they both hold out the possibility of universal peace among nations, conditional upon nations conforming to the principles of natural law or the Law of Peoples. The two concepts are, nevertheless, conceived very differently. Rawls's characterisation of natural law, and its relation to other law, such as eternal, and revealed law, or scripture, is essentially Thomist: 'The natural law is thought to be part of the law of God that can be known through the natural powers of reason by our study of the structure of the world. As God has supreme authority over all creation, this law is binding for all humankind as members of one community. Thus understood the natural law is distinct from the eternal law, which lies in God's reason and guides God's activity in creating and sustaining the world.'[30] Such a characterisation grossly oversimplifies what was an immensely complex set of issues, especially that of the relationship between the law of nature and the law of nations.

The method for discovering the content of the law of nature was a matter of contention. Grotius, for example, distinguishes the principal methods: the *a priori* and *a posteriori. A priori* reasoning entails demonstrating that something conforms or fails to conform to a 'reasonable and social nature'.[31] *A posteriori* reasoning can result only in probabilities by inferring from the common agreement or practices of at least the civilised peoples that something is, or is not, in conformity with the law of nature. Both Aquinas and Vitoria maintained that the natural law could be known by the exercise of right reason, independent of revelation. Vitoria contended that natural law was not innate. It was natural because our natural inclinations endow us with the capacity to judge what is right.[32] The test of whether something contravenes natural law is 'when it is universally held by all [civilised people] to be unnatural'.[33] Vitoria intimates that the law of nations and customary law are to be equated with human positive law, and not with the natural law. He does nevertheless posit an intimate relation. Rather ambiguously,

Vitoria suggests that the law of nations 'either is or derives from natural law'.[34] For example, natural law as a dictate of reason prohibits the killing of the innocent. The law of nations as a deduction from the dictate of reason determines who are to be regarded as innocent.[35] James Turner Johnson suggests that for Vitoria the '*jus gentium* is a conscious, though culturally relative, expression of the law of nature'.[36]

Thinkers such as Vitoria and Gentili are evasive on the relation between the law of nations and the natural law. Vitoria suggests that there are some things in the law of nations that are clearly derived from the law of nature, while others receive their legitimacy from 'the consent of the greater part of the world'.[37] Gentili at first appears to equate the two,[38] but nevertheless maintained a distinction between them, suggesting that the law of nations is extremely difficult to discern. It is discoverable by consulting a variety of sources, including its authors, customary practice, trade regulation,[39] reason itself and the arguments and authority of philosophers, along with the Holy Scriptures. All shed light upon the law of nature and nations.[40] In Gentili we have an emphasis upon the positive aspect of the law of nations, as that which is generally agreed or well established by custom, having its basis in natural reason and natural law. Gentili's position is further complicated by the fact that he thinks both the law of nature and the law of nations are expressions of the Divine Will. This to a large extent detracts from the view that he secularises the natural law and the law of nations.[41] Both individuals and states are the subjects of this law of nations.

Vattel reflects the extent to which the state had by the middle of the eighteenth century become the central actor in international relations. For Vattel natural law is the basis of the law of nations, but the two are not identical.[42] Individuals are the subjects of natural law, having rights and obligations in relation to each other, but states differ from individuals, and although states are related to each other in a condition analogous to the state of nature, the law of nature has to become transformed into the law of nations. For Pufendorf, Wolff and Vattel states are corporate moral persons with rights and duties different from those of individual persons. They are the creation of the individuals who comprise them, and states exercise on their behalf the duties that those individuals have to humankind as a whole.[43] For Vattel the state is a deliberative agent having 'an understanding and a will peculiar to itself'.[44] For Rawls it is peoples, acting through their representatives, who have this moral capacity.

One of the principal ideas of the natural law and law of nations theorists, from the Stoics to Vattel, is the idea of a community of mankind. It is a community subject to a moral law that acknowledges and accommodates the institutions of societies and states to which duties are owed. Although natural law theorists posit a universal law and a community of humankind, there is no suggestion of an institutional cosmopolitanism. States are very much at the centre of the law of nations.

There are, of course, other versions of cosmopolitanism, such as the utilitarian and Marxian. Rawls rejects all versions of cosmopolitanism. He explicitly distances

himself from modern cosmopolitans, but by implication also theorists who put individuals at the centre of their conception of international law and justice. Cosmopolitans, he claims, in contrast with his own position, are ultimately concerned with individual well-being and not the justice of societies.[45] In addition, Rawls specifically singles out those versions of cosmopolitanism that ground principles of international justice, including human rights, on arguments such as 'human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights'.[46] The Law of Peoples that regulates the Society of Peoples takes peoples as the actors, just as individuals are actors in domestic society. The society of peoples comprises both liberal and 'decent' peoples. Liberal peoples have three basic features. Their interests are served by a reasonably just constitutional democratic government, they cohere as a society in sharing common sympathies, and they have a moral nature.[47] On the principle of toleration liberals have to acknowledge that there are decent societies capable of subscribing to and upholding various international principles such as human rights, but whose societies are hierarchical and not democratic.

3 The Kantian Inheritance

Rawls's *Law of Peoples* is, like Kant's *Perpetual Peace*, designed to replace the balance of power principle in international relations with the rule of law, based on a contract, or reasonable agreement, among the participants. To rely upon the mechanism of the balance of power, which has built into it the use of war as an instrument of policy, in order to achieve a condition of permanent peace is, Kant suggests, 'a pure illusion'.[48] He sought instead to establish peace on a legalistic footing. For Rawls it is reasonable interests that make democratic peace possible, 'and the lack thereof causes peace between states to be at best a *modus vivendi*, a stable balance of forces only for the time being'.[49] Kant's primary concern in political philosophy was to emphasise the priority of establishing the rule of law among nations within the context of a properly organised confederation based upon agreement.[50]

The Law of Nations for Kant is much more broadly conceived than its formulation in the hands of Vattel and his predecessors. It encompasses the relations among nations as well as the relations among individuals who are members of different nations, including the position of the individual in relation to a foreign state. Kant argued that in order for a treaty of perpetual peace to be legally binding it must attain the formal consent of civilised nations. In other words, it cannot be effected in the absence of a legally constituted framework. This is the point that Rawls takes firmly on board.

Kant was dismissive of his predecessors who, in their attempts to eliminate force from international relations and to regulate states by subjecting them to the

moral law, espoused nothing but vacuous aspirations. He dismissed as unrealistic the schemes of Grotius, Pufendorf and Vattel, whom he called 'miserable comforters'. They were not, however, unaware of the tenuousness of the constraining influence of the law of nations, often acknowledging its fragility.

Pufendorf, for example, affirms the regulatory capacity of natural law, custom and conventional agreements, but denies that they have the force of law in the required sense of being backed by a sovereign who can demand compliance. In other words, the obligations of states under the law of nature, and those customs and agreements in accordance with it, are for Pufendorf imperfect. In *A Theory of Justice* Rawls makes a distinction between obligations that are by and large acquired by express or tacit agreement, and natural duties (negative and positive) that are obligatory regardless of agreement, such as the duties not to be cruel, not to harm or injure another, and to act civilly. Natural duties hold between individuals regardless of institutional relationships, but Rawls is clear that we would acknowledge them in the original position. They are applicable to all individuals as equal moral persons, and are owed not only to definite individuals related to each other in a cooperative arrangement, but to persons in general. Because of their universality, 'One aim of the law of nations is to assure the recognition of these duties in the conduct of states'.[51] The idea and content of natural duties look suspiciously like a moral foundationalism derived from an implicit acceptance of natural law, which is of course a 'comprehensive' doctrine. In developing his ideas of justice as political rather than metaphysical Rawls was at pains to exclude comprehensive doctrines as the basis of the theory. Both the ideas of natural duties and of the law of nations no longer figure in *Political Liberalism*, *The Law of Peoples*, or in 'The Idea of Public Reason Revisited'. Individuals and peoples continue to have duties of civility, which are moral and not legal, without the adjective 'natural', within domestic societies, and also in the society of peoples where it is a requirement to give public reasons 'appropriate to the Society of Peoples for their actions'.[52]

The distinction made in *A Theory of Justice* between obligations and natural duties is the equivalent of Pufendorf's categories of congenital and adventitious obligations. Congenital obligations are enjoined directly by natural law and refer to those obligations we owe to God as our creator, and to each other by the mere fact that we are human. For Pufendorf the natural disposition of men is to be peaceable, and the fundamental laws, or the absolute congenital obligations, relating to this disposition are natural, and are beyond the capacity of men to alter.[53] Adventitious obligations are assumed voluntarily, or are imposed upon us by others.[54] The distinction between congenital and adventitious obligations, or duties, refers to their source and should not be confused with the distinction between natural and civil obligations, which refers to the force they have in community life. Pufendorf contends that 'natural obligation is that which binds only by the force of natural law; civil obligation that which is reinforced by civil laws and authority'.[55]

Moral obligations that we find it difficult to enforce in a state of nature become enforceable when we constitute an authoritative civil sovereign capable of prescribing them by law with enforceable penalties attached: 'Hence we are said to have an imperfect right [*jus imperfectum*] to the former, a perfect right [*jus perfectum*] to the latter, and similarly to be imperfectly obligated in the former case, perfectly obligated in the latter'.[56] In a state of nature our moral obligations are compelled by conscience, and in civil society become compelled by the force of positive law. For Pufendorf both natural and civil obligations have an equal moral foundation in natural law.[57] The use of the terms imperfect and perfect duties and obligations is not always consistent in the history of ethics. The distinction is also used to suggest that perfect obligations have correlative rights and rights holders, while imperfect obligations do not.[58] In this sense imperfect and perfect duties do not have an equal moral foundation and have significant structural differences.[59]

It is the very emphasis upon conscience in the state of nature (including the international 'state of nature') by natural law and law of nations theorists that convinced Kant that unless such informality of conscience was replaced by the formality of international contracts and agreements to establish a peaceful federation with explicitly agreed rules, then nations in their relations with each other would continue acting according to their own interpretation of international right, and exercise their so-called right of war. It is theorists such as Grotius, Pufendorf and Vattel, Kant believed, who gave credibility to this idea of International Right, and the right to go to war, in which human nature is seen at its most depraved and unconstrained. There is, Kant argues, 'no instance of a state ever having been moved to desist from its purpose by arguments supported by the testimonies of such notable men'.[60] Their codes, Kant argues, lack even the slightest legal force because states are not subject to an external constraint.

Rawls explicitly wants to resurrect the Kantian ideal of *foedus pacificum*, or a league of peace that eliminates force from among and between the relations of liberal peoples and decent hierarchical peoples, but which also allows for a pragmatic element that he believes traditional natural law lacks.[61] Whereas, in Rawls's view, the Thomist follower of natural law cannot condone the deliberate loss of innocent life, political liberalism allows exemptions in supreme emergency: 'The statesman must look to the political world, and must, in extreme cases, be able to distinguish between the interests of the well-ordered regime he or she serves and the dictates of the religious, philosophical, or moral doctrine that he or she personally lives by'.[62] The Law of Peoples is therefore, in contrast, expressed as a political conception with political values. The statesman must act in such a way that he or she does not follow capricious whims, or what rationality prescribes in the interests of reason of state, or blindly follow an otherworldly law divorced from the contingencies of the moment, and instead act in such a way as justice and utility are in no way divided as regards what right dictates and interest prescribes.

Rawls very much subscribes to Michael Doyle's thesis that liberal states do not go to war against each other.[63] Kant himself subscribed to a similar thesis in believing that republican states, those that have a consultative decision-making process representative of the various groups in society, would not choose to go to war against each other, and on the contrary would choose to confederate in order to prevent such wars. Kant envisaged a gradual broadening of his pacific league until rogue states were either defeated, or saw it in their interests to emulate peaceful states.

Kant had no wish to eliminate the state from international relations. On the contrary, he wished to transform the state internally, ensuring that the decisions made were reflective of a consultation process he called republicanism. This is a fundamental prerequisite to the peaceful pact in that it is assumed that, when properly consulted, those immediately affected by war would do all in their power to avoid it. Cosmopolitan right is grounded in the idea of free commerce, and amounts for Kant to the right of hospitality, that is, the right not be treated as an enemy, or with hostility by another individual or state. It affords no right of permanent residence in foreign lands. In other words, it amounts to little more than the rights of passage of which many traditional natural law theorists speak. The guarantee of rights in Kant's plan is much more firmly attached to sovereign states.

4 Rawls's Debt to Rousseau – the Third Criterion

For Rawls 'The Law of Peoples' is not arbitrary; it is not the reaction to a felt need, but has an underlying manifold of reasonableness. Nor is it so abstract that it fails to connect with the interests of the society of peoples it regulates. Rawls does not want to deny the validity of the emphasis upon interests in the realist tradition. He contends that peoples must have interests – otherwise they would be either inert or passive, or likely to be swayed by unreasonable and sometimes blind passions and impulses. The interests which move peoples (and which distinguish them from states) are reasonable interests guided by and congruent with a fair equality and due respect for all peoples.

Rousseau was familiar with the natural law writings of Grotius, Pufendorf and Burlamaqui, but transformed the meaning in his use of the vocabulary. Rousseau is critical of modern exponents of natural law because they restrict it to moral relations among rational men, who come to know it through the instrument of reason. They are all agreed, Rousseau contends, despite differences of definition, that it is impossible to come to know the principles of natural law and to conform to them without being a 'great reasoner and profound metaphysician'.[64] They fail to see the paradox that men must have required prior to the establishment of society a highly developed rational faculty, a level of achievement that only the intellectually gifted few acquire even within it.

Rousseau's main criticism of natural law jurists is that they assume what they seek to prove. They fail to identify and discount the characteristics of man acquired as a result of living in a society. Natural law jurists fail to go back far enough or deep enough into the origins of man in assuming socially acquired capacities as natural and projecting them back into a state of nature.

Rousseau, while not denying that God may be the source of all justice, emphasises our inability to apprehend justice from such an abstract source – hence, for him, the necessity of establishing governments.[65] When he talks of natural law in the state of nature it is to equate it with the natural sentiments, which make acts of cruelty repulsive to us. It is neither discoverable by, nor consistent with, reason because man in the state of nature has not developed rational capacities. Rationality must await the institution of civil society.

Rousseau denies that there is a general society of mankind subject to a universal moral law. Humanity is not united by a common feeling, nor is there a sense that in acting as an individual an end relative and general to the whole of humanity is being pursued. The moral community of humanity is not prior to and manifest in individual societies. Instead it is our experience of actually constituted society that gives rise to ideas of an imagined universal society. We only conceive ourselves as men after first becoming citizens. Rousseau argues that it is relatively late in human history that the admirable ideas of natural right and a universal brotherhood of man emerge. It is not until the advent of Christianity that they become more widely accepted, but even under the laws of Justinian the humanity of the Romans extended only as far as the boundaries of the Empire.[66]

Rousseau believes that human nature is shaped by politics.[67] Character is the result of nurture rather than nature. Humans are malleable, or, to use Martin Hollis's term, they are plastic, capable of being moulded to a degree by institutions.[68] A good society provides the environment for the development of virtuous citizens whose interests are in harmony with the common good. A corrupt society produces citizens motivated by their particular selfish wills. Rousseau's theory is constitutive in that the nature of man is related to the social relationships into which he is interwoven and which extend over long periods of time. Human nature and human community are inextricable, the latter being constitutive of the former.

Like Giambattista Vico, Rousseau sees the human world as a product of human intelligence. The evils that he sees around him – the power politics, insecurity and immorality – are of human creation, and far from being structurally inherent and deterministic, can be overcome by human will. Thus, far from being the extreme pessimist that realists portray him to be, Rousseau has faith in the human capacity for redemption, starting with the reconstitution of the state on ethical principles. The criterion of ethical conduct is to be not an abstract natural law divorced from the experience of human beings, nor principles based upon self-interest and capable of justifying any capricious act, but instead a criterion that is immanent in

the real will of individuals. It is a criterion based upon the principle of a common good rather than self-interest, the idea of the General Will rather than a particular will. This is what he means at the beginning of the *Social Contract* when he says that: 'I will always try in this inquiry to bring together what right permits with what interest prescribes, so that justice and utility do not find themselves at odds with one another.'[69] He goes on to say that the rights of a social order are the most sacred of all and are the foundation of all others. The rights are not natural, but instead 'founded upon conventions'. Unlike the human constitution, which is a work of nature, the constitution of the state is a work of art.[70]

Rawls, like Rousseau, attests to the importance of the socialisation process in forming reasonable and just citizens, proud of their institutions, achievements and cultural heritage. To enjoy the protection and nurture of a framework of reasonable and just political and social institutions that have endured predisposes individuals to endorse those institutions when they reach maturity. In this context, to say that human nature is good is to say that citizens who grow up under reasonable and just institutions – that satisfy any of a family of reasonable liberal political conceptions of justice – will affirm those institutions and act to make sure their social world endures. (As a distinguishing feature, all members of this family of conceptions satisfy the criterion of *reciprocity*.) There may not be many such institutions, but, if there are, they must be ones that all of us can understand and act on, approve, and endorse.

Rawls is indebted to Rousseau for one of the necessary conditions for a 'realistic utopia'. Rawls contends that it must rely upon the actual laws of nature and attain the sort of stability that the laws allow, that is, citizens acting in conformity with the appropriate principles and sense of justice into which they have become inducted as a result of 'growing up under and participating in just institutions'.[71] Rawls claims to be taking people as they are, within the constraints of the laws of nature (descriptive rather than prescriptive), and constitutional and civil laws as they might be 'in a reasonably just and well-ordered democratic society'. This he attributes to the opening lines of Rousseau's *Social Contract*.[72]

In essence, Rawls wants to follow Kant's lead, which he takes to be the use of a social contract to establish a constitutionally democratic government, as the prerequisite for a second contract 'in which liberal peoples make an agreement with other liberal peoples', and with non-liberal, but decent peoples.[73] For Rawls, both agreements are hypothetical and non-historical. For Kant, the first contract is certainly hypothetical, but the second is certainly historical.

Rawls's second contract, like his first, is premised on a veil of ignorance, but instead of individuals as the agents, the representatives of peoples work out the fair terms of agreement that reflect the fundamental interests of peoples, based on a liberal conception of justice already chosen in the original position. As in the first, there is a baseline of equality, not in social and economic primary goods, but 'the equality of and equal rights of all peoples'.[74]

Like Kant, Rawls sees the process of consolidating the confederation as one of socialisation. In the domestic case citizens develop a sense of justice as they participate with others in the just social world. There is a parallel international process by which the habitual honouring of the terms of a just Law of Peoples, exhibiting an evident and mutually recognised intention to comply, generates mutual trust and confidence. They come to see these norms as mutually advantageous, and in time adopt them as ideals of conduct.

This process of moral learning is integral to the success of the Law of Peoples, and includes a proper sense of pride in the historical achievements of one's forebears.[75] This is the proper sense of patriotism, not to be confused with nationalism that harnesses and perverts patriotism and that is inconsistent with respect for the equality of all peoples. What Rawls is effectively doing is alluding to, and drawing upon, the republican tradition in Western political thought. He is nevertheless subscribing to the type of patriotism epitomised by Pericles' Funeral Oration in the *History of the Peloponnesian War*, and characterised in the modern era by Rousseau, the model to which Rawls subscribes in portraying patriotism as lacking arrogant or wounded pride: 'Their respect rests on the freedom and integrity of their citizens and the justice and decency of their domestic political and social institutions. It rests also on the achievements of their public and civic culture. All these things are rooted in their civic society and make no essential reference to their being superior or inferior to other peoples. They mutually respect one another and recognise equality among people as consistent with that respect'.[76]

A people, in Rawls's view, has an interest which he calls 'proper self-respect'.[77] It is a self-respect based upon a common consciousness of their historical and cultural achievements, what Rousseau calls *amour propre*, altogether distinct from their interest in the safety and security of the community. Like Pericles, Rousseau extols the virtue of a passionate love of one's country, which is 'a hundred times more ardent and delightful than that of a mistress'.[78] The community of the whole world dilutes the sentiment of humanity and provides little or no foundation for obligations to each other as fellow human beings rather than citizens. The most virtuous acts, Rousseau contends, arise out of the sentiment of patriotism.[79] Each people has, or ought to have, a national character. If it did not it would have to be given one. It is national traditions and institutions that shape the character of a people and give rise to its genius. Education 'must give souls a national formation' by instilling in the young the whole cultural heritage of its people. A people whose love of liberty and country has been brought to the 'highest pitch' will not easily be conquered.[80] In Rawls's view it is a people's interest, in Rousseau's sense, that leads them to demand from other peoples acknowledgement of and proper respect for them as equals. For Rawls it is *amour propre* that distinguishes a people from a state. Just peoples readily extend the same acknowledgement of equality and proper respect of other peoples.[81]

Conclusion

Rawls's reformulation of the powers of sovereignty arising from a reasonable Law of Peoples is designed to restrict the traditional right of states to wage war and to have complete internal autonomy.[82] He does not envisage world government for the reasons that Kant gives. Unlike individuals in the state of nature instituting a commonwealth, states cannot successfully join together into one universal state. Nations, Kant claims, because of their views on the international rights of individual states, will not join together into one state of nations. The idea of a universal republic, although right in theory, would be rejected in fact.[83] The extent of its territories and the immense difficulty of governing them and protecting the rights of citizens would be impracticable and lead to internal strife.[84] Furthermore, Kant argues that a world state is not feasible because of the diversity of language and religions among nations.[85] Only by means of what Kant describes as a 'federal union', 'federative associate partnership or confederation', or 'permanent congress of states', can peace begin to be effectively kept between states.[86] A federation, Kant claims, is preferable to one where a state outgrows itself and absorbs all others into a 'Universal Monarchy'. In such a soulless despotism the range of government grows over a larger area and the laws become too general and lose their degree of definitiveness, undermining what is good and precipitating anarchy.[87] The evils both of a universal despotism and of war impel states to seek deliverance, not in a universal state under one ruler, but in 'a lawful *federation* under a commonly accepted *international right*'.[88]

The vigour of the laws wanes as the extent of government increases. A world despotism loses its grasp of power and the political unit disintegrates. A confederation of states was for Kant practicable and desirable. Rawls does, nevertheless, reject Kant's transcendentalism and metaphysics. His is not a deontological theory of ethics like Kant's, nor is it merely instrumental like that, for example, of Hobbes. Practical reason, although associated with Kant, is for political liberalism quite distinct, in that it is based on the idea of reasonableness. Reasonable citizens, for example, 'are characterised by their willingness to offer fair terms of social cooperation among equals and by their recognition of the burdens of judgment'.[89] It is a constrained instrumentality, within the bounds of what is reasonably rather than rationally determined.

The rights of sovereignty that peoples enjoy derive from the Law of Peoples and result from their common agreement in 'suitable circumstances'.[90] There is the realisation that between the immutable miseries of the human condition such as pestilence, plague and epidemics, on the one hand, and unfathomable irresistible causes such as fate and the will of God, on the other, the civil social life is the creation of human beings and can be modified to respond to new contingencies.[91] Like Vico, Burke and Dilthey, Rawls realises that whereas the natural world may be a mystery to everyone save its creator, we are the authors of our social

world and we are everywhere at home in it because we are capable of changing it and ourselves through manipulating institutional arrangements by means of reasonable agreements. In justification of his project Rawls maintains that: 'I contend that this scenario is realistic – it could and may exist. I say it is utopian and highly desirable because it joins reasonableness and justice with conditions enabling citizens to realize their fundamental interests'.[92]

Notes

[1] Martha Nussbaum, 'Women and the Law of Peoples', *Politics, Philosophy and Economics*, 1 (2002): 287.

[2] John Rawls, *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999, pp. 10 and 13.

[3] E. H. Carr, *The Twenty Years' Crisis 1919–1939*, London: Macmillan, 1939.

[4] For example, Graham Evans, 'E. H. Carr and International Relations', *British Journal of International Studies*, 1:2 (1975): 77–97.

[5] Charles Jones, *E. H. Carr and International Relations: A Duty to Lie*, Cambridge: Cambridge University Press, 1998.

[6] Rawls, *Law of Peoples*, p. 6n.

[7] For a detailed discussion of these traditions see David Boucher, *Political Theories of International Relations from Thucydides to the Present*, Oxford: Oxford University Press, 1998. Selections from primary sources may be found in Chris Brown, Terry Nardin and Nicholas Rengger, eds, *International Relations in Political Thought*, Cambridge: Cambridge University Press, 2002.

[8] R. G. Collingwood, 'Goodness, Rightness, Utility', in *The New Leviathan: or Man, Society, Civilization and Barbarism*, revised edition, ed. David Boucher, Oxford: Clarendon Press, 1992, pp. 458–79.

[9] Quentin Skinner, 'The State', in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr and Russell L. Hanson, Cambridge, Cambridge University Press, 1989.

[10] See Adam Watson, *The Evolution of International Society*, London: Routledge, 1992, pp. 182–97.

[11] Evan Luard, *International Society*, Basingstoke: Macmillan, 1990, p. 96.

[12] It is this Westphalian system with its strong emphasis upon state sovereignty that impels Rawls to resort to the idea of peoples rather than states (*Law of Peoples*, p. 25).

[13] John Rawls, *A Theory of Justice*, Oxford: Oxford University Press, 1972, pp. 108, 378.

[14] Rawls, *Law of Peoples*, pp. 28 and 46.

[15] Rawls, *Law of Peoples*, p. 28.

[16] Rawls, *Law of Peoples*, p. 38.

[17] Rawls, *Law of Peoples*, pp. 26–7.

[18] Rawls, *Law of Peoples*, p. 37.

[19] See Allen Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World', *Ethics*, 110 (2000): 697–721, for a criticism suggesting that Rawls does not go far enough in his departure. Buchanan is unsure whether Rawls's 'duty to assist' is an imperfect obligation to act charitably, or whether it is a duty of justice.

[20] Rawls, *Law of Peoples*, p. 27.

[21] Rawls, *Law of Peoples*, p. 107.
[22] R. J. Vincent, *Human Rights and International Relations*, Cambridge: Cambridge University Press, 1986, p. 27.
[23] St Thomas Aquinas, *On Law, Morality and Politics*, ed. William P. Baumgarth and Richard J. Regan, Indianapolis: Hackett, 1988, p. 141.
[24] Rawls, *Law of Peoples*, p. 3, fn. 1.
[25] Samuel von Pufendorf, *On the Natural State of Men*, trans. Michael Seidler, New York: Edwin Mellen, 1990, para. 13.
[26] Emer Vattel, *The Law of Nations or the Principles of Natural Law*, trans. C. G. Fenwick, Washington, D.C.: Carnegie Institution, 1916, Introduction, sect. 18.
[27] Peter Pavel Remec, *The Position of the Individual in International Law According to Grotius and Vattel*, The Hague: Martinus Nijhoff, 1960.
[28] Christian Wolff, *The Law of Nations Treated According to a Scientific Method in Which the Law of Nations is Carefully Distinguished from that Which is Voluntary, Stipulative and Customary*, trans Francis J. Hemelt, Oxford: Clarendon Press, 1934, sect. 18.
[29] Wolff, *The Law of Nations*, sect. 72.
[30] Rawls, *Law of Peoples*, p. 104.
[31] Hugo Grotius, *The Rights of War and Peace*, trans. A. C. Campbell, Westport, CT: Hyperion, 1993, Bk. I, chap. I, sect. xii.
[32] Francisco de Vitoria, *Political Writings*, ed. Anthony Pagden and Jeremy Lawrence, Cambridge: Cambridge University Press, 1991, p. 169.
[33] Vitoria, *Political Writings*, p. 209.
[34] Vitoria, *Political Writings*, p. 278.
[35] Richard Shelly Hartigan, 'Franceso Vitoria and Civilian Immunity', *Political Theory*, 1 (1973): 83.
[36] J. T. Johnson, *Just War Tradition and the Restraint of War*, Princeton, NJ: Princeton University Press, 1981, p. 97.
[37] Vitoria, *Political Writings*, p. 281.
[38] Gentili says: 'questions of war ought to be settled in accordance with the law of nations, which is the law of nature'. Alberico Gentili, *The Three Books on the Law of War*, trans. John C. Rolfe and introduced by Coleman Phillipson, Oxford: Clarendon Press, 1933, I, i, 5.
[39] Gentili, *Law of War*, I, i, 10–11.
[40] Gentili, *Law of War*, I, i, 17.
[41] 'Let the Theologians keep silent about a matter which is outside of their province.' Gentili, *Law of War*, I, xii, 92. He did think that jurists and theologians had different areas of competence, but this does not imply that he rejected the religious foundations of law and society.
[42] Vattel, *The Law of Nations*, sects. 3a and 4.
[43] Wolff, *The Law of Nations*, Prolegomena, sect. 3.
[44] Vattel, *The Law of Nations*, Introduction, sect. 2, and Wolff, *The Law of Nations*, Preface, 10a.
[45] Rawls, *Law of Peoples*, p. 99.
[46] Rawls, *Law of Peoples*, p. 68. Also see Simon Caney, 'Cosmopolitanism and the Law of Peoples', *The Journal of Political Philosophy*, 10 (2002): 99.
[47] Rawls, *Law of Peoples*, p. 23.

[48] Immanuel Kant, 'On the Common Saying: "This may be True in Theory, But it Does Not Apply in Practice"', in *Political Writings*, ed. Hans Reiss, trans. H. B. Nisbet, Cambridge: Cambridge University Press, 1991, p. 92.
[49] Rawls, *Law of Peoples*, p. 45.
[50] Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in *Political Writings*, p. 47.
[51] Rawls, *Theory of Justice*, p. 115.
[52] Rawls, *Law of Peoples*, p. 58. Cf. John Rawls, *Political Liberalism*, New York: Columbia University Press, 1993, pp. 217–18.
[53] Pufendorf, *The Law of Nature*, II, ii, 11 (see note 54).
[54] Samuel von Pufendorf, *The Elements of Universal Jurisprudence*, translation of the 1672 edition by W. A. Oldfather, Oxford: Clarendon Press, 1931, DEF XII, I: *On the Duty of Man and Citizen According to the Law of Nature*, I, vi, I: *On the Law of Nature and Nations*, III, iv, 3.
[55] Pufendorf, *Law of Nature*, III, iv, 6.
[56] Pufendorf, *Duty of Man and Citizen*, I, ix, 4.
[57] Knud Haakonssen, 'Hugo Grotius and the History of Political Thought', *Political Theory*, 13 (1985): 256.
[58] See, for example, Grotius, *The Rights of War and Peace*, chap. xi, sect. 3. He says of imperfect obligations, 'we may be under an obligation of duty, to the performance of which another has no right to compel us. For in this respect the duty of fidelity to promises is like the duties of compassion and gratitude.'
[59] Onora O'Neill, *Towards Justice and Virtue*, Cambridge: Cambridge University Press, 1996, p. 145.
[60] Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in *Political Writings*, p. 103.
[61] Rawls, *Law of Peoples*, p. 21.
[62] Rawls, *Law of Peoples*, p. 105.
[63] Rawls, *Law of Peoples*, pp. 51–2. Michael Doyle, *Ways of War and Peace*, New York: Norton, 1997.
[64] Jean Jacques Rousseau, 'On the Origins of Inequality', in *The Basic Political Writings*, trans. D. A. Cress, Indianapolis: Hackett, 1987, p. 34.
[65] Jean Jacques Rousseau, *On the Social Contract*, in *Basic Political Writings*, p. 58.
[66] Jean Jacques Rousseau, *The First Version of the Social Contract* (The Geneva Manuscript), in *Rousseau on International Relations*, ed. Stanley Hoffmann and David P. Fidler, trans. Judith R. Masters, Oxford: Clarendon Press, 1991, pp. 104–9.
[67] Robert Wokler, 'Rousseau's Pufendorf: Natural Law and the Foundations of Commercial Society', *History of Political Thought*, 15 (1994): 373.
[68] Martin Hollis, *Models of Man*, Cambridge: Cambridge University Press, 1977.
[69] Rousseau, *Social Contract*, p. 141.
[70] Rousseau, *Social Contract*, p. 194.
[71] Rawls, *Law of Peoples*, p. 13n.
[72] 'My purpose is to consider if, in political society, there can be any legitimate and sure principles of government, taking men as they are and laws as they might be. In this inquiry I shall try always to bring together what right permits with what interest requires so that justice and utility are in no way divorced'. Cited in Rawls, *Law of Peoples*, p. 13.

[73] Rawls, *Law of Peoples*, p. 10.
[74] Rawls, *Law of Peoples*, pp. 33 and 41.
[75] Rawls, *Law of Peoples*, p. 44.
[76] Rawls, *Law of Peoples*, p. 48.
[77] Rawls, *Law of Peoples*, p. 34.
[78] Jean Jacques Rousseau, 'Discourse on Political Economy', in *The Basic Political Writings*, p. 121. Cf. Rousseau, *Considerations on the Government of Poland*, in *Rousseau on International Relations*, ed. Hoffmann and Fidler, p. 168.
[79] Rousseau, 'Discourse on Political Economy', p. 121.
[80] Jean Jacques Rousseau, *Considerations on the Government of Poland*, p. 190.
[81] Rawls, *Law of Peoples*, p. 35.
[82] Rawls, *Law of Peoples*, p. 27.
[83] Kant, *Perpetual Peace*, p. 105.
[84] Kant, *The Metaphysics of Morals* in *Political Writings*, p. 171.
[85] Wolfgang Schwarz, 'Kant's Philosophy of Law and International Peace', *Philosophy and Phenomenological Research*, 23 (1962–3): 76.
[86] See W. B. Gallie, *Philosophers of Peace and War*, Cambridge: Cambridge University Press, 1979, p. 25.
[87] Kant, *Perpetual Peace*, in *Political Writings*, p. 113.
[88] Kant, 'On the Common Saying: "This may be True in Theory, But it Does Not Apply in Practice" ', in *Political Writings*, p. 90.
[89] Rawls, *Law of Peoples*, p. 87.
[90] Rawls, *Law of Peoples*, p. 27.
[91] Rawls, *Law of Peoples*, p. 46.
[92] Rawls, *Law of Peoples*, p. 7.

3

Rawls's Peoples

Philip Pettit

John Rawls's work on the law of peoples[1] is notorious for its anti-cosmopolitan stance: roughly, its insistence that those of us in well-ordered societies do not owe to the members of other societies the sort of justice that we owe to one another. I believe that his assumptions about the nature of societies – if you like, his ontology of peoples – make this stance a natural one to adopt and the aim of my paper is to explain why. Social ontology does not drive political theory as axioms drive a theorem, but it can have an important shaping or constraining effect; this fits with Rawls's idea[2] that our views on normative and related topics should be in "wide reflective equilibrium." My goal is to document the shaping effect of his social ontology on his theory of international justice. The paper complements an earlier discussion of Rawls's theory of domestic justice, where I argued for a parallel thesis.[3]

The paper is in three sections. First, I look at Rawls's rejection of cosmopolitanism. Next, I review the claims that he makes about peoples and try to articulate the ontology of peoples that they support. And then in the final section I show how that ontology helps to explain his position on cosmopolitanism.

1 Rawls's Anti-Cosmopolitanism

Rawls's project in his work on the law of peoples is to use the device of the original position, first introduced in his theory of domestic justice,[4] in order to develop principles of justice for the international domain. In his earlier work he asked after the principles of justice that ought to determine the "basic structure" of a society, assuming that to do this they would have to be universal in scope, apply equally to all, and be publicly recognized as the final court of appeal for resolving the conflicting claims of individual members.

He suggested that in order to identify such principles, we should think of what we would individually choose for our own society, were we making a rational choice in light of our own interests or those of our family line but under "a veil

of ignorance" as to how far we have the qualities that will help us to do well in social life. He reasoned that a social choice made under such a veil of ignorance would reflect our view of what a society should be required by justice to do for its members.

How to transfer this contractualist way of thinking to the international stage? The obvious way would be to assume that those in the original position represent, not the members of a particular society, as in the earlier case, but individuals from they-know-not-what-society (and for the moment I put aside issues having to do with which societies are represented in the original position). Were we to ask about what such individuals would choose in the way of principles of justice to rule across different societies then it might seem that this would give us the international counterpart to domestic principles of justice. The principles would tell us what the society of peoples should in justice do for individuals everywhere, and so what a more fortunate people or its members should do for the members of a less fortunate group.

Charles Beitz[5] and Thomas Pogge[6] had argued for such a use of the original position device prior to Rawls's work on the topic. They had suggested that just as the device can tell us what a society owes in justice to its members, so it can tell us what a society and its members owe to individuals everywhere. The idea is that one and the same ideal of justice makes demands across societies as well as within societies; justice is cosmopolitan, not parochial.

This normative cosmopolitanism, as we might call it, should be distinguished from institutional cosmopolitanism. Even if justice is available as a common basis on which people can make claims against their own society and against other societies, other considerations will also be relevant to determining what sorts of arrangements are required in the domestic and the international domains. Justice might require a domestic society to set up a state that enforces very demanding principles of justice; justice in international society might not require anything of the same extensive kind. It will not be taken to require a world state, for example, if such a state is thought to be impractical or dangerous.

Although not necessarily committed to the development of cosmopolitan institutions, normative cosmopolitanism would nonetheless have characteristic implications. Consider a situation where a pair of countries are each domestically just, satisfying Rawls's two principles of domestic justice: in each society everyone has equal liberty under a system of liberties that is fully adequate; and, given that system, material rewards in each society are available under fair equality of opportunity and are allowed to be unequal only so far as the inequality improves the absolute lot of those in the worst-off position. Suppose that in one society people – and in particular, the worst off – are wealthier than their counterparts in the other. And suppose that a certain redistribution would improve the position of the worst off in the poorer society. Would that redistribution be required as a matter of justice? According to cosmopolitanism, as Rawls (*LoP*: 120) understands the doctrine, it would.

While Rawls wants to redeploy the original-position device in the international domain, however – he speaks of it as the second original position – he shrinks from embracing this normative cosmopolitanism. He maintains that we should try to work out what he describes as the principles of international justice or the principles of the law of peoples (*LoP*: 37) by looking at what contractors would choose in an original position, where they represent they-know-not-what-country, rather than individuals from they-know-not-what-country. The idea, roughly, is to articulate the requirements of justice as "basic fairness among peoples" (*LoP*: 115), not justice among the individuals who constitute different peoples.

More exactly, the idea is to formulate the requirements of international justice that are binding on what Rawls describes as well-ordered peoples. A well-ordered people is one whose affairs are regulated on the basis of shared ideas or reasons from which it is possible "to work up" a conception of justice. Equivalently, it is "a society effectively regulated by some public conception of justice, whatever that conception of justice may be."[7]

The principles endorsed in the second original position, as Rawls conceives it, presuppose the substantive principles of justice that ideally prevail within each well-ordered people. Their role is to dictate the relations that ought to obtain, as a matter of international justice, among well-ordered peoples as such and between those peoples and less fortunate societies (*LoP*: 33). The principles will not posit obligations of justice as between one well-ordered society or its members, then, and the members of another well-ordered society; and this, no matter how much variation in affluence there is between them. They will be indifferent between the two well-ordered societies where the worst off in one happens to be better off, perhaps very much better off, than the worst off in the other; they will not represent either society as more fair or just than the other (*LoP*: 119–20).

This restriction on obligations towards the members of another well-ordered people, as indicated, does not entail a restriction on obligations towards the members of all *other* societies. Rawls argues that well-ordered societies and their members are required to do what they can to protect the rights of those who suffer at the hands of ill-ordered, outlaw regimes and to provide relief for those in ill-ordered, impoverished societies; these requirements figure in the law of peoples that he thinks international justice requires (*LoP*: 37–8).

There are three elements, then, in the anti-cosmopolitan position that Rawls embraces:

1. *The domestic claim.* Justice makes substantive demands in any well-ordered society, dictating what the society as a whole should do for its members.
2. *The negative international claim.* Justice makes no such demands across the membership of different well-ordered societies; it dictates nothing that one such society or its members should do for the members of another.

3. *The positive international claim*. Justice requires well-ordered societies to relate to one another in a certain way, and to provide up to a certain limit for the victims of oppression or poverty.

Rawls does not reject cosmopolitanism just for the superficial reason that it makes excessive demands and is in that sense utopian. He emphasizes throughout his book that it is right to restrict international justice in the society of peoples along the lines just sketched, not that it is merely pragmatic or prudent to do so.[8] But why is the restriction right? Emergencies aside, why is it that the ideal of justice as fairness applies only to the way well-ordered societies treat their members and to the way in which they treat one another? Well-ordered societies may differ significantly in their levels of affluence. So why doesn't justice require that richer societies or their members do something to redress such imbalances? That is the question that will concern us here.

2 Rawls's Ontology of Peoples

My answer to the question is that Rawls endorses an ontology of peoples in relation to their members and in relation to one another that helps to make his anti-cosmopolitanism intelligible. I develop a case for this view in the remaining two sections. In this section I review Rawls's more or less explicit claims about peoples and identify the sort of theory or ontology of a people to which he is committed. And then in the final section I show how his anti-cosmopolitanism is intelligible in light of that ontology.

First, then, to Rawls's claims about peoples and the ontology they support. I set out his claims under a number of headings, dealing in turn with the extension of peoples, the agency of peoples, and the requirements that must be fulfilled for peoples to be truly represented by governments. I then go on to consider the implications of those claims for an ontology of peoples.

The extension of peoples

Rawls distinguishes five sorts of society: liberal peoples, decent peoples, outlaw states, burdened societies, and benevolent absolutisms (*LoP*: 4). The first two sorts of society he describes as well ordered, the others as not well ordered. An outlaw state will fail to be well ordered so far as it behaves aggressively towards its citizens and towards other states. A benevolent absolutism will fail to be well ordered so far as it tracks just the ruler's ideas – albeit the ruler's ideas about what is for the common good – not a public conception of justice. And a burdened society will fail to be well ordered so far as it suffers a level of poverty and destitution that makes proper order impossible: indeed it is this impossibility that identifies it as burdened (*LoP*: 37).

Although liberal and decent societies are both well ordered, they are ordered in different ways. In the liberal society a conception of justice reflects received ideas as to what reciprocity among equal, reasonable individuals requires. In the decent society such a conception reflects in the same way a generally accepted notion of the common good (*LoP*: 71, fn 10). But the notion at work in the decent society does not represent all individuals as equal. The ruling conception in this case favors the members of some groups over others but gives an otherwise fair hearing to the representatives of the less favored groups; no one will fail to have a voice, though the less favored will only have the indirect voice that their group gives them (*LoP*: 71–2).

On the face of it, Rawls's suggestion is that while liberal and decent societies are well-ordered peoples, the other three are ill ordered or "disordered"; indeed he once describes them as such (*LoP*: 38). But it is necessary to be careful here. Rawls only rarely uses the term "people" of those other three regimes, resorting instead to terms like "society," "state," and "country." In reconstructing his view we need to take account of this reluctance to describe ill-ordered societies as peoples. We need to be able to explain why only well-ordered societies – liberal or decent, as they may be – figure in the primary extension of the term "people."

The agency of peoples, direct and representative

Peoples are treated by Rawls as capable of agency and as possessed of something that parallels the psychology of an individual agent. Thus he says that peoples are "actors" to whom we can ascribe motives, including the "moral" motives that go with making a commitment, such as a commitment to the law of peoples (*LoP*: 17). They are capable of "a proper pride and sense of honor," including a pride in their own histories and achievements (*LoP*: 44, 62). And they can both give and receive respect from one another; they can each insist on "receiving from other peoples a proper respect and recognition of their equality" (*LoP*: 35).

But motivated as they may be in these ways, what do peoples actually do? They are said to act on three different fronts. In relation to government – on the constitutional front, as we say – they act to "coordinate" government action (*LoP*: 19), and to "author" the powers of government (p. 26). These actions presumably involve citizens acting to joint effect, say in referendums or elections or class actions, or acting individually in contesting or not contesting received arrangements. Most of what peoples do, however, is done on two other fronts: on the domestic front, in relation to their own citizens and, on the international front, in relation to other peoples. And on these fronts, a people acts through its government. For Rawls, its government is "the representative and effective agent

of a people" (p. 38) or, as it is also called, "the political organization of the people" (p. 26).

The conditions for representation of a people

A people will exist as an agent on the domestic and international fronts, then, only if the government acts appropriately in its representative role, giving the people a voice and a presence on those fronts. What it means for a government to act appropriately, according to Rawls, is that it allows itself to be domestically constrained by a public conception of justice, whether liberal or merely decent in character (*LoP*: 65–6). His picture is that if a government does not take its cue from that conception of justice – if it is not in that sense well ordered – then it cannot be regarded as the representative of a people.

This is a striking claim. Let the government be domestically unjust, Rawls suggests, and there will be no people present in its actions. The government will have to be seen as a body that acts only in its own name and, he would say, as a body that has no standing under the law of peoples. The norms that tell us how the government should behave in relation to its citizens are constitutive norms that determine what it is to represent a people, not regulative norms that merely instruct us on how representation is best pursued.[9] Suppose a government breaches those norms through failing to behave with respect towards its own citizens. In that case we might be tempted to say that while the government still represents its people, it represents them badly. But Rawls always speaks as if it does not represent a people at all. It is just a freewheeling agency with no claims to such a role: it comes to constitute an outlaw state or, at best, a benevolent absolutism. It usurps the position of the people.

A view once prevalent in law held that if the representatives of a company or corporation act *ultra vires* or without authority, then they do not act or speak for the company and the company cannot be held responsible for what they do.[10] Rawls holds in parallel fashion that if the government acts *ultra vires*, then the people are no longer present, no longer represented, in what is said or done. A usurper has taken its place.

The people may still exist as a potential agent when its government becomes a usurper, of course, since the people will retain a residual power on the constitutional front: a power that is capable, in principle, of establishing and controlling a representative government. But the people will not be present – it will not be represented – in the actions of the usurper government. This presumably explains why Rawls tends to use the word "people" only of well-ordered societies. The people that corresponds to an outlaw state or a benevolent absolutism – or indeed a burdened society – scarcely exists as an agent. It will be there to be invoked in envisioning better ways of arranging things

on domestic or international fronts but it will not be there as a power with which citizens or other peoples may hope to reason in a relationship of mutual respect.

Towards an ontology of the people

The ontology of any composite like the people will have to identify the components out of which the composite is built, characterize the relationships or structure among those components that the composite presupposes, and detail the profile of the composite as a whole – say, its capacity to relate to other such wholes – that is fixed by the presence of that structure. This is true whether we are considering a molecule or cell or organism or something artificial like a social entity.

For Rawls the basic components out of which a people is composed are natural persons. He allows that persons may form groupings that are not yet peoples and that may play a role in the life of a people. Indeed, he makes explicit room for such formations in his account of how the less favored members of a decent society get a hearing; they are represented by the ethnic or religious groupings to which they belong. But it remains the case that ultimately every people is composed just of natural persons.

The structure of a people

Individuals must amount to more than just an unstructured collection of persons if they are to be a people, for clearly not just any collection will constitute a people or indeed any sort of group. The natural persons who happen to have the same height or to live at the same latitude on earth constitute collections but amount to nothing of social significance. So what are the relationships that persons must have with one another in order to constitute a people? What is the structure that the persons must exemplify?

Rawls's answer to this question is that the persons who constitute a people must be related to one another in the manner that leads us to say that their society is well ordered. They must subscribe as a matter of common awareness to certain ideas about how their affairs should be ordered. They must treat these ideas as common reasons that constitute the only currency in which it is ultimately legitimate to justify the way things are done in the collective organizing of their affairs. I speak here of common rather than public reasons since Rawls speaks only of the ideas that operate in liberal regimes as "public reasons." And the persons envisaged must exist under a basic structure that enforces the rule of those reasons, requiring government to justify its coercive decisions, or at least the procedures under which it reaches those decisions, to those who are subject to it; this structure will make some room, at least in liberal societies, for the

election of officials and for the possibility of contesting the justifications offered for government actions.

The idea that persons might come to constitute a people of this kind represents, from one point of view, a political ideal. Indeed Rawls treats it as such an ideal in *A Theory of Justice* (1971), where he asks us to consider which among a range of possible well-ordered societies we would like to live in, did we not know how we would personally be situated within the chosen candidate; he ignores candidates that do not satisfy the well-ordered ideal. By the time of *Political Liberalism* (1993) and later writings, however, Rawls suggests that there is an empirical division among societies between those that are well ordered and those that are not. He never suggests that any society is perfectly well ordered but he thinks that some approximate that ideal – it is there in embryo, waiting to be more fully realized – while in others the ideal is completely lacking.

Rawls does not think it is accidental that some societies of natural persons come to be more or less well ordered and so to constitute peoples in his sense. He does not go in for explanations in the style of Habermas and others as to why suitable ideas might happen to get established in public consciousness as common reasons for constraining government.[11] But he does think that there is an empirical inevitability attaching to their appearance, once certain conditions hold.

He suggests in particular that the emergence of democratic institutions is more or less bound to give rise to what he would see as a liberal order. In his own words,

> the political culture of a democratic society that has worked reasonably well over a considerable period of time normally contains, at least implicitly, certain fundamental ideas from which it is possible to work up a political conception of justice suitable for a constitutional regime.[12]

He assumes that in any such society the ideas that are valorized in this way amongst its members will attain the status of publicly endorsed reasons that govern the actions of those in government. Specifically, he assumes that the ideas will require and elicit a constitutional dispensation that entrenches, at least in the liberal case, the usual measures for facilitating free election and the possibility of contestation. Citizens will be entitled to challenge the actions of government that apparently offend against suitable reasons or that are not obviously decided under procedures that those ideas support.

The profile of a people

That a people instantiates a structure of the kind discussed means that it is more than a collection; it constitutes a group. But it also means that it constitutes what I describe as a group agent. This fits with Rawls's own assumptions, since he says that well-ordered peoples are "the actors in the Society of Peoples, just as citizens are the actors in domestic society" (*LoP*: 23).

Many groups are not group agents. Consider those who routinely enter exchanges with one another in a market, or those who interact on the basis of a common set of norms. The members of such a group, like the members of any collection, may often act together for common ends; I put aside the question of how exactly such joint action is to be analyzed.[13] But they will not act together to establish a group subject that can be treated on a par with an individual subject and held to parallel expectations. They will not establish the sort of agent that can act effectively and responsibly over time.

If a group is to count as a group agent then at least three conditions must be fulfilled.[14] First, there must be certain goals that the group pursues, whether pre-set goals or goals identified over time by pre-set procedures; the group will pursue these so far as members act jointly to promote them or authorize an individual or group of individuals to do so in its name. Second, the group must endorse a common body of judgments about those issues that arise in the course of pursuing its goals; issues to do with whether to revise or remove or add certain goals, with how to order the goals amongst themselves, with what opportunities are available for their pursuit, and with what means promise to be most effective. Third, under intuitively normal conditions, the group must form its goals and judgments in a more or less rational manner and act rationally so as to satisfy those goals, according to those judgments. At the least, the group must be responsive to the recognition of any theoretical or practical form of irrationality; it must be disposed to mend its ways on having such irrationality pointed out.

To require that a group agent should satisfy these conditions is to require that it simulate individual agents in the most minimal way. No group can be depicted as an agent if it lacks the goals or judgments or minimal sensitivity to reason that agency requires. But how might a group reliably satisfy the three conditions? In particular, how might a Rawlsian people do so?

There are two simple models of how a group might succeed in meeting the three conditions, one involving endogenous organization, the other organization of an exogenous kind. Though neither of these models captures the way a Rawlsian people is supposed to organize itself for agency, they are worth mentioning as contrasting cases.

The endogenously organized group will involve its members, not just in authorizing the ends for which the members of the group are to act, whether jointly or via representatives; it will also engage its members in the formation of the body of judgments by which such action is to be guided. The age-old suggestion is that this can be done by using majority voting to generate judgments on relevant matters, ranging from what ends to pursue, to what means to adopt, to other more complex questions. Hobbes and Rousseau[15] concur on this recipe, for example, when they consider how an assembly of citizens might serve in the role of sovereign. As Hobbes says: "if the representative consist of many men, the voice of the greater number must be considered as the voice of them all."

However, the majoritarian recipe won't work reliably[16]; nor indeed will any recipe that relies on standard voting procedures.[17] The trouble is that voting can lead a group into inconsistent bodies or sets of judgment, even if all the members are individually consistent. Suppose that three individuals, A, B and C, consider the issues of whether p, whether q, and whether p-and-q. A and B may support the claim that p, with C against; B and C the claim that q, with A against; and A and C the claim that not-p-and-q, with B against: A will endorse this claim, because of rejecting q, C because of rejecting p. Thus, under majority voting, the group would have to endorse the inconsistent combination of judgments: p, q, not-p-and-q.

The upshot is that if a group is to organize itself endogenously, then it will have to follow a procedure like the following. The members take a straw vote on each issue that comes up. If a problem of inconsistency appears, then they negotiate in committee – perhaps in a committee-of-the-whole, perhaps in a sub-committee – about where they should revise the set of judgments: they debate, in effect, about whose initial judgments should be ignored in the group judgment. And then they act, when they act in the group's name, according to those endogenous judgments. Thus the members of our A-B-C group might agree that they and their representatives should act on the judgment that p, that q, and – despite the fact that two members individually reject this – that p-and-q.

The exogenously organized group agent will not involve members in the process of judgment formation in the same manner as the endogenous counterpart. On the contrary, the members will leave it to some individual or some other group of individuals, perhaps electorally chosen, to determine what they as a group shall be deemed to judge. They will outsource the formation of judgment rather than conducting it in-house. An example might be the shareholders in a company who allow the board or chief executive to speak and act for them. The shareholders' membership consists in providing the resources required for such representation and having the right to vote at the annual meeting; it has little or no participatory significance.

The people in Rawls's model does not have the participatory character that would be required in order to constitute an endogenously organized agent; it is too large and disorganized to be able to go through anything like the straw-vote procedure. Such a participatory image of the people was invoked in the medieval theory of the *populus* as a *corporatio* – in effect, an artificial person – and in those early modern writers who were influenced by that theory.[18] But it has no application in the context of contemporary, large-scale democracies. Rawls recognizes as much in arguing that on most fronts the people only acts via the actions of its government.

Is Rawls committed, then, to the passive, minimally participatory image of the people that would apply if the people were taken as an exogenously organized entity? Surely not. The one theorist who clearly endorses that sort of image is Hobbes. He argues that individuals come to constitute a people as distinct

from a multitude when they individually and unanimously authorize a sovereign king to speak for them, giving him a *carte blanche* about what to say and do in their name.[19] Rawls will have no truck with the idea that a people might be seen as a group that gives over the management of its voice and presence in this absolute measure. Clearly, he thinks that while the people has to be represented by government if it is to exist as an effective agent, government does not have an unlimited power of discretion in the manner of Hobbes's sovereign.

So what then is Rawls's positive image of the people as agent? I suggest that for him a people will be organized for agency, not purely endogenously and not purely exogenously, but in a manner that goes precisely with its having a well-ordered structure. This involves continuous interaction between an exogenously representative government and an endogenously responsive citizenry. The members of any well-ordered people will be party to certain shared ideas that are capable of being articulated into a theory of justice. And they will control the government that represents them, they will constitute it as their representative, to the extent that the government is ordered or regulated by those common reasons, and by the corresponding conception of justice.

So far as the government operates under the control of such common reasons, and ultimately under the control of the conception of justice implicit in them, it will be truly representative of the people. And so far as government is representative in this way, the people will get to be established as an agent that is domestically and internationally effective. The people-as-represented-in-government will meet the three conditions for group agency. It will act for the realization of certain ends; it will act under the guidance of a body of judgments that members authorize as common property; and it will display a modicum of rationality in how it holds and acts on those ends and judgments. The judgments endorsed as common property will be the judgments that government makes when it acts under the constraints imposed by common reasons; what makes them common property will be the reliance on and enforcement of this sensitivity to such ideas.

I hope that this discussion will help to spell out the agential nature of a well-ordered people, in Rawls's view of these matters. He depicts peoples as group agents but he avoids both the implausible picture under which this would require intense participation and the vacuous picture under which it would require nothing more than the authorization of a self-willed spokesparty. He represents a well-ordered people as a "civicity" – pronounced as in "velocity" – to use a term that I introduced elsewhere.[20] The members are not participants on the model of those in an endogenously organized group. But neither are they relatively passive presences like the members of an exogenously organized group. They are active in the manner characteristic of citizens, as citizens are traditionally conceived, being disposed to invigilate and interrogate those who act in the name of the collectivity.

3 Reconstructing Rawls's Rejection of Cosmopolitanism

And so, finally, to the denouement. We began this paper by noting that Rawls thinks there is a certain geography to justice and by asking about what can lead him to that view. The answer is, I think, that he sees his anti-cosmopolitan position as the only one that sits easily with the nature of well-ordered peoples. Rawls himself says in another context that "the correct regulative principle for anything depends on the nature of that thing."[21] My claim is that by his lights cosmopolitanism fails to take sufficient account of the nature of peoples. It fails to reflect an understanding of just what sort of thing a people is.

Anti-cosmopolitanism, as we presented it earlier, involves three claims:

1. *The domestic claim.* Justice makes substantive demands in any well-ordered society, dictating what the society as a whole should do for its members.
2. *The negative international claim.* Justice makes no such demands across the membership of different well-ordered societies; it dictates nothing that one such society or its members should do for the members of another.
3. *The positive international claim.* Justice requires well-ordered societies to relate to one another in a certain way, and to provide up to a certain limit for the victims of oppression or poverty.

I will consider each of these claims in turn, explaining how it fits quite naturally with Rawls's view of the nature of well-ordered peoples.

The domestic claim

Whenever something is claimed in justice, there must be considerations or reasons to be offered in support of the right or obligation alleged. Call these the grounding reasons for the obligation. Under Rawls's picture of well-ordered peoples, the grounding reasons for domestic obligations of justice are the received ideas that are licensed as reasons on the basis of which government can be required, uniquely, to act. If individuals are part of a single civicity, then they will each organize their lives around the assumption that just as they can make direct or indirect demands on their government or people, grounding them in the common reasons accepted by all, so others can do so too. They will give normative weight to those reasons, taking them to indicate what can and cannot be claimed in justice.

Does the capacity of these received ideas to support claims in justice derive, as some might want to suggest, from a contract to maintain the civicity on this pattern? Not necessarily. All that is required for the considerations to carry binding force is that it is a matter of common assumption and expectation that they

represent the terms on which members relate in a civicity. Given that assumption, each will manifestly rely on others – in particular, on the government and the people it represents – to deal with them on those terms. And each will be manifestly supported in this reliance by the way that the civicity operates as an ongoing enterprise; the government and the people will acquiesce in the reliance of each and may be taken, in effect, to invite it. Such manifestly displayed and manifestly supported reliance is a plausible source of obligation, recognized under many different theories.[22]

We should not be surprised that Rawls thinks that obligations in justice have such social roots. Already in *A Theory of Justice* he traces the obligations of justice to the bonds that living together under a well-ordered regime involve. Persons do not have claims on the collectivity, and indirectly on one another, just in virtue of their humanity. They have such claims, rather, in virtue of the sort of social life they lead together: in virtue of the fact, as it is registered in his earlier work, that society is "a cooperative venture for mutual advantage, . . . marked by a conflict as well as by an identity of interests" (*TJ*: 4). If there is a shift on this matter in the later work, it is merely that he comes to recognize that living together under a regime of common reasons is the aspect of social cooperation that is crucial to claims of justice.

The negative international claim

Domestic obligations of justice are grounded on the regime of common reasons in which people participate, then, and on the manifest mutual reliance that this involves. But, according to Rawls, there are no such grounds available to support similar obligations of justice towards the members of other well-ordered peoples. The members of a well-ordered people are not socially connected with the members of any other well-ordered people in the way in which they are connected with one another as partners in a regime of common reasons. And so, by his lights, there is nothing like the ground available in the domestic case, for why a well-ordered people or its members should have obligations in justice towards the members of another such people.

The relations between a well-ordered people or its members and the members of another well-ordered people might be compared to the relations that exist between the individuals considered in a well-known scenario discussed by Robert Nozick.[23] In this imaginary story a number of Robinson Crusoes live on the islands of an archipelago, mutually isolated from one another, and perhaps even mutually unknown to one another. According to the sort of view adopted by Nozick himself, those people, should they become aware of one another's existence, can make exactly the same claims in (non-contractual) justice on each other and on others collectively as the members of an ongoing society. He thinks that the claims involved will be of the minimal, self-protective sort defended in libertarian doctrine, of course, and he argues that those claims are grounded in

people's humanity, not in the contingent fact of their living with one another in a particular society. In this respect he is an archetypal cosmopolitan, though one who recognizes fewer obligations of justice than writers like Pogge and Beitz.

Nozick himself is quite clear that Rawls would take a different view from his own. He recognizes explicitly that Rawls derives his substantive obligations in justice from the character of social cooperation in a domestic society. But he thinks, as a good cosmopolitan would, that this is simply confused. He alleges that "the reasons for the view that social cooperation creates special problems of distributive justice otherwise not present, are unclear if not mysterious."[24]

I hope that the points rehearsed in this discussion will remove the mystery alleged by Nozick. More positively, I hope they will help to explain the second thesis in Rawls's anti-cosmopolitanism. It is because they relate to one another in the dense, structured manner of a well-ordered society that the members of a people owe so much to one another. And it is because they do not relate to the members of another well-ordered society in that manner that they owe them so little.

If this line of interpretation is correct, then Rawls's theory is quite distinctive and contrasts, for example, with the contractualism about rightness that T. M. Scanlon defends.[25] Under Scanlon's view I should never behave towards others in a manner that breaches those principles that none of us would reasonably find objectionable were we, in a spirit of cooperation, to seek out principles for the general regulation of our behavior. Assuming that this also applies to the groups I form with others, it might well follow that we, a rich well-ordered people, ought to treat strangers from another well-ordered people as well as our own, or perhaps even better.

Rawls cannot make the issue of whether it is just to discriminate between compatriots and strangers turn so contingently on what principles for the regulation of behavior we would or would not find reasonably objectionable. The obligations in justice that he countenances derive, unlike Scanlon's obligations in rightness, from actual relationships of cooperation. And by his lights it is a matter of stipulation that relevant relationships will be present amongst the members of any well-ordered society and absent across the membership of different well-ordered societies. That a society is well ordered entails that the relationships will be present in the first case; that different well-ordered societies are distinct entails that they will be absent in the second.

The positive international claim

We have seen that the intense, structured aspect of a well-ordered people explains why it can support obligations of justice towards its members that find no parallel in obligations towards the members of other well-ordered societies. The members of such a people constitute what I called a civicity where the members of different peoples – individuals across the world – do not. And that difference is relevant to

the claims that the members of a well-ordered people may make on other individuals or peoples. It explains the first two elements in the anti-cosmopolitan position.

The fact that well-ordered peoples are structured in this intense manner, however, also explains the third element in that position. Or at least it does so to the extent that it explains, as we have seen, why a Rawlsian people has the profile of a group agent. It is because well-ordered peoples are group agents, capable of performing like individual persons, that we can ask about how they relate amongst themselves and about whether that mode of relationship supports any obligations of justice towards one another or towards less fortunate societies. It is because of their standing in this regard, indeed, that we can think of such peoples being represented in a second original position, and can ask about what "basic structure of the relations between peoples" (*LoP*: 33) representatives would rationally endorse under a veil of ignorance.

Peoples have interests of their own, according to Rawls, just like individual agents. These include the protection of their territory, the security and safety of their members, the preservation of their political institutions and "a proper self-respect of themselves as a people" (*LoP*: 34). But peoples – as represented, of course, in suitable governments – can also recognize the diversity of these interests as a manifest fact and can see that if they are to organize their lives peacefully with other peoples, then they cannot each insist on the priority of their own interests.

Can they hope to find a common set of reasons on which to base their relations, as in the domestic case? Rawls claims that they can. Thus he argues that while they may be rationally moved by their own interests, they can distinguish what is rational from what is reasonable and can be moved to act reasonably. And, he explains, it is part of

> being reasonable and rational that they are ready to offer to other peoples fair terms of political and social cooperation. These fair terms are those that a people sincerely believes other equal peoples might accept also; and should they do so, a people will honor the terms it has proposed even in those cases where that people might profit by violating them. Thus, the criterion of reciprocity applies to the Law of Peoples in the same way it does to the principles of justice for a constitutional regime. (*LoP*: 35)

When Rawls thinks of reflectively working out the terms that ought to govern relationships between well-ordered peoples, then by the account offered here he has to be thinking of explicating ideas that already have a presence, however ill developed, in the culture of the international world. If he thinks that he is merely spelling out an attractive ideal, as if from nowhere, then his complaint against cosmopolitans cannot stand; they will not be doing anything ill-conceived, as he suggests, but will be just trying to explicate a rival ideal of their own. I take Rawls

to endorse the line ascribed to him under the account developed here when he makes remarks to the effect that unlike cosmopolitan principles, his theory "proceeds from the international political world as we see it" (*LoP*: 83).

Not only should a government relate to its citizens reasonably or decently, then, as its claim to represent a people requires. It should also relate reasonably to other governments. But what exactly does public reason demand in the international sphere? The second original position directs us to a law of peoples that ought to govern how well-ordered peoples relate towards one another and towards other sorts of regime (*LoP*: 37). The very familiarity of the principles recognized in this law of peoples provides support for my claim that Rawls sees himself as working out the implications of ideas already implicit in international culture.

The principles will require well-ordered societies not to breach human rights, not to intervene in one another's territory, not to resort to war or to conduct war except under very demanding constraints, and so on; in a word, it will require well-ordered peoples to display mutual respect. What will the law of peoples require under the non-ideal assumption that some societies are oppressive or impoverished? Rawls thinks that it will require well-ordered societies to provide help – what sort of help is another question – for those whose human rights are violated by the oppression or aggression of states. And he holds that it will require well-ordered peoples to provide assistance for those who live under conditions of such poverty that they cannot achieve a well-ordered society. Rawls admits that well-ordered societies may have rival aims that could prompt aggression: "Peoples may often have final ends that require them to oppose one another without compromise" (*LoP*: 123). But he generally thinks that non-ideal theory will come into play only in dealing with disordered regimes.

Whether in helping individuals to resist the aggression or oppression of outlaw states, or in providing relief against the poverty endured in burdened societies, Rawls thinks that there is a clear limit to what is required in justice. Let the societies for which help is provided become well-ordered peoples, perhaps as a result of the assistance delivered, and further help ceases to be necessary or obligatory: this, in accord with the negative international claim.

> The final political end of society is to become fully just and stable for the right reasons. Once that end is reached, the Law of Peoples prescribes no further target such as, for example, to raise the standard of living beyond what is necessary to sustain those institutions. Nor is there any justificable reason for any society's asking for more than is necessary to sustain just institutions, or for further reduction of material inequalities among societies. (*LoP*: 119)

Does the second original position provide a good argument for the principles of international justice prescribed, according to Rawls, in the law of peoples? For example, is it proof against the cosmopolitan suggestion that the representatives

of well-ordered peoples behind a veil of ignorance would be bound to worry about how badly off they might be as individual peoples and would guard against that danger by prescribing for rules of international redistribution?[26]

The ontology of peoples gives us ground for thinking that both the relations between the members of a well-ordered people, and the relations among well-ordered peoples themselves, will underpin obligations of justice of a kind that can be explored via the original position device. But that ontology gives us no ground for thinking that the relations between one well-ordered people and the *members* of another are of the same justice-engaging kind. So to this extent it appears that the ontology will help Rawls meet the cosmopolitan criticism. If there is a weakness in Rawls's schema it shows up, ironically, with the principles on which radical cosmopolitans are likely to agree rather than disagree: namely, that well-ordered peoples should help those who live under oppressive and burdened regimes. For if those in the second original position represent only well-ordered societies, and not individuals across all societies, then it is unclear why they would have a rational motive for endorsing such altruism. But I leave this question open, since it does not bear on our theme.

To conclude, then, Rawls's view of the nature of well-ordered peoples helps in good part to explain his rejection of cosmopolitanism. The structure of relations within well-ordered peoples explains why domestic obligations of justice can be so demanding, as registered in the first anti-cosmopolitan claim. The absence of that structure in the relations between well-ordered peoples explains why, as in the second anti-cosmopolitan claim, no such obligations of justice obtain between one well-ordered people and the members of another. And the analogue to that structure in the relations within well-ordered peoples explains why they can behave like persons and, as in the third claim, recognize obligations of international justice in their interaction as collectivities. Rawls's normative views may seem surprising in isolation but, as suggested in the introduction, they become more intelligible when set within the context of his social ontology.

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Notes

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Part II

Cosmopolitanism, Nationalism, and Universalism: Questions of Priority and Coherence

4

Cultural Imperialism and 'Democratic Peace'

Catherine Audard

In his book, *The Law of Peoples*,[1] John Rawls breaks away from three traditional views on international justice: *realism*, which sees justice as irrelevant for solving international conflicts, *cultural relativism*, which is generally suspicious of any universal principles or global institutions, and *cosmopolitanism*, which affirms that the end of the nation-state means that individual persons, not states, are now the main players in a global world. In contrast, Rawls claims that justice, suitably defined, is a major factor for international peace, that agreement on universal normative principles between very different peoples is possible and may be reached without disrespect for their distinctive identities, and that peoples, not only individual persons, have a moral status and deserve consideration even if they are not fully democratic. And, more importantly, he stresses the need for more discriminating conceptions where too often wide and empty generalisations have been used.[2] Unfortunately his theory has been, on the whole, badly received.

In particular, it has been submitted to diametrically opposed criticisms concerning its scope. For cosmopolitan writers such as B. Barry, C. Beitz, A. Buchanan, T. Pogge or Kok-Chor Tan,[3] on the one hand, its scope is too limited. Rawls is mostly concerned with justice *between* societies, not with justice *within* societies, whereas for most people the two are deeply connected. He insists that 'how peoples treat each other and how they treat their own members are, it is important to recognize, two different things' (*LoP*: 83). Against the background of this distinction, his criteria for the toleration of non-liberal societies are too relaxed and provide justifications for too many limitations of the scope of full human rights. *LoP* retreats from the ambitions of *A Theory of Justice* and is almost anti-individualistic.

For cultural relativists such as John Gray or Barry Hindess,[4] on the other hand, its scope is dangerously universalistic, as if the liberal paradigm should apply to the whole world. Because the Law of Peoples advocated by Rawls is an extension of a liberal conception of justice, it cannot escape its origins, and may not be

acceptable to non-Western cultures. It is little more, in the end, than an expression of cultural imperialism.

In *LoP*, Rawls mostly deals with the debate with cosmopolitanism, but he is fully aware of this latter criticism and warns that: 'We must address the question whether the liberal law of peoples is ethnocentric and Western' (*CP*: 562, and *LoP*: 121).

In this paper I examine this latter charge with the aim of shedding light on one major flaw in Rawls's argument, the unresolved nature of his conception of stability and peace and of the role that justice plays in it. I first present a moderate version of the argument against the claim that, in the end, all peaceful peoples will favour democratic institutions, as if peace could not last without widespread democratic institutions and practices, a claim that is understandably open to the charge of cultural imperialism. I then examine Rawls's answers to this charge, in particular the way in which he claims to respect peoples' identities and the 'fact of reasonable pluralism' between peoples and not to impose a liberal view of international justice. I conclude that his answers are not totally satisfactory and that it is only in clarifying the relations between peace and justice and in limiting the scope of the Law of Peoples that he can successfully answer the criticisms of both cultural relativists and cosmopolitans. Such clarifications are not provided by Rawls, but are necessary. They may bring him closer than he would wish to political realism, as Stanley Hoffmann noted in his 1995 review of *LoP*.[5] But it would then be clear that his ambition is to provide a feasible 'extension of a liberal conception of justice to an international Society of Peoples', not to describe 'a just world order'. It would avoid, in the spirit of Kant, both the dogmatism of cosmopolitan writers and the scepticism of relativists. Without such clear boundaries, it is impossible to arrive at a truly 'critical' theory, in the Kantian sense.

1 Cultural Imperialism in Rawls's Law of Peoples

Let us start with a brief presentation of the Rawlsian project. Following Kant's idea of *foedus pacificum* or a peaceful federation of states,[6] Rawls sketches, in a two-stage conception, how peaceful liberal and 'decent'[7] peoples can constitute a just Society of Peoples able to establish and protect lasting peace between them and face external threats to peace created by 'outlaw' states and poor 'burdened' societies (*LoP*: 5). His normative theory is to provide guidance for the foreign policy of liberal peoples in these two cases. It extends the social contract theory of domestic justice to the domains of international relations and law. But such an extension could become imperialistic as, in the name of peace, it would tend to extend liberal ideals to the whole world. The question that Rawls asks is whether peace is only guaranteed by democratic justice *within* and *between* peoples or

whether it can be the result of agreements between different cultural and political systems. This is the main issue. The first interpretation would seem to lead to a cosmopolitan advocacy of global liberal justice, which Rawls rejects. The second would be compatible with cultural diversity, but would leave the role of justice *within* peoples unresolved, as cosmopolitan critics have underlined. My aim here is to see how Rawls's position manages to stand clear of both cosmopolitanism and cultural relativism and to examine whether it is able to create a 'third way'.

In this section, I reconstruct what I think is a plausible and moderate version of the charge of cultural imperialism. I first examine how Rawls's extension of the theory of justice may sound or appear ethnocentric. I then analyse the nature of 'democratic peace', asking whether it is compatible with respect for cultural and political diversity and does not aim at imposing the liberal ideal on the whole world. I conclude that Rawls tends to hesitate between values and facts, between a purely normative analysis of peace and a conception of history and progress as having necessarily its 'end' in democratic peace, and that this may give weight to the charge of cultural imperialism.

Ethnocentrism and imperialism

The first problem is the scope of the theory and its extension to the whole world. How ethnocentric is *The Law of Peoples*? At first sight, it is obviously embedded in American values, ignoring historical alternatives such as imperial peace – *Pax Romana* – and other forms of peaceful coexistence between undemocratic nations. Linking peace and democracy is typical of American liberalism and tends to show contempt for other forms of peace-building processes between nations. Rawls typically describes the historical achievements of American constitutionalism as the discovery of a new, better and more tolerant order that could become a model for the whole world. For instance, in his paper 'The Idea of Public Reason Revisited', he gives as examples of the political values of public reason 'those mentioned in the preamble to the United States Constitution: a more perfect union, justice, domestic tranquillity, the common defence, the general welfare, and the blessings of liberty for ourselves and our posterity'.[8] In *Political Liberalism*, he insists that: 'Indeed, the success of liberal constitutionalism came as the discovery of a new social possibility: the possibility of a reasonably harmonious and stable pluralist society. Before the successful and peaceful practice of toleration in societies with liberal institutions, there was no way of knowing of that possibility.'[9] But toleration is certainly not the monopoly of liberal democracies and we can suspect some degree of ethnocentrism in Rawls's claims. In his examination of the much-debated question of Asian values, Bhikhu Parekh provides an illuminating answer, showing that there are many tolerant societies based on non-liberal beliefs or comprehensive doctrines.[10] Is Rawls's own version of liberalism aware of these distinctions and well-equipped to overcome these difficulties?

Does its avowed respect for diversity overcome this parochialism or not? How does his distinction between political liberalism and 'comprehensive' doctrines translate into the world of international relations? The way the question of stability and peace among nations is reformulated suggests that possibly not enough attention has been paid to these problems.

How would democratic peace extend to non-democratic but decent and peaceful peoples? Would that not be due to the progress made by liberalism? Rawls thus typically writes that: 'If a liberal constitutional democracy is, in fact, superior to other forms of society, as I believe it to be, a liberal people should have confidence in their convictions and suppose that a decent society, when offered due respect by liberal peoples, may be more likely, over time, to recognize the advantages of liberal institutions and take steps towards becoming more liberal on its own' (*LoP*: 62). The claim here is that 'decent' societies will naturally see liberal democracy as the way forward. This claim, legitimate as it may sound, can be, for some critics, an echo of the old colonial 'norm of civilisation', which assumed that all non-liberal societies were still 'un-civilized'.[11]

At this stage, we may understand the charge of cultural imperialism as grounded in the lack of balance between the two types of societies concerned with peace: more advanced democratic societies and non-democratic but decent ones. The underlying ambition is to extend a given set of values or principles to all members of the Society of Peoples, first as regulating relations *among* them, but ultimately as ruling institutions *within* as well. In that sense, if Rawls's ambition is ultimately to see the world order becoming a liberal one, it is highly problematic. Such a move would seem questionable from at least three angles. From a logical point of view, it confuses facts and values, treating specific historical situations such as the emergence of liberal democracy as the embodiment of universal norms. From a moral point of view, in affirming the universal scope of its principles without consultation or participation of the parties concerned, it seems to show no respect for the *otherness* of others, in contradiction with Rawls's awareness of the fact of pluralism. Lastly, from a political point of view, it could easily lead to unacceptably self-righteous forms of domination, reminiscent of colonialist self-complacency.

'Democratic' peace as imperialist

The second problem is Rawls's unresolved notion of peace and stability as the aim of the Society of Peoples. Peace is addressed at three levels in Rawls's theory. First, we have the first part of the 'ideal' theory, which deals with relations among democratic peoples within a Society of Peoples. There, peace and justice are tightly connected. Then, we have the other two levels where liberal democratic peoples have to deal with non-democratic societies, first with 'decent' peoples, then with 'outlaw' states and 'burdened' societies. The case of 'decent' peoples is the focus of the debate as obviously outlaw states and burdened societies cannot

on their own move towards more decent institutions and show respect for international law, becoming members of good standing of the Society of Peoples. What sort of peace can we expect in our relations with 'decent' societies? Is it the result of generalised democratic institutions *within* peoples – a very idealistic view – or of compliance with international principles by peoples that remain undemocratic domestically? In the latter case (the *modus vivendi* realistic solution), would they not remain a potential threat to peace? How does Rawls navigate between these two answers?

Peace and stability *within* well-ordered peoples, liberal or decent, require, for Rawls, two series of conditions. On the one hand, we have *psychological* conditions such as the understanding and internalising of a common good conception of justice, the necessity to address all members' interests and concerns, the value of 'core' human rights, etc. But in the case of hierarchical decent societies, the consensus is based on a comprehensive religious doctrine whereas in liberal democracies, it is based on a political conception of justice. On the other hand, *institutional* conditions are crucial: the existence to some degree of fair equality of opportunity, a decent distribution of income, long-term security at work, the provision of basic health care and the public financing of elections, etc.[12]

Now, the balance between these two series of conditions should differ in the two types of societies. Unfortunately, and this is revealing, Rawls tends to emphasise psychological conditions because this is the way allegiance to democratic institutions and stability works in liberal democracies. He simply extends the process to decent hierarchical societies and thus risks being seen as culturally imperialist. 'Citizens develop a sense of justice as they grow up and take part in their just social world . . . Similarly, peoples, including both liberal and decent societies, will accept willingly and act upon the legal norms embodied in a just Law of Peoples' (*LoP*: 44). Two series of criticisms might be made here.

First, we can sketch a series of *external* criticisms, based on examples of cultural diversity. Emphasising psychological processes against institutional ones is probably more typical of the Western secular tradition than of anything else. Psychological processes that lead to allegiance to democracy are what Rawls has described elsewhere as the superior and more complex 'morality of principles' (*TJ*: 414–20) that is to replace the more primitive 'morality of authority', external coercion and fear of authority, or the 'morality of association' or group pressure, as a basis for peace and stability. In democratic contexts, reason, debates and exposure to diversity shape our understanding of justice and create the conditions for personal autonomy. Rawls, interestingly, mentions 'moral learning' (*LoP*: 44) as the process that leads to autonomy and should replace coercion or group pressure. But he tends to ignore or overlook the institutional and cultural conditions for this moral development. The idea that non-democratic but decent peoples can act 'willingly', as individuals may do in liberal societies, is problematic. This does not make much sense if the relevant free institutions and protections are not there for this process to develop, even if we are told that a common good conception of

justice is in place. In effect and, as recent history has shown, it is more likely that political and economic pressures, the need for assistance and cultural domination, will lead to a not very 'willing' adoption of democratic institutions. Non-liberal but decent peoples will have to bow in some ways to the moral superiority of the West. Ignoring the balance of powers between peoples is not conducive to true respect for peoples' identities.

Moreover, it is obvious that stability and peace between well-ordered peoples may be reached without any appeal to autonomy and the morality of principles, which are the basis for Rawls's concept of 'stability for good reasons'[13] that is 'brought about by citizens acting correctly according to the appropriate principles of their sense of justice' (*LoP*: 13, n.2). Establishing peaceful relations without reaching agreement on first principles – but thanks simply to political compromises, negotiations, treaties, promise keeping, respect and trust – is very different, psychologically, from the full-blown notion of allegiance.[14] Indeed, the value of compromise and negotiation is very high in many cultures where bargaining processes have the force of social recognition and communication. This is an essential point which is missed in Rawls's fictional example of a people that would be acceptable for membership in a liberal Society of Peoples: Kazanistan (§9.3). This example concentrates on one single aspect of non-liberal but decent Muslim societies – that they are communitarian and hierarchical societies – and it misunderstands the role that is played in them by negotiation and bargaining. When agreement on regulative principles is reached through political bargaining and compromises, without asking for personal allegiance, then it can possibly preserve the identity and the self-respect of the parties involved, and avoid domination and imperialism. Not enough attention is paid by Rawls to the diverse forms of authority, negotiation and agreement in different cultures. This may, for instance, explain the level of *ressentiment* and frustration in many contemporary Muslim societies (among others) at the fact that acceptance into the Society of Peoples requires personal allegiances to the core values of liberal democracies, when these values are external to their culture and tradition. These peoples are placed in a situation of deep inequality that is easily translated as cultural imperialism. This fact is not taken into account by Rawls. For many decent but non-democratic cultures, democracy encompasses a sense of disruption and potential conflict, because it exacerbates what is different and does not emphasise what is common. Thus, it may be a factor of division in social contexts of deep ethnic and religious hatred. For Islam, in particular, but also in many other non-liberal contexts, liberalism and the stress on conflict and diversity is seen as disruptive and dangerous.

A second series of *internal* criticisms points to tensions between imperialism and respect for diversity within the theory. Rawls's conception of stability may be criticised in that he does not distinguish between stability in a domestic context of opposing comprehensive doctrines and stability in an international context of conflicting peoples. He applies to the Law of Peoples the conceptual analysis already present in *PL* in relation to a pluralist domestic context. As Kok-Chor

Tan notes, 'the main flaw in Rawls's global thesis is his belief that the global overlapping consensus between different political societies is morally equivalent to a domestic overlapping consensus between different comprehensive doctrines . . . the consensus Rawls presents in *LoP* is more a political compromise than a consensus around genuine liberal values'.[15] It is impossible at the global level to treat political liberalism as a neutral doctrine in relation to non-democratic peoples and practices. At some stage, assertion of its liberal content, especially of its commitment to individual liberty, has to be expressed, creating a tension and ruining the balance that Rawls wants to preserve.

An added difficulty is that the basis for international stability is presented as psychological and very narrow. How is it psychologically possible that non-liberal, but decent peoples, might be ready to switch allegiances and to accept liberal principles, even if at the domestic level they would find them repulsive? Here we have a situation not entirely dissimilar to the problem of the 'divided Self' in *PL*, where a member of a liberal society is said to be capable of being devoted to liberalism as a citizen, even while, as a private person, he or she is opposed to it.[16] To ask peoples to give their allegiance to values that are alien to them can sound fairly imperialistic. It can also lead to contradictions for the dominant side, too, as in the context of contemporary development policies. There the international regime of aid has recently insisted on the necessity for states to put their internal policies under the controls and standards provided by the aid donors. It thus combines a powerful disciplinary focus with an emphasis on empowerment and self-development even for poor countries; this can be unsettling and destructive both for rich donors and poor recipients. The flaw in the argument is the supposed psychological basis for peace when it is obvious that many more objective and non-individual factors must play their part. There is a deep tension in Rawls between the *psychological* nature of his conception of peace and stability and his *holistic* and institutional conception of justice.

Confusing facts and values

I now turn to another major difficulty, which is that we do not know whether we are talking of 'democratic peace' as a historical fact or a desirable end. 'Democratic peoples do not go to war with each other' (*LoP*: 51–4 and 125). What is the value of this observation? Is it historical or normative? Rawls seems to confuse facts and values and to treat historical facts as the embodiment of universal norms. This mistake is typical of universalism.[17] Instead of remaining consistently at the level of norms and regulative ideals, Rawls is tempted to prove that facts agree with him, that 'democratic peace' has not only a moral justification but also a historical basis, which he examines in detail, in spite of the fact that many historians still discuss this factual connection.[18] (Rawls suggests, but unfortunately does not develop, a quasi-Hegelian conception of history as the progressive reconciliation between ideals and social conditions.[19])

Kant affirmed a similar thesis on democratic peace and wrote: 'The first definitive article of Perpetual Peace is that the civil constitution of every state shall be Republican.'[20] But where Kant drew a sharp distinction between ideal Republics and real democracies, which have proved historically to be despotic,[21] Rawls understands the Republican ideal as embodied in American history. Rawls is possibly a victim of the 'liberal illusion' which has characterised so much international political theory recently, as he obviously overestimates the achievements of liberalism.[22] Unfortunately, this is not simply an intellectual confusion. Because value judgements are not mere statements of facts, that is, they are not theoretical but practical in the Kantian sense, they necessarily lead to practices and institutions that objectify them, and intellectual and political domination cannot be separated from each other. This is the core of the argument against universalism and the dangers of cultural imperialism.

As a consequence of this confusion, it would seem to follow that if decent peoples are to be part of a peaceful Society of Peoples, and if peace is only secure when institutions are democratic, then clearly the Society of Peoples is entitled to transform the domestic institutions of its members and to put pressure on non-democratic but decent governments to change. Here the ambiguity of Rawls's position is obvious. In order to promote peace, democratic nations can be justified in intervening in the domestic politics of 'decent' peoples, not only in those of 'outlaw' states. Justice here is both a necessary and sufficient condition of peace because historically it seems to have been the case. But this argument is not valid within the context of Rawls's own normative theory of justice, where the fact of reasonable pluralism is to be respected, including the pluralism of conceptions of justice. Moreover, justice is 'the first virtue of social institutions' and cannot become a means to an end. 'Justice' cannot be forced upon peoples and liberal peoples should learn to live with their non-liberal neighbours, confident in their own values, not hoping for the territorial and intellectual expansion of their own conception of justice.

2 Rawls's Answers to the Charge

I have shown that the charge of cultural imperialism has some basis in Rawls's conception of democratic peace and stability. How does that stand against his well-known recognition of 'the fact of reasonable pluralism'? To these criticisms, what would the Rawlsian answer be? I suggest that it would run along the following two lines.

First, I think that the way Rawls appeals to the *principle of reciprocity* between peoples is crucial in answering the charge of imperialism. 'The Law of Peoples satisfies the criterion of reciprocity . . . It asks of other societies only what they can reasonably grant without submitting to a position of inferiority or domination' (*LoP*: 121). Secondly, with the emphasis on *self-respect* in the description of

peoples as members of the Society of Peoples, Rawls departs from the cosmopolitan view that presents liberal democracy as a universal model and thus he should not be accused of cultural imperialism. Let us examine these two answers.

The appeal to reciprocity

Rawls stresses that his commitment to toleration of non-democratic but 'decent' peoples is based on *the principle of reciprocity*, even among very diverse and unequal peoples. This is a principle, he says, that is neither Western nor liberal, but that any 'decent' people will accept. Against his numerous critics, Rawls stands firmly on his position and affirms that these decent peoples represent a middle ground between a situation where states, in the name of state sovereignty, are guaranteed total immunity from foreign intervention, even in cases of gross abuse of human rights, and one in which any violation of human rights has to be punished in the name of the overriding value of individual freedom and dignity. This middle ground is occupied by societies that are not liberal, but nevertheless are not unreasonable and can be recognised as 'decent', that is, as respecting a sufficient level of core human rights to be acceptable in the community of peaceful peoples. 'Without trying to work out a reasonable liberal Law of Peoples, we cannot know that non-liberal societies cannot be acceptable' (*LoP*: 83).

One should, then, treat all well-ordered peoples, liberal or 'decent', within the Society of Peoples, as having a corporate moral status. This status deserves respect, independently of their political institutions, democratic or hierarchical, in a way that is distinct from respect for individuals. Thus the moral status of 'well-ordered' peoples should not depend upon their present institutions being liberal and democratic. This is the mistake made by cosmopolitans, who deny a people its moral status if its institutions are not fully democratic and refuse to treat it equally. For cosmopolitans equality should be 'only between individuals, and treating societies equally [should] depend on their treating their members equally' (*LoP*: 69). But peoples, for Rawls – and this is the controversial issue – are more than collections of individuals. To a variable degree, they are self-standing and self-sufficient in a way that individuals can never be.[23] They are characterised by a relatively stable collective identity, based on a common history, language and culture, even if their constitutive elements are as multiple and mutually contradictory as the sub-cultures that make them up. 'Peoples (as opposed to states) have a definite moral nature. This nature includes a certain proper pride and sense of honour; peoples may take pride in their histories and achievements as what I call a "proper patriotism" allows' (*LoP*: 62). With this distinction in place, it is clear that, for Rawls, self-determination should be preserved as much as possible. 'Self-determination, duly constrained, is an important good for a people' (*LoP*: 84) in the same way that 'it is a good for individuals and associations to be attached to their particular culture' (*LoP*: 61). This raises the

question of patriotism, respect for which should be part of liberalism. Again, this involves stressing the importance of boundaries and of preserving peoples' distinctive identities so far as possible, thus successfully overcoming the charge of cultural imperialism.

But such an 'explanatory nationalism', to use Thomas Pogge's expression,[24] attracts another series of criticisms. Leaving space for patriotism and national identities, even when the defence of individual human rights is not fully assured, seems to imply a defence of the nation-state and of the old Westphalian context of sovereign states, as Allen Buchanan has suggested.[25] Rawls answers this with a clear distinction: peoples are not states and states never possess a moral status. But here he is treading a thin line between realism and cosmopolitanism, when he extends respect to non-democratic, if peaceful peoples, even if they do not fully respect their individual members. This is a risk he is ready to take because of his *holistic* conception of justice. Justice applies to the basic structure of societies, not to individual situations, and justice *within* peoples is a matter that members, not foreign powers, should take into their own hands. The case for foreign intervention is limited by this conception of peoples. As David Reidy says, 'Rawls's most fundamental commitment is to reciprocity within a shared public reason. To be a genuine manifestation of human freedom and autonomy, moral agents, natural and corporate, must realize a just social world without sacrifice to this commitment . . . Rawls surely hopes for a world within which all peoples are liberal and democratic. But he hopes even more deeply that we can find our way to that world without violating the demands of reciprocity within a shared human reason.'[26] As in *PL*, he bases his argument on 'the fact of reasonable pluralism' between cultures and peoples: 'If all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways (if such there are, as I assume) of ordering society . . . Provided a nonliberal society's basic institutions meet certain specified conditions of political right and justice and lead its people to honour a reasonable and just law for the Society of Peoples, a liberal people is to tolerate and accept that society' (*LoP*: 59–60).

Thus, showing equal respect and consideration for decent peoples' institutions and traditions within the framework of the Law of Peoples is not contradictory. 'Equal peoples will want to maintain this equality with each other' (*LoP*: 60). It would be illiberal to treat decent non-liberal peoples as unequal: 'decent nonliberal peoples will be denied a due measure of respect by liberal peoples' (*LoP*: 61). 'Although full equality may be lacking within a society, equality may be reasonably put forward in making claims against other societies' (*LoP*: 70).

It is obvious from these analyses that Rawls develops a 'holistic' and institutional view of justice between peoples, which is consistent with his holistic view of justice in the domestic context. The particular attention that he pays to the collective dimensions of what makes a people a people and to the consequences for international relations may be seen as parallel to his emphasis on the institutional nature of domestic justice. This is why it is misguided to interpret his views

as still Westphalian and attached to the traditional prerogatives of sovereign states. It is this 'holistic' approach that sets him apart from cosmopolitans and is a powerful argument against the charge of cultural imperialism.

The critique of cosmopolitanism

Cosmopolitanism is *universalistic* in the Kantian sense of unconditional respect for the human person as an end in itself. It claims that full human rights should apply to anyone anywhere in the world and neither historical contingencies nor natural circumstances should play any role in their application. It starts with the very ambitious claim that all persons are to have the equal liberal rights of citizens of a constitutional democracy. Cosmopolitanism takes seriously the priority of justice over state powers or prerogatives, economic welfare or religious traditions, and wants the full list of human rights, both political and economic, to be implemented. Universal human rights represent the moral basis for international law and foreign intervention. They override the autonomy of states, the rules of trade and commerce as well as domestic policies, which they lead to reshape, as the case of the European Union clearly shows. Cosmopolitanism is a *moral individualism* that states that individual persons, not states, are to be recognised as the primary objects for concern in international relations. Only they have a moral status forming the basis for any normative theory and criticism. Realists have ignored this moral status and are unable to account for the current changes in international relations, especially progress made by the implementation of human rights, good governance and the rise of liberal democratic values in the face of unwilling states still attached to their prerogatives. As a consequence, cosmopolitanism claims that a *global difference principle* that allows not only redistribution between richer and poorer members, but also a correction of an unjust global structure, should be applied beyond national borders to counteract the arbitrariness of the territorial distribution of natural resources and to fight poverty. As a matter of principle, all unjust inequalities between persons as well as between nations should be eliminated, perhaps through global taxation.

The reasons for Rawls's rejection of cosmopolitanism are multiple and their analysis would go beyond the limits of this essay. I will simply mention two main reasons connected with the discussion of cultural imperialism.

A first reason is the arrogance and lack of respect of cosmopolitanism for cultural and national identities. On the cosmopolitan view, says Rawls, 'the foreign policy of a liberal people will be to act gradually to shape all not yet liberal societies in a liberal direction, until eventually all societies are liberal . . . only a liberal democratic society can be acceptable' (*LoP*: 82–3). Neither the diversity of member states nor 'the fact of reasonable pluralism' is relevant. Thus, despite being overtly concerned with the well-being of individuals all over the world, cosmopolitanism is as arrogant and dogmatic as utilitarianism in its affirmation of

one single good, to recall Rawls's critique in *TJ*. 'The ultimate end of a cosmopolitan view is the well-being of individuals, not the justice of societies' (*LoP*: 119).

Secondly, cosmopolitanism is individualistic in the wrong way as it does not take into account the various basic structures of society and it does not make a distinction between decent non-liberal societies that deserve consideration and the rest. Rawls seems then to share the cultural relativist's view that universalism can be a mask for imperialism, for justifying sanctions and for arrogance. 'The danger of error, miscalculation and also arrogance on the part of those who propose sanctions must, of course, be taken into account . . . decent societies . . . deserve respect, even if their institutions as a whole are not sufficiently reasonable' (*LoP*: 84). Cosmopolitanism ignores the importance of respect for and recognition of peoples' distinctive identities and cultures as well as for individuals' commitments to their communities. The Law of Peoples regulates relations between peoples, not between individuals who should address their domestic situation before claiming global rights. Otherwise, they would lose their identity and the self-respect that goes with belonging to a valued community.

This critique is especially obvious in Rawls's analysis of the duty of assistance to 'burdened societies' and in his rejection of global *distributive* justice (*LoP*: 106–13). Where cosmopolitans would like to see an open-ended process of assistance to less well-off peoples, Rawls proposes a 'target and cut-off point' conception of assistance that will exclude the application of the difference principle to the global context.[27] The primary target of assistance is not the welfare of all individuals, but to establish just or decent institutions. Therefore, poverty is to be fought until this target is reached but not beyond, because that would lead to paternalism and lack of respect for the autonomy of the peoples concerned. If relative poverty is compatible with just or decent domestic institutions, so be it.

To conclude, and this is his best defence: in rejecting cosmopolitanism Rawls is showing that his kind of universalism is distinctive. It is a 'universalism in reach' (*LoP*: 80–1, 85–6). It is not based on the *intrinsic* universality of liberal values, but rather on their appeal to many peoples across very different social and historical conditions, as the contemporary progress of human rights law has shown. Indeed, human rights are not specifically liberal. Rather they are 'the necessary conditions of any system of social cooperation' (*LoP*: 68). The fact of their present universal appeal is the result of historical conditions, the post-Second World War context, for instance; it does not depend simply on the political imperialism of the victors. The recognition of universal human rights is the result of long and difficult political processes, which have changed the identity of the peoples concerned – processes such as the Glorious Revolution in Britain, the American War of Independence and the French Revolution. By contrast, where these struggles did not take place, but were replaced by struggles for national independence, as in Germany and Italy in nineteenth-century Europe, the impact of these rights has been virtually non-existent until after the Second World War. The role played by

domestic struggles and by democratic participation in the elaboration of the prevailing set of rules and principles is crucial here.

These are, rapidly sketched, Rawls's most convincing lines of defence against the charge of cultural imperialism.

3 Conclusion: Peace or Justice?

There remains an obvious difficulty. Why has *The Law of Peoples* been accused of being culturally imperialist and, at the same time, too accommodating to non-democratic societies? Cosmopolitans treat Rawls as insufficiently liberal and individualistic just as cultural relativists claim him to be too liberal and universalistic. As I have suggested, Rawls is treading a thin line between two obstacles, or even three if we include that posed by political realism. Can he succeed? I suggest that he should have insisted that it is only in clearly limiting the scope of the Law of Peoples to political ambitions, to securing peace and not to attaining a just world order, that both cosmopolitans' and cultural relativists' claims can be finally rejected. The normative weight of the whole enterprise has not been clearly defined. Is it peace or is it justice?

One answer in line with Rawls's inspiration could be to defend a holistic conception of peace and to abandon his emphasis on psychological processes to create allegiance to 'democratic peace'. The Society of Peoples as a social structure can itself become the prime mover for changes because of its attraction in creating peace and security. The psychological processes that strengthen peace need institutional structures to develop freely. This is a major concern in development policies at the present moment under the general requirement of 'good governance'. But is it possible to envisage political and institutional changes and progress in terms of basic liberties without appealing to incentives? Unfortunately, the whole problem is simply alluded to when Rawls writes: 'it is not reasonable for a liberal people to adopt as part of its own foreign policy the granting of subsidies to other peoples as incentives to become more liberal' (*LoP*: 85). Psychological processes, subsidies and coercion cannot generate the kind of institutional domestic changes necessary for lasting peace and 'decent societies should have the opportunity to decide their future for themselves' (ibid.). But without a public space and a global structure within which to frame these decision procedures, we are bound to see psychological processes and political pressures as well as economic incentives set to play the major role in the move towards better governance.

For many readers, indeed, the Law of Peoples is no more than a political compromise with non-liberal peoples in the name of peace and stability. How could it have, more ambitiously, a *moral* scope, aiming at establishing a just world order, as the ideal of 'stability for good reasons' seems to imply? If it is the former (peace and stability), then the charge of cultural imperialism no longer

makes sense. We develop a theory of international justice for liberal and similarly minded peoples, and its constituency is clearly limited: defining morally permissible politics. The agreement of most peoples would be desirable but should not detract from the limited scope of the theory, which is political and practical in the Kantian sense. But if it is the latter (a just world order), then the border with cosmopolitanism is blurred.

There are elements in Rawls's argument that do point towards a non-psychological basis for peace and that are concerned with institutional design and structures. He indicates that the scope of the Law of Peoples is mostly political, not simply moral, in the following senses. Firstly, it is not the result of applied moral philosophy. No comprehensive doctrine is relevant for the purposes of international justice. This is the basic tenet of political liberalism. The basis for peace cannot be one specific comprehensive doctrine, but respect for the fact of reasonable pluralism. Secondly, it is political in the sense that it is limited to political questions, the very questions that occupy foreign policy: war, immigration, the duty of assistance, control of nuclear weapons, etc. Thirdly, as shown in Rawls's use of 'target and cut-off point' conceptions of human rights, the right to war, aid and international justice, its aim should be political in the sense that it is limited to feasible decision-making rules such as: do we go to war in the case of breaches of the full list of human rights, such as equal freedom of religion or expression? Or do we put the limit at the violation of a more limited list of 'urgent' human rights such as the right to survive, to some measure of personal freedom, etc? The question is: are we ready to go to war to protect equal freedom of expression, equal freedom of religion, and the full list of human rights, everywhere, anytime, or do we have to restrict that list to the rights that regulate permissible state action? Rawls's conception of the right to war is political, not ideological as in the case of pacifism or cosmopolitanism, because it is a 'target and cut-off point' conception, based on political analysis, not on general principles leading to dangerous open-ended decisions. Equally, his conception of the duty of assistance is also political in the sense that it deals with political societies, not individual persons, and that it sees just institutions, not individual welfare or personal situations, as its field of intervention. We may see how with these clarifications this conception acquires a much-needed relevance.

To summarise, I have taken seriously the charge of cultural imperialism addressed to Rawls in order to discover where the major difficulties in his argument lie and why, consequently, his book has been so badly received. Exploring the middle ground between political realism and moral idealism has proved to be difficult, but it is indeed the right direction. Rawls's valuable contribution to the debate is thus the following. Rejecting both cultural relativism and cosmopolitanism, he is trying to define a conception of international justice from the point of view of peace and stability, not from that of the creation of a just world order. Philosophers cannot determine what universal justice may be without violating the fact of reasonable pluralism, but they can examine what the

conditions for peace and stability are, justice being one of them. Rawls quite rightly emphasises that a people is a political entity with a corporate moral status of its own. Thus, the demands of peace are paramount and a lesser ambition in the area of domestic justice and full human rights can be justified in the name of respect for peoples' self-determination.

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Notes

[1] John Rawls, *The Law of Peoples* with "The Idea of Public Reason Revisited," Cambridge, MA: Harvard University Press, 1999 (hereafter *LoP*). The 1993 version of *LoP* appears in S. Freeman, ed., *Rawls Collected Papers*, Cambridge, MA: Harvard University Press, 1999 (cited hereafter as *CP*).

[2] Note that already in *A Theory of Justice* (hereafter *TJ*), 2nd edn, Cambridge, MA: Harvard University Press, 1999, his conception of conscientious refusal was discriminating. 'What is needed then,' he wrote, 'is not a general pacifism, but a discriminating conscientious refusal to engage in war in certain circumstances' (*TJ*: 335). This, in my view, is one of the strong points of his conception of international justice.

[3] Brian Barry, *Culture and Equality*, Cambridge: Polity Press, 2000; Charles Beitz, *Political Theory and International Relations*, Princeton, NJ: Princeton University Press, 1979 and 'Rawls's Law of Peoples', *Ethics*, 110/4 (2000): 669–96; Allen Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World', *Ethics*, 110/4 (2000): 697–721; Thomas Pogge, *Realizing Rawls*, Ithaca, NY and London: Cornell University Press, 1989; Kok-Chor Tan, 'Liberal Toleration in Rawls's Law of Peoples', *Ethics*, 108/2 (1998): 276–95, and *Justice without Borders*, Cambridge: Cambridge University Press, 2004.

[4] John Gray, *Enlightenment's Wake*, London: Routledge, 1995; Barry Hindess, 'Neo-Liberal Citizenship', *Citizenship Studies*, 6/2 (2002): 127–43.

[5] Stanley Hoffmann, 'Dreams of a Just World', *New York Review of Books*, 42 (1995): 52–7. 'This overlapping consensus is really just a modus vivendi among quite different models of society' (p. 54).

[6] Immanuel Kant, *Political Writings*, ed. Hans Reiss, Cambridge: Cambridge University Press, 1970, p. 104, and Rawls, *LoP*, p. 10.

[7] 'Decent' peoples, for Rawls, are non-democratic and do not treat all their members as free and equal, but they respect basic human rights such as the right to life, the right to liberty, 'liberty of conscience though not an equal liberty', and formal equality. They

are non-aggressive, they possess a common good conception of justice, they have a decent consultation hierarchy and, in the end, they allow a limited right of dissent for individual persons through their representation in communal institutions (*LoP*: §§7–10).

[8] Rawls, *CP*, p. 144.

[9] *Political Liberalism* (hereafter *PL*), New York: Columbia University Press, 1993, p. xxvii.

[10] Bhikhu Parekh, *Rethinking Multiculturalism*, London: Macmillan Press, 2000, p. 136.

[11] In the first version of *The Law of Peoples*, one could note a morally superior undertone in the way Rawls formulated the ambitions of a reasonable Law of Peoples. 'Our first duty,' he writes, 'is to leave the state of nature and submit to the rule of a reasonable and just law . . . Another long-run aim is to bring all societies eventually to honour that law, to be full and self-standing members of the society of well-ordered peoples and to secure human rights everywhere' (*CP*, pp. 556–7).

[12] In *LoP* (p. 50), Rawls gives a detailed account of both conditions in a domestic liberal situation. But how might this apply to a non-liberal situation where these institutional conditions do not obtain? We are left with only subjective conditions, beliefs and allegiances, and this is where the argument is failing. Only moral domination can make up for the missing democratic institutions. This gives strength to the cosmopolitan view that only democratic regimes can be the basis for real stability and peace in international relations.

[13] On the question of stability, see also *PL*, pp. 142–3 and *LoP*, pp. 44–5; 'the problem of stability has played very little role in the history of moral philosophy' (*PL*, p. xix). It is surprising that Rawls does not seem aware that, as stability is a political/social problem, involving analysis of historical forces at work, and not simply a theoretical problem, it cannot be solved at the level of moral first principles. What is even more confusing is that stability seems to be a property not only of political societies, but also of the conceptions of justice at work themselves. This is why the nature of the question of stability, and peace at the international level, is still unresolved in *The Law of Peoples*. Rawls only looks at the question of stability from the subjective point of view, that of the allegiances or beliefs that sustain a conception of justice. He does not take into account the objective social and historical forces at work.

[14] On these alternatives to Rawls's overlapping consensus, see E. Picavet and C. Arnsperger, 'More than Modus Vivendi, Less than Overlapping Consensus', *Social Science Information*, 32/2 (2004): 167–204.

[15] Tan, 'Liberal Toleration in Rawls's Law of Peoples', p. 289.

[16] On the 'divided Self', see William Galston, *Liberal Purposes*, Cambridge: Cambridge University Press, 2001, p. 153, and his critique of Rawls, esp. of his conception of individuality: 'persons must be emotionally, intellectually and ontologically capable of drawing an effective line between their public and non-public identities . . . but this excludes individuals and groups that do not place a high value on personal autonomy'. The same must be assumed of non-liberal peoples in their exchanges with the liberal Society of Peoples, and this is highly problematic as basic human rights allowing these choices and critical reflections are non-existent in non-democratic societies.

[17] It is very interesting that the two great nations that see themselves as 'universal Republics', France and the United States, should be so blind to that confusion and incapable

of distancing themselves from these myths inherited from their two very different revolutions. A measure of scepticism and humility here would be welcome but is rarely the case among political philosophers. For an exception, see Pierre Rosanvallon, *Le modèle politique français*, Paris: Le Seuil, 2004.

[18] See *LoP*, pp. 51–4 for the debate between historians on democratic peace.

[19] Interestingly, he mentions Hegel for the first time as a member of the family of 'liberalism of freedom' in *LoP* and the reason for it is that Hegel, as in the late writings of Kant, offers a solution to the facts-values problem through a view of social history: there are 'social conditions under which we can reasonably hope that all liberal and decent peoples may belong, as members in good standing, to a reasonable Society of Peoples' (*LoP*, pp. 126–7). On Rawls and history, see Jan-Werner Müller's paper, 'Rawls as Historian: Remarks on Political Liberalism's Historicism', in *Revue internationale de Philosophie*, forthcoming special issue on John Rawls, Brussels: Michel Meyer, 2006.

[20] Kant, *Political Writings*, p. 99.

[21] Kant, *Political Writings*, pp. 100–2: 'None of the so-called "republics" of antiquity employed such a (representative) system and they thus inevitably ended up in despotism.' Rawls has no possibility to make such a distinction because his view of liberalism is too close to the American historical experience.

[22] See Chris Brown, *Sovereignty, Rights and Justice*, Cambridge: Polity Press, 2002, p. 61, on liberal internationalism and Continental political theory.

[23] For an analysis of this distinction, see David Reidy, 'Rawls on International Justice: A Defence', *Political Theory*, 32/3 (2004): 291–319, esp 298.

[24] On 'explanatory nationalism' and its critique, see Thomas Pogge, *World Poverty and Human Rights*, Cambridge: Polity Press, 2002, pp. 139–44 and Tan, *Justice without Borders*, pp. 70–2.

[25] Buchanan, 'Rawls's Law of Peoples', p. 701.

[26] Reidy, 'Rawls on International Justice: A Defence', p. 305.

[27] For a discussion of the duty of assistance, see John Tasioulas, 'Global Justice without End?', to appear in *The Legacy of John Rawls*, Lisbon University Press, 2005.

5

The Problem of Decent Peoples

Kok-Chor Tan

One of the more controversial claims in *The Law of Peoples* (*LoP*) is Rawls's conclusion that liberal toleration extends to certain nonliberal societies that he calls "decent peoples."[1] The problem of how liberal peoples are to relate to "decent peoples" poses an important challenge for any construction of a liberal theory of international justice. This is because liberal justice is committed to the protection and promotion of individual liberty; yet liberalism is also defined by its commitment to the ideal of toleration. How liberal peoples are to relate to nonliberal but decent peoples, a central issue in *LoP*, brings to the forefront a fundamental question within liberal morality: how to balance the protection of individual liberty with the toleration of diversity – in this particular case, that of the diverse ways that different nations have of organizing their own political life.

It is one of Rawls's many important achievements in *LoP* that he presents powerful considerations against the complacent view that liberal democracy is the globally correct and enforceable form of political arrangement.[2] Given the tendency of countries to invade and to impose their values on each other, Rawls's cautionary stance, as Samuel Freeman observes, "makes good sense."[3] Yet Rawls's conclusion that liberal peoples tolerate nonliberal peoples (which, as I will explain later, includes recognizing them as members of international society in good standing) troubles some commentators. In particular, liberal cosmopolitans, who hold, broadly, the view that a just global arrangement is one in which the basic liberties and democratic rights of all individuals are protected, will argue that nonliberal societies fail to merit liberal toleration.

In this discussion, I examine and clarify this cosmopolitan critique of Rawls's Law of Peoples. For some background, I begin (in section 1) by explicating Rawls's notion of a decent people, and his reasons why decent peoples, even though nonliberal, qualify as members in good standing in the just society of peoples. Next, I discuss (2) the ideal of toleration as it is deployed in *LoP*. Clarifying the notion of toleration in the Law of Peoples is essential because

it will help locate more precisely the points of contention between Rawls and some of his main cosmopolitan opponents. In particular, I want to stress that Rawls's account of toleration enjoins a certain normative attitude and is not just a prescription against coercive interference. I then (3) move on to discuss the cosmopolitan criticism of Rawls's conception of international toleration. I will suggest that the cosmopolitan conception of international toleration is more consistent with liberalism's core commitments. Moreover (4), while a proper Law of Peoples has to take heed of the problem of intervention, the cosmopolitan alternative to the Law of Peoples does not amount to a standing invitation to liberal peoples to intervene against nonliberal or even tyrannical regimes.

1 Decent Peoples

Rawls uses the term "peoples" as opposed to "states" or "nations." Yet the notions of nations and states are not entirely dismissed. A people, as Rawls deploys the term, is an idealized nation-state. There are three defining features of a people. Rawls calls these the institutional, cultural, and moral features (*LoP*: 23). The first feature, the institutional feature, shows that a people is also a government with a set of legal and political institutions. For a *liberal* people, this institution will take the form of a "reasonably just constitutional democratic government" (ibid). Given that the law of peoples is concerned with the foreign policies of societies and how societies are to relate to each other in the international domain, it can be inferred that peoples are also *independent* governments, or states.

But Rawls prefers the concept of a people to that of a state because he wants to work with an *idealized* account of the state. For Rawls, states as traditionally conceived in realist doctrines are assumed to be motivated primarily by their "rational prudential interests" and world politics is consequently "marked by the struggle of states for power, prestige, and wealth in a condition of global anarchy" (*LoP*: 23, 28). In the world as conceived by realists – a Hobbesian state of nature dominated by states driven by power and strategic considerations – the concept of international justice has no place. Peoples as stipulated by Rawls, on the contrary, have a moral character (the third feature of a people as noted above). As Rawls has it, peoples are reasonable in addition to being rational. Peoples, therefore, unlike states as traditionally conceived under realism, have the capacity to limit their interests against the requirements of justice.

Focusing on this first idealization, some commentators of *LoP* have pointed out that peoples as conceived by Rawls are simply states as they exist today but with a moral character.[4] But to note only the moral character in Rawls's definition is only partly right. Peoples, as envisioned by Rawls, are states *idealized* in a second way. In addition to being states with a *moral* character, peoples are also states with a *cultural* character. This recalls the second feature of a people, and this cultural feature ties the concept of a people to that of a nation. As Rawls writes,

a people is identified by a certain "shared pattern of cultural values." A people is thus not just a politically organized group but is also a nation whose members are bound by the "common sympathies" that Mill said were necessary for supporting and sustaining free institutions. What might be the source of the common sympathies that distinguish and define a people? Rawls refers to "identity of political antecedents; the possession of a national history; and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past" (*LoP*: 23n) as the possible bases of the common bond that unifies and identifies a distinct people. These bases of common sympathies that Rawls speaks about are similar to the kinds of sociopolitical cultural ties that liberal nationalist theorists commonly refer to.[5] A people constitutes a *national* community in that it exhibits a common "societal culture," as Kymlicka would call it, that is, a set of public institutions and practices operating under a common language that covers the full range of persons' activities.[6] On this liberal account of nationality, a nation need not be ethnically or racially homogenous. David Miller explicitly describes the USA as a nation that is characterized by ethnic plurality.[7] What generates a national cultural character is the fact of participation in common public institutions, a shared language, a sense of common belonging and destiny, and a sense of a shared history or collective memory among individual members.

This second idealization bears emphasizing because it tends to be overlooked in the critical commentary on *LoP*. Assuming that the law of peoples is essentially a law of states *as we know them* but with a moral capacity, some theorists have charged that Rawls fails to fully appreciate that one common source of strife in today's world is that of intra-state conflict between different national groups within a country. States as they exist, after all, are multinational and multi-ethnic rather than coextensive with a single national culture, and the national and ethnic cultural differences within states are potential sources of inter-national (though intra-state) conflict which a complete theory of international justice must address. Thus, they argue that Rawls's Law of Peoples is seriously deficient because of the absence of any principle regulating the right of secession and other intra-state cultural conflicts.[8] But if this second idealization of the state – that Rawls takes states to represent a single national community whose respective individual members are bound by common sympathies and share a collective national identity – is acknowledged, then this charge against Rawls's can be deflected. The problem of secession does not arise under Rawls's ideal theory where peoples are conceived as nation-states. Under ideal theory, a people is an independent government that represents a distinct and united national community. The problem of secession and intra-state national conflict is a problem that arises only in non-ideal theory under Rawls's construction of the Law of Peoples, where the boundaries of a people do not match actual political boundaries, and nothing in the construction of the theory precludes its proper treatment in that context.

Peoples are thus states *twice idealized*. First, peoples are states with a moral capacity for complying with a reasonable law of peoples and treating other states justly. Second, peoples also are states that reflect a distinctive national community; that is, a people is also a nation-state. The Law of Peoples is thus a law for *nation*-states *capable of a sense of justice*.

A people thus constitutes an independent political society that represents a national culture; and a *liberal* people is such a political entity with a liberal democratic constitution. What about a nonliberal people that is, however, "decent"? "Decent peoples," as Rawls calls them, are not liberal because they do not adopt and protect the standard list of liberal rights, such as the equal liberty of conscience, equality of individuals before the law, the right of democratic participation; and they endorse only limited freedom of expression and association for individuals (*LoP*: 71–5). And while individuals in a decent society have the right of dissent, this is a right limited by and channeled along the hierarchical structures of a society as dictated by the common good conception of justice in that society (*LoP*: 72). Essentially, while individuals qua citizens are free and equal in a liberal society, individuals are not so regarded in a decent hierarchical society. Individuals are seen first as members of associations and corporations (membership in which need not be voluntary), and their rights and interests are represented to the state through these associations and corporations. It is not ruled out, for example, that in a decent society, a woman enjoys no direct political representation; her interests (if effectively possible) may be represented by, say, the male head of her household rather than directly by herself.

But these nonliberal societies are nonetheless *decent* because they satisfy two criteria. The first criterion is an external or *international* one: decent peoples are not aggressive towards other peoples. They have no expansionist aims and are not disposed to subject other peoples to their own comprehensive doctrines. In short, decent peoples are peaceful and cooperating members of international society. The second criterion is an internal or *domestic* one that has three related but distinct parts: one, the society of a decent people is governed in accordance with a common good conception of justice thus securing basic human rights for its members. Basic human rights include the right to life (and which include the right to security and subsistence), right to liberty of persons, right to property, and formal equality before the law.[9] No common good is possible if basic rights of individuals are not respected. Notice, however, that basic human rights are distinct from the standard liberal rights mentioned earlier, such as equal liberty of conscience, individual equality before the law, equal individual right of dissent, and democratic political rights. Two, individual members of decent societies are regarded as moral agents capable of acting responsibly and in cooperation with each other. That is, individuals in a decent society are capable of a sense of obligation and justice. Three, laws are administered and enforced in good faith in a decent society in accordance with the common good conception of justice. While individuals may not be equal qua individuals before the law (for they may

have different legal standing according to their corporate membership within society), they enjoy nonetheless formal equality before the law in the sense that there is no arbitrary application of the law and that like cases are treated alike. Members of a decent society know what the law expects of them and what their rights and duties are. In sum, the second criterion, as a whole, relates three necessary conditions for decency in the domestic realm: the respect for human rights and the common good, recognition of the moral capacity of individual members, and the presence of the rule of law. It is worth pointing out then, as Freeman stresses in response to some of Rawls's critics, that a decent society would not exhibit many of the common atrocities that real-world liberals are concerned about, such as apartheid or ethnic cleansing and so on. Indeed a state fractured by deep ethnic and cultural conflict fails even to be a people in Rawls's sense (as suggested above), let alone count as a decent people. A decent people is a nonliberal society conceived in a certain way that should not be confused with real world illiberal regimes.[10]

An important consequence of satisfying both the external and domestic criteria of decency is that (representatives of) decent peoples can also on their own terms affirm the same principles of the law of peoples that liberal peoples affirm. Recall the basic steps in the construction of the Law of Peoples: in the first stage of his construction of the Law of Peoples, Rawls argues that representatives of liberal peoples in a global original position, when situated behind the veil of ignorance, will affirm the core principles of the law of peoples. These principles include the principle to honor human rights and a principle to provide assistance to peoples in need; and principles to respect and not use aggression against other peoples (*LoP*: 37).

The second stage of the construction is to extend this procedure to nonliberal peoples. Here the question is whether representatives of decent peoples can independently affirm the same principles in a second global original procedure. Because these nonliberal peoples are decent – they honor human rights and the rule of law, and are not aggressive towards other peoples – Rawls believes that they can on their own terms endorse the principles of the Law of Peoples. These principles, as affirmed by liberal peoples, are compatible with the kinds of values that characterize a decent people. Decent peoples can thus be part of an international overlapping consensus with respect to the core principles of the Law of Peoples. Liberal peoples, therefore, have no cause to attack or militarily intervene against decent peoples. Indeed, and very importantly, because they affirm the principles of the Law of Peoples, decent peoples are to be accepted as societies in good standing in a society of peoples. There is no basis for criticizing their political arrangement as unacceptable under the Law of Peoples.

In short, decent peoples are to be tolerated because they are decent – they are, to recall, peaceful internationally and respectful of human rights and the rule of law domestically. In other words, they are to be recognized and accepted as equal members in the society of peoples because they affirm the very same principles as

do liberal peoples. Why should decent peoples be singled out for criticism if they accept the same principles for a just world order as do liberal peoples? What basis can there be for criticizing them without also condemning liberal peoples? Thus, unlike outlaw societies that run afoul of the principles of the Law of Peoples (outlaw societies are warlike societies and/or are societies that do not respect the basic rights of their own members) and so do not meet the criteria of liberal toleration, decent peoples endorse these principles even though they are not liberal, and so are deserving of toleration and equal membership in the society of peoples.

2 The Idea of Toleration

Tolerating another society, for Rawls, requires more than just refraining from forceful interference against it. It includes the notions of acceptance and respect. As Rawls writes, "to tolerate [decent peoples] also means to recognize these nonliberal societies as equal participating members in good standing of the Society of Peoples" (*LoP*: 59). Thus, when liberal peoples tolerate decent peoples, they not only refrain from acting coercively against them (by not engaging in military intervention, for example); they are to, more fundamentally, recognize the legitimacy of decent peoples and their status as equals. Toleration then, for Rawls, is not just nonintervention; it is, very importantly, also noncriticism. Rawls's position, as suggested above, is that there is simply no principled basis for liberal peoples to criticize decent peoples. Toleration thus expresses a certain normative attitude towards the subject that is being tolerated, and is not just a prescription against coercive action against the subject.

As some philosophers have pointed out, there is a certain paradox in the idea of toleration. We normally think of toleration as the accommodation of ways of life or practices that we find offensive and not fully deserving of respect. When we tolerate certain attitudes or practices, we put up with attitudes and practices that we consider not fully acceptable, much less respectable.[11] Thus, toleration is a paradoxical virtue in that it enjoins acceptance of the unacceptable; and this tension is seemingly aggravated if to tolerate means also to respect. One is asked to harbor two conflicting moral standpoints.

One way of understanding the idea of toleration that can help make sense of this paradox is to treat it as an institutional virtue. Consistent with Rawls's overall framework, the principle of toleration in the context of political justice should be seen as a principle for the basic structure of society.[12] On the institutional approach, the idea of toleration is not concerned directly with the personal attitudes of individuals (that is, their preferences and likes and dislikes as measured against their own conception of the good), but with the system of public laws and norms that individuals may impose on each other. The principle of toleration demands that individuals support and maintain background institutional rules and norms

that accord different ways of life or practices equal status and respect, not that they should come to personally endorse these ways and practices for themselves. Thus, individuals may find a given practice or attitude offensive in light of their own conception of the good, and speak strongly in favor of alternative practices *within* the rules of institutions. The idea of toleration does not require that these individuals alter their personal conceptions of the good. Yet, as agents capable of a sense of justice, they are to recognize, where appropriate, that this is a practice compatible with the rules of justice, and therefore deserving of respect, and even protection, from the public-political point of view. Individuals can accept, therefore, that they ought to support public-political institutions whose rules regard the practice, which they personally find offensive and even wrong, with equal respect and concern. We might say that the virtue of toleration is expressed when individuals endorse and support institutional arrangements that protect reasonable ways of life or practices or attitudes that they also find objectionable according to their particular idea of the good.

The dualism of perspective that underlies the institutional approach to justice offers one explanation for the phenomenology and paradox of toleration. On this view, toleration reflects a conflict that arises because of the two perspectives moral agents are capable of – that of a sense of justice and that of a conception of the good. The virtue of toleration becomes salient when there is a tension between the point of view of justice and the personal point of view; that is, to be precise, when justice requires the respect for ways of life that a person also happens to find offensive or even wrong in light of her particular conception of the good. In domestic society, for example, the question of toleration comes to the fore in situations when, from their personal point of view, individuals find various ways of life, for personal, religious, and moral reasons, offensive and unacceptable, but who at the same time, from the point of view of equal citizens, are able to acknowledge that these ways of life are reasonable and hence are entitled to equal respect and protection by the rules of their common public-political institutions.[13]

Toleration in the Law of Peoples is best read as an institutional virtue in the above sense. That is, toleration in Rawls's international justice is a virtue of the background institutional rules and norms of international society – what Rawls calls "the basic structure of the society of peoples," against which independent peoples interact with one another. The principle of toleration requires that representatives of peoples propose and support only those principles for the Law of Peoples that grant all peoples equal respect and that treat each of their interests equally. For Rawls, the ideal of toleration is expressed by a basic framework of a society of peoples that is structured so as to affirm and respect the equality and freedom of all liberal and decent peoples, and when representatives of peoples respect the constraints of public reason and offer appropriate kinds of reasons to each other for their actions within the terms of this basic structure.

The institutional view of toleration also limits the demands of toleration in a more agent-focused way: it is a demand not imposed on moral agents as such,

but specifically on moral agents in their relevant *institutional* capacities and *offices*. When Rawls says that liberal peoples are to respect decent peoples, what he means is that *representatives of* liberal peoples may not in their official capacities as state delegates, for example, and in official global forums such as the United Nations (UN), criticize decent people. Qua representatives of liberal peoples, individuals have to show respect for decent peoples even if they do not in their private capacity respect these peoples. But liberals in their private and personal capacities may of course, individually or in private associations, criticize decent peoples and voice their opposition to them within the rules of the basic structure of the society of peoples.

Accordingly, treating toleration as an institutional ideal not only allows us to make sense of the ideal of toleration as a demand on individuals to respect that which they may find unacceptable. It also clarifies Rawls's potentially misleading remark that "[c]ritical objections [by liberals against decent peoples], based either on political liberalism, or on comprehensive doctrines, both religious and nonreligious, will continue regarding this and other matters. Raising these objections is the right of liberal peoples and is fully consistent with the liberties and integrity of decent hierarchical societies" (*LoP*: 84). This comment that criticism is permitted, and his earlier claim that liberal peoples are to recognize decent peoples as members in good standing in the society of peoples, are not in tension because they are directed at liberal agents in their different capacities. As private individuals, and within the rules of the basic structure, liberals may of course exercise their liberal freedoms to express their opinions and to criticize decent peoples and to promote liberal values in peaceful and nonviolent ways. It would be a perversion of liberalism to think otherwise. But in their official institutional capacities as representatives of liberal societies, it would indeed be inconsistent with the institutional ideal of toleration to criticize decent peoples. Here one would not be criticizing decent peoples as a private individual within the rules of the society of peoples, but would be acting in one's capacity as a representative of a society that is supposed to accord other decent peoples equal respect and recognition. Specifically, if a liberal representative criticizes decent peoples from a global forum such as the UN along with its sanctioning authority, she would be using inappropriately international institutional resources shared by all members to put pressure on some.

That toleration also includes respect and not merely nonintervention is an important point for Rawls's project. It reflects and reinforces Rawls's claim that decent peoples are accepted into the society of peoples not for the sake of global stability as a final end (what Rawls calls a "modus vivendi"). That is, decent peoples are not tolerated on Rawls's account as a second-best arrangement for the sake of minimizing conflict and antagonism in spite of what justice demands. If this were so, the law of peoples would be stable for the wrong reason. Rather, decent peoples are accepted into the just society of peoples as members in good standing. The society of peoples is stable with respect to justice.

In addition, the distinction between judgment and action implied in Rawls's account of toleration allows us to see that even though outlaw societies fail to meet the test for liberal toleration, it does not imply that they may be attacked or intervened against. Toleration pertains to a more fundamental question – whether the legitimacy of a government is to be recognized by a liberal people. Whether or not a liberal people is to forcefully act against a tyrannical or outlaw regime depends on a variety of further moral and pragmatic considerations, including severity of the wrongs of the regime, the potential repercussions (locally and globally) of forceful military action, the probability of success and so on. Waging war against a tyrannical regime, even purely for the purpose of protecting basic rights, brings into play additional considerations about the morality of going to war that the fact of illegitimacy in itself does not address. This distinction between *making a judgment* (criticizing) and *acting on that judgment* (intervening) is an important point that I will return to below. It applies also to decent peoples, and can allow, as we will see, for the possibility of a noninterventionist cosmopolitan alternative to Rawls's Law of Peoples.

In sum, treating toleration as an institutional virtue shows how Rawls's account of international toleration allows space for private (liberal) citizens to challenge decent peoples within the rules of the basic structure of the society of peoples. Rawls's toleration is not so restrictive as to preempt liberal individuals from speaking out against decent peoples. Yet because toleration thus understood grounds the evaluative standards for how we are to construct the basic structure of the society of peoples, it does set strict limits on the kinds of global institutions that liberal peoples can impose on decent peoples and the terms by which *representatives* of liberal peoples may critically judge decent peoples. So while there is surely space within the terms of Rawls's international theory for liberals to criticize decent peoples, the question is whether this space is correctly drawn. If the aim of justice is to construct the appropriate background conditions against which moral agents interact, then cosmopolitans do have a point when they say that it is beside the point that the Law of Peoples permits liberal citizens in their personal capacities to criticize nonliberal peoples. The question of global justice concerns the kind of global institutions that should be established and defended, not just the kinds of things individuals and states may do within the rules of global institutions.

3 The Cosmopolitan Critique

For liberal cosmopolitans, Rawls's limit of toleration is wrongly placed. According to these cosmopolitans, the limits of international toleration will be defined not merely by respect for basic human rights but also by respect for liberal rights.[14] Or, alternatively, the category of universally basic human rights must be expanded to include the other common important liberal rights – such as the

right to political participation, equal political representation, equal liberty of conscience and so on – that Rawls's own understanding of human rights leaves out. Thus the fact that decent peoples fail to respect liberal rights, or fail to respect human rights construed more broadly to include liberal rights, disqualifies them from equal membership in a just society of peoples. They fail to meet the necessary condition for liberal toleration on this view. But Rawls explicitly denies that the Law of Peoples is a cosmopolitan model of justice in this way. He contrasts the Law of Peoples with what he calls the cosmopolitan view thus: "The ultimate concern of a cosmopolitan view is the well-being of individuals and not the justice of societies . . . What is important to the Law of Peoples is the justice and stability for the right reasons of liberal and decent societies" (*LoP*: 119–20).

Before going on, it is important to clarify why the toleration of decent peoples exercises Rawls's main cosmopolitan critics. The problem of tolerating decent peoples is not that it blocks liberals from imposing liberal values on all persons. Cosmopolitans do not paternalistically demand that all individuals regard themselves as free and equal. The problem of tolerating decent peoples is that it lets down dissenting individual members in these nonliberal societies. According to the Law of Peoples, liberal peoples are not just asked to refrain from intervention in these cases; they are not even permitted to take sides in internal disputes for this would be at odds with the ideal of mutual respect and recognition that liberal peoples are to accord decent peoples. Defenders of decent peoples seem to take international paternalism to be the central global problem. Cosmopolitans, in contrast, are worried about individuals whose liberties and liberal freedoms are denied by their own state. The fact of dissent in any society (liberal or nonliberal) is a given, even under the construction of an ideal theory. It is the inevitability of personal disagreements over conceptions of the good that move political philosophers to care about the fairness of the background rules of society within which such differences are to be adjudicated. To assume away the fact of dissent is to assume away the relevance or "usefulness" of the subject of justice. Indeed Rawls recognizes the presence of individual dissent in decent societies, and he expects a decent society to permit dissent. But the problem is that Rawls allows the exercise of dissent to be limited by the hierarchical arrangement of the society in accordance with its common good conception of justice. To take one example, we can imagine a decent society in which women who wish to question their subordinate political position in society may do so, but can so do only through their corporate representatives (e.g., male head of households or religious leaders or tribal leaders) as determined by the nonegalitarian (but decent) social structure of that society. To say that the exercise of dissent is adequately allowed in this case, however, seems paradoxical, for the structure of expressing dissent is constrained by the hierarchical values of the society that are themselves the very source of contention. The problem of decent peoples, then, presents the question of how to accommodate and permit individual dissent in nonliberal societies. The cosmopolitan critique is that Rawls's account of toleration fails to offer a satisfactory

response, that it fails to offer sufficient protection to individuals in decent societies whose aspirations to become free and equal persons are being thwarted by their state.[15]

In other words, while Rawls's toleration of decent peoples is moved by a respect for the autonomy and independence of peoples as well as by a concern for global peace and stability (that liberal interventionism can upset), cosmopolitans are moved by a distinct worry, that of supporting individuals within decent societies whose liberal rights and freedoms are being denied. This is not to say that cosmopolitans are indifferent about intervention, global stability, and national self-determination. But, for cosmopolitans, there are other pressing global moral values that these concerns need to be balanced against. Cosmopolitanism is thus not a form of moral imperialism or paternalism that has as its fundamental intention the imposition of liberalism on all societies. Rather it is concerned fundamentally with protecting the rights of individuals, no matter where they are, to choose a life for themselves.

To be sure, we can imagine a hierarchical society in which all persons are content with their station and its duties in the social order and hence there will be no visible dissent in this society. But one can reasonably suspect that such a society is not really a decent one but a "successfully" tyrannical one that has effectively stymied or stunted any opposing views members of that society would otherwise have, through say religious or political indoctrination.[16] Thus my account does not hold that cosmopolitans may not respond unless there are dissenting individuals in decent societies. Cosmopolitans can reasonably be skeptical of societies, liberal or otherwise, in which there is no open dissent at all, and will therefore be moved to investigate why this is the case.

Rawls described his own position as a noncosmopolitan one to contrast his position with that of his main critics. But it is worth pointing out the precise sense in which Rawls is not a cosmopolitan in order to properly identify the nature of the dispute between Rawls and his cosmopolitan opponents.

Rawls can be read as endorsing a cosmopolitan position of sorts because he holds that respect for human rights is a necessary condition for decency and membership in the society of peoples. To recall, tyrannical or outlaw societies may be criticized and even intervened against in grave cases in the name of protecting human rights (see *LoP*: 81, 93–4n). Yet a concern for human rights on the ground that all individuals matter is a quintessentially cosmopolitan concern. So the Law of Peoples can rightly be described as a cosmopolitan position in this respect.[17] Still a significant difference between Rawls and his typical cosmopolitan critics remains. While both sides accept that societies have to be responsive to the basic interests of individuals, they disagree over whether these interests ought to include *liberal* interests. Rawls's cosmopolitan critics say that individual basic interests include or entail standard liberal rights and freedoms, a point which Rawls rejects. One way of describing the difference between Rawls and his cosmopolitan critics is to call on David Miller's distinction between "weak

cosmopolitanism" and "strong cosmopolitanism."[18] The Law of Peoples can be described as a weak cosmopolitan position as opposed to the strong cosmopolitan position of its critics. It is cosmopolitan in that it recognizes the normative force of human rights on the ground that individuals are what morally matter ultimately (though why individuals matter fundamentally is left to different comprehensive moral, religious, and philosophical views to determine for themselves). But it is a weak cosmopolitan account because it does not consider liberal rights and liberal equality to be essential to these interests. But describe the competing positions how we want, the substantive difference between Rawls and his critics remains: while Rawls's cosmopolitan critics think that *liberal* standards should serve as the bench mark for the legitimacy of a people, Rawls denies this, taking a people's respect for human rights minimally construed and its peaceful coexistence with other peoples as the sufficient conditions for legitimacy and international tolerance.

Why does Rawls reject the (strong) cosmopolitan position? Rawls's central reason is that he worries that a law of peoples founded on the cosmopolitan ideal of individuals as free and equal would make the basis of that Law "too narrow."[19] In other words, to insist on an international theory of justice premised on the strong cosmopolitan ideal that individuals are ultimate is to propose a conception of justice that nonliberal societies could *reasonably* object to. It would amount in effect "to saying that all persons are to have the equal liberal rights of citizens in a constitutional democracy . . . that only a liberal democratic society can be acceptable" (*LoP*: 82–3). And this, Rawls says, "would fail to express due toleration for other acceptable ways (if such as there are, as I assume) of ordering society" (*LoP*: 59). It is for this reason that Rawls rejects the proposal that there be a single global original position procedure where individuals are represented, and opts instead for a two-stage procedure in which only representatives of societies are convened at the second global stage (*LoP*: 82–3; 30–5). A global original position would have to assume that all individuals "have the equal liberal rights of citizens in a constitutional democracy" (*LoP*: 82), and this we should not do.

This toleration of nonliberal ways of organizing society, Rawls argues, stems from a principle that is central to political liberalism, that "a liberal society is to respect its citizens' comprehensive doctrines – religious, philosophical, and moral – provided that these doctrines are pursued in ways compatible with a reasonable political conception of justice and its public reason" (*LoP*: 59; 69–70). Likewise, liberal societies are to tolerate nonliberal societies so long as these are decent, i.e., capable of conforming to the principles of the Law of Peoples.

The idea of public reason, which is central to Rawls's political liberalism, is therefore extended to the international context in the following way: "in proposing a principle to regulate the mutual relations between peoples, a [liberal] people or their representatives must think not only that it is reasonable for them to propose it, but also that it is reasonable for other peoples to accept it"

(*LoP*: 57).[20] So while it would not be unreasonable, but is indeed "a consequence of liberalism and decency" (*LoP*: 81), to criticize, and even intervene against in grave cases, violations of *basic* human rights in outlaw societies, it would be unreasonable to demand that all societies adopt liberal democratic institutions. Similarly, while it is a reasonable requirement of liberal (and indeed human) decency to assist others lacking basic resources for a decent human life, it would be unreasonable to expect independent peoples with distinct political and economic cultures to support ongoing distribution of resources for the sake of minimizing inequalities (as we saw).[21]

But is it necessarily the case that "political liberalism would fail to express due toleration for other acceptable ways . . . of ordering society" (p. 59) if it insisted on a strong cosmopolitan conception of global justice? Rawls, to recall, argues that liberalism has to be accepting of well-ordered though nonliberal modes of ordering society. This, he says, is analogous to the political liberal ideal of tolerating nonliberal but reasonable philosophical, moral, or religious comprehensive views within a democratic liberal society. But this supposed analogy between the domestic and the international spheres does not seem to hold: while political liberalism tolerates nonliberal philosophical, moral, and religious outlooks, it does not, and cannot, tolerate challenges to liberal political ideals themselves. As Rawls himself points out in his discussion of liberal domestic justice, "comprehensive doctrines that cannot support . . . a democratic society are not reasonable" (*LoP*: 172–3; see also 178–9).[22] That is to say, the scope of liberal toleration does not and cannot extend to alternatives to liberal justice itself. A political philosophy, for reasons of consistency, must take a stance against competing political philosophies. Indeed, Rawls affirms in *Political Liberalism* that a liberal must be able to philosophically and not just politically defend liberalism against its enemies (even if, as some critics point out, it is not clear on what grounds the political liberal can do this).[23]

If it is correct that the scope of liberal toleration does not extend to nonliberal ways of ordering politics in the domestic context, reasons must be given why the scope of toleration should extend to nonliberals when we move to the global context. On first glance, to be consistent with its own fundamental commitments, a *liberal* law of peoples has to globalize the standard liberal commitments, even if this entails taking a stance against nonliberal hierarchical societies. While nonliberal societies may find a strong cosmopolitan commitment an imposition, this is not an *unreasonable* imposition from the liberal point of view. A Law of Peoples that claims to be "an extension of a *liberal* conception of justice for a domestic regime to a Society of Peoples" (p. 9, my emphasis) has to remain steadfast in its commitment to liberalism, and this means embracing the strong cosmopolitan view that individual well-being is ultimate.

For this reason, Beitz wonders if the Law of Peoples has not given too much weight to some "pre-theoretical" understanding of toleration. According to Beitz, the tolerance of decent peoples is taken in Rawls's construction as a desideratum

that any plausible theory of global justice has to accommodate. Yet, Beitz continues, if one of the goals of a theory of justice is to establish the criterion of toleration, then the starting assumption that decent peoples must be tolerated cannot serve as one of the fixed points from which to begin the theory construction. Rather it will be an assumption that must be tested against the account of justice that we arrive at independently of this consideration. Justice determines the limits of toleration, not the other way around.[24]

Here cosmopolitans will be reminded that Rawls has already rejected the idea that individuals are to be regarded as free and equal moral persons in his account of political liberalism. To recall, Rawls in *Political Liberalism* recognizes that not all individuals in a liberal society see themselves as free and equal persons. What is expected of individuals on the political conception is that they understand themselves, and each other, as free and equal *citizens.* Rawls thus makes the distinction between the *political* autonomy of persons (i.e. their rights and freedoms qua citizens) and their *ethical* autonomy (their rights and freedoms as determined by their comprehensive doctrines), and argues that political liberalism is concerned only with the former.[25]

But this appeal to Rawls's already constrained commitments in *Political Liberalism* slips past the cosmopolitan charge. An important difference (and apparent inconsistency) remains between political liberalism and the Law of Peoples. While Rawls's political liberalism is neutral about ethical autonomy, it continues to protect and secure the political autonomy of individuals. Under political liberalism, individuals are assured of a domestic basic structure that treats them as free and equal citizens. Moreover, this basic structure ensures that individuals have the state-protected option of leaving (reasonable) nonliberal associations (should they belong to one) and to take on a comprehensive liberal or some other nonliberal comprehensive way of life. That is, although there is no moral expectation under Rawls's political liberalism that individuals accept liberalism as a comprehensive ideal (i.e. as an ideal to regulate the whole of life), they retain the right to adopt such a life. In short, within political liberalism, (i) individuals have access to a basic structure that guarantees their political autonomy, and (ii) they have the right to strive for an ethically autonomous life if they wish.

But neither of these two conditions is met in the Law of Peoples. There is no functional equivalent of a basic structure in Rawls's account of the Law of Peoples that protects the political autonomy of persons (other than of those who belong to liberal societies). Members of decent hierarchical societies simply do not enjoy full political autonomy, and have no further court of appeal (e.g. within the *global* basic structure) should they find their lack of political autonomy objectionable. And, on the second condition, short of emigrating to a liberal society, individuals in decent hierarchical societies do not enjoy the right to renounce the nonliberal comprehensive doctrines within their country and to take on liberal ones.[26] Thus cosmopolitans can accept the premises of political liberalism and still reject the conclusions of the Law of Peoples. Unlike in political liberalism, there

is no requirement for a basic structure (at some level) that protects the political autonomy of persons. The inconsistency between political liberalism and the Law of Peoples is that while the ideal of individual autonomy is merely restricted (to the political realm) under the former, that ideal seems to be eliminated altogether as a matter of justice under the latter.

The crucial reason for Rawls's domestic–international shift is his belief that the boundary of reasonable disagreement expands as we move from the domestic setting to the international arena. Disagreements about conceptions of justice that are not necessarily reasonable in the domestic realm can be reasonable in the global realm. A person who insists on a theocratic government within the confines of liberal society is proposing an unreasonable position from the perspective of political liberalism, though that same view advocated and indeed institutionalized in a different country is acceptable. In either case, individual liberal freedoms are at threat though they are urgent enough presumably only in the domestic case to warrant criticism but not in the international case. This is fundamentally the crux of the issue with tolerating decent peoples, as cosmopolitans see it. But why should the scope of reasonable disagreement be extended as the domain of justice is extended beyond state borders? Even granting (not implausibly) that that there are more extensive disagreements globally about moral and political issues than there are in the domestic case, the crucial question is why these disagreements should be considered *reasonable* in the Rawlsian sense. A reasonable disagreement for Rawls is a disagreement of a particular sort. It is a disagreement that stems from differences over deep philosophical, moral, or religious comprehensive views and commitments. These commitments can give rise to reasonable disagreements because they involve what Rawls calls "the burdens of judgments" concerning the epistemological and ontological status of these metaphysical, moral, and philosophical claims, and hence are irresolvable differences. Yet the normative status of political liberalism rests on the presumption that the political liberal conception of justice is not itself prone to the burdens of judgment, and that a citizen of a liberal state who rejects the political conception is simply being unreasonable. The question then is whether a *cosmopolitan* Law of Peoples, advocating a global basic structure that requires all peoples to uphold liberal principles to gain acceptance as members in a just society of peoples, is susceptible to the burdens of judgments that give rise to reasonable disagreements. It does not seem so: as the political conception can be constructed for a domestic society without making appeal to contentious metaphysical claims, so can a liberal political conception (with a similar list of rights and liberties for individuals) can be constructed for the global domain. There will be objections from nonliberal quarters; but it is not clear why this fact of actual disagreement should count as a reasonable disagreement that political liberals should tread around. In short, it is not immediately clear why any global disagreement (as there will be) about how to regulate the basic structure of the society of peoples should be seen as a reasonable disagreement from the political

liberal perspective, in particular when honoring such disagreements means letting down liberal dissenters in nonliberal societies. There indeed may be further reasons for extending the scope of reasonable disagreement in the way supposed by Rawls's Law of Peoples. But more arguments need to be given; and these will have to be arguments that do not render political liberalism into a form of a conventionalist moral philosophy. To be sure, the analysis above assumes the universality of justice as the default and so assumes that any deviation from this ideal needs explanation.[27] Perhaps justice is necessarily asymmetrical in the way Rawls describes, and thus the burden of proof is on the cosmopolitans to defend the symmetry they assume, and one might suggest that there is no non-question-begging way of affirming the universality of justice. But this defensive move is to be used with great care for it risks rendering political liberalism more contingent and contextual than perhaps Rawls himself intends or would want

4 Intervention and Cosmopolitanism

Rawls's call for tolerating decent peoples is certainly appreciable in a world order in which liberal societies are often quick to forcefully intervene in other societies, ostensibly in the name of promoting and protecting liberal democratic values. Indeed, it will be hard to overstate the problem of unjustified intervention in the current global climate. But this worry about liberal intervention does not entail a rejection of cosmopolitan toleration. As Rawls himself understands it (so I have argued), toleration is an attitudinal value, an ideal that guides judgment but which does not alone determine how that judgment may be enforced. Whether a society that fails the test for toleration is to be intervened against is a further question (of enforcement) that brings into play other pragmatic and moral considerations (including the common considerations in just war theories). This distinction between making a judgment and acting on that judgment that underlies Rawls's account of toleration gives cosmopolitans a way around the criticism that a cosmopolitan conception of toleration would be too interventionist. Cosmopolitans can recognize that while many societies are lamentable and open to criticism for their failure to respect individual rights and liberties, intervention is not necessarily the best strategy for protecting these rights and liberties, or even a morally acceptable course of action (if the intervention would violate the moral limits of just war). A global basic structure informed by the cosmopolitan ideal therefore need not diverge *in practice* from Rawls's Law of Peoples. Both can have reasons for not attacking decent hierarchical societies and even outlaw regimes.[28] Indeed, a cosmopolitan Law of Peoples can consistently (and should) take heed of Rawls's own balanced considerations on the limits of just war and intervention in Part III of *LoP*, and be mindful of the practical and moral limits of intervention.[29] It can recognize the important moral and practical considerations that any intervention to protect and enforce human rights and liberal democracy

will have to confront. So while cosmopolitan justice provides a normative framework for criticizing decent peoples, it will not necessarily be a position that carelessly greases the path of intervention. There is thus the option of a noninterventionist cosmopolitan alternative to Rawls's Law of Peoples. In this respect, in terms of liberal practical responses to decent peoples, there can be a convergence between Rawls and his cosmopolitan critics. The main difference, however, and not an insignificant one, is that the cosmopolitan position will set higher ideals for a just society of peoples to aspire to.

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Notes

[1] *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999. Indeed, for many of Rawls's critics, this conclusion, along with Rawls's view that there is no place for a global distributive principle in the Law of Peoples, constitute the two most controversial aspects of Rawls's international theory. On the second controversy, see Samuel Freeman's contribution in this volume.

[2] See Alyssa Bernstein's contribution in this volume.

[3] Samuel Freeman, "Introduction: John Rawls – An Introduction," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman, Cambridge: Cambridge University Press, 2003, p. 46.

[4] See Allen Buchanan, "Rawls's Law of Peoples," *Ethics*, 110 (2000); and Onora O'Neill, *Bounds of Justice*, Cambridge: Cambridge University Press, 2001.

[5] See David Miller, *On Nationality*, Oxford: Oxford University Press, 1995; Yael Tamir, *Liberal Nationalism*, Princeton, NJ: Princeton University Press, 1993.

[6] Will Kymlicka, *Multicultural Citizenship*, Oxford: Oxford University Press, 1995, p. 18.

[7] Miller, *On Nationality*, pp. 20–1. To say that there is a nationalist element in Rawls is not to accuse him of a form of ethnocentrism commonly associated with real-world nationalism. Rather it is only to point out that Rawls acknowledges that there are certain cultural and historical characteristics of a people that enable the collective identification of its members as a distinct people. And there is nothing objectionable about this view per se. This is a form of nationalism that liberals like Mill have endorsed.

[8] See for example Buchanan, "Rawls's Law of Peoples," pp. 716–21.

[9] See Henry Shue, *Basic Rights*, Princeton, NJ: Princeton University Press, 1980, which Rawls takes note of.

[10] Samuel Freeman, "The Law of Peoples, Social Cooperation, and Distributive Justice," *Social Philosophy and Policy*, 23/1 (Winter 2006), forthcoming.

[11] See T. M. Scanlon, "The Difficulty of Toleration," in *Toleration: An Elusive Virtue*, ed. David Heyd, Princeton, NJ: Princeton University Press, 1996, pp. 226–9. Hans Oberdiek thus calls tolerance a virtue that hovers between forbearance and acceptance. See his *Tolerance: Between Forbearance and Acceptance*, Lanham, MD: Rowman & Littlefield, 2001.

[12] John Rawls, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971, p. 7.

[13] This dualism of judgment is fundamental to the idea of political liberalism, and is well illustrated in Rawls's account of what he calls "public reason." While individuals in their private capacities may be critical of moral, philosophical, or religious comprehensive views that they disagree with, in their public-political capacity (as when as citizens they go to the polls, or, in their official public capacities such as judges, legislators etc., should they hold such positions) they are to respect such views where they are reasonable. The constraints of public reason apply to the latter but not to the former. See John Rawls, *Political Liberalism*, New York: Columbia University Press, 1993.

[14] Charles Beitz, "Rawls's Law of Peoples," *Ethics*, 110 (2000): 669–96; and Thomas Pogge, "Rawls's International Justice," *Philosophical Quarterly*, 51/203 (2001): 246–53. Other examples include Darrel Moellendorf, "Rawlsian Constructivism and Cosmopolitan Justice," in *Cosmopolitan Justice*, Boulder, CO: Westview Press, 2002; Andrew Kuper, "Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons," *Political Theory*, 28 (2000): 640–74; Simon Caney, "Cosmopolitanism and the Law of Peoples," *The Journal of Political Philosophy*, 10/1 (2002): 95–123.

[15] For an argument that liberals should not expect all individuals in the world to see themselves as free and equal, see David Reidy, "Rawls on International Justice: A Defense," *Political Theory*, 32/3 (2004): 291–319.

[16] Would a state-sponsored propagation of a noble lie, as in a Plato's republic, to keep individuals content with their social station and duties, be acceptable for a decent society? Or would we prefer to call this society a tyrannical one for disrespecting basic rights, albeit in more subtle ways? I thank Samuel Freeman for discussion on the points in this and the above paragraph.

[17] See Erin Kelly, "Human Rights as Foreign Policy Imperatives," in *The Ethics of Assistance*, ed. Deen Chatterjee, Cambridge: Cambridge University Press, 2004, pp. 177–92, here p. 184. See also Freeman, "The Law of Peoples, Social Cooperation, and Distributive Justice."

[18] This distinction captures the contrast between a conception of international justice that only "respects the conditions that are universally necessary for human beings to lead minimally adequate lives," on the one hand, and a more robust conception of international justice that includes commitments to the standard liberal rights and equality on the other. David Miller, *Citizenship and National Identity*, Cambridge: Polity Press, 2000, p. 174.

[19] The phrase in quotes is from Rawls's essay, "The Law of Peoples," in *On Human Rights*, ed. Stephen Shute and Susan Hurley, New York: Basic Books, 1993, p. 65.

[20] *The Law of Peoples* includes a reprint of Rawls's final account on public reason, "The Idea of Public Reason Revisited," originally published in the *University of Chicago Law Review*, 64 (1997).

[21] For comments on public reason and the law of peoples, see Reidy, "Rawls on International Justice: A Defense." For a study of Rawls's account of public reason, see Samuel Freeman, "Public Reason and Political Justifications," *Fordham Law Review*, 72/5 (2004): 2021–72.

[22] Also *Political Liberalism*, pp. 152–3.

[23] Ibid. For criticisms, see David Dyzenhaus, "Liberalism After the Fall," *Philosophy and Social Criticism*, 22/3 (1996): 9–37.

[24] Beitz, "Rawls's Law of Peoples," p. 681.

[25] *Political Liberalism*, p. 78.

[26] It should be noted here that exiting a nonliberal comprehensive community in the domestic situation and exiting a nonliberal political society present very different kinds of choices. I discuss this briefly in *Toleration, Diversity and Global Justice*, University Park, PA: Penn State University Press, 2000, pp. 40–1.

[27] Some might ask if this means that from the liberal cosmopolitan perspective, societies through much of human history are to be seen as illegitimate because they failed to uphold liberal values. This depends on whether liberalism is at any given time period an appropriate framework of evaluation. The cosmopolitan account of toleration does not assume that liberal justice is the only reference point through all of human history. It only assumes that at the point in history where it is an appropriate basis of evaluating justice, as it certainly is in contemporary times, then legitimacy of states can be thus also evaluated against liberal standards.

[28] These observations have been made by Charles Beitz, "What is International Toleration?" Paper presented at the University of Pennsylvania, The Program for Philosophy, Politics, and Economics colloquium series, spring 2004.

[29] For discussion on Rawls and intervention to promote democracy, see Bernstein in this volume.

6

Why Rawls is Not a Cosmopolitan Egalitarian

Leif Wenar

In John Rawls's *The Law of Peoples* we find unfamiliar concepts, surprising pronouncements, and what appear from a familiar Rawlsian perspective to be elementary errors in reasoning.[1] Even Rawls's most sensitive and sympathetic interpreters have registered unusually deep misgivings about the book.[2] Most perplexing of all is the general character of the view that Rawls sets out to justify. For in this book Rawls, the twentieth century's leading liberal egalitarian, advances a theory that shows no direct concern for individuals and requires no narrowing of global material inequality.

I believe that *The Law of Peoples* does present a coherent and powerful argument, if not one beyond criticism. Two points are crucial for understanding the book's strengths and weaknesses. The first is that Rawls in this work is concerned more with the legitimacy of global coercion than he is with the arbitrariness of the fates of citizens of different countries. This connects *The Law of Peoples* much more closely to *Political Liberalism* than to *A Theory of Justice*. The second relates to Rawls's unusual conception of the nature and interests of peoples. A people, in Rawls's view, is startlingly indifferent to its own material prosperity, and this fact gives Rawls's law of peoples much of its distinctive cast.

This paper develops these themes by contrasting Rawls's law of peoples with the cosmopolitan theories of Charles Beitz and Thomas Pogge. We begin with a brief review of Rawls's theory of justice for a single country (justice as fairness) and the cosmopolitan theories that developed out of it. I then summarize Rawls's law of peoples and some of his puzzling statements about its justification. The bulk of the paper explains why Rawls's fundamental norm of legitimacy rules out cosmopolitanism, and how Rawls's conception of a people led him to reject international egalitarianism. In the conclusion I suggest that Rawls's morality of states may be more plausible than is commonly supposed, especially when contrasted to rival cosmopolitan theories.

Justice as Fairness

The subject of justice as fairness is the basic structure of a modern democratic nation.[3] Rawls focuses on the basic structure because its institutions have such pervasive and unchosen effects on the life chances of the people who live within them. The problem of the justice of the basic structure arises because while social cooperation within its institutions produces great advantages, citizens are not indifferent to how the benefits and burdens of this cooperation (rights, opportunities, recognition, income and wealth) will be divided up.

Rawls's solution to the problem of the justice of the domestic basic structure can be stated in one sentence: a just society will be a fair scheme of cooperation among citizens regarded as free and equal – where "fair," "free," and "equal" are understood in a rather specific way. Social cooperation is to be fair in that all who do their part are to benefit according to publicly agreed standards. Citizens are free and equal in that each is an equally valid source of claims on social institutions regardless of her religious affiliation, philosophical commitments, and personal preferences. To these characterizations of society and citizens Rawls also adds what could be called the "strong egalitarian proviso": the distribution of benefits and burdens should not be based at the deepest level on citizens' race, gender, class of origin, or endowment of natural talents. As Rawls famously put it, in justice as fairness the distribution of social goods will not be grounded in factors "arbitrary from a moral point of view."[4]

In Rawls's original-position thought experiment, representatives of free and equal citizens are placed in fair conditions for choosing the fundamental rules of social cooperation. Rawls holds that two principles of justice would be selected in this original position. The first principle guarantees citizens equal basic rights and liberties. The second principle requires that all have equal opportunities for obtaining positions of power, and requires that any inequalities of income and wealth work to the greatest benefit of the worst-off members of society. The second part of the second principle is known as the difference principle.

Rawls and the Cosmopolitan Egalitarians

Justice as fairness is a theory for the institutions of one self-contained national society. In *A Theory of Justice* Rawls discussed only briefly how this theory might be extended to the global order.[5] For a number of Rawlsians, however, the nature of the extension was clear. Global justice should be just as liberal, and just as egalitarian, as justice as fairness says domestic justice should be.

Two of the most astute Rawlsian theorists, Charles Beitz and Thomas Pogge, argued as follows.[6] There is an international basic structure just as there is a

domestic basic structure, with political, economic, and cultural institutions linking citizens of different countries together in a worldwide system of social cooperation. Moreover this global basic structure has deep and unchosen effects on the life chances of the people within it.[7] The problem of global justice is thus the same, *mutatis mutandis*, as the problem of domestic justice. What is therefore needed is a theory to specify what counts as a fair distribution of the benefits and burdens of global cooperation.

Beitz and Pogge proposed a direct cosmopolitan transposition of domestic justice as fairness, replacing the citizens of a liberal society with human beings regarded as "citizens of the world." They portrayed a just global society as a fair system of cooperation among global citizens, all of whom are regarded as free and equal to each other. Indeed they described these global citizens as "strongly" equal to each other. The fact that one citizen is born in an affluent and abundant country while another is born in an impoverished and barren land is just as arbitrary from a moral point of view as are the facts that fellow countrymen are born to different genders, races, and classes. Their cosmopolitan theories of justice aimed to justify a distributive principle that would overcome this arbitrariness.

The cosmopolitans proposed a global original position in which each "world citizen" has a representative, just as in the domestic original position every domestic citizen has a representative. Such a global original position will endorse, they claimed, a globalized difference principle: inequalities of income and wealth should be allowed only if these inequalities work to the greatest benefit of the world's worst-off individuals. Beitz in particular championed such an international difference principle, which would – given the vast inequalities in global income and wealth – require significant restructuring of the world's economic institutions.[8]

When Rawls finally published his own theory of global institutions, the shape of the theory greatly disappointed the cosmopolitans. Contrary to the cosmopolitan interpretation, Rawls stipulated that the parties in the global original position should not be thought to represent individual human beings. Rather, each party in the global original position should represent an entire domestic society – or a "people," as Rawls prefers to say.[9] Worse still, the primary principles that Rawls claimed would be agreed upon in such a global original position bore little resemblance to the principles of justice as fairness. They instead looked very much like "familiar and largely traditional principles . . . from the history and usages of international law and practice."[10] Rawls's conservatism in the international realm was most unwelcome to those who had tried to develop justice as fairness into an international egalitarian theory. As Pogge remarked in discouragement on an early version of Rawls's theory of global relations, "I am at a loss to explain Rawls's quick endorsement of a bygone status quo."[11]

The Puzzle of Rawls's Rejection of Global Egalitarianism

Rawls's vision of a well-ordered society of peoples is, in essence, that each people should be just by its own lights within the bare constraints of political legitimacy, and that peoples should be good neighbors to each other.

Domestically, this means that each government must respect basic human rights, apply its own laws impartially, and be responsive to the grievances of its citizens. Beyond these minimal constraints, each national society is left to work out the justice of its domestic institutions as it sees fit. Internationally, Rawls's principles state that peoples have a right to self-defense; that peoples should keep their treaties; and that peoples should fund a world bank and ensure that trade between them is fair. Rawls does add to these international principles a moderate principle of economic distribution, which he calls the "principle of assistance." Under this principle wealthier peoples have a duty to assist those "burdened" societies, which, because of natural disaster or an impoverished political culture, are not able to sustain minimal conditions of legitimate government. But Rawls includes no principles that require a narrowing of inequalities between richer and poorer countries beyond what the principle of assistance requires.[12] Once a society has become self-sustaining and self-guiding, any duty to transfer resources to it ceases. There is no requirement for permanently redistributive, much less egalitarian, international institutions.

Rawls's reasons for resisting more egalitarian proposals initially sound very odd indeed. Rawls first criticizes Beitz's global difference principle for not having a "target" state after which its demands "cut off" – as Rawls says, Beitz's global difference principle is meant to apply "continuously and without end."[13] Yet this seems a peculiar objection for Rawls to make to a principle of distributive justice. If Beitz's globalized difference principle is flawed because it lacks a target and a cut-off, then one would think that Rawls's own domestic difference principle would be flawed for that same reason, whatever that reason turns out to be.

Rawls also ventures that redistribution among peoples would be unacceptable because it would not respect peoples' political autonomy.[14] He asks us to imagine two societies, initially equally well off. The first society decides to industrialize and increase its real rate of savings; the second society prefers a more pastoral and leisurely existence. After a few decades, the first society is twice as well off as the second. It would be inappropriate, Rawls says, to tax the first society and redistribute the proceeds to the second – for this would not respect each society's right to self-determination.

The strangeness of Rawls making this reply can be shown by conjuring up an old debate in which Nozick attempts to use an analogous example against the principles of justice as fairness. Imagine two citizens of the same society, Nozick

might say, initially equally well off. The first citizen works hard at the factory and saves, the second has a leisurely life as a shepherd. After a few years, the first citizen is twice as well off as the second. Would it not impinge on the industrious citizen's "self-determination" to tax his earnings to give to the shepherd?

What Rawls should say in response to this sort of example in the domestic case is by now familiar. He should say that it is acceptable for differential effort and savings to bring differential rewards, but only when background institutions like taxes keep the overall distribution from reflecting factors arbitrary from a moral point of view. Since this would obviously be Rawls's response within justice as fairness, it is hard to see how he could have a different view internationally. Yes, an industrializing and abstemious society may be allowed to become better off – but only if background institutions assure that any inequalities work to the advantage of all.

In opposing the cosmopolitan egalitarian interpretation Rawls faces the general problem of identifying the asymmetry between the international order, where he rejects an egalitarian distribution, and the domestic order, where he requires one. Until he identifies such an asymmetry, any objection he makes to international egalitarianism will simply boomerang as an objection to justice as fairness. How can Rawls resist egalitarianism at the global level?

One thought is that Rawls might point to the decent but deeply inegalitarian cultures of the world, with worries about foisting alien Western ideas of equality on unwilling foreigners. But Rawls does not in fact pursue this strategy. Indeed he says that he would reject international egalitarian principles *even for a world populated only by liberal peoples all of whom accepted justice as fairness.*[15] So the existence of illiberal peoples is not relevant to our puzzle.

Alternatively, Rawls might have resisted international egalitarianism by claiming that – in contrast to the domestic case – the affinity among citizens of different countries could never grow to be strong enough for citizens of wealthier countries to make continuous and significant sacrifice of potential income for the sake of the poor of the world. Although he gestures toward this sort of skepticism in a footnote, Rawls appears to think that he cannot rest too much weight on it.[16] To make plausible his own duty of assistance he must maintain that, "The relatively narrow circle of mutually caring peoples in the world today may expand over time and must never be viewed as fixed."[17] This leaves him in a weak position to assert that an extension of fellow feeling sufficient to sustain a globalized difference principle must be impossible.

Finally, Rawls might have voiced misgivings that global institutions could be constructed that are capable of administering any egalitarian principle. He does endorse Kant's thesis that a centralized global government with legal powers like those of domestic governments would be either despotic or riven by unmanageable civil strife.[18] Yet Rawls does not cite the impossibility of stable global government as a reason to resist global egalitarianism. Nor do the egalitarian proposals of Beitz and Pogge call for a centralized world government, but

rather for dispersed and overlapping agencies that together realize the egalitarian ideal.[19]

So far we have made little progress in clarifying Rawls's motives. Yet Rawls's final comment on the differences between his own and the cosmopolitan approach to global justice provides us with a clue. Cosmopolitan egalitarian views are concerned with *the well-being of individuals*, Rawls says, while his own law of peoples is concerned with *the justice of societies*.[20] To understand this important remark we must look more closely at why Rawls populates his global original position with representatives of peoples rather than representatives of individuals. And to understand the construction of Rawls's global original position we must explore the Rawlsian architectonic further, especially its idea of legitimacy.

Rawls's Fundamental Norm of Legitimacy

Let us put to one side for the moment justice as fairness, which was Rawls's project in the 1970s and early 1980s. In the late 1980s and 1990s, Rawls worked out a very different kind of theory: a theory of political legitimacy.[21] A theory of legitimacy defines the minimal criteria for the acceptable use of coercive political power. Legitimacy is a more permissive standard than justice: institutions may be legitimate without being wholly just, and no doubt many nations' institutions are exactly this way.[22] Yet the laws of a legitimate basic structure are sufficiently just that it is justifiable to enforce them. Moreover, the laws of a legitimate basic structure are sufficiently just that foreigners may not permissibly intervene to attempt to change these laws. Legitimacy is in this way a primitive concept of normative recognition both for those within and for those outside a basic structure. Citizens who recognize laws as legitimate will see these laws as appropriately rather than as merely coercively enforced; and foreigners who recognize a government as legitimate will see this government as a rightful authority instead of as merely a powerful gang issuing threats.

The key to interpreting Rawls's later work, and for understanding how it coheres with his earlier writing, lies in appreciating how deeply Rawls came to be concerned with the legitimate use of coercive power. Indeed Rawls's later work only makes sense when it is interpreted in light of a fundamental norm of legitimacy, a norm which sets the minimum for the use of coercive political power anywhere. This fundamental norm of legitimacy is a generalization of the liberal principle of legitimacy in *Political Liberalism*. It states that the exercise of coercive political power over persons is legitimate only when this exercise of power is in accordance with a basic structure that those persons can accept, regarding those persons as either decent or reasonable, as appropriate.[23] This fundamental norm underlies Rawls's accounts of the normative minima for all three of the basic structures that his later work discusses: the basic structure of a liberal society, the basic structure of a decent, nonliberal society, and the global basic

structure that regulates relations among decent and liberal peoples. The remainder of this section describes how this fundamental norm of legitimacy explains the criteria of legitimacy that Rawls sets for national institutions, both decent and liberal. The next section takes up the legitimacy of the global basic structure.

In *The Law of Peoples* Rawls presents four general conditions that national basic structures – whether liberal or nonliberal – must meet in order to be legitimate. Such basic structures must recognize basic human rights; they must impose *bona fide* legal duties and obligations on all persons within the territory; they must be conscientiously administered; and they must give citizens a meaningful role in political discussions. Any national basic structure that meets these four conditions will be acceptable to all decent persons. Meeting these four conditions is also necessary (though not sufficient) for a national basic structure to be acceptable to all reasonable (liberal) persons.[24] These four conditions thus set universal criteria of legitimacy within the fundamental norm of legitimacy.

Beyond these universal criteria – and every society will have a constitution whose essential provisions go beyond them – legitimate coercion must accord with principles that are acceptable to the citizens of that particular society. In a decent traditional or hierarchical society the problem of finding such generally acceptable principles may be less acute, since decent citizens within such a society may, for example, adhere to the same religion. But the problem of finding such generally acceptable principles is more serious for modern liberal societies, in which reasonable citizens hold a wide variety of views and allegiances.

The problem of finding principles that can stably order the legitimate institutions of a liberal society is addressed in *Political Liberalism*.[25] Rawls's fundamental norm of legitimacy states that the basic structure of a modern liberal society will be legitimate only if its design is acceptable to all reasonable citizens. Within any pluralistic society it is unreasonable to expect all citizens to accept coercive institutions based on any sub-group's particular views. This is clearest in the religious case: Protestants can reasonably reject the basic structure of their society being based on the Catholic tenets of their neighbors, just as Catholic citizens can reasonably reject the basic structure of their society being based on Protestantism. Indeed no citizen's comprehensive view of the good will be reasonably acceptable to all citizens of a liberal society, and so no citizen's comprehensive view may be used as the basis for legitimate coercion within such a society.[26]

Given that no comprehensive doctrine can provide the content of a liberal society's basic structure, Rawls believes that there remains only one other source of generally acceptable ideas for ordering its institutions. This is what he calls the society's *public political culture*. A society's public political culture comprises its political institutions and the public traditions of their interpretation, as well as historic texts and documents that have become part of common knowledge.[27] All citizens can reasonably accept coercion based on ideas in the society's public political culture, Rawls writes, because the public culture is "a shared fund of implicitly recognized basic ideas" that are likely to be "congenial to [citizens']

most firmly held convictions."[28] In other words, all citizens can accept ideas drawn from the public political culture as a reasonable basis for their common institutions because – in view of the pluralism of liberal societies – the public political culture is the only fund of ideas that citizens can reasonably regard as a focal point for all.

In a liberal democracy, the public political culture will contain at the deepest level the abstract idea that citizens, who are seen as free and equal, ought to relate fairly to each other within a scheme of social cooperation. Rawls believes that these abstract ideas of fairness, freedom, and equality impose three conditions of legitimacy for a liberal basic structure that go beyond the four general conditions of legitimacy stated above. These three conditions state that a legitimate basic structure will ascribe to all citizens a set of familiar basic rights and liberties; will assign a special priority to these rights and liberties; and will assure all citizens adequate means for taking advantage of these rights and liberties.[29] A basic structure that meets these three conditions will be acceptable to all reasonable citizens; and so the problem of legitimacy for the institutions of a liberal society is resolved when these three conditions are met.

Beyond this threshold of liberal legitimacy each liberal society may also strive to achieve a more extensive scheme of *justice*, to give fuller expression to the basic ideas found in its particular public political culture. Rawls sees his own justice as fairness as one proposal for how to order a liberal society's institutions justly – a proposal based on specific interpretations of the abstract ideas of "fair," "free," and "equal," as well as on the strong egalitarian proviso. Justice as fairness is thus presented in the later work as one of a family of reasonable views of how a legitimate liberal society can be made just.

Why Rawls is not a Cosmopolitan

Returning to the global level, we can now see how Rawls's fundamental norm of legitimacy explains his populating his global original position with peoples instead of individuals. A global original position will select principles for institutions of the global basic structure. Since these global institutions will be coercive, they will also have to meet the fundamental standard of legitimacy. This means that these global institutions will have to be acceptable to all those individuals who will be coerced by them. Yet the plurality of comprehensive doctrines is even greater globally than it is within any liberal society.[30] So, analogously to the liberal domestic case, Rawls must draw on the *global* public political culture to find ideas that can be acceptable to all. And he must draw on the existing global political culture, as this is the only source of doctrine that can serve as a focal point for all individuals.

This, I believe, is where Rawls turned away from a cosmopolitan original position, which would be constructed from ideas concerning the nature of and

relations among individual "citizens of the world." For the global public political culture is primarily *international*, not interpersonal. The ideas that regulate the institutions of global society are concerned primarily with the nature of nations and their proper relations – not with the nature of persons and their proper relations. This can be seen not only in the structure of the major political and economic institutions such as the United Nations and the World Trade Organization, but also in the laws that regulate global cooperation and competition in nearly all areas (trade, law enforcement, the environment, and so on). Even those documents within the global public political culture which do proclaim the freedom and equality of all individuals, such as the *Universal Declaration of Human Rights*, are almost exclusively concerned to establish limits on how domestic governments may treat individuals within their territories. These documents do not set out any substantive conception of how "citizens of the world" should relate directly to one another.

There simply is no robust global public political culture which emphasizes that citizens of different countries ought to relate fairly to one another as free and equal within a single scheme of social cooperation. Much less is there in this global public culture the strongly egalitarian ideal that the distribution of global resources and wealth among individuals should not be based on characteristics of individuals that are "arbitrary from a moral point of view." There is no conceptual focal point comparable, that is, to the ideas within the public political culture of a liberal democracy that individuals ought to relate fairly to one another as free and equal, regardless of their more particular characteristics. It is peoples, not individuals, that international political institutions regard as free and equal, and this is why Rawls makes peoples the subject of his global political theory.

Rawls doubtless believes as much as anyone that all humans should be regarded as free and equal. Yet he believes more deeply that humans should be coerced only according to a self-image that is acceptable to them. This far, Rawlsian politics is identity politics. Since "global citizens" cannot be presumed to view themselves as free and equal individuals who should relate fairly to each other across national boundaries, we cannot legitimately build coercive social institutions that assume that they do.[31] Indeed such coercive institutions would be illegitimate even in a world populated only by liberal peoples all of whom accepted justice as fairness, so long as in that world (as in our world) the public political culture does not emphasize that the members of different peoples ought to relate fairly to one other. A cosmopolitan basic structure could not meet the fundamental requirement of legitimacy.

The global public political culture does, however, emphasize that *peoples* seen as free and equal should relate fairly to each other. Using these fundamental ideas of freedom, equality, and fairness, Rawls is able to construct what he believes to be an original position argument that can meet the demands of legitimacy. Only this kind of original position, constructed from ideas publicly available to all, will produce principles for the global order that are acceptable to all.

Because Rawls frames his global political theory around peoples instead of individuals, he is able to meet the requirements of legitimacy as he understands them. This focus on people produces a thoroughly statist version of liberal internationalism. The thoroughgoingness of Rawls's statism gives his theory a high degree of internal coherence, but this coherence comes at a price. Because Rawls's global theory works exclusively in terms of peoples, it cannot show any direct concern for individuals. This is clearest in Rawls's account of human rights and humanitarian intervention. When a Rawlsian people intervenes in another people's affairs, to stop human rights abuses or to provide food aid, the intervention is *not* for the sake of the well-being of the oppressed or the starving individuals in the other country.[32] Rather, the intervener aims to bring the "outlaw" or "burdened" people up to the level of legitimacy, so that it can play its role in the society of peoples. It is as if societies were individuals, with their members being merely the cells of their bodies, and one society intervened to give medical treatment to another to enable it to rejoin the scheme of social cooperation. The fact that the concerns of peoples do not "trickle down" to become concern for individuals gives Rawls's accounts of human rights and humanitarian intervention a bloodless, institutional character.[33]

How much of a price this is I leave for the reader to judge.[34] But we can now understand much better Rawls's enigmatic comment that while the cosmopolitan views are concerned with the well-being of individuals, his own law of peoples is concerned with the justice (or, better, the legitimacy) of societies. The law of peoples orders the relations among peoples, and therefore leaves the interests of individuals as an indirect and rather attenuated concern.

Why Rawls is not a Global Egalitarian

Understanding Rawls's views on legitimacy makes sense of his focus on peoples instead of individuals. Yet it may now seem even more puzzling why Rawls is not a global egalitarian.

Rawls implies, after all, that the international public political culture already contains the fundamental ideas that *peoples* should be regarded as free and equal, and that *peoples* should relate fairly to each other.[35] And these are just the ideas of freedom, equality, and fairness that in justice as fairness led to the domestic difference principle. It may or may not be true that the global political culture contains the analogue of what I have called the strong egalitarian proviso – that the distribution of benefits and burdens should not depend on arbitrary features of peoples like their place in the distribution of natural resources. But if this idea is not yet in the global political culture then it might well develop. Since Rawls's fundamental ideas of the global society of peoples so closely resemble those of the liberal society of citizens, should not Rawls be advocating that economic inequalities between peoples are only permissible if they work to the advantage of

the least advantaged peoples? While we have seen why Rawls is not a cosmopolitan, we still have not found the asymmetry between the global and domestic spheres that produces egalitarian principles in one but not the other.[36]

The asymmetry emerges when we realize how Rawls understands the interests of peoples. As Rawls defines them or discovers them in the relevant public political cultures, peoples and domestic citizens simply have different fundamental interests. Domestic citizens as such want more income and wealth, while peoples as such do not. This is why the distribution of income and wealth is a central problem for citizens, but not for peoples.

Citizens within justice as fairness are assumed to want more income and wealth, not as positional goods but simply as resources with which to pursue their visions of the good life. Peoples within the law of peoples, on the other hand, are not assumed to want more wealth, because peoples have no vision of the good life. Rawls says that peoples have interests only in maintaining their territorial integrity, securing the safety of their citizens, maintaining their free and just social institutions, and securing their self-respect as peoples.[37] He suggests that the idea that peoples must hunger for more territory is left over from the disastrous days of imperial Europe, and the idea that peoples must perpetually pursue greater wealth is merely the ideology of capitalist businessmen.[38] The right conception is of a people as satisfied within itself, having no projects to further beyond its own material and moral maintenance. Once internal justice is achieved, Rawls says, it is perfectly possible and perhaps even preferable for a people's real rate of economic growth to stop.[39]

A people must be concerned with its level of wealth if this is insufficient to support what its members see as a just political order. A people must also be concerned if economic inequality threatens its political status – if it is being menaced by an aggressive neighbor, for instance. But above the goal of internal justice and given no political knock-on effects, a people as such is totally uninterested in its economic status both absolutely and relative to other peoples.

We can now make more sense of Rawls's earlier example of the initially equal societies, one of which decides to industrialize and the other of which remains pastoral. Rawls said of this example that it would be unjust to tax the first to give to the second, and this seemed odd given his repeated emphasis in the domestic realm on the importance of maintaining background justice. But Rawls's reasoning is now clearer. Above the level of political self-sufficiency, there is no need to redistribute to maintain background justice because peoples are indifferent to that which would be redistributed. Should a people decide to make itself wealthier through greater savings, then this should be of no official concern whatsoever to other peoples. We can now also understand why Rawls complained that Beitz's globalized difference principle lacks a "target" and a "cut-off point." In Rawls's view a global distributive principle for wealth must have a target, because beyond some minimal level peoples' concern for wealth simply cuts off.

So the members of wealthier peoples, wanting to justify themselves to the members of poorer peoples, could in a Rawlsian world say: "Your society meets the minimal standards of legitimacy and stability. It is just by your own lights, or if it is not just it is your task to make it so. We have more wealth than you do, it is true. But that is an indifferent matter from the standpoint of international legitimacy. If you want more wealth, it is up to you and your compatriots to decide to save more, or to borrow more, or to change your population policy, or whatever. We will guarantee your decency and stability but we need take no notice of your prosperity. Prosperity is a matter to which legitimate international institutions need not attend."

The Impossibility of Pure Cosmopolitanism

It is not my aim here to evaluate Rawls's premise that peoples as such are indifferent to greater wealth, or the implications of this premise for his account of international distributive duties.[40] Rather, I would like to return to the deeper dispute between Rawls and his cosmopolitan critics. The nascent academic sub-discipline known as "global justice" is in the process of solidifying its formulation of the basic questions of the field, and of setting out the canonical list of the theories that might provide answers to these questions. The two alternatives that are coming to be standard in scholarly articles and course reading lists are a Rawlsian statism, on the one hand, and the variants on cosmopolitanism, on the other. Between these alternatives, it is safe to say that most scholars currently engaged in debates over global justice favor cosmopolitanism. Most have found Rawls's *The Law of Peoples* opaque, and, where clear, disappointingly conservative. Cosmopolitanism, by contrast, seems a natural and progressive extension of the theories of justice that many have found plausible in the context of the national institutions of a liberal society.

However, I would like to suggest that Rawls's law of peoples is superior to cosmopolitan theory both in terms of its resonance with our considered convictions and also in terms of its completeness. Indeed it seems to me premature to present cosmopolitanism as a competitor to Rawlsian statism in the way that is now becoming widespread. There is a serious question concerning whether we currently have, and indeed whether we can have, a genuine cosmopolitan alternative to Rawls's theory.

Above we saw why Rawls, with his concern for the legitimate use of coercive power, framed his global principles in terms of the relations among nations. There may be those who reject this emphasis on legitimacy, either as a theoretical matter or perhaps as an interpretation of Rawls. However, even these skeptics will recognize that theorizing in terms of peoples confers on Rawls's global theory a distinctive advantage. For theorizing in terms of peoples allows Rawls to present an argument in *The Law of Peoples* that shares the justificatory pattern of his

argument in *A Theory of Justice*. Specifically, theorizing in terms of peoples allows Rawls to construct a global original position argument that first confirms and then extends the reader's considered judgments, in just the same ways as his domestic original position argument does.

Rawls's domestic original position first "shows its worth" by affirming a principle which we already believe to be very important: the first principle of justice, which secures citizens' equal basic rights and liberties. Rawls then uses the same original position to endorse a principle of domestic economic distribution – the difference principle – which orders our intuitions in an area where our judgments were much less confident. The domestic original position first selects what we already firmly believe is the right answer about basic rights and liberties, and then the controversial distributive principle picks up justificatory power from being selected from the same perspective.

Rawls's global original position argument proceeds in the same fashion. This global original position first shows its worth by confirming principles that we already believe to be very important: that peoples have a right to self-defense, that peoples should keep their treaties, that trade among peoples should be fair, and so on. Rawls then uses the same original position to affirm a principle for global economic relief – the duty of assistance – which orders our intuitions in an area where our judgments were much less confident. Both original position arguments work by first reinforcing and then extending our reflective equilibria. Phrasing the global argument in terms of peoples enables Rawls's global original position, like his domestic original position, to "accommodate our firmest convictions and . . . provide guidance where guidance is needed."[41]

By contrast, the cosmopolitans have endorsed highly progressive economic principles (such as the globalized difference principle) without first showing that their approach can confirm the basic rules of international relations that keep our global order even minimally tolerable. Cosmopolitans, that is, have insisted upon radical distributive principles without a prior demonstration that they can validate the most fundamental norms of global stability. Nor will it be easy for them to overcome this deficiency. For cosmopolitans cannot simply staple the basic principles of international relations into their individualistic theories. Should they wish to redeem norms like "nations have a right to self-defense" and "nations should keep their treaties," cosmopolitans will have to explain why and in what circumstances the principles of their theories should be framed in terms of nations instead of persons. And this will require a general account of the ideal role of the nation-state in a world that is just to individuals regardless of their nationality – a formidable challenge indeed. Yet until they meet this challenge, cosmopolitans will be advancing a view whose coherence with many of our most important beliefs about the maintenance of the global order will remain at best conjectural.

Indeed we not only currently lack a comprehensive cosmopolitan theory; it can be proved that no pure and complete cosmopolitan theory is possible. There can be, that is, no theory of global affairs all of whose primary principles refer (as the

globalized difference principle does) only to individuals without any reference to their national affiliation. The major steps of this proof are as follows:

1. A global state with a stable monopoly of coercive power is either impossible or highly undesirable.
2. In the absence of a global state, territorial powers with armed forces that may permissibly protect territorial borders will be a permanent feature of the global order.
3. If territorial powers may permissibly use armed forces to protect territorial borders, then individuals' basic rights and liberties cannot be fully specified without reference to those individuals' territorial affiliation.
4. No complete set of pure cosmopolitan principles is possible.

Let us examine each of these steps in turn. The first step is uncontroversial. Almost every theorist joins Rawls in accepting Kant's thesis that a global government would be either perpetually unstable or intolerably oppressive. Cosmopolitans have adopted Kant's thesis, and have portrayed the solution to the problems of governance as "dispersing political authority over nested territorial units."[42] On this model, the sovereignty that is currently concentrated at the level of the state is to be dispersed upwards to international levels, and downwards to local levels, depending on which arrangement will best realize the goals of cosmopolitan freedom and equality for all individuals.

If there is no global state, however, then as stated in the second step there will be territorial borders and armed forces to defend these borders. Territory is, as Rawls says, property; and no system of property can be stable if its rules are not backed up by coercive power. Since there will be no overarching global state to enforce territorial borders, this coercive power must continue to be vested within the territorial units themselves. Whatever other aspects of sovereignty are dispersed away from the national level, the ability of the governments of territories to oppose military incursions must remain. In fact, territorial armed forces would be required even in a world in which a cosmopolitan principle for the just distribution of individual property entitlements were perfectly realized. Regardless of how property is distributed, there must be some coercive power that resists when a group on one side of a territorial border attempts to seize resources on the other side of the border. In the absence of a world state with overarching coercive powers the only powers that can fill this role are territorially based armed forces. There appears to be no alternative, that is, to the system of rules that Rawls describes in which each territory is allowed to maintain armed forces in order to defend its borders.

Yet if territorial armies are maintained and permissibly used, then individuals' basic rights and liberties cannot be fully specified without reference to those individuals' territorial affiliation. The basic rights and liberties in question are individuals' basic rights to the integrity of the person. If we accept territorial

armed forces, then we must continue to accept principles like those of the established laws of war that allow individuals to kill and be killed for the sake of protecting territorial integrity. And such principles will inevitably refer to individuals as affiliated with their territory. For example, such principles will refer to individuals as soldiers of a national army, or as members of the territory's civilian population. There can be no purely cosmopolitan principle that simply reads: "Individuals must not kill other individuals except in self-defense." Principles for individuals must add further qualifications that identify individuals with their territory, for example: "Individuals must not kill other individuals except in self-defense, unless the individual attacked is part of an enemy army"; and ". . . unless the individual attacked is a member of an enemy civilian population which is unavoidably attacked as part of an attack on an enemy military target."

We do currently accept such statist principles of war without question. Take as an example the first Gulf War. After the Iraqi incursion into Kuwait in 1990, American soldiers traveled to the Middle East and killed many thousands of Iraqi soldiers and civilians. We do not believe that these American individuals violated the basic rights of those Iraqi individuals. The American soldiers were not murderers, even though the Iraqi individuals who were killed were not (before the American invasion) threatening the Americans' lives, or anyone else's lives for that matter.[43] The individual Iraqi soldiers who were permissibly killed were permissibly killed because they represented a state with whom America was at war. Similarly, at least some of the Iraqi civilians who were killed as part of the American attack were permissibly killed because they were close to Iraqi military targets. In the absence of a global power, principles that allow such killings are ineluctable. The laws of war are in this way incompatible with pure cosmopolitanism. Therefore, no purely cosmopolitan set of principles for the global order is possible.

A cosmopolitan might accept the inevitability of statism in war and peace, but attempt to deny that this taints the purity of his cosmopolitan theory. At the deepest level, this cosmopolitan might say, his theory is only concerned with individuals as such and their bodily integrity. The cosmopolitan might concede that the only feasible schemes of global institutions for securing individuals' bodily integrity require armed territorial powers. But this concession does not, he says, obviate the purity of cosmopolitanism. Cosmopolitanism can still present a list of principles that "at the deepest level" refer to individuals without mentioning their territorial affiliation, such as "individuals have a right to secure access to bodily integrity." Cosmopolitanism can remain pure in principle, because individuals as such are still the ultimate units of the theory.[44]

This response is both disappointing and unsuccessful. First, this response finds the cosmopolitan begrudgingly accepting the same conservative, statist principles that cosmopolitanism had promised to replace. Second, the cosmopolitan who attempts this response is thrown into the awkward theoretical posture of affirming that national boundaries and state membership are morally arbitrary, while

also conceding that these are practically indispensable. Third, and most importantly, this response cannot in fact rescue the purity of cosmopolitanism. For, as we have seen, individuals are also the ultimate units of theory in Rawls's law of peoples. Rawls's theory is based in his fundamental norm of legitimacy, which takes justifiability to individuals as the measure of the legitimacy of coercive power. So at the deepest level Rawls's theory is also individualistic (as one expects that all theories of global morality are). Yet Rawls's theory is, of course, not cosmopolitan. Cosmopolitan and statist theories can only be distinguished by whether they refer to states or state affiliation in their primary principles – that is, in their most specific principles that are invariant across contingencies. It is at this level of primary principles that the cosmopolitan cannot scrub statism out. As the proof above shows, no global theory which has primary principles that refer to individuals can avoid classing these individuals according to their territorial affiliations in at least some circumstances.

In Rawlsian terms, contemporary cosmopolitans have tried to fill in their theories from bottom to top. Cosmopolitans early on proposed very progressive principles of economic justice, such as a purely cosmopolitan difference principle and a global resource dividend.[45] Subsequently theorists such as Moellendorf advocated a purely cosmopolitan principle of fair opportunity,[46] and Pogge has endorsed something like cosmopolitan fair value of the political liberties.[47] The efforts here have been to defend analogs of Rawls's domestic second principle, and an analog of the "bottom half" (fair value) of his domestic first principle. But this upward progression cannot be completed.[48] There can be no purely cosmopolitan first principle because the description of the most basic individual right – the right to bodily integrity – must necessarily refer to how individuals are affiliated with sovereign territorial units.[49]

Statist principles such as *jus ad bellum* and *jus in bello* are by far the most highly developed normative doctrines we have for the regulation of global affairs. The neglect by cosmopolitans of the issues of war and peace suggests that cosmopolitans have been underestimating the great importance of global political stability. As Brian Barry once wrote, in the global arena "the problem of establishing a peaceful order eclipses all others."[50] In a slogan, we might say: "No peace, no justice." That is to say: peace is the first condition of justice; without peace, no progressive economic reform will be possible. And short of a global government, the principles of peace that maintain a stable global order will be inescapably statist.

Conclusion

In *Political Theory and International Relations* Charles Beitz set out three approaches to normative international political theory: realism, cosmopolitan morality, and the morality of states. Since realism is essentially skeptical, he concluded that

only the last two are contenders for framing a global political morality.[51] If the argument in the last section of this paper is correct, Beitz's list of contenders is still too long by one. Cosmopolitanism is not only incomplete as it stands, it cannot become a complete theory of a legitimate and stable world order. Rawls's law of peoples, though often surprising and perhaps in places flawed, represents a liberal statism that is the only realized approach to global political morality that we have.

Notes

[1] John Rawls, *The Law of Peoples* (hereafter *LoP*), Cambridge, MA: Harvard University Press, 1999. The current essay updates my article "The Legitimacy of Peoples," in *Global Politics and Transnational Justice*, ed. P. de Greiff and C. Cronin, Cambridge, MA: MIT, 2002, pp. 53–76. There are substantial revisions throughout, and the final section is new.

[2] See for example the papers by Charles Beitz and Allen Buchanan in the "Symposium on John Rawls's *The Law of Peoples*," *Ethics*, 110/4 (2000); Thomas Pogge, "The Incoherence between Rawls's Theories of Justice," *Fordham Law Review*, 72 (2004): 1739–59.

[3] John Rawls, *A Theory of Justice* (hereafter *TJ*), revised edition, Cambridge, MA: Harvard University Press, 1999; John Rawls, *Justice as Fairness: A Restatement*, (hereafter *JasF*), ed. Erin Kelly, Cambridge, MA: Harvard University Press, 2001; see also *LoP*, pp. 30–2.

[4] *TJ*, p. 63.

[5] *TJ*, pp. 331–3.

[6] Charles Beitz, *Political Theory and International Relations*, with a new afterword, Princeton, NJ: Princeton University Press, 1999; "Cosmopolitan Ideas and National Sentiment," *Journal of Philosophy*, 80/10 (1983): 591–600. Thomas Pogge, *Realizing Rawls*, Ithaca, NY: Cornell University Press, 1989; "An Egalitarian Law of Peoples," *Philosophy and Public Affairs*, 23/3 (1994): 193–224. I am here eliding some significant differences between Beitz's and Pogge's views.

[7] To take an example of Pogge's, "The current distribution in national rates of infant mortality, life expectancy and disease . . . [can] be accounted for, in large part, by reference to the existing world market system" (*Realizing Rawls*, p. 237).

[8] Pogge supported a globalized difference principle, but also suggested that a Rawlsian should favor a more modest Global Resource Tax as a step toward an egalitarian world order. Pogge is no longer engaged in the Rawlsian project, although he would welcome support from Rawlsians for his current proposal, a Global Resource Dividend. See chapter 8 of his *World Poverty and Human Rights*, New York: Polity Press, 2002.

[9] *LoP*, pp. 23–30. Many have objected that Rawls's category of "peoples" is not apt for a global normative theory, because its use ignores the arbitrariness of international boundaries and the existence of important sub-national groups. Although I share some of these misgivings, I will not discuss this issue here.

[10] *LoP*, p. 57.

[11] *Realizing Rawls*, p. 246.

[12] *LoP*, pp. 35–43.

[13] *LoP*, p. 117.
[14] *LoP*, pp. 117–18.
[15] *LoP*, pp. 119–20.
[16] *LoP*, p. 112, fn 44.
[17] *LoP*, p. 113.
[18] *LoP*, p. 36.
[19] See, for example, chapter 7 of Pogge, *World Poverty and Human Rights*.
[20] *LoP*, pp. 119–20.
[21] Rawls's attention to legitimacy finds its fullest expression in *Political Liberalism* (hereafter *PL*), New York: Columbia University Press, 1993. See David Estlund, "The Survival of Egalitarian Justice in John Rawls' *Political Liberalism*," *Journal of Political Philosophy*, 4/1 (1996): 68–78; Allen Buchanan, "Justice, Legitimacy, and Human Rights," in *The Idea of a Political Liberalism*, ed. Victoria Davion and Clark Wolf, Boston, MA: Rowman & Littlefield, 2000, pp. 73–89; and Burton Dreben, "On Rawls and Political Liberalism," in *The Cambridge Companion to Rawls*, ed. Samuel Freeman, Cambridge: Cambridge University Press, 2003, pp. 316–46.
[22] *PL*, pp. 427–9.
[23] I derive this generalized principle of legitimacy, which applies to both liberal and nonliberal societies, from Rawls's liberal principle of legitimacy (*PL*, p. 137). The phrase "decent or reasonable" reflects Rawls's usage in *The Law of Peoples* that ties "reasonable" to liberal societies and "decent" to legitimate nonliberal societies. I show in more detail how an interpretation of all of Rawls's major writings can be organized around this general principle of legitimacy in "The Unity of Rawls's Work," *Journal of Moral Philosophy*, 1/3 (2004): 265–75.
[24] *PL*, pp. 16, 109; *LoP*, pp. 65–8, 83, 93; *JasF*, p. 6.
[25] *PL*, pp. xvi–xviii.
[26] *PL*, pp. 36–8.
[27] *PL*, pp. 8–15.
[28] *PL*, p. 8.
[29] *PL*, pp. 156–7; *LoP*, p. 141.
[30] *LoP*, p. 18.
[31] For the view that peoples should be treated as free and equal regardless of how they see themselves, see Beitz, "Cosmopolitan Ideas and National Sentiment," p. 596; Pogge, *Realizing Rawls*, p. 270; and Andreas Føllesdal, "The Standing of Illiberal States, Stability and Toleration in John Rawls' 'Law of Peoples,'" *Acta Analytica*, 18 (1997): 152–3.
[32] A point made well by Pogge in "An Egalitarian Law of Peoples," pp. 209–10.
[33] For critiques of Rawls on these topics see, for example, Charles Beitz, "Rawls's Law of Peoples," *Ethics*, 110 (2000): 669–96; Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics*, 110 (2000): 697–721; Pogge, "An Egalitarian Law of Peoples," and "Rawls on International Justice," *Philosophical Quarterly*, 51 (2001): 246–53; Simon Caney, "Survey Article: Cosmopolitanism and the Law of Peoples," *Journal of Political Philosophy*, 10 (2002): 95–123.
[34] In "The Legitimacy of Peoples," I proposed a supplemental original position argument – here omitted for reasons of space – that aims to give more attention to individuals as members of the global economic order.
[35] *LoP*, pp. 33–4.

[36] See Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," p. 708.
[37] *LoP*, pp. 29, 34.
[38] *LoP*, pp. 25–8, 107.
[39] *LoP*, pp. 106–7.
[40] On this point see Pogge, "An Egalitarian Law of Peoples," pp. 208–11.
[41] *TJ*, p. 18.
[42] Pogge, *World Poverty and Human Rights*, p. 169.
[43] The Iraqi invasion of Kuwait in August 1990 was very quick, a matter of days. By the time the world fully appreciated what had happened, the Kuwaiti royal family had fled and Iraq was governing Kuwait as its "19th province." Thus by the time of the US invasion, the Iraqi soldiers in Kuwait – who were in any case not the only Iraqis killed in the war – were posing no exceptional threat to the lives of Kuwaitis (beyond the standard threats of law enforcement). Nor before the US attack were the Iraqi soldiers posing a threat to American lives; certainly before the US attack (and often during it) the Iraqi soldiers were no threat to the American soldiers who later killed them.
[44] The language of "ultimate units" of a theory is from Pogge, "An Egalitarian Law of Peoples," p. 48.
[45] Charles Beitz, *Political Theory and International Relations*, pp. 125–76; Pogge, "An Egalitarian Law of Peoples," and *World Poverty and Human Rights*, pp. 196–215.
[46] Darrel Moellendorf, *Cosmopolitan Justice*, Boulder, CO: Westview Press, 2002, pp. 78–80.
[47] Pogge, "An Egalitarian Law of Peoples," p. 196.
[48] Thus there can be no pure "cosmopolitan law of persons." Andrew Kuper, "Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons," *Political Theory*, 28 (2000): 640–74.
[49] It is important to emphasize that cosmopolitans have said explicitly that they have not attempted to present a unified and comprehensive cosmopolitan theory of the kind I am discussing. See, for example, Beitz, *Political Theory and International Relations*, p. 6; and "Rawls's Law of Peoples," p. 695.
[50] Brian Barry, *Political Argument: A Reissue with a New Introduction*, New York and London: Wheatsheaf Harvester, 1990 (1965), p. lxxiv.
[51] Beitz, *Political Theory and International Relations*, pp. 181–3. For Beitz's further thoughts on the tripartite division of theories, see his Afterword to the 1999 edition.

Part III
On Human Rights

7

Human Rights as Moral Claim Rights

Wilfried Hinsch and Markus Stepanians

In this paper we give a broadly sympathetic review of Rawls's minimalist approach to human rights in his *The Law of Peoples* (*LoP*).[1] However, in many respects the Rawlsian account stands in need of further elaboration. We attempt to provide such an elaboration in terms of a Hohfeldian analysis of human rights as (moral) claim rights. In section 1 of the paper we briefly summarize Rawls's somewhat sketchy comments on human rights in *LoP*. In section 2 we explain our understanding of human rights as moral claim rights. In section 3 we defend Rawls's minimalist approach against objections brought forth by Téson, Tasioulas, and Beitz among others.

1 Human Rights in Rawls's *The Law of Peoples*

Human rights play an important role in John Rawls's conception of international justice in *The Law of Peoples*. The sixth entry in his "basic charter of the Law of Peoples" requires that peoples honor human rights (*LoP*: 37). These rights set a limit to a regime's internal autonomy (*LoP*: 27, 42, 79f.). According to Rawls, the violation of human rights is, next to self-defense, one of only two reasons capable of justifying not only diplomatic and economic sanctions but, as a last resort, also military interventions (*LoP*: 37f., 81, 93f.n). Only societies that honor the human rights of their members (and are non-aggressive) may consider themselves safe from the threat of external political sanctions and international intervention. They, and only they, can claim a right to war in self-defense (*LoP*: 92). Clearly, human rights matter. Given their significance for his Law of Peoples, it is surprising how little Rawls says about the nature of human rights. It seems as if human rights were taken by him as more or less firmly established elements of

our moral common sense: "I leave aside the many difficulties of interpreting these rights [. . .] and take their general meaning and tendency as clear enough" (*LoP*: 27). All we get in terms of explanation from reading *The Law of Peoples* is basically this:

1. Human rights are neither constitutional rights nor rights "that belong to certain kinds of political institutions." Rather they set a "necessary, though not sufficient, standard for the decency of domestic political and social institutions" (*LoP*: 79f.).
2. Human rights are "universal rights" in that "they are binding on all peoples and societies, including outlaw states" (*LoP*: 80f.).
3. Human rights are necessary conditions of social cooperation that are recognized by all decent regimes (*LoP*: 65, 68).
4. Human rights are not supposed to be justified in terms of any particular comprehensive religious, philosophical, or moral doctrine, because doing so would be divisive in a pluralistic world (*LoP*: 68, 81).
5. Human rights are a proper subset of the basic rights and liberties protected by liberal societies (*LoP*: 68, 78f., 81). They are particularly "urgent rights" (*LoP*: 79). On page 65 of *LoP* Rawls lists the following rights: the right to life (including a right to the means of subsistence and security), the right to liberty (including freedom from slavery and serfdom and "a sufficient measure" of liberty of conscience), the right to (personal) property, and the right to formal equality.

More comprehensively, Rawls takes all rights specified in the articles 3 to 18 of the *Universal Declaration of Human Rights* from 1948 to be "human rights proper" (*LoP*: 80n). Rawls's reference to the *Universal Declaration* adds to the list on page 65 freedom of movement and the right to immigration (art. 13; for immigration see also *LoP*: 74), the right to asylum (art. 14), the right to a nationality (art. 15), and equal rights to marry without being subject to ethnic or religious discrimination for men and women (art. 16). Articles 6 to 12 give us a more fine-grained account of the right to formal equality (before the law) and the protections of habeas corpus and due process.

6. Conspicuously not included in the Rawlsian list of human rights is the right to equal political participation and the right to an unconstrained liberty of conscience (cf. *LoP*: 65n, 74). Also missing is the demand of full equality for women. Rawls stresses, though, that decent societies must make special efforts to strengthen the representation of women in their consultation hierarchies (*LoP*: 75) and also "elements" of equal justice for women are required by a well-ordered society (*LoP*: 117).
7. Well-ordered societies are supposed to establish "new institutions and practices" in order to protect human rights beyond their own borders (*LoP*: 48, 93).

By and large, this brief synopsis covers everything about human rights to be found in *LoP*. Given the scarcity of explanatory help from Rawls, it is small wonder that the human rights minimalism[2] of the Law of Peoples has not found much approval. Nevertheless, we shall propose a somewhat sympathetic interpretation of the Rawlsian approach.

2 Human Rights as Universal Claim Rights

It is understood that the human rights of the Law of Peoples are not constitutional or legal rights. But what kind of right or, more generally, what kind of normative standard are they? One way to make sense of what Rawls says about human rights in *LoP* is to conceive of them as *universally valid moral rights*. Following this line of thought, what we want to know is, firstly, what makes a particular normative standard a *right*; secondly, what makes it a *moral* right; and thirdly, what makes it a *universal* moral right. Unfortunately, Rawls does not give us much of an answer to these questions. But we need an answer in order to assess the various misgivings about Rawls's account of human rights has been brought forward by, among others, Fernando Tesón, Charles Beitz, and John Tasioulas.[3]

In the light of what is said in *LoP* it seems defensible to understand Rawls's Law of Peoples on the basis of something like the "classical view" about rights. The classical view takes human rights to be "claim rights" in Hohfeld's sense and not merely valid moral claims. Even in their simplest form these rights are not merely two-term relational claims between a person and a good the person has a claim to (e.g. life, liberty, and security). Rather, they are three-term relational claims between a person as the claim holder, a good, and another person who bears the corresponding (relational) duty to make good on the claim in question. Since the existence of a duty bearer is a necessary condition for the existence of a claim right, it takes at least two agents for a right to exist. Three-term claim rights are, in contrast to mere (two-term) claims, interpersonal relations between a right holder and a duty bearer. And since we are talking about *human* rights, the person in the claimant position is a human being (a natural person) whereas the duty bearer may either be a natural or a non-natural person (e.g. a state or state agency).

According to Paul Sieghart, the view of rights underlying international human rights law takes the existence of a duty bearer not only to be necessary but to be sufficient as well: "In all legal theory and practice, rights and duties are symmetrical . . . if I have a right, *someone else* must have a correlative duty; if I have a duty, *someone else* must have a corresponding right."[4] But despite Sieghart's assurance to the contrary, the second implication from legal duties to legal rights is, at least in this unqualified form, doubtful and highly controversial. Many lawyers would argue that having a legal duty towards someone is a necessary, but by no

means a sufficient condition for someone else's possessing a correlative legal right. Moreover, *moral* theory and practice seems to allow for "imperfect" moral duties towards others without those others having corresponding rights. Candidates for such imperfect duties are, for example, duties of charity and benevolence towards everyone. Whatever the truth in this matter, for our purposes it is sufficient to endorse the considerably weaker conceptual implication that *if* A has a claim right to X, *then* there must be a B that has a correlative duty concerning X towards A.

We take it that the human rights identified by Rawls as a part of the Law of Peoples are best understood as claim rights in this sense. Consider the family of rights guaranteed by article 3 of the *Universal Declaration*: "Everyone has the right to life, liberty and security of person." Here we have three fundamental values life, liberty, and security of person and we have the idea that these values are to be protected by a right, or more precisely, by a complex multitude of rights against many persons, with the familiar structure of "claim rights." Claim rights imply multitudes of pretty specific duties. To endow one person with a claim right is *e definitione* to impose corresponding duties on one or more others. And the violation of a person's claim right implies the non-fulfillment of at least one of these duties, be they negative duties of non-interference or positive duties of providing a certain good or service. Hence, proceeding from the human right stated in article 3 of the *Universal Declaration*, we may promptly arrive at the prohibition of article 4, "No one shall be held in slavery or servitude," which imposes on everyone negative duties of not holding other human beings in slavery or servitude. Or, take the human right of equal recognition as a person before the law (art. 6) and of equal protection of the law (art. 7), and you readily derive not only the prohibitions of article 9, "No one shall be subjected to arbitrary arrest, detention or exile," imposing certain negative duties on courts and state agencies, but also positive duties of public recognition and protection.

Violating a human right, then, consists in the non-fulfillment of rather clear-cut negative or positive duties that go along with the right and account for its respective *regulative force*. Indeed, if human rights are more than mere "considerations" to be taken into account but not necessarily acted upon, this is because they impose pretty specific duties – i.e. peremptory demands to perform certain actions or to abstain from their performance – on more or less well-defined agents, be they natural or non-natural persons. Note that on this understanding it is not the existence of institutionalized enforcement mechanisms that gives practical importance to claim rights in the first place – even though these mechanisms will normally increase their effectiveness – but the individual and social recognition of the implied duties.

The duties following from human rights do not only involve primary duties of direct compliance with the requirements of the right in question but also secondary, auxiliary duties of assistance or protection. The latter have to be discharged if the primary duties go unfulfilled or can be expected to go unfulfilled. They are

"secondary" or "auxiliary duties" because the requirement to act on them is contingent upon the non-fulfillment of other (primary) duties.[5] The right to life, for example, imposes negative primary duties of not killing others on everybody and it also imposes auxiliary duties of protection and assistance for the (potential) victims of violent crimes at least on some agents. For example, there may be corporate agents that have been established *inter alia* for protecting people against violent crime (like the state) and there may be natural duty bearers that, in a given situation, can provide the necessary help at acceptable costs. It follows from the fact that human rights do not only involve correlative primary but also secondary auxiliary duties that not only primary duty bearers can violate a person's human rights but also auxiliary duty bearers, viz. if they fail to discharge their duties of protection or assistance towards those whose rights are not respected.

This links up with another important aspect of the classical understanding of rights: the requirement of their social protection. John Stuart Mill has emphasized this aspect. A right, Mill maintains, is something "which society should protect me in the possession of."[6] Given this understanding, it is part of the definition of a right that it involves a general requirement of its social protection and, under suitable circumstances,[7] may impose auxiliary duties of protection and assistance. At this point, it is important to carefully distinguish two distinct claims. There is the claim (A) that rights, in virtue of their definition, involve a *normative* requirement of social protection (they *ought* to be protected by society) and hence, under suitable circumstances, impose auxiliary duties of protection and assistance on third parties. And there is the claim (B) that rights, in virtue of their definition, actually have to be enforceable. We deny (B) but affirm (A).

Our understanding of human rights as moral claim rights comprises, then, three main elements: (1) a fundamental human value; (2) claims that arise from that value, but by themselves do not imply concrete duties of specified agents; and finally, (3) the (primary and secondary) duties implied by the right which are a necessary condition of its existence.

What makes a right a *moral* right, we suggest, is that the involved claim to something can be justified with exclusive reference to the value basis at its center, the intuitive idea being that people have moral rights because of the importance of the core value for their autonomy and well-being as human persons. The claim that human rights are *universal* moral rights may then be explained as follows: They are (a) universal in the sense of having a universal value basis the values of which (life, liberty, security) are of such a significance for a human life worth living that their protection normally cannot be reasonably denied to any human being.[8] In virtue of their universal value basis human rights are (b) universally valid claims, i.e. valid claims all individuals have to certain goods. They are universal in the sense that every person has these rights.

Note that this terminology is at odds with Rawls's saying that human rights are "universal" in that "they are binding on all peoples and societies, including

outlaw states" (*LoP*: 80f.) in two respects. Firstly, we think that a special justification is required for restricting the scope of possible duty bearers and rights violators, as Rawls does, from all agents (including natural persons, organizations, and institutions) capable of protecting or violating rights to peoples, to societies and states only. This should in any case not be done from the outset through the choice of a certain terminology. Secondly, we think it more in line with common practice to reserve the attribute "universal" for rights *everybody has*, i.e. human rights. However, it is nonetheless important to distinguish clearly between *everybody's having a right* and *having a right against everybody*. We mark this distinction terminologically by calling a right "universal" if and only if everyone possesses it; but a right is "general" if and only if it is held against everybody. The significance of the distinction between right-holder universality and duty-bearer generality lies in the fact that it allows for the possibility of non-universal but general rights as well as universal, though non-general, i.e. special rights.[9] Indeed, there are human rights against *some*, but not necessarily *all* other agents.

We emphasize again that it is the implied duties that turn a valid moral claim into a claim right and not its institutionalization or entrenched practices of mutual criticism and (formally or informally) socially enforced compliance. To say that something is a moral *right* is to say that it has a certain relational normative structure involving (1) a right holder, (2) a duty bearer, and (3) a content that specifies what the right holder has a right to. There is no denying that established institutions and recognized practices of criticism typically enhance the regulative force of (moral) rights. Indeed, such institutions and practices are, practically speaking, prerequisites of any form of social order that effectively protects the moral rights of individuals. Nevertheless they are, in our view, not constitutive elements of the concept of a right. What is constitutive for the existence of a right is a normative requirement of its social protection, which in turn, under suitable circumstances, gives rise to specific duties of protection and assistance.[10]

Clearly, Rawls's account of the human rights that are a part of his Law of Peoples ultimately has to rely on some such non-institutional understanding of human rights in order to make good on the claim that these rights are universal and general rights irrespective of already existing institutions and entrenched social practices.

3 Human Rights Minimalism and the Problem of Justification

To allow for an unforced agreement on the Law of Peoples that is not parochial or subject to the charge of Western imperialism, human rights must not be expounded in terms of controversial comprehensive philosophical or religious doctrines (*LoP*: 68, 81). That much seems uncontroversial. Still, we need an account of these rights that explains why they are universally valid and generally

binding and why they are so important. After all, it is not only comprehensive doctrines that are subject to reasonable disagreement; human rights are contested as well. In view of the rather sparse and minimalist account of human rights in *LoP*, one may also wonder why so many rights acknowledged as human rights in international declarations and covenants are not included in Rawls's short-list.

In his earlier work, Rawls conceives of basic rights and liberties – the rights and liberties incorporated in his first principle of justice and effectively guaranteed in well-ordered liberal democracies – as *basic goods* that all persons need in order to adequately develop and exercise the capacities constitutive for their moral agency, i.e. their capacities for rational action, fair cooperation and for the pursuit of the individual and the common good (cf. *Political Liberalism* [*PL*], VIII[11]). Since Rawls considers the human rights of the Law of Peoples to be a subset of the rights identified by his first principle of justice (*LoP*: 68, 78f., 81) human rights clearly qualify as basic goods, too. There is no reason, then, to assume that their value basis is different from the value basis of those liberal basic rights and liberties that are part of the first principle of justice as fairness. And there is also no reason to assume that the rationale for the human rights of the Law of Peoples is basically different from the rationale for the basic rights and liberties of domestic justice in Rawls's earlier writings. In some way or other, individuals need the social protection of these rights as a precondition for the development and exercise of their moral powers, and this is supposed to hold true independently of how the conceptions of rationality, fairness, and the good involved are spelled out.

Both in *LoP* and in his earlier work, Rawls seems to rely on the same general (and hard to reject) notions of social cooperation and moral agency. It is worth remembering how Rawls in *PL* derives his idea of the citizen as a person with two moral powers from the idea of social cooperation as a mutually advantageous social activity that is regulated by reciprocally recognized rules (*PL*: I.3). The original position is used in this context as a device of representation to derive from these fundamental ideas specific principles of justice that, among other things, demand equal basic rights and liberties for all citizens (*PL*: I.4).

Now compare Rawls's account of human rights in *The Law of Peoples*. Following the argument in *LoP*, §8.2–4, not only liberal societies but all decent societies affirm a law of peoples that guarantees certain basic human rights. Decent societies endorse these rights for the simple reason that they are *decent* societies, i.e. forms of social cooperation rather than mere command systems. It is part of the definition of a decent society that it be internally regulated by an idea of the common good that includes the good of all its members and that it is based on reciprocal obligations rather than mere command by force (*LoP*: 65ff.).[12] The requirement to honor human rights joins in with this idea of a decent society. "What have come to be called human rights are recognized as necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind" (*LoP*: 68, cf. 65).

The intuitive idea of the argument is simple enough and quite persuasive. If human rights are basic goods that individuals need to develop and exercise the basic capacities constitutive of their moral personality, no society that fails to protect these rights can reasonably claim to promote the common good of its people and can demand compliance as a matter of obligation rather than brute force. Both the argument in *PL* and the argument in *LoP* rely on the normative idea of social cooperation (as opposed to mere command by force) and trade on the fact (explicitly in *PL*, implicitly in *LoP*) that cooperation, unlike a mere command system of social coordination, presupposes a form of human agency that is conditional upon a sufficient degree of social protection for certain basic individual rights.[13]

Still, there are differences in how the idea of social cooperation is spelled out in detail in both arguments, the main difference being that what is constitutive of decent societies is social cooperation *simpliciter* whereas what is constitutive of liberal societies is social cooperation *among free and equal citizens.* However, given the background structure of arguments to be found in *PL* and given Rawls's account of human rights in *LoP*, what seems in need of justification is not so much that there are generally binding human rights. What seems puzzling is rather that according to Rawls, not all basic rights and liberties (identified as basic goods in the context of the conception of justice as fairness) are human rights that every social order must protect. Assuming that the argument for the human rights of the Law of Peoples and the argument for the scheme of equal basic liberties in Justice as Fairness are really as closely connected as we suggest, the question arises how the same kind of argument can yield two different kinds of moral standards: the minimalist human rights standard of decency and the more ambitious standard of equal basic rights and liberties of fully just liberal societies.

Now, the development and exercise of moral capacities and the realization of the corresponding values of human autonomy and individual well-being may come in varying degrees. Both the argument for human rights and the argument for equal basic liberties, therefore, have to rely on a threshold notion of "adequate development and exercise" or "adequate realization" where adequacy is judged from an appropriately defined moral point of view. What seems adequate from one point of view may be inadequate from another. Hence, different standards for the protection of basic rights – the minimal human rights standard of decency and the equal basic liberty standard of fully just liberal societies – may be in order from different evaluative perspectives. Offhand it also seems clear that the standards defining the fair terms of cooperation *among free and equal citizens* must be more ambitious standards than those defining the line between a "a slave system" and a scheme of social cooperation based on a common good conception of justice.

We shall not go into the sparse details of Rawls's account of this distinction and whether he actually draws the line where it should be drawn. There will be reasonable disagreement about whether a society can fail to protect certain rights

– say, fail to protect full equality for women or equal political liberties for all citizens – and still be a decent society rather than (at least partially) a system of mere command by force. There also may be reasonable disagreement about what counts as a "regular violation" of those most basic human rights that define the minimal threshold of decency. But there can hardly be reasonable disagreement that some threshold of human rights protection has to be met in order to confer at least minimal moral standing on a social system and it also should be clear that the requirements of this threshold have to be considerably weaker than the equal basic liberty requirement for fully just liberal societies.

Rawls's contention that not all societies need to meet the standards of full liberal justice in order to be considered decent societies that deserve respect and toleration has been sharply criticized. Early on in a discussion of Rawls's Amnesty Lecture in Oxford 1993, Fernando Tesón argued that Rawls is "too forgiving of serious forms of oppression" because his list of basic human rights neither includes the rights of freedom of expression and association nor the rights of democratic participation.[14] Tesón blames Rawls, in particular, for being insufficiently sensitive to the concerns and problems of democratic dissidents and human rights reformers in nonliberal hierarchical societies.[15] Sure enough, a decent hierarchical society is characterized by a decent consultation hierarchy. Minorities and dissenters that do not endorse the comprehensive conception of the good regulative in their society have to be heard and responded to in the society's political decision-making process (*LoP*: §9). Once political decisions are taken in line with the regulative comprehensive conception, however, the lack of freedom of expression and association precludes that further opposition may be publicly organized and voiced.[16] Moreover, given that the freedoms of liberal democracy are not on Rawls's short-list of basic human rights, dissidents in hierarchical societies cannot hope to find the public support of liberal democracies that accept the Rawlsian guidelines of foreign policy. Tesón sees this as an unacceptable constraint on international free speech and concludes that Rawls's minimalism "inflicts a serious blow to human rights activism . . . by weakening the grounds on which nations can press each other."[17] Tesón also argues that Rawls's minimalism is at odds with the development of international law after the Second World War and "fails to meet the considered moral judgments of the international community. The range of human rights that is now recognized by international law considerably exceeds the modest requirements of legitimacy proposed by Rawls."[18]

Many details of Tesón's criticism of Rawls's Amnesty Lecture from 1993 cannot be upheld after the publication of *The Law of Peoples* in 1999.[19] Moreover, what Tesón says about the broader understanding of human rights in contemporary international law is questionable. Firstly,[20] there seems to be wide agreement now that the international declarations and covenants drafted after the *Universal Declaration of Human Rights* of 1948 have more entries for human rights than could be reasonably recognized as universal moral standards generally binding

irrespective of local institutions, traditions, and circumstances. An example often mentioned is the alleged right to "periodic holidays with pay" stated in article 24 of the *Universal Declaration*. Indeed, the unprincipled proliferation of human right claims in international documents explains why Rawls (and others)[21] began to pursue more austere approaches. It is this fact that motivates his distinction between "human rights proper" and mere "liberal aspirations" (*LoP*: 80n).[22] Secondly, we cannot take the international human rights documents at face value, so to speak, if we wish to find out which human rights are binding law. All the major human rights instruments of contemporary international law are subject to extensive reservations by state parties, typically made in order to protect national political structures, domestic religions, or local traditions. Thirdly, states are parties to international human rights agreements for all kinds of political considerations and sometimes for cynical reasons that have nothing to do with the "considered moral judgments of the international community."[23] Even if the international community had "considered moral judgments," there is little reason to assume that positive international law gives us a clear idea of what they are.

Still, Tesón's straightforward criticism of Rawls's Amnesty Lecture has set the stage for the ongoing critical discussion of the Law of Peoples. Charles Beitz agrees with Tesón that the Law of Peoples endorses too limited a range of human rights and is "excessively deferential to societies with discriminatory or undemocratic institutions."[24] Beitz also notes that Rawls's account of human rights is at odds with contemporary international law but he does so in a more general and, indeed, more convincing way than Tesón. According to Beitz, Rawls ends up with his short-list of human rights – not including the rights constitutive of liberal democracies as identified, for example, by the articles 19–21 of the *Universal Declaration* – because of his narrow understanding of the role of human rights in international politics.[25]

Rawls's account of human rights contrasts, indeed, starkly with what Beitz calls the "conventional view" which found expression, for example, in the *Universal Declaration*. The "conventional view" gives human rights a broad political role. According to the *Universal Declaration*, human rights serve as "a common standard of achievement for all peoples and nations."[26] They are standards of conduct not only for governments and international institutions but also for the various non-governmental organizations in the emerging global civil society. Human rights are seen as shared goals of political reform and not, as Rawls sees them, merely as a constraint on political sovereignty.[27] On Rawls's understanding human rights (proper) regulate the legitimacy of international intervention: regimes that meet the minimum standard are safe from external interferences whereas regimes that do not meet that standard are properly subjected to external sanctions and even military interventions.[28] Indeed, on the basis of this role, nothing may be considered a human right that could not, at least in principle, function as a warrant for foreign interference and, as a last resort, for military intervention. It goes without saying that not all rights identified as human rights (say, in the

Universal Declaration) meet this criterion. As Beitz points out, it is the narrow understanding of the role of human rights – namely, to regulate and to justify external interference and intervention – that explains the minimalism of the Rawlsian human rights list: "[A] less restricted understanding of the political role of human rights would suggest a different view of their justification and, most likely, a more expansive interpretation of their content."[29]

John Tasioulas has taken up this line of argument and has given it a conceptual twist. Like Tesón and Beitz, Tasioulas has serious misgivings in particular about the exclusion of democratic participation rights from Rawls's short-list. In his analysis, Rawls's minimalism follows from a conflation of questions concerning the recognition of rights in an ideal theory of justice and questions concerning the enforcement of rights (e.g. by military intervention) in the non-ideal world in which not all agents comply with the norms of ideal theory. Establishing the existence of a human right as a matter of ideal theory is, Tasioulas argues, "independent of establishing the remedial question of how violations of such norms are best dealt with."[30]

It would be a shame, if it were true, that Rawls conflated questions of ideal theory with questions of law enforcement. Rawls is quite explicit in his intention to separate questions of the ideal theory of right and justice from the problems of public international law and its enforcement: "This monograph is neither a treatise nor a textbook on international law" (*LoP*: 5). Moreover, it is a classroom exercise to show that one may recognize the existence of a particular (moral) right and still deny that it should (or even could) become positive law or that it should (or even could) be enforced on a particular occasion. Concerning this point we are in full agreement with Tasioulas (see section 2 above). Is Rawls (notwithstanding his better intentions) actually guilty of making the fundamental mistake Tasioulas ascribes to him? We do not think so.

Indeed, we deny that Rawls's account of human rights is flawed because it presupposes a tight connection between human rights (proper) and reasons for intervention. It would be a mistake to define international human rights as norms whose grave violation by a political regime justifies (in principle) international intervention *by military force*. Doing so would set up an entirely arbitrary threshold for membership in the class of human rights. It would by fiat exclude all rights compliance with which could always be achieved in better ways than through military intervention (or could never be achieved by military intervention but perhaps in other ways) without even taking notice of the value of these rights for their holders and of how serious the violations that have to be dealt with are. However, Rawls says nowhere in *LoP* that *military intervention* (or *coercive* intervention)[31] defines the crucial benchmark for membership in the class of human rights. Rather, he speaks of "forceful intervention": The fulfillment of human rights by a society "is sufficient to exclude justified and forceful intervention by other peoples" (*LoP*: 80). It is obvious from the immediate verbal context that "forceful intervention" in the quoted passage cannot mean "military intervention"

because the passage continues: ". . . for example, by diplomatic and economic sanctions, or in grave cases by military force" (ibid.). Rawls does not claim that there is a necessary connection between human rights and military intervention in particular but only between human rights and the justifiability of intervention in general.[32]

One could, of course, endorse Tasioulas's more radical critique and argue that even maintaining a more general (but still necessary) connection between human rights and (military or non-military) intervention is still unacceptable. It may be seen as resting on a conflation of the two questions (a) which rights exist and (b) which reactions to the violation of existing rights seem appropriate upon due consideration of all relevant circumstances. In the light of what we said in section 2 two comments seem in order.

Firstly (and obviously), to say that violations of human rights *in principle* justify "forceful intervention" is not to say that whenever human rights are seriously violated an intervention is justified. Whether, all things considered, an intervention is actually justified depends in every particular case on the circumstances. Even in the case of serious human rights violations on a large scale, there may be decisive countervailing reasons not to intervene. Since, practically speaking, we can never rule out the existence of countervailing reasons in advance, it is clear that all the rights on Rawls's short-list (or, indeed, on any human rights list one might think of) can only provide *pro tanto* reasons for intervention in other countries.

Secondly, to maintain that international human rights violations by themselves are not even *pro tanto* reasons for intervention, as Tasioulas does, strikes us as an extravagant and eventually untenable position.[33] Why should we care so much about whether a certain right qualifies as a universally valid international human right, if we did not believe that these rights, at least in principle, justify international action aiming at the protection of fundamental human values all over the world? In section 2 we have opted for the "classical view" of rights, which explains the *regulative force* of rights in terms of their correlative duties. It is not, we said, the existence of institutionalized enforcement mechanisms that gives practical significance to a right in the first place but the social recognition of the corresponding duties. These duties involve, as we have seen (in section 2), not only primary duties of direct compliance but also auxiliary duties of protection and assistance. If we take it (a) that the point of human rights is to protect individuals and to secure the realization of certain basic values for them by imposing duties on others, and if we also accept (b) Mill's statement that it is constitutive for a right that it involves a requirement of its social protection, then it seems hard to deny (c) that human rights provide at least *pro tanto* reasons for third-party intervention whenever they are violated. And since we are discussing *international* human rights, i.e. rights that are binding on political regimes, the auxiliary duties of protection and assistance are naturally conceived of as duties that transcend the borders of domestic societies and constitute *pro tanto* reasons of international intervention by other governments and international institutions.[34]

How do these rather abstract considerations about rights and duties bear on the question of whether there is a right, say, to democracy or to full gender equality? As they stand, they fail to provide us with concrete answers, positive or negative. However, they tell us something about the kind of argument we need to support the answer we eventually come up with. If human rights are conceived as claim rights the existence of which requires not only a sound value basis but an appropriate allocation of correlative duties, the crucial test for establishing the existence of a particular right is this. We have to check whether, on balance, the value basis of the right warrants the imposition of the respective duties (including duties of third-party intervention) or whether the fulfillment of these duties would require sacrifices that from a moral point of view seem unacceptable. And this test applies, of course, for any candidate for the list of human rights proper, be it the right to democracy or the right to full gender equality.

Rawls clearly maintained that hierarchical societies, which meet his minimum threshold of decency but fall short of political equality, nevertheless meet moral requirements that are "sufficient to override the political reasons we might have for imposing sanctions on, or forcibly intervening with, its people and their institutions and culture" (*LoP*: 83). There will always be reasonable disagreement about this answer. Balancing the value of democracy against the value of political sovereignty and independence and evaluating the chances and long-term consequences of international interventions of all sorts is a difficult business. Therefore, the only point we want to make here is that to simply do away with the idea that rights imply duties, and that these duties include duties of assistance, is not a satisfactory solution to the problem of identifying human rights. The gains we could make that way in terms of entries in our list of human rights would come at the price of a significant loss of regulative force and protective value for each of them.

One difficulty one still may have with Rawls's idea of a minimal standard of decency is that Rawls seems to derive it from one set of considerations – dealing with the appropriateness of political, economic, and military sanctions (cf. *LoP*: 83f.) – but that he subsequently applies this idea in a very different setting, dealing with the question which societies should be regarded as "members in good standing" of a society of peoples and are therefore represented in the second original position where the principles of international justice are selected (cf. *LoP*: 59f.). It is one thing, one may object, to say that as a matter of practical international politics, societies that meet Rawls's standards of decency should be tolerated and not subjected to any kind of external sanctions. But it is another to grant these societies, in effect, a veto power in the determination of the principles of international justice. Meeting minimal standards of basic human rights protection and political participation may suffice to warrant respect and toleration and may yet not be enough for equal veto powers. After all, the principles of justice chosen in the second original position must not be compromised by the existence of injustice. And, of course, for Rawls merely decent societies are not fully just societies (*LoP*: 78, 83).

The answer to this problem depends on whether we conceive of the Law of Peoples as a set of norms that in the absence of countervailing reasons should (if possible) be enforced or not. If we follow Rawls (*LoP*: 25ff., 81 and our own argument in this section), the minimal standards of decency that warrant respect and toleration also warrant equal representation in the second original position. Otherwise, the inconsistency could arise that the norms of international justice selected only by well-ordered liberal societies (requiring, perhaps, full liberal justice) in the second original position must at the same time be enforced and not enforced. They must be enforced because they are part of the Law of Peoples; and they must not be enforced because the societies that violate them are *decent* societies that may claim respect and tolerance for their form of social order even though they do not meet the requirements of fully liberal justice.

Acknowledgments

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Notes

[1] John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (hereafter *LoP*), Cambridge, MA: Harvard University Press, 1999.

[2] We borrow this term from John Tasioulas, "From Utopia to Kazanistan: John Rawls and the Law of Peoples," *Oxford Journal of Legal Studies*, 22 (2002): 380.

[3] Fernando Tesón, "The Rawlsian Theory of International Law," *Ethics and International Affairs*, 9 (1995): 79–99; Charles Beitz, "Rawls's Law of Peoples," *Ethics*, 110/4 (2000): 669–96; Tasioulas, "From Utopia to Kazanistan, pp. 367–96.

[4] Paul Sieghart, *The Lawful Rights of Mankind*, Oxford: Clarendon Press, 1985, p. 43.

[5] Cf. Henry Shue's account of what he calls "default duties" (and what we call "secondary" or "auxiliary duties"): H. Shue, *Basic Rights*, Princeton, NJ: Princeton University Press, 1996, pp. 170–8, passim.

[6] John Stuart Mill, "Utilitarianism," in *Utilitarianism: On Liberty. Essay on Bentham*, ed. Mary Warnock, New York: New American Library, 1974, ch. 5.

[7] Only under "suitable circumstances" because, as a matter of fact, it may be impossible to provide protection and assistance at acceptable costs.

[8] "Normally" because there are situations in which the protection and realisation of human rights values cannot be secured for all individuals.

[9] For a clear view of this distinction and its importance, cf. Peter Koller, "Der Geltungsbereich der Menschenrechte," in *Philosophie der Menschenrechte*, ed. Stefan Gosepath and Georg Lohmann, Frankfurt/M.: Suhrkamp, 1998, pp. 96–123.

[10] Despite a number of important commonalities (in particular regarding the conceptual distinction between mere valid claims and rights in the sense of claim rights) we thus, ultimately, do not agree with Rex Martin's view that within the Rawlsian framework

rights generally should best be conceived of as "legitimate expectations." *Legal* rights (including basic constitutional rights) that as socially recognized norms meet basic demands of justice *give rise to* legitimate expectations but they are not identical with legitimate expectations neither from the Rawlsian nor from our point of view. "When these rules [of the legal system] are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled" (cf. John Rawls, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1999 [1971], p. 235). Martin's view that *e definitione* rights presuppose social recognition because without social recognition there could be no correlative duties strikes us as unconvincing (cf. Rex Martin, *Rawls and Rights*, Lawrence, KS: University Press of Kansas, 1985, pp. 33f.). From our point of view, all it takes to establish right–duty relations between persons are valid moral principles with a sound value basis. Social recognition and "reflective availability" (ibid.) of rights and duties are relevant for the ascription of individual responsibility and hence, for example, for our social practice of praising or blaming individuals, but they are not necessary conditions for their mere existence.

[11] John Rawls, *Political Liberalism* (hereafter *PL*), New York, NY: Columbia University Press, 1993. (The paperback version of 1996 is unchanged in content from the hardback version of 1993, except that it has a second [paperback] introduction, pp. xxxvii–lxii, and adds Rawls, "Reply to Habermas," *Journal of Philosophy*, 92 [1995]: 132–80, as Lecture IX.) All subsequent citations to *PL*, by page, will be to the paperback version of 1996.

[12] Indeed, not only decent societies meet this minimal requirement of decency but also "benevolent absolutisms," which for that reason may rightfully resist a military intervention and have a right to self-defense if they are non-aggressive (*LoP*: 92). Nevertheless, they are not well ordered and decent societies (and, hence, not "members in good standing" of the society of peoples) because "they deny their members a meaningful role in making political decisions" (*LoP*: 63, cf. 92). Rawls does not say whether benevolent absolutisms deserve respect or not.

[13] Admittedly, it is not entirely clear that Rawls would have endorsed this line of reasoning. It presupposes the idea of the moral person from political liberalism. But in *LoP* we read that "the Law of Peoples does not say, for example, that human beings are moral persons" (*LoP*: 68; cf. Charles Beitz, "Human Rights and the Law of Peoples," in *The Ethics of Assistance*, ed. Deen Chatterjee, Cambridge: Cambridge University Press, 2004, p. 201, who, in our view correctly, emphasizes this point). We must, however, keep certain points in mind. (1) Surely, we need some account of human rights to explain their importance and universal validity. We also need to be able to say why "a slave system" is not a suitable form of social organization for human beings. It seems difficult, therefore, if not impossible, not to presuppose some idea of the person as a moral agent in thinking about human rights. (2) According to Rawls, the principles of the *Law of Peoples* are primarily guidelines for the foreign policy of liberal democracies and not principles of justice for a global basic structure of world institutions (*LoP*: 9f.; cf. Beitz, "Rawls's Law of Peoples," p. 675). The first question, therefore, is why *liberal democracies* in their foreign policies must insist on the generally binding character of the human rights contained in the Law of Peoples. From the vantage point of political liberalism it is the idea of the person with two moral powers that gives the answer to this question. Nevertheless, the idea of the moral person is not part of the content of

the human rights themselves. Peoples who reject allegedly liberal notions of the moral person can, therefore, recognize the rights in question without recognizing, at the same time, the underlying notion of the moral person, provided, of course, that they have other (philosophical or religious) grounds for recognizing human rights.

[14] Tesón, "The Rawlsian Theory of International Law," p. 79.

[15] Ibid., pp. 88f.

[16] Ibid., p. 82.

[17] Ibid., p. 89.

[18] Ibid., p. 91.

[19] This is true, for example, of Tesón's claim that from a Rawlsian perspective democratic dissidents in hierarchical societies appear to be "political misfits who battle mindlessly (and unjustifiably) against tradition" (Tesón, "The Rawlsian Theory of International Law," p. 88) and also of his statement that Rawls's Law of Peoples, once implemented, would force Amnesty International out of business (p. 96n). We do not need to address the question here whether these were valid points of criticism against the earlier Amnesty Lecture.

[20] In this and the next two points we follow Tasioulas, "From Utopia to Kazanistan," pp. 382f.

[21] Cf. James Griffin, "Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights," *Telos*, 10 (2001): 133–56; and id., "First Steps in an Account of Human Rights," *European Journal of Philosophy*, 9 (2001): 306–27.

[22] See also James Nickel's article in this volume.

[23] Tesón, "The Rawlsian Theory of International Law," p. 91.

[24] Beitz, "Rawls's Law of Peoples," p. 687.

[25] Ibid., p. 687.

[26] Preamble to the UN's *Universal Declaration of Human Rights* (1948); cf. Beitz, "Rawls's Law of Peoples," p. 687.

[27] Beitz, "Rawls's Law of Peoples," p. 687f.

[28] Cf. *LoP*: 37f., 81, 93fn. Note, however, that in Rawls's view only intervention by other governments or by international institutions like the International Monetary Fund or the World Bank is regulated by the minimal human rights criterion. The lawful pursuit of "liberal aspirations" beyond the Rawlsian short-list of human rights by citizens and non-governmental organizations of all kinds is fully compatible with Rawls's human rights minimalism (cf. *LoP*: 85) and arguably also compatible with the Rawlsian minimalism are all kinds of efforts to extend the positive universal rights of human beings that are protected by international law. We owe this comment to Rex Martin and David Reidy.

[29] Beitz, "Rawls's Law of Peoples," p. 688. See also his recent article (2004) "Human Rights and the Law of Peoples," in which he takes a somewhat more sympathetic stand towards Rawls's minimalism.

[30] Tasioulas, "From Utopia to Kazanistan," p. 386.

[31] Cf. Beitz, "Human Rights and the Law of Peoples," p. 206.

[32] We should like to point out that neither Beitz, "Rawls's Law of Peoples," nor Tasioulas, "From Utopia to Kazanistan," say anything to the contrary (see however Beitz, "Human Rights and the Law of Peoples," p. 37, where it is said that Rawls "holds that human rights are conditions whose violation would justify *coercive* intervention" [our

italics]). The reason why all interventions (and not only military interventions) may be considered "forceful" interventions is that they always involve the exertion of pressure of governments against other governments – if not other (non-military) coercive measures – intended to influence political decision-making processes of sovereign political societies. Rawls's *Law of Peoples* contains a general duty of non-intervention (principle 4, *LoP*: 37) and even justified non-military intervention may be seen as an infringement of sovereignty rights by force.

[33] Tasioulas, "From Utopia to Kazanistan," pp. 384–7.

[34] What we say in this and in the preceding paragraph seems to be in line with Beitz, "Human Rights and the Law of Peoples," pp. 204f.

8

Rawls's Narrow Doctrine of Human Rights

Alistair M. Macleod

Sponsorship of a truncated doctrine of human rights provides a tempting escape from the many problems presented by efforts to secure worldwide recognition of, and respect for, a broad swath of human rights. The aim is to undercut objections to too robust a regime for the international enforcement of human rights by pruning, perhaps quite drastically, the list of rights to which such a regime is committed.[1] Human rights "minimalism" comes in at least two versions. According to the first – "justificatory minimalism" – a short list is attractive because it contains (it might be thought) the only rights for which a credible justification can be mounted. Alternatively – for "enforcement minimalism" – a short list is to be preferred if potentially dangerous trends towards international enforcement of human rights on too broad a front are to be headed off.

Both kinds of minimalism can take a number of forms. For example, for what might be dubbed "principled" justificatory minimalism, no justification is *in principle* available for any but the most fundamental of the rights on longer lists of human rights. Such rights as the right not to be killed at will or the right not to be tortured may on this view qualify as bona fide human rights, even if no credible case can be mounted for according recognition as human rights to such putative rights as the right to health care and the right to education. By contrast, for what might be called "pragmatic" justificatory minimalism, the issue is not whether a justification for longer lists of human rights can in principle be defended but whether, when issues of justification are looked at more pragmatically, the prospects are good for the achievement of an international *consensus* about any but the most fundamental of putative human rights.

While the central concern of enforcement minimalists is different – namely, to moderate any novel enthusiasm there may be for the adoption by the international community of interventionist measures to protect human rights – they may or may not be justificatory minimalists as well. If they are not – if, that is, they have no quarrel with expansive doctrines of human rights – their aim is to try to

ensure that coercive measures for the international enforcement of respect for human rights[2] are resorted to only in situations in which very basic human rights are violated (and even then only if the violations are widespread and persistent and if intervention can be expected to help bring them to an end). But enforcement minimalism can go hand in hand with justificatory minimalism of both the kinds I have distinguished.[3] The shorter the list of human rights for which a defensible rationale can be given – or the shorter the list for which an international consensus can be hoped for – the fewer the situations will be in which international intervention to protect human rights can be proposed even as an option.

I want in this paper to ask not only whether (and if so, why) Rawls's doctrine of human rights in *The Law of Peoples*[4] can be characterized as "minimalist" in one or more of the senses distinguished but also (a) what role his narrow doctrine plays in relation to a number of the principal theses of *LoP* and (b) whether he provides, either expressly or implicitly, a satisfactory defense of this narrow doctrine. In discussing the first of these questions, I shall suggest that, while it would probably be a mistake to think that Rawls, in *LoP*, embraces "principled" justificatory minimalism, it seems likely that he favors some version of both "pragmatic" justificatory minimalism and "enforcement" minimalism. My discussion of the second question focuses in part on some of the tensions there are between positions to which Rawls's liberalism might be expected to make him sympathetic and the role the narrow doctrine of human rights in *LoP* plays in his defense of so-called "decent" societies[5] against the strictures of more consistently liberal critics. On the question whether Rawls provides in *LoP* an adequate defense of a narrow doctrine of human rights, the answer for which I try to argue is that he does not, partly because the arguments for the doctrine are underdeveloped, partly because the occasional hints he provides seem to point in incompatible directions, and partly because no justification seems to be on offer for his implicit unwillingness to recognize that rights as fundamental as the right to full liberty of conscience and the right to equal participation in political decision-making processes ought to be regarded as *human* rights.

1 Rawls and Human Rights Minimalism

It isn't easy to be sure what Rawls's attitude is towards the various forms of human rights minimalism. Take "principled" justificatory minimalism, for example. Despite the narrowness of the doctrine of human rights to which he seems to subscribe in *LoP*[6] – and it is this narrow doctrine that provides the focus for much of the discussion below – there are several reasons for suspecting that it is not traceable to any doubt he has about the availability of a plausible philosophical rationale for a more expansive doctrine. The principles of justice to which he is committed as a political liberal – the principles respected by "liberal democratic" societies within

what he calls, in *LoP*, "a society of well-ordered peoples" – provide the basis for a reasonably rich doctrine of human rights. The Equal Liberty Principle, the Equal Opportunity Principle, and the Difference Principle are principles which – when taken together, and when given a reading that is consonant both with the early and with the later Rawls[7] – can readily be cited in defense of most or all of the rights itemized in such documents as the *Universal Declaration of Human Rights*, the *Covenant on Civil and Political Rights*, and the *Covenant on Social, Economic and Cultural Rights*. And although Rawls is unwilling, in *LoP*, to claim that the principles of international justice embedded in what he calls "the law of peoples" reflect the superiority of a liberal democratic approach to questions of international law, his attempt to represent the approach to these questions of decent societies as equally defensible seems to be qualified by the occasional admission that the institutional arrangements in decent societies are less than fully just. And they are said to be less than fully just partly because they do not guarantee full liberty of conscience and partly because they do not enable all their members to participate on terms of equality in political decision-making processes.[8]

There do, however, appear to be traces in *LoP* of the more "pragmatic" version of justificatory minimalism. That is, there are indications that Rawls may be prepared to settle for a much less expansive doctrine of human rights than his own (liberal democratic) principles would support because he thinks these principles are unlikely to command universal assent in the international community in the foreseeable future. For example, these principles are rejected – and it may seem that they will continue for some time to be rejected – by societies in which social, cultural, and political traditions are deeply entrenched which privilege certain kinds of moral or religious doctrines that are neither fully liberal nor fully democratic. Rawls's elaborate attempt in *LoP* to accommodate such societies – the societies he dubs "decent" societies – as societies in good standing within a "society of well-ordered peoples" seems to be designed to ensure that the principles of international justice embedded in the "law of peoples" are principles shared by liberal democratic and decent peoples. Thus, if full liberty of conscience – a central value in liberal democratic societies – is something which decent peoples, given their moral and religious traditions, are unwilling to endorse, then the law of peoples must soften its requirement on this front. It seems to be for no better reason than this that Rawls is prepared to settle for the view that the law of peoples should require only "a measure of" liberty of conscience. Again, if the hierarchically structured governmental arrangements in decent societies are inconsistent with the liberal democratic requirement that all the members of a society must be guaranteed the right to participate on equal terms in political decision making, then the political participation requirements ensconced in the law of peoples must be moderated to accommodate this fact. Well-ordered societies must respect the right of their members to be "consulted" but they need

not follow the example of liberal democratic societies and accord them the right to participation in political processes on terms of equality. All this at least suggests that part of the motivation behind Rawls's endorsement of a kind of human rights minimalism is largely pragmatic, in that a consensus about human rights to which both liberal democratic and decent peoples can be parties seems to be achievable only if ambitious lists of human rights are subjected to quite drastic pruning.

As for what I have called "enforcement" minimalism about human rights, there seems to be good reason to think that Rawls's position in *LoP* is minimalist in this sense. Although, as we shall see, Rawls seems to want to refashion the traditional doctrine of state sovereignty in ways that open the door to intervention by other states in the internal affairs of a society in which the human rights of the members are being violated, he doesn't want to open the door more than a crack. This is to be achieved, not only by requiring that there is evidence that the rights violations are widespread and persistent – and by requiring too that interventionist measures (military, economic, or diplomatic) are likely to lead to a significant reduction in such violations – but also by insisting that the rights being violated are among the most fundamental of the rights human beings have.

There remains a good deal of uncertainty, however, both about the precise content of, and about the precise motivation behind, Rawls's human rights minimalism in *LoP*. This is the case not only because he doesn't consciously address the issue – and because, *a fortiori*, he doesn't make it clear whether any concerns he may have lie more on the "justification" or on the "enforcement" side of the distinction I have drawn – but also because there is reason to fear that his discussion confounds the justification and enforcement issues at important junctures. It is easy for readers of *LoP* to come away with the strong impression that part of the underlying reason for the narrow doctrine of human rights he endorses is his seeming unwillingness to so much as recognize something as a "human right" unless "intervention" to enforce its protection might in principle be warranted. If this cannot be dismissed as a simple misreading of the text of *LoP*, it reveals a very serious confusion. A much sharper distinction is needed between questions about the content and scope of doctrines of human rights, on the one hand, and questions on the other about the strategies that ought to be adopted to secure respect for, and protection of, human rights. Once these questions are distinguished, two things become clear. First, coercive measures (including such coercive measures in the international domain as military intervention and diplomatic or economic sanctions) form only a sub-class – perhaps only a small sub-class – of the measures that ought to be contemplated for the purpose of fostering respect for human rights across the world. Second, it is a mistake to think that lists of human rights should be pruned until the only rights they contain are rights it might be legitimate, in the right circumstances, to enforce by resort to coercive measures.

2 State Sovereignty and the Role of Human Rights

An important feature, in *LoP*, of Rawls's account of international justice (justice among "peoples") is his repudiation of the traditional doctrine of state sovereignty. According to Rawls, states are not free to adopt whatever policies they please in matters of domestic policy nor, in their dealings with other states, are they entitled to pursue their own interests by any and every means within their power. Both of these claims are related to what he has to say in *LoP* about the role of human rights. In matters of domestic policy, what states are entitled to do is constrained by the obligation to respect the human rights of their citizens. In matters of foreign policy, intervention in the internal affairs of other states may sometimes be justified to put an end to gross violations of human rights. The two points are of course connected, in that it is only by pursuing domestic policies that are respectful of human rights that states can secure themselves against legitimate intervention in their internal affairs by other states.

It consequently looks as though Rawls's doctrine of human rights in *LoP* offers hope for more effective protection of human rights in all parts of the world, on the one hand by diminishing the right of states to violate human rights with impunity within their own borders, and on the other by giving other states the right to intervene in their internal affairs if such violations continue to occur. How far is this a well-founded hope?

One reason for thinking that the hope is somewhat illusory – and it is the reason on which I shall principally focus – is the extreme narrowness of the doctrine of human rights to which Rawls assigns so important a role. The rights to which domestic and international recognition is to be given under the Rawlsian doctrine form a small sub-class of the rights recognized in the *Universal Declaration of Human Rights*. There cannot, of course, be a legitimate objection to the mere fact that Rawls is unprepared to take his cue, in giving content to a doctrine of human rights, from the rights enumerated in the *Universal Declaration* (and, in more detail, in such international documents as the *Covenant on Civil and Political Rights* and the *Covenant on Social, Economic and Cultural Rights*). However, a philosophically defensible doctrine must incorporate an appropriate account of the rationale for the rights that are to be singled out as human rights – the sort of rationale that is of course not to be looked for in such international documents as the *Declaration* or the *Covenants*.

The problem, however, is that the rather sparse list of rights Rawls sets out in *LoP* is one for which he offers neither a clear explanation nor a satisfactory defense. Among the rights that are conspicuously absent from his list – and it is the omission of these that will play an important role in much of the argument of this paper – are the right to (full and equal) liberty of conscience and the right to participation on terms of equality in political decision-making processes.

3 Rawls's Political Liberalism and the Doctrine of Human Rights in *LoP*

One of Rawls's central purposes in *LoP* is to extend to the problem of international justice the approach to matters of domestic justice that is adopted by "political liberalism." An essential (not to say defining) feature of this approach is that when it is understood that putative principles of justice are to be used to settle political issues – about the recognition of the rights of citizens, the shape of political institutions, the thrust of public policy, etc. – their justification cannot take the form of appeal to any so-called "comprehensive" (moral or religious) doctrine. The only defensible approach to domestic political questions is one that invokes a "political" conception of justice, one that can be a matter of agreement among the sponsors of a wide variety of comprehensive (moral or religious) doctrines. There can be agreement on this political conception because it represents an "overlapping consensus" among these doctrines. Despite the differences there may be among the comprehensive doctrines in question, all who subscribe to these doctrines are thus in a position to accept the principles of justice that give content to the so-called "political conception" as the principles on the basis of which basic political issues are to be resolved. They can do so, moreover, without abandoning (or even modifying) the comprehensive doctrines to which they subscribe.

On one straightforward way of understanding the Rawlsian idea of an "overlapping consensus," a shared (and principled) approach to the settlement of questions in the political domain – questions about the rights of citizens, or about the shape of political arrangements, or about the general direction of public policy – can consort with an indefinite amount of disagreement about the ways in which various non-political (moral or religious) questions about the way life should be lived are to be dealt with. Indeed, since the political conception of justice favored by "political liberals" must be "stable for the right reasons," the consensus that is in principle achievable in the political domain must extend to the rationale for the rights to be enjoyed by citizens as well as to the nature of the justification for political institutions, programs, and policies.

It is consequently entirely unclear why, when it comes to questions of international justice, there is so much apparent discontinuity between the approach Rawls recommends and the approach to domestic issues of justice favored by political liberals. The most striking manifestation of this discontinuity is Rawls's apparent willingness to support the claim of so-called "decent hierarchical" societies to various arrangements in the political domain that are called for by the comprehensive doctrines – moral or religious – to which their rulers happen to subscribe. Rawls is rather dismissive of the view of political liberals who favor an unrepentantly liberal approach to issues of international justice. They point out that political liberals for whom domestic political arrangements cannot be grounded

in comprehensive (moral or religious) doctrines ought, in consistency, to be unwilling to make concessions to sponsors of comprehensive doctrines when they attempt to privilege these doctrines in the structuring of political arrangements in the international domain. Indeed, the considerations that rightly persuade political liberals to dismiss approaches to the settlement of domestic political questions that involve appeal to (divisive) comprehensive doctrines ought, in consistency, to provide a basis for dismissing approaches to the settlement of questions in the international domain (including questions about the foreign policy of liberal societies) that involve appeal to (what are presumably some of the very same) comprehensive doctrines. Just as at the level of domestic politics, the preferred solution is to draw a sharp distinction between the political and non-political spheres – and to insist that comprehensive doctrines have a legitimate application only in the latter – so too, when questions of international relations have to be dealt with, the preferred solution (from the standpoint of political liberalism) ought to be one that permits appeals to comprehensive doctrines only in the non-political sphere.

4 The Importance of the Role in *LoP* of Rawls's Narrow Doctrine of Human Rights

Rawls's insistence on the adoption by liberals of a foreign policy that accords full recognition as societies in good standing to the non-liberal societies he calls "decent hierarchical" societies is reflected in – or facilitated by? – the very narrow doctrine of human rights articulated in *LoP*.

When he is trying to fend off liberal critics who think his position is "insufficiently liberal" – critics for whom the long-term aim of a properly liberal foreign policy should be the transformation of all societies into liberal democracies – he maintains that it cannot be argued, against full recognition of decent societies, either (a) that they do not respect and protect "human rights" or (b) that they fail to give their citizens an adequate role in political decision-making processes. Against (a) he insists that decent societies do recognize and protect the human rights of their members. Against (b) he points out that decent societies give recognition to the right all their members have to be consulted about (at least a certain range of) political matters. Although their constitutional arrangements are not democratic – political decision-making authority being vested in the members of an unelected elite who occupy key positions within the ruling hierarchy – all members of decent societies have a right to be consulted.

It is implicit in this response that if it could be shown, in support of (a), that decent societies do not respect and protect the human rights of their members,[9] their status as societies with equal standing in a Rawlsian society of well-ordered peoples would be imperiled (indeed, undermined). This makes it critical to the defense of the Rawlsian position for only a narrow doctrine of human rights to be sponsored – a doctrine, that is, with a short list of human rights. The defense

would collapse if it could be shown – contra Rawls – that the right to full and equal liberty of conscience (a right decent societies do not recognize) is a human right and/or that the right to participation on equal terms in political decision-making processes (another right decent societies do not recognize) is a human right. A broader doctrine of human rights – one that included one or both of these rights – would make it impossible for Rawls to claim that decent societies respect and protect human rights. The contention that (a) is a claim that liberal critics of Rawls cannot advance would be false and thus one of the crucial parts of Rawls's defense of his position against these critics would collapse.

What about (b), the claim that decent societies do not recognize in any adequate way the political participation rights of their members? Rawls's dismissal of this claim is also vulnerable. As has already been noted, one possibility would be to represent the right to participate on terms of equality in political decision-making processes (a right not recognized by decent societies) as a fundamental *human* right. The claim in (b) would then not be in need of defense independently of the claim in (a). But there is of course another possibility. Even if it could not be argued – contra Rawls – that political participation rights are *human* rights, the claim in (b) could be defended on the ground that the attenuated version of political participation rights favored by decent societies offers an inadequate account of the participation prerogatives societies in good standing ought to be prepared to accord all their members.

The crucial question is this: if it is important for societies in good standing (societies that are entitled to full membership in a Rawlsian "society of well-ordered peoples") to give their members an adequate role in the making of political decisions, what justification is there for the view that an appropriate formulation of the requisite right to participate is the attenuated version of this right to which alone recognition is given by decent societies? There seems to be no *argument* in *LoP* for this view. Indeed, there is something disturbingly *ad hoc* about the position Rawls adopts. He does nothing more – it seems – than *stipulate* that a decent society[10] is one that has a "consultation hierarchy" and that it consequently gives recognition to nothing more ambitious than the right its members have to be "consulted." This may indeed be a *defining* feature of a Rawlsian "decent" society. The question to which we seem to have no answer at all, however, is the question whether – and if so, why – a society that gives recognition to the political participation prerogatives of its members in this very limited way ought to be viewed by (political) liberals as a society in good standing in a "society of well-ordered peoples."

5 Rawls's Arguments for the Narrow Doctrine

What, then, does Rawls suppose the rationale to be for the rather narrow doctrine of human rights to which he commits himself in *LoP*?

One possibility (it might be thought) is that it is to be found in the original position argument "at the second level"[11] in which the representatives of peoples seek agreement about the principles to be embedded in a "law of peoples." After all, one of the eight principles about which Rawls thinks there would be agreement in this second-level "original position" requires the peoples that are the parties to this agreement to "honor human rights."[12] The trouble is that although the parties to the "social contract" establishing a Law of Peoples are depicted as endorsing the requirement that respect for human rights is to serve as a constraint on the internal policies and practices of all states, the principle they endorse to this end does not itself specify *which* rights are to be given recognition as "human rights." While Rawls does take on, in at least two passages elsewhere in *LoP*,[13] the task of providing (at least part of?) the required specification, there is no indication what the rationale is thought to be for the inclusion of certain items on the lists in question (no indication, either, why certain items one might reasonably suppose ought to be on them are given no recognition). The explanation cannot be that Rawls thinks the social contract that yields agreement about the eight principles is the *source* of the answer to the question why the list of human rights he works with contains just the rights that are listed. On the contrary, the rationale for the list – whatever it should be thought to be – seems to be independent of (and perhaps prior to) the second-level original position argument. There are no features of the "second level" original position argument (whether in the "liberal peoples" version or in the "decent peoples" version) that throw light, for example, on why the right to participation in political decision-making processes (even in the attenuated version favored by decent societies – in the form, that is, of a right on the part of all a society's members to be "consulted" about political matters) does not get on to the list of human rights all peoples are committed to "honoring." Nor does the argument serve to explain why the right to *a measure of* liberty of conscience does, while the right to *full* liberty of conscience does not, count as a human right.

The second-level original position argument is in any case peculiarly ill-suited to settling questions about the rights of the individual members of a society, since it is said to be the principal (perhaps the only?) function of the argument to tell us what justice requires in *the relations between peoples.* If there is an original position argument that can furnish the rationale for a doctrine of human rights – where these are, at least centrally, rights *individual human beings* are taken to have – it looks as though it would have to be a "first level" original position argument.

But this draws our attention to another very peculiar feature of the view Rawls takes as a social contract theorist in *LoP.* He announces that while there is a first-level original position argument to which appeal can be made in determining the content of the principles of justice that are to shape a liberal society's *domestic* political arrangements, no such argument can be constructed for decent societies. Why? Is it because the principles of justice for domestic political contexts that

would be selected by the parties in an original position are principles – *liberal* principles – that decent societies would reject? If so, it is a very curious reason for anyone who is enamored of original position arguments. Instead of carving out an exception for decent societies – allowing them to adopt a conception of justice that would *not* be chosen from an original position – political liberals, including Rawls, should find the approach of decent societies to questions of justice in the political domain simply *indefensible*.

If there is to be an attempt to give content to the doctrine of human rights by appeal to an original position argument that is *not* the sort that yields principles of justice for the ordering of *domestic* political arrangements – and domestic arrangements *alone* – it looks as though it will have to be the kind of original position argument favored by Rawlsian cosmopolitan theorists. This argument, it would seem, is just the sort of argument it should be possible to construct – if one has faith at all in the broadly "contractarian" methodology that any original position argument presupposes – if we want to be in a position to say what the rights are that *any* individual human being ought to be taken to have. Yet this, clearly, is not the kind of answer to our question about the rationale for the *LoP* doctrine of human rights that Rawls wants to endorse. Indeed, he expressly rejects the idea that questions of international justice are best approached through the elaboration of a *global* version of the original position argument.[14]

Where does that leave us, then, on the question of the rationale for Rawls's (narrowly drawn) doctrine of human rights in *LoP*?[15]

There are passages in *LoP* in which Rawls seems to be suggesting that there are *two* ways in which the rationale for the rights he dubs "human rights" might be conceived. On the one hand, there is the sort of rationale endorsed in liberal societies, a rationale that takes for granted that a society is, in the first instance, a society of "free and equal" *individuals*. On the other hand, there is the sort of rationale endorsed in decent societies, a rationale that takes for granted that the members of a society are, in the first instance, members of *groups* and assigns rights to them, not as individuals (in the sense of the term central to a liberal understanding of society) but as members of the groups to which they belong and with which they identify.[16]

Unfortunately this "dual rationale" account is not elaborated in sufficient detail to make it clear why precisely Rawls thinks it defensible to exclude from the short list of human rights he favors certain rights he himself regards as of central importance to a just society – such rights, notably, as the right to full and equal liberty of conscience and the right to participation on terms of equality in political decision-making processes. Moreover, the attempt to sponsor (what might be dubbed) a two-track account of the rationale for human rights – whatever the details of the account should turn out to be – gives rise to at least two disquieting questions.

First, are these two different justificatory stories – the stories that purport to articulate the rationale for human rights favored by liberal and decent societies

respectively – to be read as stories that converge on a single (agreed) list of rights, or are the lists of rights justified in these different ways two rather different (even if also, to some extent, overlapping) lists of rights? Are we to suppose that, despite the (quite considerable) differences there are in the content of the two justificatory stories, it just *happens* to be the case either (a) that there is complete agreement about the list of rights to be given recognition as human rights, or (b) (if the two lists are not identical) that there is agreement, nevertheless, to *count* as human rights only those rights that appear on both lists? These questions are disquieting, on the one hand because it is natural to expect different justificatory stories to go hand-in-hand with different lists, and on the other, because it is entirely mysterious how a single list is supposed to emerge if the two lists do indeed differ in content. What, for example, would the justification be, from the standpoint of the sponsors of each of the two different lists, for simply settling for a list of the rights that *happen* to be on both lists instead of taking on, or pursuing more relentlessly, the question which of the justificatory stories is the more reasonable?

The second problem suggested by Rawls's willingness to allow for two mutually incompatible accounts of the rationale for the *LoP* doctrine of human rights is that it is difficult to square with his insistence on the universality of the rights in question. In particular, if the representatives of decent societies are to be allowed to sponsor a list of human rights that is considerably shorter than any list the sponsors of liberal principles of justice would be content to endorse – on the ground, merely, that liberal principles of justice are *not in fact accepted* by the representatives of decent societies – it is difficult to see why the representatives of so-called "outlaw" societies should be thought to be under an obligation to respect the human rights about which liberal and decent societies happen to be in agreement despite the fact that *they* do not accept the principles from which these rights derive. The sense in which human rights are said to be "universal" – and thus binding on all societies – seems to be inconsistent with any attempt being made to trim the doctrine of human rights to accommodate the "common good conception of justice" embraced by decent peoples. If the "dual rationale" account Rawls seems to accept in *LoP* involves any such trimming, it is arguably inconsistent with his contention[17] that human rights are "binding on all peoples and societies" – binding on them "*whether or not they are supported locally*" (emphasis added).

6 "Ideal" and "Non-ideal" Theory in *LoP*

A further puzzling feature of Rawls's argument in *LoP* – and a major source, arguably, of the difficulties into which he runs trying to reconcile liberal principles of international justice with unblinking defense of the political arrangements (institutions, policies, practices, etc.) of decent societies – is the way in which he

distinguishes questions of "ideal" theory from questions of "non-ideal" theory. The distinction itself is relatively unproblematic (and useful) if it enables us to distinguish between questions about political arrangements (whether in the domestic or in the international domain) that would more or less fully satisfy the requirements of justice, and questions about the implementation strategies that ought to be adopted with a view to bringing about such ideally just states of affairs.[18] It is some such distinction that Rawls seems to want to draw when he says that ideal theory abstracts from issues of compliance with principles of justice by making the (clearly contrary-to-fact) assumption that there is "full compliance" with these principles. It is then the task of non-ideal theory to determine how (at least some reasonable measure of) compliance with principles of justice is to be secured when, initially, there is (at least some degree of) non-compliance.

The trouble with the distinction as Rawls deploys it in *LoP*, however, is that, instead of treating all societies, including both ostensibly liberal societies and so-called decent societies, as posing some of the problems that arise in non-ideal theory – simply because of the imperfect degree to which they will be found in practice to have complied, fully and effectively, with all the requirements of justice – he treats questions about liberal and decent societies as questions belonging to ideal theory, reserving discussion in non-ideal theory for "outlaw" societies, "burdened" societies, and "benevolent absolutisms." It would arguably be less misleading, for someone like Rawls who is a committed (political) liberal, to restrict ideal theory to the elaboration (with suitable supporting argument) of the principles that would be exemplified in the institutions, policies, and practices of an ideally just society – a society Rawls would have to represent as a society that fully exemplifies the principles of liberal justice – and relegate to non-ideal theory all discussion of strategies for the more effective implementation, over time, of these principles. Instead of dealing, under the head of "non-ideal theory," only with the problems posed for liberals (and in particular for the problems posed for a liberal foreign policy) by (a) "outlaw" societies, (b) "burdened" societies, and (c) "benevolent absolutisms," he would also have to deal, under this head, with the problems posed both by (d) the imperfect degree to which even liberal democratic societies have established fully just institutions, practices, and policies, and (e) the shortcomings, from the standpoint of justice, of decent societies. Not only would it be salutary for express recognition to be given in this way to the fact that even so-called liberal democratic societies are typically rather imperfect when their institutions, practices, and policies are scrutinized from the standpoint of justice;[19] it would also make it possible for Rawls to give more prominence to the failure of decent societies to honor some pretty fundamental human rights – including (notably) the right to full and equal liberty of conscience and the right to equal participation in political decision-making processes. Instead, what we get from Rawls is an attempt to protect decent societies from such criticisms by refusing to count as "human rights" the rights that decent societies are unprepared to recognize.

7 Strategies for the International Enforcement of Respect for Human Rights

A franker acknowledgment by Rawls of the fairly fundamental deficiencies of decent societies – deficiencies evident in the constitutional arrangements that are among their defining characteristics – could advantageously be accompanied by a more realistic recognition of the great diversity there is in the strategies that may have to be adopted as part of their foreign policy by liberal democratic societies if progress is to be made towards the transformation over time of various kinds of unjust societies into societies marked by fewer injustices. Over-concentration on the stark injustices that are to be found in "outlaw" societies seems to go hand in hand in *LoP* with excessive attention to a narrow band of rather ambitious strategies for the elimination of injustice – military intervention, for example, or the imposition of diplomatic and economic sanctions. It is understandable that these are strategies Rawls would be unwilling to see adopted by liberal societies in their dealings with decent societies. It is perhaps not without significance that there is some hesitancy in Rawls's discussion of the question whether it would be defensible to go to war against even an "outlaw" society simply to put an end to (gross) violations of human rights – to go to war, that is, even if there were no reason to think that the society in question posed a security threat to other societies.[20]

Whether or not Rawls's reluctance to extend just war theory through express recognition of the right to take military action against outlaw societies for the (sole) purpose of putting an end to violation of human rights proves in the end to be defensible, it is certainly plausible to think that resort to war would normally not be the appropriate (or even a morally permissible) response to the injustices found in decent societies. For one thing, resort to war ought to be seen to be a last resort – a strategy to be adopted only when all other less drastic strategies have proved inadequate. For another, it is likely to be a singularly ineffective means of trying to bring about lasting changes in a society's political arrangements in the direction of greater democracy.[21] And although diplomatic and economic sanctions are (potentially) less damagingly "interventionist" than resort to war, it is understandable that Rawls should think that they too are unduly "coercive" – too coercive to be useful instruments of policy for a liberal society in its dealings with decent societies. If Rawls had conceived of non-ideal theory somewhat more broadly – as covering questions liberals need to try to answer as they hammer out a foreign policy for dealing with both less-than-fully-just liberal democratic societies and decent societies – he might have given more consideration to strategies in the war against injustice that are much less intrusive (and therefore, perhaps, also more effective) than the "coercive" strategies that seem to him to provide the principal options when policies for dealing with "outlaw" societies are at the center of attention.

Conclusion

I began this paper with the question whether Rawls's account of human rights in *LoP* can be characterized as "minimalist," and with a related question about what might motivate it in so far as it can be so described. In the final section I suggest that at least one form of minimalism to which he does seem to subscribe – namely, what I called "enforcement minimalism" – is difficult to contest if it simply recommends a very cautious approach towards military intervention as a means of protecting human rights when they are under threat. It is worth underscoring the point, however, that this sort of caution can readily go hand in hand with a much more expansive doctrine of human rights than Rawls seems prepared to allow himself. Indeed, if such an expansive doctrine is combined – as of course it ought to be – with a realistic and yet imaginative view of the very diverse strategies that may have to be contemplated, in situations of different kinds and for rights of different sorts, if the goal of a world in which human rights are everywhere respected is ever to be achieved, then there is reason to regret the fact that Rawls's approach to issues of international justice in *LoP* fails to mirror adequately the liberal democratic convictions to the defense of which he devoted so much of his illustrious career.

Notes

[1] For a recent example of this sort of argument, see Michael Ignatieff's Tanner Lectures at Princeton, published in 2001 under the title *Human Rights as Politics and as Idolatry*. For a critical discussion of some of the issues raised by Ignatieff, see Joshua Cohen's "Minimalism about Human Rights: the Most We Can Hope For?" in *The Journal of Political* Philosophy, 12/2 (2004).

[2] Leading examples of the kinds of "coercive measures" in question would be military intervention and the imposition of economic or diplomatic sanctions. These are the sorts of measures for the enforcement of respect for human rights that are mentioned by Rawls in *The Law of Peoples* as measures liberal democratic and "decent" societies may have to contemplate adopting in their dealings with "outlaw" states – reluctant, and circumspect, though they of course ought to be about actually resorting to any of them.

[3] That is, both the "principled" minimalism for which a justification simply cannot be provided in principle for many of the putative rights on longer lists, and the "pragmatic" minimalism for which the best that can be expected is an international consensus about the status of only the most fundamental rights on longer lists.

[4] John Rawls, *The Law of Peoples* (hereafter *LoP*), Cambridge, MA: Harvard University Press, 1999.

[5] For Rawls's understanding of a "decent" society, see footnote 2 on p. 3 of *LoP* and also the extensive discussion in Part II of *LoP* (esp. pp. 59–78). For the purposes of this paper, two differences between "decent" societies and "liberal democratic" societies are important. First, the members of "decent" societies enjoy only "a measure of" liberty of

conscience (not the full liberty of conscience enjoyed in liberal democratic societies). Second, the members of "decent" societies have a right to be "consulted" about the direction of public policy but not a right to participate on terms of equality in political decision-making processes.

[6] See, for example, p. 65 of *LoP* for one version of the short-list of human rights he sponsors and pp. 79–80 for another version.

[7] By the "early" Rawls, I mean the author of *A Theory of Justice*, and by the "later" Rawls the author of *Political Liberalism*.

[8] See, for example, *LoP*, p. 83. (". . . I am not saying that a decent hierarchical society is as reasonable and just as a liberal society. For . . . a decent hierarchical society clearly does not treat its members equally.") There is further discussion in Section 6 below of this feature of Rawls's account in *LoP*.

[9] Rawls's claim is that "decent" societies should respect (*all*) "the" human rights of their members. The claim is *not* that such societies should recognize and protect some, or even most, of their members' human rights.

[10] The sort of decent society, at any rate, that he describes at some length in his account of the institutional arrangements in "Kazanistan." See *LoP*, sect. 9, pp. 71–8.

[11] What Rawls calls "the original position argument at the second level" is formulated twice in *LoP*. In the first – which is set out in *LoP*, 3.2, pp. 32–4 – the parties who are depicted as choosing a Law of Peoples are representatives of "liberal peoples." In the second – which is set out in *LoP*, 8.4, pp. 68–70 – the parties represent "decent peoples." Despite the differences there are said to be between the conceptions of justice to which "liberal" and "decent" peoples subscribe – and there is discussion of some of these differences in *LoP*, 8.2, pp. 64–7 – Rawls maintains (*LoP*, p. 69) that the representatives of "decent hierarchical peoples" would "in an appropriate original position" adopt "the same eight principles (4.1) as those I argued would be accepted by the representatives of liberal societies."

[12] The principle, as set out in *LoP*, reads: "Peoples are to honor human rights" (p. 37).

[13] See *LoP*, p. 65 for the first of these passages, and *LoP*, pp. 79–80 for the second.

[14] *LoP*, sect. 11, pp. 82–3.

[15] I omit discussion here of the rather cryptic remarks Rawls makes about the connection there is between respect for human rights and the satisfaction of certain minimal conditions of (voluntary) social cooperation. The "essential conditions of social cooperation" argument is much too skeletally developed for it to be at all clear how it could serve to determine the content – and the boundaries – of a doctrine of human rights.

[16] *LoP*, p. 68.

[17] *LoP*, p. 80.

[18] Importance obviously attaches to care in the devising of implementation strategies, given (a) that principles of justice are in practice only imperfectly realized in societies as we find them, and (b) that there are obstacles of various kinds to be overcome – including the rather formidable obstacle presented all too often by the sheer unwillingness of those who wield political power to adopt justice-promoting policies.

[19] Consider, for example, the "democratic deficit" there is in such nominally democratic societies as the United States – and the degree to which they have failed to adopt measures for the adequate recognition and protection of certain fairly fundamental human rights in the areas of health, education, and welfare.

[20] *LoP*, p. 81. See footnote 26 on this page. (But see also the later discussion, in sections 14 and 15, of the "question of interfering with outlaw states simply for their violation of human rights, even when these states are not dangerous or aggressive.")

[21] If the right to participate on terms of equality in political decision-making processes is to be given recognition by the members of a "decent hierarchical" society, it is almost certainly *not* going to be on the basis of a military invasion aimed at establishing a democratic regime.

9

Taking the Human out of Human Rights

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1 Rawls's Commitment to Avoiding Parochialism

One of the most valuable features of *The Law of Peoples* is the unflinching acknowledgment of the need to develop a conception of human rights that is not vulnerable to the objection that human rights are parochial – more precisely, that what are called human rights are merely rights suitable for members of liberal societies. It is at least in part because he takes the problem of parochialism so seriously that in order to avoid it he is willing to reduce the list of human rights found in the six major human rights conventions by more than 50 percent.[1] For Rawls parochialism is a grievous deficiency from a liberal perspective because it signals a failure to honor what he takes to be the liberal commitment to tolerance, which in turn requires reciprocity of justification: the principles to which we hold others must be such that they cannot reasonably reject them, at least so far as their comprehensive moral views are themselves not unreasonable.

In this essay I critically examine Rawls's response to the parochialism objection. I will argue that Rawls's approach can be understood as an attempt to ground a theory of human rights without recourse to a conception of minimal human good and indeed without reliance on the idea that there are any morally fundamental characteristics that all human beings have. In that respect, I shall argue, the most distinctive feature of Rawls's theory is not that he takes the parochialism objection seriously, but that in order to rebut it he develops a theory of human rights in which the idea that these rights are grounded in our humanity is conspicuously absent. I will show that Rawls's reasons for eschewing the idea of humanity are not cogent and that his arguments for shortening the list of human rights are unconvincing.

Rawls's list of human rights

Rawls's list of human rights does *not* include the right to freedom from religious discrimination, but rather only the right to freedom from religious persecution, understood as the right to freedom of religious thought and to practice one's religion "without fear." Nor does it include a right to freedom from other forms of discrimination – including systematic, institutionalized, public discrimination – on grounds of race, gender, ethnicity, nationality, or sexual orientation. Beyond the right to subsistence and a wholly unspecified right to personal property, so-called welfare rights of any kind are also absent. So it appears that for Rawls a society in which there is a permanent racial, ethnic, religious, or gender underclass, hovering just above subsistence, systematically excluded from the more desirable economic positions, having grossly inferior property rights, lacking access to education and health care services available to the dominant classes, unable to afford legal counsel and bereft of sophisticated due process protections available to others, would *not* be a society in which those who were thus disadvantaged could complain that their human rights were violated.[2]

No aid from Kazanistan

It is true that Rawls's brief description of Kazanistan, his hypothetical example of a nonliberal ("hierarchical") decent society, is not so bleak. However, Rawls gives us no reason to believe that a society whose respect for human rights was limited to his truncated list of rights would be as tolerant as Kazanistan. Our understanding of Rawls's conception of human rights must be based on his arguments, not on his very sketchy and misleading example of a nonliberal, but decent society. Perhaps a nonliberal society *could* be as benign as Kazanistan, but that is beside the point.[3] The question is whether the implementation of Rawls's austere conception of human rights would provide adequate protection against egregious discrimination. It would not.[4]

Given that Rawls's attempt to avoid the charge of parochialism appears to lead him to a truncated list of human rights whose implementation is compatible with severe discrimination and oppression, it behooves us to examine critically the arguments by which Rawls arrives at this unsettling destination. Although the text of *The Law of Peoples* is arguably more ambiguous than Rawls's other works, I believe four mutually compatible lines of argument can be distinguished. The first, the Political Conception Argument, begins with the idea, taken from *Political Liberalism*, that avoiding parochialism requires not relying upon *comprehensive conceptions of morality or the good*.[5] The second, the Associationist Argument, holds that any attempt to ground human rights in a conception of basic *human* interests would be biased against and hence intolerant of what Rawls calls "associative social forms," because this type of society "sees individuals first

as members of groups" within society, rather than as having certain interests common to all human beings. The third, the Cooperation Argument, attempts to derive Rawls's lean list of rights from intuitions about what it is for a society to be a form of cooperation as opposed to a command system based on force and about the moral significance of cooperation. The fourth, or Functionalist Argument, tries to derive Rawls's list of human rights from the assumption that the distinctive function of human rights norms is that their violation supplies grounds for interventions across borders.

2 Avoiding Parochialism by Avoiding Comprehensive Conceptions

In the following passage from *The Law of Peoples* Rawls appears to say that unless a theory of human rights avoids reliance on a comprehensive moral conception, it will be parochial and for that reason unacceptable. The implication is that a more expansive list of human rights than his, in particular one that includes rights distinctive of liberal societies, must rely on a comprehensive moral conception.

> [Human] rights do not depend upon any particular comprehensive religious doctrine or philosophical doctrine of human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God: or that they have certain moral and intellectual powers that entitle them to these rights. To argue in any of these ways would involve religious and philosophical doctrines that many decent hierarchical peoples might [not unreasonably] reject as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures.[6]

Political versus comprehensive conceptions

For Rawls comprehensive and political conceptions differ in scope. In *Political Liberalism*, where the contrast is introduced, we are told that political conceptions are conceived of as applying to only a part of the domain of morality – the political realm of public principles of justice for the regulation of the basic structure of a society – while comprehensive conceptions speak to a wider range of subjects, including "what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole."[7] Political conceptions, in contrast, address individuals only as citizens, not as whole moral persons. Comprehensive conceptions and political conceptions differ epistemically as well: Comprehensive conceptions claim to be true while political conceptions claim only reasonableness.[8]

Given that Rawls sees *The Law of Peoples* as building on *Political Liberalism*, it is hardly surprising that in the former he holds that a theory of human rights must not rely upon any comprehensive moral conception. But in the first passage above he seems to be saying more than this – that to avoid parochialism a theory of human rights cannot include the idea that human rights are grounded in characteristics that all human beings have, such as certain "moral and intellectual powers." So the question arises: Must any theory of human rights that grounds these rights in characteristics that all human beings have rely on a comprehensive moral conception? Alternatively, to be a political conception in the sense required to avoid parochialism must a theory of human rights avoid reference to common human characteristics in its justification of a list of human rights?

Rawls versus the dominant philosophical view

It is clear enough that the dominant contemporary philosophical theories of human rights all hold that human rights are grounded in certain common characteristics of human beings. For example, James Nickel, Henry Shue, Amartya Sen, and Martha Nussbaum each ground human rights in common characteristics of human beings – more specifically, in a conception of basic human interests (or of central human capabilities in the cases of Sen and Nussbaum) understood as those interests that must be realized (or those capabilities that an individual must have) if a human being is to have the opportunity to live a *decent* or *minimally* good life.[9] It is also clear that all of these theories are intended to support longer lists of rights than Rawls's.

In grounding more extensive lists of human rights in characteristics common to all human beings these theorists scrupulously avoid at least one key feature of comprehensive conceptions of the good that does seem to run the risk of parochialism: These theories do not purport to apply to all or even most subjects in the domain of morality and they do not rely on anything approaching a full specification of human good. Because they assume that human rights are in some importance sense *minimal moral standards*, all of these theorists hold that the appropriate benchmark is a decent or minimally good human life, not the best human life or a fully good human life. The point is that an account of the conditions for having the opportunity to have a minimally good human life is agnostic as to the question of whether an encompassing theory of morality, one that covers all moral subjects, is even possible. Such theories are simply silent on most of the subjects within the domain of theories of morality; thus they have nothing approaching the scope of comprehensive conceptions. To the extent that their claims are modest in this way, the risk of parochialism is reduced.

Nor is it at all clear that these theories have the epistemic characteristic of comprehensive conceptions, namely an insistence on the truth of the human rights norms they ground. Little or nothing seems to be lost if we interpret them

as holding that their claims about the moral significance of basic human interests (or fundamental human capabilities) are justified while remaining agnostic as to whether, or in what sense, such claims are strictly speaking true.

Yet all such theories fail to meet *one* of Rawls's criteria for being political conceptions, even if they satisfy the others, and they are therefore comprehensive conceptions in Rawls's special sense, in spite of their minimalism: There is a (quite limited) sense in which they extend beyond "the political." For even if all of these theories of human rights apply primarily to the basic structure of society, they all also seem to include some human rights norms that apply, under some circumstances, to other areas of human life as well. Given their accounts of the preeminent moral importance of not undercutting human beings' basic interests (or capabilities), all seem to imply that individuals or groups can violate human rights in extra-institutional ways. In addition, they all include characterizations (though minimal ones) of human beings as such, not simply of human beings as *citizens*, viewed from the standpoint of their being subject to political institutions that are to meet standards of justice, and perhaps this too counts as having a scope that exceeds the political.

Suppose that we grant that the dominant contemporary theories are all, strictly speaking, comprehensive, not political conceptions in Rawls's sense. Does it follow from their being comprehensive conceptions in this very special sense that they are parochial and for that reason unacceptable? Why should the mere fact that a theory of human rights has some implications beyond the political realm make it parochial?

Why comprehensive conceptions are supposed to be parochial

To answer this crucial question one must understand why Rawls thinks it is necessary to restrict the inquiry to political conceptions. In *Political Liberalism*, Rawls makes it clear that the point of relying on political conceptions and avoiding comprehensive ones is that doing so is required by a proper acknowledgment of "the fact of reasonable pluralism." In *The Law of Peoples* it seems to be "the fact of not unreasonable pluralism" that underlies the insistence that a conception of human rights be political, not comprehensive. Rawls thinks that the conceptions of the good or of morality that distinguish certain nonliberal societies are "not unreasonable" and that a more expansive list of human rights would express an intolerant attitude toward them. The assumption here is that if someone can "not unreasonably" reject a principle, it is intolerant to impose it on them and violates the requirement of reciprocity of justification.

However, *if* the claims about basic human interests (or capabilities) that a theory relies on to ground a list of human rights are *justified*, then the fact that such theories are not political conceptions in Rawls's sense – the fact that they

include elements whose applicability extends somewhat beyond "the political"– seems irrelevant to the question of whether they are parochial. What matters is whether the claims are sufficiently justified; if they are, then it is unreasonable to deny them, and attempting to implement the human rights norms in question may not be parochial or intolerant in the sense of imposing an alien conception on those whose rejection of it is not unreasonable.

Remarkably, Rawls never directly addresses any of the interest-based (or capabilities-based) theories of human rights. He never argues explicitly that any such claims about morally significant common human characteristics ("moral and intellectual powers," etc.) are unjustifiable. Instead, he appears simply to dismiss all such theories because they exemplify *one* of his criteria for being comprehensive, as opposed to political – some of their key concepts apply beyond the political realm. Yet the connection between failing to meet this one criterion and being parochial is tenuous at best.

It is not my aim here to provide a convincing defense of the dominant approach to theorizing about human rights that Rawls dismisses, though I think this can be done. Instead, I simply want to emphasize how intuitively implausible it is to say that the mere fact that a theory of human rights (a) includes norms that in some cases apply to individual actions, not simply to the basic structure of society, and to that extent addresses individuals as human beings, not strictly as citizens of this or that polity, and (b) grounds human rights in characteristics common to all human beings, somehow disqualifies it from serious consideration because any such theory must be parochial and therefore intolerant.

The objection that the dominant contemporary theories of human rights are parochial deserves to be taken seriously; I do not mean to deny that. But whether they are parochial can only be determined by scrutinizing the content of the theories – in particular their claims about what the basic human interests are and their moral significance – and the institutional processes that allow for the ongoing criticism and revision of the norms in question. They cannot be ruled out as parochial simply because they have features (a) and (b).

No doubt Rawls would reply that he provides the needed argument in *Political Liberalism* – that there he has shown that the only proper response to the fact of reasonable pluralism is to develop a political conception of justice. But of course it is precisely the soundness of the central argument of *Political Liberalism* that is in question here. Those who hold that there are justifiable claims about morally significant basic human interests (or capabilities) needn't reject Rawls's claim that tolerance requires refraining from espousing conceptions of justice that others can reasonably (or not unreasonably) reject. Instead they can argue that the claims about human interests (or capabilities) on which they ground a list of human rights are sufficiently justified that they cannot be reasonably rejected. Or, perhaps more plausibly, they can reject Rawls's assumption that it is intolerant to apply a conception of justice to anyone who can reasonably (or not unreasonably) reject it and hold instead that what matters is whether we are sufficiently justified in

holding the theory of justice we apply to them and whether the concrete efforts to implement that theory manifest the values that underlie tolerance, including respect for others' convictions and a proper appreciation of our own fallibility.

One reason for preferring the second alternative is an understandable skepticism about the usefulness of the notion of what cannot unreasonably be rejected. The problem, as many critics have noted, is that Rawls says far too little about what counts as reasonableness or the lack thereof. In one sense, we can well imagine cases where, given his systematically distorted belief system, it would not be unreasonable for someone to deny that certain rights are human rights, for example, those that protect women from serious and systematic discrimination. In one sense people who have only known life in an extremely sexist society may "not unreasonably" reject a more expansive list of human rights that includes equal rights for women – *if* what is not unreasonable for an individual to believe can depend upon the character of his or her overall system of beliefs. But even if that is so, it doesn't follow that efforts to secure the rights of women through the power of law in such societies are necessarily intolerant. To show that they are, one would need to do more than merely assert that tolerance requires not imposing on people principles that they can "not unreasonably" reject. If the reason why someone can "not unreasonably" reject a human rights norm is that his conception of morality is seriously distorted by indefensible beliefs about the natural inferiority of women, then it may not be intolerant to impose that norm on him. Surprisingly, Rawls never engages the question of whether meeting minimal epistemic standards is necessary for being entitled to toleration.[10]

To summarize: Rawls's view that if it is to avoid parochialism a theory of human rights must be a political, not a comprehensive conception, is not convincing and therefore does not supply a good reason for dismissing attempts to ground human rights in some set of morally significant characteristics common to all individuals. Interest-based (and capabilities-based) theories, being quite minimalist, need not be "comprehensive" in any sense that entails parochialism. Nor does the Rawlsian principle that it is illegitimate to impose principles on others that they can reasonably (or not unreasonably) reject, provide a cogent reason for assuming that any such theories are parochial and dismissing them out of hand.

3 Tolerance toward Associationist Conceptions of Individual Good

The key passage for this argument is one in which Rawls says that his list of human rights can be accounted for in two ways: One is to view them "as belonging to a reasonably just liberal political conception of justice . . . The other is to view them as belonging to an associationist social form . . . which sees persons first as members of groups . . ."[11]

Presumably the point of saying that an associationist social form sees persons "first" as members of groups is that in such a society what might be called an individual's *associative* (or *ascriptive*) *identity* is primary, in the sense that there is no more fundamental conception of an individual's good that is not tied to her being a member of this or that group within society. An associationist conception of individual good, then, is one according to which an individual's basic interests cannot be specified without reference to his or her identity as a member of this or that group (corporation, estate, etc.).[12]

Are appeals to basic human interests illegitimate?

If this interpretation is correct, Rawls is saying two things in this passage that have momentous import for his conception of human rights. First, he is saying that although the individual's good is conceived in a *nonassociationist* way in *liberal* societies, in that certain basic interests are ascribed to all individuals regardless of their group affiliation or social role, in *nonliberal* societies (or at least some of them, those that are "associationist social forms") an individual's good is *not* understood in this way. Instead, in "associationist social forms" any characterization of the individual's good is irreducibly social, and indeed not just social, but *particularistic* in the sense that the good of an individual cannot even be characterized simply by reference to his or her membership in a particular society, but also must include reference to her particular associative identity within that society.[13] Second, Rawls is saying – or at least implying – that it would be wrong to construct a list of human rights that ignores the fact that the individual's good is conceived in an associationist way in (at least some) nonliberal societies. Any conception of basic *human* interests assumes that it is possible to characterize a set of conditions necessary for *any* human being to have a good human life, and this is inconsistent with the view that what is necessary for a good life for an individual varies depending upon his or her membership in this or that corporation, association, or estate, and upon the role of that group in his or her society. That seems to be the point of his remark that his human rights – as distinct from what he takes to be the inflated conventional list – *can* be conceived of from the associationist standpoint. The idea is that to be legitimate a list of human rights must be accessible to members of associationist social forms, and this means that it cannot ground human rights on any conception of basic human interests, interests that all human beings have. The *point* of the passage seems to be that his list of human rights meets this criterion of accessibility and that this counts in favor of it; otherwise, the passage is mysterious.

According to this interpretation, Rawls is (1) stating that a theory of human rights grounded in a conception of interests that all human beings have would not be acceptable from the standpoint of (some) nonliberal societies, due to their

associationist conceptions of individual good, *and* (2) assuming that reliance on a standpoint that is unacceptable to such nonliberal societies is illegitimate.

There are two distinct reasons why Rawls might think that it is illegitimate to ground a list of human rights in a conception of individual good that is not acceptable in societies in which the conception of individual good is associationist. First, he might think that in fact *there are no basic human interests.* In other words, Rawls might believe that Sen, Nussbaum, Nickel, Shue, and others who hold that there are conditions that must be satisfied for any human to have the opportunity for a good life are simply wrong. Instead, there are simply the conditions necessary for a good life for members of a liberal society, on the one hand, and, in the case of nonliberal, associationist societies, the various conditions necessary for a good life for this or that individual, as a member of this or that association, in this or that society, on the other.

On the first interpretation, Rawls is denying that there can be an objectivist conception of human rights, a conception of human rights based on facts about the basic interests of all individuals, because *there are no such facts.* In my judgment, there is no textual evidence in favor of this first interpretation, and the following statement, which follows immediately after the passage cited above about associationist social forms, counts against it: ". . . The Law of Peoples does not deny these doctrines."[14]

On the second interpretation Rawls is agnostic – or at least noncommittal – as to whether there are certain basic interests common to all individuals. Instead, his claim is that the existence of basic human interests is sufficiently controversial that it would be *intolerant* to construct a list of human rights grounded on these interests. According to the second interpretation, Rawls believes that those who deny that there are basic human interests are not unreasonable and that if they are not unreasonable it is illegitimate to impose upon them a conception of human rights that relies on the assumption that there are basic human interests.

Human interests, parochialism, and intolerance

Are there any basic human interests, understood as conditions that are generally necessary and sufficient for the opportunity to lead a decent or minimally good human life (and hence necessary conditions for a good human life)? Some obvious candidates are the interest in avoiding torture, in physical security, and in not being enslaved.

Notice that what is at stake here is *how* one argues for human rights – whether or not it is legitimate to appeal to basic human interests – not whether Rawls, who on my interpretation claims to eschew any such appeal, includes among the human rights any rights that can be grounded in basic human interests.

My aim here is not to make a conclusive case that there are basic human interests, much less to ground a theory of human rights in them and then show

conclusively that such a theory would support a significantly more expansive list of rights than Rawls's. The mainstream human rights theorists noted above all have written sophisticated, closely reasoned volumes to do just that. My objective, rather, is to make clear how much of a departure from the mainstream Rawls's approach is and to demonstrate how unconvincing his reasons for pursuing it are. Consequently, I will focus primarily on how implausible it is to say that grounding human rights in basic human interests is illegitimate if one believes, as the mainstream theorists do, that there are basic human interests.

The key point is that there is nothing *parochial* about grounding human rights in basic human interests if, as seems clear enough, such interests exist. To say that a theory of human rights is parochial is to say that it is based on a partial, or narrow, or unduly circumscribed perspective – that it leaves out something of relevance. A theory of human rights based on interests that are common to all human beings is not based on a parochial conception of human good, if this means a conception of human good that is appropriate only for human beings in this or that particular society. To take the examples of basic human interests noted above, human beings have an interest in being able to avoid torture and violent death and in having enough to eat, regardless of what sort of society they live in. So such a conception of human rights is not parochial; nor, consequently, is it intolerant by virtue of being parochial. It is true that it counts as a "comprehensive conception" in Rawls's peculiar sense because, as I noted earlier, it has implications beyond "the political," even though it relies only on a minimalist conception of the good and does not claim to cover a wide range of subjects in the domain of morality or value. However, as I have argued, that one feature of what Rawls calls comprehensive conceptions alone does not justify the charge of parochialism.

If anything is parochial here, it is to deny that there are basic human interests or capabilities because one is so enmeshed in an "associationist social form" that one cannot conceive of an individual as having any interests or capabilities apart from those ascribed to her in virtue of the particular social identity she has in her own particular society. In other words, if there are basic human interests or capabilities, as it certainly appears there are, then to be limited in one's conception of individual good in the way Rawls attributes to members of associationist social forms is to hold a parochial view, one that fails to look beyond the confines of one's own society and one's particular place in it to recognize something that is common to all human beings. If this kind of parochialism is what causes people in certain societies to reject some of the conventional human rights, then the assumption that their views are "not unreasonable" – and for that reason are entitled to tolerance – is dubious at best.

Furthermore, if the goal is to be tolerant, there are many ways in which this can be achieved in the process of attempting to promulgate and institutionalize a theory of human rights that is grounded in assumptions about basic human interests or capabilities, without abandoning the whole enterprise. Tolerance

can be given its due in many aspects of the institutionalized processes of formulating human rights conventions and devising procedures to monitor compliance with their norms. For example, provision can be made, as it is in the current institutionalization of human rights, for ensuring that the various adjudication and compliance monitoring processes through which the content of human rights norms is specified and critically revised over time include inputs from a variety of cultural perspectives, under conditions of accurate information about what sorts of institutional arrangements are needed to protect human beings' basic interests.

If, as I have suggested, what is most distinctive about Rawls's approach to human rights is his rejection of the mainstream assumption that human rights are grounded in basic human interests, then one would expect that his international hypothetical agreement argument for his list of human rights would reflect this fact. I now want to argue that it does. In the next section I show that there is a plausible interpretation of the most controversial feature of Rawls's international hypothetical agreements that also supports my hypothesis that Rawls holds that it is illegitimate to ground a list of human rights on any conception of basic interests all human beings have because doing so is inconsistent with the way peoples with "associationist social forms" conceive of an individual's good.

Rawls's international hypothetical agreement

A number Rawls's critics have taken issue with the hypothetical agreement derivation of Rawlsian human rights.[15] Here I will focus on what I take to be the most obviously problematic feature of the hypothetical contract argument and show that it can be seen as a consequence of Rawls's rejection of the possibility of an account of human rights that grounds them in basic human interests.

Rawls says that both representatives of liberal and of decent nonliberal peoples would agree that all peoples are to respect his shortened list of human rights and that any society that respects these rights is entitled to nonintervention.[16] The crucial point – and the one that has drawn the most critical fire – is that for Rawls the choosers represent peoples, not individuals. Rawls asserts that the representatives of liberal peoples and of nonliberal decent peoples would choose the same principles for an international legal order, including the same list of human rights.[17]

Why peoples, not individuals?

The obvious question, for anyone who takes the international human rights movement seriously, is why the hypothetical agreements that determine the most fundamental principles of the international legal order should only include choosers representing peoples, not individuals. Given that the first modern human

rights conventions were in large part a conscious response to the Holocaust – in which millions of individuals were slaughtered by their own government in the name of a people (the German *Volk*) – one would think that the hypothetical international contract should include choosers who represent individuals. (Whether or not there should be a two-stage agreement that includes choices by representatives of groups and by representatives of individuals is another matter, and one that I have explored elsewhere.[18]) The result of not including representatives of individuals is a list of human rights sharply constrained by what is acceptable from the standpoint of nonliberal peoples, whose political cultures do not include the idea that society should be a system of fair cooperation among free and equal individuals.

Rawls believes that the parties must be representatives of peoples, not individuals, if the principles chosen are to remain within the bounds of tolerance. In the only passage in which he responds explicitly to those who criticize his assumption that the parties should be representatives of peoples, not of individuals, he suggests that it would be parochial, and hence intolerant, to conceive of the parties as representing individuals *as liberals conceive them* – as free and equal participants in cooperation:

> Some think that any liberal Law of Peoples, particularly any social contract [*sic*, any social contract theory of?] such law, should begin by first taking up the question of cosmopolitan or global justice for all persons.[19]

Here Rawls is addressing those who say that a law of peoples should be derived from a hypothetical agreement among representatives of individuals, and hence cosmopolitan, so far as cosmopolitanism takes individuals as morally primary. But he then goes on to say something quite different:

> They argue that in such a view all persons are considered to be reasonable and rational and to possess what I have called "the two moral powers" – a capacity for a sense of justice and a capacity for a conception of the good – which are the basis of political equality both in comprehensive liberalism . . . and in political liberalism. From this starting point they go on to imagine a global original position with a veil of ignorance behind which all parties [representing individuals] are situated . . . Proceeding this way would straightaway ground human rights in a political (moral) conception of liberal cosmopolitan justice. To proceed in this way, however, takes us back where we were in [section] 7.2 (where I considered and rejected the argument that nonliberal societies are always properly subject to some form of sanctions), since it amounts to saying that all persons are to have the equal liberal rights of citizens in a constitutional democracy.[20]

On the face of it, this passage contains a major confusion. Rawls is supposed to be rebutting the objection to having the parties represent peoples rather than individuals, but in fact he argues *that if the parties representing individuals are*

characterized in one particular way, as having the distinctive interests of persons *as conceived in liberal societies*, then the theory of human rights will confuse human rights with liberal rights – that it will be parochial. In brief, Rawls seems to slip from "including representatives of individuals as liberals conceive them would be parochial and hence intolerant" to "including representatives of individuals (*tout court*) would be parochial and hence intolerant."

But perhaps there is no confusion. Perhaps Rawls is assuming the following thesis: There is no way of conceiving of individuals such that the choice of principles of international law by their representatives in a hypothetical original position would not be biased toward liberal political conceptions. Call this assumption IB, for individualist bias.

Why might Rawls think that IB is true? My hypothesis is that he thinks that if the parties are to be representatives of individuals they must be characterized in ways that would be incompatible with the associationist conceptions of individual good that he believes are found in nonliberal societies and that this is tantamount to a bias in favor of liberal conceptions. In other words, there is no way of characterizing individuals – all individuals, regardless of whether they come from liberal or nonliberal decent societies – so that they could be represented in an original position for the choice of principles of international order, that would not conflict with the way individuals are conceived in associationist social forms. Any characterization that relied on a nonassociationist conception of individual good, any characterization that conceived of individuals' basic interests without reference to their particular associative identities, would be unacceptable from the perspective of (associationist) nonliberal societies – and therefore ruled out by principle IB above. So any attempt to include representatives of individuals in the original position is unacceptable, if one accepts IB.

Charity speaks in favor of attributing IB to Rawls: Unless Rawls subscribes to it, his justification for excluding individuals from the original position is based on an egregious slip from "don't include representatives of individuals as liberals conceive them" to "don't include representatives of individuals." If there are any basic human interests, then appealing to them in the characterization of representatives of individuals in a hypothetical choice situation is *not* the same as conceiving of the representatives in a peculiarly liberal way and hence is not parochial.

If this is Rawls's justification for excluding representatives of individuals from the original position, then his hypothetical agreement argument for the shortened list of human rights relies upon (1) the assumption that there is no defensible conception of basic human interests, interests that can be ascribed to all individuals regardless of what sort of society they live in, or upon (2) the assumption that even if there are basic human interests it is illegitimate to appeal to them in deriving human rights because doing so runs contrary to the way individuals are conceived in (associationist) nonliberal societies. I have already argued that neither of these assumptions is warranted.

4 The Argument from Cooperation

The following passage can be read as an attempt to derive Rawls's list of human rights from intuitions about cooperation and its moral significance. "What have come to be called human rights are recognized as necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind."[21]

In this passage Rawls suggests that a list of human rights can be derived from the idea of *cooperation*. The argument would go like this: (1) Every society that qualifies as a cooperative association is entitled to immunity from intervention. (2) A society is a cooperative association if and only if it is not based (primarily? exclusively?) on force, but rather exemplifies a common good conception of justice. (3) If a society respects the human rights R1, R2, etc. (Rawls's shortened list of human rights) of its members, then it is not based (primarily? exclusively?) on force, but rather exemplifies a common good conception of justice and is therefore a cooperative association. (4) Therefore, if a society respects rights R1, R2, etc. (Rawls's shortened list of human rights), then it is entitled to immunity from intervention. (5) A right is a human right if and only if it is a member of a set of rights such that if a society respects them, that society is entitled to immunity from intervention. (6) Therefore, rights R1, R2, etc. (i.e., Rawls's shortened list of human rights), and only these, are human rights. For Rawls a cooperative association exemplifies a common good conception of justice, and this in turn implies that social relations are rule-governed, that the good of every member of society counts, and that every member is regarded as a moral agent in the sense of being a subject of duties specified by his or her role or position.

Grounding human rights in characteristics of societies, not individuals

What is striking about the Cooperation Argument is that it *appears* to avoid any appeal to a conception of basic human interests or capabilities or to the idea that there are some characteristics that all human beings have that ground human rights. In brief, it seems to be an attempt to ground a list of human rights without recourse to the idea of humanity, the idea that there is something of moral significance that is common to all human beings. Instead, it purports to derive a list of human rights from a view about what characteristics a *society* must have if it is to be decent, or worthy of nonintervention – namely, it must be a cooperative association in Rawls's technical sense.

Perhaps the most obvious difficulty with the Cooperation Argument is premise (1): Merely being a cooperative association in the sense of being a form of human association that is not based exclusively or primarily on force and exemplifies a common good conception of justice is a rather anemic conception of what it

takes to be a decent society, or to be entitled to nonintervention. In brief, given Rawls's undemanding criteria for what counts as a cooperative scheme, premise (1) begs the question at issue. Being a cooperative scheme in Rawls's quite minimal sense may well be a *necessary* condition for being a decent society or for being entitled to immunity from intervention, but why should one think it is sufficient? Why should we assume that tolerance rules out any higher standard for immunity from intervention? Recall that a society can exemplify a common good conception of justice – everyone's good, as specified according to that society's conception of the common good, can count – and yet the good of some (e.g., women) can count much less than that of others and this devaluing of their good can be reflected in systematic institutionalized discrimination. Moreover, the societal justifications given for their good counting less, and hence for the discrimination they are subjected to, can rely upon grossly false beliefs about natural differences among types of human individuals.

If Rawls were to respond that cooperation (as he understands it) is an *intuitively plausible* criterion for nonintervention, there is an obvious reply: These intuitions are not widely shared, as the considerable volume of criticisms of Rawls's lean list of human rights attests. If his goal is to produce a conception of human rights that avoids the charge of bias or parochialism, it cannot be one that is based on intuitions that are not widely shared even among liberals. Many liberals would question whether a Rawlsian "decent" society, in which there was systematic, institutionalized discrimination against women or against people of color or members of a minority nationality, can never be subject to justifiable intervention.

Why the Cooperation Argument violates Rawls's own strictures

The Cooperation Argument appears to contradict Rawls's claim that he will not rely upon any premise about the moral equality of persons or upon the idea that all are entitled to certain rights because they possess certain "moral or intellectual powers." Presumably Rawls's claim must be that a society is entitled to toleration only if it is a form of association that exemplifies a common good conception of justice, according to which everyone's good counts, and is therefore not based exclusively or primarily on force when viewed from the standpoint of every member – otherwise he would not say that to qualify as a cooperative association a society must respect the (Rawlsian) human rights of *all* its members. That is, for each member it must be true that society is a cooperative association. But surely to ground a list of human rights on this requirement makes sense only if the well-being and freedom of every individual is of fundamental importance, morally speaking; and this is to rely upon a premise of the moral equality of all persons, though a rather limited one. However, in the passage I cited at the beginning of

this inquiry, Rawls explicitly eschews recourse to any notion that "human beings are moral persons." If all human beings are entitled to this rather minimal sort of freedom and well-being, then presumably this must be so by virtue of some characteristics that all humans have – presumably some "moral or intellectual powers" that they all have. Yet Rawls explicitly denies that his conception of human rights is grounded in any such characteristics.

If it is so important that every society be a scheme of cooperation, then surely this must be because of how the difference between being a scheme of cooperation and being a "command system based on force" affects human beings. Otherwise, we must attribute to Rawls the spooky, repugnant, and implausible view that protecting individuals' human rights is only instrumentally important because it guarantees that *societies* will have a certain characteristic, namely, that they will be cooperative schemes. But if what is so important about cooperation is that it serves certain morally important interests – including the interest in freedom – that all human beings have, then the cooperation argument, if sound, tacitly appeals to just the sort of premises about basic human interests and the moral equality of persons Rawls says he avoids. Furthermore, if it is so morally important that all human beings enjoy some minimum of freedom and well-being, then presumably this has implications beyond "the political," in which case Rawls's theory of human rights, like the dominant views he dismisses, counts as a "comprehensive," not a "political" conception.

5 The Functionalist Argument

This argument proceeds from a very striking assumption Rawls makes about the function of human rights norms: Human rights are those rights whose violation can provide a ground for intervention.[22] In outline, the argument goes like this. (1) Human rights are those rights whose violation can provide a ground for intervention. (2) Any list of human rights more extensive than Rawls's shortened list would include some rights whose violation cannot provide a ground for intervention. (3) Therefore, the list of human rights is not more extensive than Rawls's shortened list.

To assume that human rights have this direct connection with intervention is nothing less than a stipulative redefinition of "human rights," and Rawls gives us no good reason to accept it. Appeals to human rights perform many functions, and providing premises in arguments about the justification for intervention is only one of them and, currently, not the most important. To mention only a few of these other roles, human rights norms serve as standards for evaluating domestic institutions by their own citizens, as norms appealed to by judges in domestic legal systems, as conditions for membership in desirable international organizations (such as membership in NATO or the EU), and as qualifications for receiving loans and credits from organizations such as the World Bank and the

International Monetary Fund. Given the valuable role that appeals to human rights have in these varied contexts, we would have to have a weighty reason to accept a stipulative redefinition as radical as Rawls's; we must gain something of considerable value by accepting the stipulative redefinition, something that cannot be gained by less costly alternatives.

The reason for accepting the stipulative redefinition cannot be that unless we restrict the meaning of the term "human rights" in this way, we will have no adequate way of addressing the risk of over-intervention generally or the risk of interventions based on parochial conceptions. There is another strategy for reducing these risks and it is in fact the strategy that is embodied (though imperfectly) in international law and endorsed by most theorists of intervention. A distinction can be made within the more expansive set of human rights, between those whose violation triggers serious consideration of intervention and those that do not. On some versions of this strategy the former includes an even leaner list of rights than Rawls's, effectively taking the question of intervention off the table unless there is genocide or other massive violations of the right to life. The risk of over-intervention and in particular of interventions that are the result of intolerance or parochialism can be further reduced by embedding the decision to intervene in an appropriate institutional framework for collective institution, one that includes provisions for the representation of points of view from a wide range of societies and cultures.

Redefining "human rights" to curb human rights inflation

Rawls might reply that there is another reason for accepting his stipulative redefinition of "human rights": doing so would curb human rights inflation, the tendency to label everything that justice requires or, worse still, everything that is morally desirable as a human right. Human rights inflation is a problem, but there are less drastic ways to counter it. Furthermore, interest-based or capabilities-based theories are not inherently inflationary. What unites such theories, after all, is clear recognition that human rights are minimal moral standards, anchored in a minimalist conception of human good. A plausible conception of basic human interests (or capabilities) would resist the temptation to expand the notion of a minimally good human life toward that of a good life and would therefore almost certainly deny that some items on conventional lists of human rights belong there. Rawls does nothing to show that this approach to curbing rights inflation will not work. Instead, he simply removes it from consideration on the basis of the four weak arguments examined above, pursues a strategy that severs the idea of human rights from that of the moral significance of our common humanity, attempts to ground human rights in features of societies and their relation to one another, and produces a shortened list of human rights that allows grievous injustices and oppression.

6 Conclusion

Many commentators have criticized Rawls's thesis that the list of human rights is much leaner than is usually assumed. In this paper I have reconstructed from the text of *The Law of Peoples* four distinct Rawlsian arguments to support this thesis. What unifies the four arguments is a determination to avoid any attempt to ground a list of human rights in a conception of basic human interests or fundamental human capabilities or indeed in any morally significant characteristics common to all human beings. In that sense, Rawls's theory of human rights is a radical departure from the dominant philosophical theories and from the widespread idea that human rights are grounded in our common humanity. I have argued that none of the four arguments succeeds, either in supporting Rawls's thesis that his lean list encompasses all human rights or in justifying his dismissal of the dominant philosophical theories and the commonsense idea that human rights are grounded in our common humanity.

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Notes

[1] James Nickel, in a paper in this volume.

[2] John Rawls, *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999, p. 65.

[3] I have argued elsewhere, on social epistemological grounds, that members of nonliberal societies run a greater risk of coming to have and sustaining widespread false beliefs about natural differences among various groups of human beings (men and women, Blacks and Whites, etc.) than liberal societies, other things equal. If this is the case, then even if a nonliberal society that respects Rawls's austere list of human rights avoids serious discrimination and oppression for a time, it may not continue to do so. Rawls does not consider the important question of whether what he calls decent nonliberal societies will remain decent. I would argue that he is unable to do so effectively because his conception of society is static and lacks a social epistemological dimension. Allen Buchanan, "Political Liberalism and Social Epistemology," *Philosophy & Public Affairs*, 32/2 (2004): 95–130.

[4] Some defenders of Rawls would argue that the fact that implementation of his lean list of human rights is compatible with egregious discrimination is not a problem because Rawls stipulatively redefines "human rights" in a very narrow way, as those whose violation can ground intervention. Later I take up this interpretation, arguing that such a stipulation comes at a steep moral cost and is quite unnecessary because there are other ways to reduce the risk of over-intervention and human rights inflation.

[5] The labels for these lines of argument are mine, not Rawls's.

[6] Rawls, *Law of Peoples*, p. 68.

[7] John Rawls, *Political Liberalism*, New York, NY: Columbia University Press, 1993, p. 13.

[8] Ibid., p. 94.

[9] James Nickel, *Making Sense of Human Rights*, Berkeley, CA: University of California Press, 1987; Martha Nussbaum, *Women and Human Development*, New York, NY: Cambridge University Press, 2000; Amartya Sen, *Development as Freedom*, New York, NY: Knopf, 1999 and *On Ethics and Economics*, New York, NY: Basil Blackwell, 1987; Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2nd edition, Princeton, NJ: Princeton University Press, 1996. See also Allen Buchanan, *Justice, Legitimacy, and Self-Determination*, Oxford: Oxford University Press, 2003, ch. 3.

[10] I develop this line of criticism in detail in "Justice, Legitimacy, and Human Rights," *The Idea of Political Liberalism: Essays on Rawls*, ed. Victoria Davion and Clark Wolf, Lanham, MD: Rowman and Littlefield, 2000, pp. 73–89.

[11] Rawls, *Law of Peoples*, p. 68.

[12] Ibid.

[13] Notice that this particularism is quite consistent with Rawls's claim that decent societies are organized according to a common good conception of justice. The point is that different societies will have different conceptions of what the common good is and that in each such society the content of an individual's good will be specified by reference to that society's conception of the common good.

[14] Rawls, *Law of Peoples*, p. 68.

[15] Fernando Teson, *A Philosophy of International Law*, Boulder, CO: Westview Press, 1998, pp. 109–22; Darrel Moellendorf, *Cosmopolitan Justice*, Boulder, CO: Westview Press, 2002, pp. 7–29; Kok-Chor Tan, *Toleration, Diversity, and Global Justice*, University Park, PA: Pennsylvania State University Press, 2000, pp. 19–45.

[16] Rawls, *Law of Peoples*, p. 80.

[17] Ibid., pp. 68–70.

[18] Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics*, 110/4 (2000): 697–721.

[19] Rawls, *Law of Peoples*, p. 82.

[20] Ibid., p. 82.

[21] Ibid., p. 68.

[22] Ibid., pp. 27, 42, 79.

10

Political Authority and Human Rights

David A. Reidy

1 Introduction

In *The Law of Peoples*[1] (hereafter *LoP*), John Rawls places basic human rights center stage. All peoples must honor human rights, both internally in their own domestic orders, and externally in their relations with other peoples or human populations. Human rights constitute a cornerstone of any acceptable regime of international law and relations. In this respect, Rawls's position is orthodox; it affirms the central elements of the post-World War II consensus in human rights discourse and practice.

In other respects, however, Rawls's treatment of human rights is heterodox. Rawls does not justify human rights through direct appeal to the equal moral status of individual human persons, a teleological understanding of a universal human nature, or an explicit and well-developed account of fundamental human interests or capacities.[2] He characterizes Article 1 of the *Universal Declaration of Human Rights* of 1948 (hereafter *UDHR*), which makes just such direct appeals, as an expression of "liberal aspirations" rather than the articulation of a premise from which universal human rights might be publicly justified within the international context.[3]

Further, he characterizes human rights in the first instance as norms governing international relations, the relations between peoples.[4] They are primarily addressed to, impose duties on, and answer to the interests of peoples and their governments. To be sure, they benefit, and are undoubtedly meant by Rawls to benefit, individual human persons. But Rawls does not emphasize this. An oft-cited passage is illustrative: Rawls seems to suggest that human rights violations invite international remedial action primarily because of the threat they pose to peaceful international relations between peoples, and not, one is left to surmise, because of the harm done to the basic interests or dignity of the individual persons whose rights are violated.[5]

Finally, Rawls is explicitly minimalist in his listing of basic human rights. While he affirms basic human rights to subsistence, physical security, personal property, formal equality under the law, freedom from slavery or forced occupation, and sufficient liberty to sustain meaningful freedom of religious practice and thought, he does not affirm basic human rights to democracy, nondiscrimination, or the full range of liberal democratic freedoms (of assembly and association, or expression, for example).[6] To be sure, as we shall see, his list of basic human rights is less minimalist than many critics have allowed. Nevertheless, he clearly rejects the view that all or nearly all of the rights contained within the *UDHR* are basic human rights, or human rights proper, as he puts it.[7]

With respect to the content, nature and function, and justification of human rights, then, Rawls's position appears to be heterodox to some significant degree. This, of course, generated both surprise and disappointment in many quarters, not least among those who saw in what they took to be the reigning orthodoxy of human rights discourse and practice a natural extension of the sort of moral vision Rawls delivered in *A Theory of Justice*. My aim in this essay is to explicate sympathetically what I take to be Rawls's position on human rights and, by so doing, to demonstrate that Rawls's position is more plausible, less heterodox, more coherent, less *ad hoc*, and, finally, better justified than many critics have recognized.

2 Basic Human Rights: Rawls's List

Rawls identifies eight principles which taken together constitute the law of peoples. Principle number six states that "[p]eoples are to honor human rights." Discussions of Rawls's position on human rights typically begin with his list of basic human rights in Section 8.2.2.a. The list there strikes most readers as excessively minimalist. Of course, Rawls begins his list with the words "[a]mong the human rights are . . ." and thus does not intend it to be exhaustive. Indeed, immediately after introducing his eight principles, including principle number six on human rights, he characterizes the principles as incomplete and in need of supplement, interpretation, and explanation. That his Section 8.2.2.a. list is not exhaustive is confirmed in Section 10. There he affirms as human rights, in the full and most fundamental sense of the term, the rights specified in Articles 3–18 of the *UDHR*.[8] These include the central elements of due process and the rule of law (Articles 6–12 and 17), the right to refuse nonconsensual marriage (Article 16), a right against cruel, inhuman or degrading punishment and against torture (Article 5), the right to seek asylum (Article 14), the right to a national identity (Article 15), and the right to freedom of movement (Article 13). Rawls also affirms those rights entailed, on any plausible understanding, by the rights set out in Articles 3–18. Rawls mentions here the rights specified in the conventions on genocide and on apartheid. But there are, no doubt, many others. For example, the Article 11 right to be presumed innocent until proven guilty in a public trial

with all guarantees necessary for a meaningful defense must surely entail a right against coerced self-incrimination. Absent such a right, the Article 11 right would be of little benefit to those holding it. Thus, it would be unreasonable to suppose that Rawls does not regard the right against coerced self-incrimination to be a basic human right, even though it does not explicitly appear in Articles 3–18 of the *UDHR*.[9] Undoubtedly, careful reflection on Articles 3–18 would generate further examples of additional human rights necessarily entailed by the rights specified in those Articles. Rawls's list of human rights is, then, rather more robust than many readers have been willing to acknowledge.

Still, there is no getting around the fact that Rawls does not include among his basic human rights a general right to nondiscrimination. Indeed, he excludes the Article 23 right to nondiscrimination in employment and the Article 21 right to universal and equal suffrage.[10] But, again, his position is not quite what his critics have sometimes claimed. The human rights he does explicitly affirm set important limits to the range of discrimination his position allows. And he makes it clear that all peoples must respect the rights of minority populations.[11] Further, while he does not think that basic human rights prohibit gender discrimination in political, economic or social life, he does insist that women have a basic human right, *inter alia*, to have their interests represented in consultative political processes, to express dissent and so on.[12]

There is also no getting around the fact that Rawls does not include on his list of basic human rights many of the economic and social rights affirmed by the *UDHR*. He appears purposefully to exclude Articles 24, 25, 26, and 27. He explicitly identifies Article 22 as excluded.[13] In Section 8.2.2.a., the only economic rights Rawls lists are the right to subsistence and to personal property. If this were all he said, of course, his would be a pretty thin conception of social and economic rights. But this is not all he says.

He also says that all peoples have a duty of assistance to insure that the basic needs of all persons are met and that these basic needs must be understood in terms of the economic and institutional resources necessary for them to make meaningful use of the rights, liberties, and opportunities of their (liberal or decent) society, whatever they may be.[14] Now, admittedly, assigning all peoples this duty of assistance is not quite the same thing as saying that all persons have a basic human right to have their basic needs met. But when Rawls focuses directly on the basic human rights possessed by individual persons, he interprets the right to subsistence as a right to a "minimum economic security" including "general all-purpose economic means" sufficient to make "sensible and rational use" of the liberties afforded within one's own domestic political order.[15] Moreover, he maintains that the moral status of a people depends on its organizing itself as a mutually advantageous system of cooperation (even if not liberal and democratic). This justifies not merely a right against slavery or servitude, but also a right against systemic exploitation, for systemic exploitation is simply the institutionalized but avoidable failure of mutual advantage. A more charitable reading, then,

would have Rawls committed to a basic human right to a substantial economic and social minimum relative to the decent or liberal democratic domestic order to which one belongs, a minimum (in all cases except perhaps the atypical case of an isolated and primitive indigenous people) beyond what typically comes to mind when one thinks of mere subsistence.

While minimalist when assessed against the *UDHR* or other familiar benchmarks, Rawls's list of basic human rights is not nearly as minimalist as many critics suggest. To be sure, important liberal democratic rights are left out. Rawls recognizes no basic human rights to democratic government or universal suffrage, the robust freedom of assembly or expression typically secured in liberal democracies, nondiscrimination in political, economic, and social life, free and universal public education, social security or other welfare programs familiar from contemporary liberal democracies, and so on. These are significant omissions. But here several points must be kept in mind if we are to be clear about how significant a departure these omissions mark from the orthodox understanding of contemporary human rights discourse and practice.

First, the human rights Rawls identifies as basic represent the moral core of each of the six categories of rights listed in the *UDHR* and the two *Covenants*. These categories are: (1) rights governing the physical security and psychological integrity of persons, (2) rights governing basic individual freedoms, (3) rights governing political participation, (4) due process rights insuring nonarbitrary state action, (5) equality rights, and (6) social and economic rights.[16] While the *UDHR* and two *Covenants* include within several of these categories rights Rawls does not recognize as basic, Rawls does identify as basic the most fundamental rights within each category. On Rawls's view, these basic human rights bind and may be enforced by any people or alliance of peoples against all states and populations regardless of their consent or voluntary undertaking, something that is not true generally of the rights in the *UDHR* and two *Covenants*.[17]

Second, strictly speaking, the *UDHR* is not a legally binding document and all the parties signatory knew that when they signed. The Preamble to the *UDHR* explicitly states that its purpose is to set an aspirational standard to be used in measuring the progress or development of bodies politic to be secured internationally through teaching and education. This, of course, is just how Rawls understands the *UDHR*, even if he also thinks some of its provisions set out genuine or proper basic human rights specifying threshold conditions of recognitional legitimacy within the international order eligible for legitimate coercive enforcement regardless of consent.[18]

Third, while the two *Covenants* implementing the *UDHR* are legally binding on party signatories, many state parties signed stating explicit reservations to particular provisions, often those dealing with precisely the rights Rawls excludes from his list. The practice of signing treaties with reservations is legally recognized and accepted within international law.[19] To get a sense, then, of what is taken for granted in contemporary human rights discourse and practice, it is not

enough simply to read the two *Covenants*, or any particular list of human rights documents (including the *Convention on the Elimination of All Forms of Discrimination Against Women* [*CEDAW*], etc.). The international public political culture of which human rights discourse and practice is a part is vastly more complicated and less unified than any such reading would suggest.

Fourth, much of contemporary human rights discourse and practice is concerned with human rights either binding on particular states because they have already consented to them as such or urged on states as obligations they ought to take on by giving their consent. But Rawls's concern in *LoP* is not primarily with what we might call the politics of human rights or human rights as made part of positive international law through treaty, custom and so on, but rather with those human rights binding on states regardless of and prior to any consent they may or may not give, human rights that must be secured for there to be anything like a morally acceptable international politics of human rights.

If we keep these points in mind, the gap between Rawls's somewhat minimalist list of basic human rights and the list one arrives at through a quick review of contemporary human rights documents or the web pages of NGOs devoted to human rights advocacy is less startling. Rawls's critics typically do not notice these explanatory bases for the gap. But this is not surprising. Those who have aligned themselves with the international human rights movement as advocates (and I count myself among them) have few strategic or political incentives to distinguish sharply between human rights binding regardless of consent and those binding only with or because of consent. Nevertheless, for philosophical purposes, or at least Rawls's philosophical purposes, the distinction must be made.

There are three final points. First, Rawls's view is consistent with the unity of basic human rights. There can be no basic *right* to subsistence without a basic right to express dissent and, in a developed state occupying a large territory, a basic right to freedom of movement. Basic human rights mark the set of mutually interdependent conditions that must be met for persons to acquire legal and political obligations of at least *prima facie* moral force by virtue of their membership in a body politic. Or so I shall argue below. Second, Rawls allows that experience and research may justify including on the list of basic human rights some democratic political participation rights or gender nondiscrimination rights if it turns out that they are empirically necessary to one or more of those rights already identified as basic.[20] Presently it appears that while they substantially contribute to the ability of states to secure for their members some of the rights – most notably subsistence – that Rawls identifies as basic, they may not be empirically necessary. Cuba, for example, secures basic subsistence rights (though it may violate other basic human rights) without democratic political participation rights. The empirical case for making democratic political participation rights or general nondiscrimination rights basic (and thus internationally enforceable) is not yet complete. Third, Rawls's account of basic human rights is fully consistent with a political commitment to realizing an international order within which a

much wider range of human rights are binding on all states through positive international law by virtue of their consent and ultimately customary practice. One may affirm Rawls's account and also continue to think it important that liberal democratic and other well-ordered peoples, as well as NGOs and individuals of good will, work toward the universal voluntary affirmation by all states of the two *Covenants*, *CEDAW*, and other significant human rights documents without reservation and with meaningful enforcement.

3 Basic Human Rights: Their Nature and Function

If the previous section is correct, then Rawls's view of the content of basic human rights is less heterodox, less *ad hoc*, and more plausible than it at first appears. But what about his account of the nature and function of basic human rights?

On Rawls's view basic human rights are universal rights. They bind all states regardless of consent. They mark conditions to be met by any body politic to be recognized as legitimate within the international order and thus entitled to self-determination and nonintervention. States that honor human rights and that also remain nonaggressive secure for themselves within the international order a right against coercive or forceful intervention, whether in the hard form of military intervention or the softer forms of diplomatic or economic sanction.[21]

Basic human rights are best understood, then, in terms of their practical function within the international order.[22] They are not timeless, prepolitical, natural rights belonging to the moral fabric of the universe or flowing directly from some universal human nature. This they could not be. They presuppose a world of distinct peoples, individual bodies politic, confronting practical issues of foreign policy in international relations and prepared to address and resolve those issues as moral issues. This world with its practical problems is a contingent, historical, and political achievement. Human rights are universal; their moral force reaches even to long-isolated, territorially remote, indigenous peoples.[23] But they are not universal in the way that traditional natural rights are.

Instead, their universality is a function of their genesis within the practical reason of liberal democratic peoples as they undertake to answer, as corporate moral agents, what for them is the most pressing or basic question of foreign policy. That question is this: What other states, if any, are we, as liberal democratic peoples, morally obligated to recognize as possessed of the same right to self-determination and nonintervention we claim for ourselves on the international or global stage? The universality of basic human rights derives from the fact that liberal democratic peoples are morally obligated to recognize as possessed of an international right to self-determination and nonintervention all and only nonaggressive states the basic structure of which secures for all members the basic human rights Rawls identifies.

Basic human rights, then, are rights possessed by individuals against the particular bodies politic to which they belong. They are enjoyed, when they are enjoyed, as civil or constitutional rights. International enforcement efforts aim always at realizing domestic political orders faithful to basic human rights and thus entitled to recognitional legitimacy (and with it self-determination and nonintervention) within the international order. Basic human rights presuppose, then, not a single, unified, and centralized system of global political authority, but rather an international cooperative federation or federations of distinct, autonomous and, from an international perspective, legitimate systems of domestic political authority.

Within a morally acceptable international order, basic human rights constitute a fundamental foreign policy imperative for all member states.[24] One reason for this is that states that violate basic human rights, so-called "outlaw states," pose a fundamental threat to peace and stability within the international order. The authority they claim over their members merits no moral recognition from liberal democratic (or other decent) peoples; it is not genuine political authority. Outlaw states are systems of domination, or terror, or exploitation, or brute force. They are not morally significant systems of legal and political obligation and authority. Liberal democratic (or other decent) peoples cannot rely on them, then, at least not as a moral matter, to keep their populations from aggressive, violent, or criminal activities. And since outlaw states do not honor basic human rights, their populations, or significant portions thereof, are unlikely to be sufficiently satisfied with their domestic condition to refrain from aggressive, violent, or criminal activities. So, states that violate basic human rights, outlaw states, pose a real threat to international peace and security, even when they are nonaggressive toward their neighbors. Accordingly, liberal democratic (and other decent) peoples have good reason to insure that basic human rights are universally honored.

By emphasizing the foregoing Rawls may appear to suggest that the fundamental moral status or needs or interests of individual human beings provides no compelling reason to make human rights a foreign policy imperative. But this is not quite right. Rawls clearly thinks that the suffering of individual persons in burdened societies is fundamental to the justification of the duty of assistance, a duty which effectively makes basic human rights a foreign policy imperative for all states.[25] And he clearly thinks that bodies politic exist for and ought to serve the good of their individual members as moral agents; why else would the law of peoples require all bodies politic to be organized as genuine and mutually advantageous systems of cooperation? Of course, Rawls allows that to be genuine and mutually advantageous a system of general social cooperation between persons need not assume those persons to be free and equal individuals without any antecedent group-based memberships or obligations or claims. But he nowhere allows that bodies politic need not answer to the needs and interests of their members as persons.

Although Rawls does not emphasize it, his human rights doctrine answers to, or at least appears intended to answer to, the fundamental moral status and basic

needs of all human persons as moral agents and social beings. One might say that it answers to a fundamental interest shared by all human persons in recognition and membership as a person or moral agent (though not necessarily a free and equal citizen) in a well-ordered and decent (though not necessarily liberal and democratic) body politic or people entitled to self-determination and nonintervention. The law of peoples aims at and permits the international use of force by well-ordered decent or liberal and democratic peoples to secure (provided other moral conditions are also satisfied, e.g., that the potential harm does not exceed the potential benefit, and so on) a world within which this basic human interest is universally met as a matter of right.[26] Once this world is secure, however, force no longer has any legitimate role to play within the international order, except as a defense against aggression.

I wish to highlight just one final feature of Rawls's treatment of the nature and function of human rights. While basic human rights must be universally secured, it does not follow that they must be enjoyed everywhere as individual or citizenship rights in the familiar "rights as trumps" sense common to liberal jurisprudence. The international legal order need not commit to the universality of liberal jurisprudential categories and commitments in this sense.

Rawls affirms, and thinks liberal democratic peoples must recognize, the possibility of nonliberal, nondemocratic but nevertheless decent and well-ordered peoples entitled to recognitional legitimacy within a peaceful and morally acceptable international order.[27] Such peoples may organize themselves around various group memberships and affirm a "common good" rather than a liberal conception of justice.[28] Accordingly, they may not find congenial a liberal jurisprudence of rights belonging to individuals simply as individuals or citizens and functioning as "trumps" over competing claims tied to the common good. How, then, can they honor basic human rights? How ought the emergent international legal order interact with these domestic "common good" legal systems within which the liberal ideal of individual or citizenship rights as trumps is not at home?

The question here is: what is meant by "securing basic human rights"? Rawls is not altogether clear about this. He indicates that benevolent absolutisms honor basic human rights.[29] But he cannot mean by this that they honor basic human rights *as rights*, since the subjects in such a regime lack the political participation rights necessary to be able to insist on the content of their basic human rights *as a matter of right* or of their rights. They enjoy that content only through the good will of their benevolent ruler, not through their reciprocal commitment with their ruler to public rules backed by reasons. But such a reciprocal commitment is essential if they are to enjoy the content of their basic human rights as a matter of right – as a matter of rights that they have. Indeed, it is this absence of reciprocity between the ruler(s) and the ruled that, on Rawls's view, renders benevolent absolutisms less than well ordered and thus ineligible for recognition and full membership in a morally acceptable international order of peoples or corporate moral agents.

What distinguishes a decent people from a benevolent absolutism is that in the former but not the latter there are things citizens or subjects can do – publicly, legally, and institutionally recognized things – to insist on the content of their basic human rights. They can criticize or dissent from violations or failures to deliver that content. They can demand a public justification. And so on. Governed by public rules backed by reasons and faithful to the content of basic human rights, all within the rule of law, the citizens or subjects of a decent people stand in a relationship of at least minimal reciprocity with their ruler(s). They are constituted and recognized as moral and political agents, even if not the free and equal citizens of a liberal democracy. Thus constituted, there are things they can do, actions they can perform, to insist on the content of their basic human rights within the constitutional and legal framework of their decent domestic order with its common good conception of justice.[30] Of course, the official jurisprudential discourse within such a decent domestic order may not look much like the jurisprudential rights-talk of a liberal democracy. Citizens or subjects may not think of themselves as insisting as individual citizens on their "rights as trumps" over any conception of the common good. But what they are able to do and to insist on is sufficient to insure that the content of their basic human rights is secured within their domestic order as a matter of public reasons and right.[31] The international legal order, Rawls's view suggests, must accommodate this possibility, of a decent domestic jurisprudence that is not organized around the idea of individual rights as trumps. It need not accommodate the jurisprudential doctrines, if any, at home within benevolent absolutisms. There one finds only passive, even if happy or content, subjects; one finds no political agents, no reciprocity between the ruler(s) and the ruled.

4 Basic Human Rights: A Rawlsian Justification

Suppose we accept Rawls's account of the content, nature, and function of basic human rights. What justification does Rawls offer for this account? Here critics maintain that Rawls offers no plausible justification and that any justification he might offer will lead eventually to a more robustly liberal and democratic list of basic human rights and a less internationalist conception of their nature and function. This is, I think, not true. Although Rawls does not himself develop any extended justification for his conception of basic human rights, he suggests a sound Rawlsian justification.

The law of peoples sets out the basic moral principles to govern an international order morally acceptable to liberal democratic peoples. Because liberal democratic peoples share a fundamental practical commitment to reciprocity between moral agents, whether corporate or natural persons, the law of peoples must be publicly justifiable to all those subject to it. Reciprocity is, for Rawls and Rawlsian liberals, a root moral norm. It requires of moral agents that they restrict

themselves in their other-regarding conduct to acting in accord with principles those others also could reasonably affirm from their own moral point of view without being manipulated or lied to and so on.[32] It requires a social world structured by public norms backed or potentially backed by shared reasons and not force alone. Rawls's original position arguments, both domestic and international, are meant to identify and bring into focus those substantive principles of political morality consistent with reciprocity between existing moral agents. Principles properly identified will or could stand as a focal point of an overlapping consensus among diverse moral agents.

Rawls aims to show that basic human rights stand or could stand as one focal point of an overlapping consensus within the public political culture of international relations. But he does not aim to show this by conducting an empirical search for such a focal point of consensus. That would make his conception of basic human rights "political in the wrong way," to recall the phrase from *Political Liberalism*.[33]

Rather, he aims to show this by inquiring, firstly, into what liberal democratic peoples from an appropriate moral point of view would reasonably affirm between themselves regarding basic human rights, and then inquiring, secondly, into whether, should any exist, other apparently decent peoples – Islamic, Confucianist, perhaps some form of nondemocratic and nonliberal socialist, and so on – could also reasonably affirm those same commitments from their own moral points of view without manipulation, coercion and so on. Accordingly Rawls invokes two international original position arguments, one within which agents represent only liberal democratic peoples, and the other within which they represent only decent peoples; each leads in its own way to the same law of peoples and the same public international conception of basic human rights.[34]

Readers of *LoP* tend to assume that Rawls's desire to avoid parochialism or charges of Western imperialism best explains the minimalism of his human rights doctrine. Of course Rawls desires to avoid such charges.[35] But this desire is not what leads him to his somewhat minimalist conception of human rights. Rather, it is his commitment to reciprocity, first as between liberal democratic peoples, and then, and only then, as between liberal democratic peoples and other decent peoples. Rawls gives every impression of believing that his conception of basic human rights is the conception that would be morally appropriate (at the level of first principles enforceable against peoples regardless of consent or voluntary undertaking) even in a world of only liberal democratic peoples. His human rights minimalism, then, is not a function of concessions to or accommodations of nonliberal, nondemocratic decent peoples. To be sure, he undertakes to show that his conception of basic human rights will satisfy the demands of reciprocity even in a world of liberal democratic and other decent peoples. But the overlapping consensus between liberal democratic and other decent peoples is over a conception of basic human rights already determined, on Rawls's account, by liberal democratic peoples, consistent with their own commitment to reciprocity

and from their own moral points of view. Thus Rawls deflects charges of parochialism or Western imperialism while ensuring that liberal democratic peoples are faithful to their distinctive moral points of view and honor their commitments to reciprocity. Basic human rights belong to a liberal law of peoples, not a law of liberal peoples.

At first blush this seems counterintuitive. It seems natural to suppose that agents representing only liberal democratic peoples in an international original position would simply agree to recognize as basic human rights the full range of liberal democratic rights. After all, they know that they represent only liberal democratic peoples with a fundamental interest in realizing liberal democratic justice.

Of course, they also know that none of the peoples they represent are perfectly just and that many of the peoples they represent will reasonably disagree over what liberal democratic justice requires and the extent to which any of them approximates those requirements. Further, they also know that all the peoples they represent have a fundamental interest in their own political autonomy and thus in realizing liberal democratic justice on their own terms in their own way. Given all this, such agents will find themselves unable to agree to any particular scheme of liberal democratic rights as setting out the basic human rights binding on, and in principle enforceable against, all regardless of consent. Any such agreement would unacceptably encroach on the political self-determination of the peoples represented and invite the resolution of reasonable international disagreements through force cut free of shared or potentially shared reasons.

So, it is not reasonable to suppose that liberal democratic peoples would or should agree to a list of basic human rights that includes the full range of some particular well-defined and complete list of liberal democratic rights. But what about a more modestly or generically liberal and democratic list of basic human rights? Surely, it seems, agents representing only liberal democratic peoples could agree to a conception of basic human rights binding on all regardless of consent that is at least modestly or generically liberal and democratic. Wouldn't they agree, for example, to some general right to democratic political processes, or to universal suffrage, or to nondiscrimination in employment or eligibility to run for office?

One consequence of any such agreement would be that states not yet fulfilling the specified basic human rights, those without universal suffrage or with gender or religious restrictions on eligibility for public office, would be denied equal standing within the international order as a moral order. They would not have a right to self-determination and nonintervention, or in any case, not the same right as those states with universal suffrage, nondiscrimination and so on. At the end of the nineteenth century, then, England and the United States would have had no right against coercive or forceful intervention, diplomatic, economic, perhaps even military, by other states keen to see that women got the right to vote. At the end of the century before that, they would have had no right against

coercive or forceful intervention aimed at abolishing certain Church privileges. (Depending on what one thinks ingredient in a conception of basic human rights that is modestly and generically liberal and democratic, the United States today might have no right against forceful intervention, say diplomatic and economic, to secure domestic campaign finance reform and other essentials to anything like fair value for basic political liberties.)

There is something odd about this. Liberal democratic peoples today, at least in the paradigm cases, regard their own domestic orders as their own achievements and thus as one of their greatest sources of pride as peoples. (As an American I look forward to the day when we as a people domestically secure fair value for basic political liberties; it will be a proud day for Americans.) It is precisely because they were each free to liberalize and democratize in their own way on their own time through their own domestic struggles that this is so. But once even generically liberal and democratic rights are included among the basic human rights internationally binding and enforceable regardless of consent or voluntary undertaking, liberalization and democratization become things that may legitimately be forced on states. How can liberal democratic peoples ground their *amour propre* in their own liberal democratic domestic orders taken as their own achievements and at the same time affirm principles of international morality that permit the use of force to compel the liberalization and democratization of other nonaggressive states, even states organized as genuine systems of cooperation, committed to the common good of their members as moral agents, and faithful to a measure of reciprocity secured between ruler(s) and the ruled? Given their own self-understanding, and with it the historical bases of their own *amour propre*, it would be unreasonable of liberal democratic peoples to authorize principles of international morality that permit the use of international force solely to secure the liberalization and democratization of such an otherwise apparently decent body politic.

But what, then, would agents representing only liberal democratic peoples agree to with respect to basic human rights? If not the rights essential to any generically liberal and democratic domestic order, then what? I propose putting the question another way: What could all liberal democratic peoples agree to as minimally sufficient to justify their own claimed right to self-determination and nonintervention? Whatever this is, presumably the agents representing them in an international original position would agree to include it among the first principles of international morality binding on all liberal democratic peoples in their dealings with peoples either nonliberal or nondemocratic or both.

Rawls does not answer this question directly. But some suggestive references recommend the following view.[36] In a well-ordered polity organized as a genuine system of cooperation for the common good of all members constituted and sustained as moral and political agents, the legal and political obligations imposed by that polity on its members have *bona fide*, even if only *prima facie*, moral force. The members of such a polity are bound to one another and to their body politic, with its normative system of political and legal authority, in a morally

significant way. It is theirs in the sense that it belongs to the exercise of their moral and political agency to determine its structure and content in light of their own best judgments and other moral commitments. Nonparticipants or nonmembers ought to respect the moral and political agency of those implicated within this morally significant normative system of political authority. They ought to refuse forceful intervention. That members might be morally justified in civil disobedience is not by itself a sufficient reason for outsiders to forcefully intervene. Outsiders may of course undertake to influence the judgments of those implicated within such a system of political authority through reasoned argument, example, and so on. But respect for the moral agency of individual persons underwrites both the right to collective self-determination on the part of those implicated in such a system of political authority and the duty to refuse forceful intervention on the part of those not so implicated.

But how could anything less than a liberal and democratic domestic order confer on legal and political obligations *bona fide*, even if only *prima facie* and thus defeasible, moral force? How could a normative system of political authority be morally significant for its members or participants if it was not liberal and democratic? How could respect for the moral and political agency of individual persons underwrite a right to collective self-determination for nondemocratic and nonliberal, even if decent and well-ordered, regimes?

H. L. A. Hart sets out the conditions necessary and sufficient to genuine legal obligations. Famously, these are two. First, legal rules valid within the system must be generally obeyed. Second, officials must accept and honor in their official conduct the criteria of legal validity.[37] Hart goes on to note that there can be no genuine legal obligations in the absence of formal or natural justice (since treating like cases alike is essential to rule-following and rule-following, at least by officials, is essential to genuine legal obligations).[38] With respect to substantive justice, Hart argued that to be viable for any length of time a legal system must extend a minimum natural law content to some significant portion of the population.[39] But this content he thought necessary to a viable and enduring legal system only because of contingent facts about human beings (and thus admitting its necessity was no affront to the positivist thesis that there is no necessary *conceptual* connection between law and morality). More importantly for present purposes, Hart did not think this content had to be distributed equally or even minimally to all for genuine legal obligations to exist. For Hart, the legal system in the antebellum South in the United States generated genuine legal obligations. Officials accepted and honored in their official conduct a rule governing criteria of legal validity, citizens largely obeyed the law, and a minimum natural law content was extended to enough of the population to sustain the legal system over time. It does not follow, of course, that the legal obligations of citizens in the antebellum South had any moral force as such. But they were genuine legal obligations on Hart's account. Citizens and officials were members of or participants in a normative system of legal authority.

Hart's analysis of legal obligations thus fails to explain why legal obligations have even *prima facie* moral force for citizens or subjects. His view requires only that legal officials secure general obedience to the law and hold themselves accountable to certain internalized rules governing legal validity and the like. Hart does emphasize that officials must regard their own official conduct as guided by rules and thus reasons. But from a liberal democratic point of view this is not enough to deliver unto legal obligations even *prima facie* moral force since it requires no reciprocity at all between officials and citizens or subjects. At its core, then, Hart's view is, to invoke language used by Rawls, only a theory of how officials can satisfy themselves that they are acting properly.[40] It admits the possibility of genuine legal obligations with no more authority, from the moral point of view of citizens or subjects, than commands backed by force.[41] To identify the conditions that must be met if legal obligations are to have for all members of a polity at least *prima facie* moral force, we must move beyond Hart's theory of law.

Rawls cautiously refrains from taking a stand on Hart's theory of law or legal obligation as such.[42] Whether the antebellum South had a genuine legal system capable of imposing genuine legal obligations, Rawls explicitly refrains from saying. But Rawls does follow Philip Soper in maintaining that Hart's conditions, while minimally necessary and sufficient to genuine legal obligations, fail to invest those obligations with even *prima facie* moral force. But what, then, would be minimally necessary and sufficient to ensure that the normative force presumably carried by genuine legal obligations was always at least *prima facie* moral force, to ensure that citizens' or subjects' legal obligations were just part of a larger and morally significant normative system of political authority?

This is the fundamental question. Liberal democratic peoples have no good reason to confer on any polity a right to collective self-determination and nonintervention just because its members are bound by genuine legal obligations in Hart's sense. Those living in the antebellum South were likely bound by such obligations, but as slave-holding polities Southern states had no moral right to nonintervention.[43] Liberal democratic peoples have a good reason to confer a right to self-determination and nonintervention only on those polities within which the genuine legal obligations of members carry *prima facie* moral force derived from the morally significant normative system of political authority that is their context and home.

No system of political authority could underwrite a *prima facie* moral obligation to obey the law without being purposefully aimed at the good or advantage of all members as moral agents and enforced by officials prepared publicly to defend the law in such terms. Officials may enforce a common good or liberal conception of justice. But they must enforce (some form of) one or the other and defend their official conduct with reasons addressed to citizens or subjects as moral and political agents. And citizens or subjects must be able publicly to demand and have a right publicly to receive and evaluate reasons for official state action. Only if these conditions are met in some substantial and meaningful way

may citizens or subjects and officials realize sufficient reciprocity to confer moral significance upon the normative system of political authority (that marks them as citizens or subjects and officials) and thus upon their legal obligations within that system.

What would it mean for these conditions to be met in a substantial and meaningful way? Several things.[44] First, all citizens or subjects must have a right to evaluate, dissent from, and receive a public justification for official state actions. Because this right is without worth apart from more general rights to freedom of thought and conscience, to some minimally decent standard of living (above bare subsistence), and to physical and psychological security, citizens or subjects must also have these rights. Roughly, we might say, what Hart called the minimum natural law content of any viable legal system for human beings must be extended to all those subject to domestic political authority and the law. If it is not, outsiders will have no reason to think that the legal obligations of insiders are also *prima facie* moral obligations, and thus no reason to think that their respect for insiders as moral agents underwrites a right to collective self-determination for insiders or a duty on outsiders to refuse forceful intervention in their domestic political order.

For outsiders to have a reason to think that the legal obligations of all insiders carry *prima facie* moral force, they must also have reason to think that the political-legal system administered by officials and enforced on citizens or subjects is a system of mutually advantageous cooperation for all. In addition to securing those rights already mentioned, this will require securing also those rights necessary to immunity from systemic exploitation and to ensuring for all some nontrivial zone within which they may pursue their own good by their own lights as moral agents. There must be a right to personal property, a right to refuse marriage, a right to some substantial religious liberty, a right to asylum, rights against apartheid and genocide, and so on. Of course, the political-legal system must also secure natural or formal justice. And it must do so within the context just set out.

At this point we have arrived, more or less, at Rawls's list of basic human rights. While I cannot carry out the full analysis here, my hunch is that if we continue to inquire, from a liberal democratic point of view, into the conditions that a polity must satisfy for its members to have a right to collective self-determination and nonintervention, we will find ourselves talking about bodies politic organized as viable constitutional republics. If I am right about this, then agents representing only liberal democratic peoples in an international original position will agree to a principle of basic human rights that makes binding on all bodies politic regardless of treaty or voluntary undertaking only those rights essential to a well-ordered constitutional republican form of government. These will include the rights set out in or entailed by Articles 3–18 of the *UDHR*, along perhaps with others, but not those set out in Articles 1–2 or 19–30. They will form a proper subset of liberal democratic rights, but will not include general rights to democratic political processes or nondiscrimination. They are,

accordingly, consistent with the priority liberal democratic peoples assign their own liberalization and democratization in their own *amour propre*.

Within well-ordered constitutional republics the conditions of moral and political agency are sufficiently secured and there is sufficient reciprocity between rulers and the ruled for legal obligations to take on *prima facie* moral force. This is true even for nonliberal and nondemocratic constitutional republics, of which there have been many throughout history and are many today. And it is out of respect for the moral and political agency of those persons already subject to such *prima facie* moral obligations, that liberal democratic peoples acknowledge their right to collective self-determination and nonintervention. Indeed, this is the basis for their own claim to collective self-determination and nonintervention as liberal democratic peoples. Although the United States was at the beginning of the previous century not yet liberal and democratic – since it denied women the right to vote, to hold many jobs, and so on – it was then or plausibly could be regarded as a constitutional republic. And so, counterintuitive as it may have at first seemed, agents representing only liberal democratic peoples in an international original position will agree to regard as basic human rights only those essential to a constitutional republican form of government. Where these rights are secured and there is no threat of external aggression, a people is entitled to self-determination and nonintervention. Where these rights are not secured, respect for the moral and political agency of individual persons requires that they be secured. Outlaw states and burdened societies must be transformed.

Peaceful, well-ordered constitutional republics faithful to the basic human rights set out here are self-contained, independent, and morally significant systems of political and legal obligation and authority. They are, as corporate moral agents, entitled to self-determination and nonintervention, not because corporate moral agents have rights in and of themselves independent of their individual members, but rather because as well-ordered systems of cooperation they constitute and sustain their individual members as moral and political agents (even if not as free and equal liberal democratic citizens) with legal and political obligations of *bona fide prima facie* moral force.[45]

Of course, agents representing liberal democratic peoples will want to reserve for the parties they represent the right to engage in a diplomatic international politics of persuasion and moral criticism aimed at encouraging all peoples to more fully perfect themselves as liberal democracies, either through their own internal self-development, or through voluntary and shared political undertakings through treaty, federation, and the like. But persuasion, moral criticism, treaty making, and voluntary federation – all of which belong to a morally acceptable politics of human rights guided by liberal democratic aspirations – are quite different from force, coercion, or sanction.

The foregoing argument for basic human rights depends in no way on invoking the second international original position, within which agents represent only decent peoples. There is no compromise with or accommodation of decent

peoples. There is no rejection of the moral priority of individual persons or of liberal democratic self-understandings. There is only the inquiry by liberal democratic peoples into the moral basis of their own claims to self-determination and nonintervention within the international order. To be sure, Rawls conjectures that the agents representing only decent peoples in a second international original position would affirm more or less the same law of peoples and the same doctrine of human rights. Certainly they would affirm all the main features. Thus, decent peoples (if there are any) could affirm the same law of peoples that liberal democratic peoples affirm from the moral point of view of their own self-understanding. This is important. It ensures that liberal democratic peoples honor their own moral commitment to reciprocity and it locates the law of peoples within an existing or reasonably possible overlapping consensus within international public reason.

Rawls's conception of basic human rights does not depend on a particular religious doctrine or philosophical understanding of the moral nature of persons (though it most certainly assumes that all human beings capable of being rational, responsible, and reasonable are moral persons). It draws instead on an account of political authority and legal obligations, an account latent within the self-understanding of liberal democratic peoples and yielding a list of basic human rights presumably acceptable to other decent peoples seeking recognitional respect and a right to self-determination and nonintervention as corporate moral agents in the international order. In this way, Rawls offers a human rights doctrine that addresses the practical foreign policy issues faced by liberal democratic peoples while also satisfying their commitment to reciprocity and thus the demand for a human rights doctrine publicly justifiable within an international public reason.

5 Conclusion

Basic human rights bind all states regardless of their consent. With respect to basic human rights, what is politically on the table is only how best to secure their universal realization, whether through unilateral or coordinated and cooperative international efforts. This is one aspect of a morally legitimate politics of human rights. Liberal democratic peoples, of course, will rightly seek a world within which all states honor more than basic human rights and increasingly approximate liberal democratic ideals within their domestic orders. Toward this end, they and those individuals and associations belonging to or affiliated with them may undertake various international political initiatives aimed at bringing not yet liberal or democratic states voluntarily to take on the liberal democratic ideal (by ratifying treaties such as *CEDAW*, for example).[46] This is another aspect of a morally legitimate politics of human rights. Coercion, whether military or not, has no place here. And liberal democratic peoples may rightly federate (as in the European Union) and impose on themselves as human rights a rather

robustly liberal and democratic regime of rights. This is another aspect of a morally legitimate politics of human rights; again, coercion has no place here.

If we conjoin Rawls's doctrine of basic human rights with the foregoing account of the politics of human rights, we see that Rawls has set out a powerful vision of how free peoples, following their own historical paths and faithful to the limits of a liberal conception of international right, might arrive at a world within which (at least generically) liberal democratic rights are universally recognized and enforced as human (though not basic human) rights. Rawls's position on human rights is less heterodox, more plausible, less *ad hoc*, more coherent, better justified, *and more liberal* than has been generally acknowledged.

Acknowledgments

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Notes

[1] John Rawls, *The Law of Peoples* (hereafter *LoP*), Cambridge, MA: Harvard University Press, 1999.

[2] *LoP*, p. 68.

[3] *LoP*, p. 80.

[4] See, for example, *LoP*, pp. 27, 78–81.

[5] *LoP*, p. 81. Rawls's remark reflects United Nations practice insofar as under the United Nations Charter only the Security Council can authorize coercive intervention, including economic sanctions, and then only in the interests of peace and security.

[6] *LoP*, p. 65.

[7] *LoP*, p. 80.

[8] *LoP*, p. 80.

[9] The right to be free of coerced self-incrimination is included, along with other rights essential to the right to be presumed innocent, in Article 14 of the 1966 *International Covenant on Civil and Political Rights.*

[10] Article 23 is explicitly excluded at *LoP*, p. 80. Article 21 is clearly excluded by implication since decent peoples need not have representative democratic forms of government making use of universal equal suffrage.

[11] See, for example, *LoP*, p. 38.

[12] *LoP*, pp. 75, 78.

[13] *LoP*, p. 80.

[14] See *LoP*, p. 38, n. 47.

[15] See *LoP*, p. 65, n. 1.

[16] James Nickel and I make use of these six categories in our "Relativism, Self-Determination and Human Rights," in *Democracy in a Global World: Human Rights and Political*

Participation in the 21st Century, ed. Deen Chatterjee, Lanham, MD: Rowman and Littlefield, 2005.

[17] Rights specified in the two *Covenants* binding on state parties by virtue of their consent or voluntary undertaking may over time be so integrated into the general background landscape of international relations that they come within international law to have general force as a matter of customary practice. For discussion, see Henry Steiner and Philip Alston, *International Human Rights in Context*, 2nd edition, Oxford: Oxford University Press, 2000, pp. 69–72.

[18] For a useful discussion of the idea of recognitional legitimacy, see Allen Buchanan, "Recognitional Legitimacy and the State System," *Philosophy and Public Affairs*, 28/1 (1999): 46–78.

[19] For a summary of the legality of reservations within international human rights law, see Louis Henkin et al., *Human Rights*, Mineola, NY: Foundation Press, 1999, pp. 307–11. A related practice (insofar as it presupposes a commitment to the self-determination of well-ordered bodies politic or peoples) recognized in international human rights law is the judicially applied "margin of appreciation" doctrine according to which human rights tribunals (such as the European Court) afford state parties a significant degree of latitude or discretion in meeting their voluntarily assumed human rights obligations. For discussion and defense of the "margin of appreciation" doctrine, see Burleigh Wilkins, "International Human Rights and National Discretion," *The Journal of Ethics*, 6 (2002): 373–82.

[20] For Rawls's discussion of these matters, see *LoP*, pp. 109–11, including the notes therein.

[21] See, for example, *LoP*, p. 80.

[22] This point is powerfully advanced by Charles Beitz in his "Human Rights and the Law of Peoples," in *The Ethics of Assistance*, ed. Deen Chatterjee, Cambridge: Cambridge University Press, 2004. Beitz contrasts this "practical" view of human rights with more "orthodox" views that understand human rights in terms of timeless individual natural rights possessed by persons by virtue of some morally salient fact about them as human persons.

[23] Human rights enforcement with respect to remote, primitive indigenous peoples may be more complex than in more familiar cases of modern outlaw states. See *LoP*, p. 93, n. 6.

[24] For a helpful discussion of this aspect of human rights more or less consistent with the Rawlsian approach as I am presenting it, see Erin Kelly, "Human Rights as Foreign Policy Imperatives," in *The Ethics of Assistance*, ed. Deen Chatterjee, Cambridge: Cambridge University Press, 2004.

[25] See *LoP*, p. 114.

[26] See *LoP*, e.g., pp. 89, 93, 113.

[27] For a defense of Rawls's position on this matter, see my "Rawls on International Justice: A Defense," *Political Theory*, 32/3 (2004): 291–319.

[28] See, for example, *LoP*, p. 66.

[29] See *LoP*, pp. 4, 63, 92. Rawls's position on benevolent absolutisms is not clearly set out. But it seems to be that because they recognize no right to political participation at all, they are not well-ordered polities entitled to recognition, respect, and self-determination within a morally acceptable international order. But because the content of all other basic rights is benevolently delivered to their subjects, there is no right to

intervene on the part of outsiders. Presumably, it is up to the subjects of a benevolent absolutism to claim their own political participation rights. Their ability to do so cannot be discounted as negligible. They already enjoy the content of all their other basic rights and thus possess the resources needed for political agency. And they have an incentive to claim their political participation rights, for with political participation rights they would come to enjoy the content of all their other basic human rights not merely by virtue of a benevolent ruler(s), but rather as a matter of right.

[30] For a useful discussion of what it means to enjoy basic human rights as rights, see Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd edition, Princeton, NJ: Princeton University Press, 1996, especially ch. 3, pp. 74f.

[31] I owe a debt to Rex Martin for illuminating discussion on this point.

[32] For discussion of the various ways in which reciprocity might be understood within Rawls's work, see my "Reciprocity and Reasonable Disagreement: From Liberal to Democratic Legitimacy," forthcoming *Philosophical Studies*, 2005.

[33] Rawls uses the phrase regularly. See, for example, John Rawls, *Political Liberalism*, New York, NY: Columbia University Press, 1996, p. 142.

[34] See *LoP*, pp. 63, 69–70.

[35] See *LoP*, p. 68.

[36] The suggestive references are to H. L. A. Hart's *The Concept of Law*, 2nd edition, Oxford: Oxford University Press, 1997, and Philip Soper's *A Theory of Law*, Cambridge, MA: Harvard University Press, 1984. See *LoP*, pp. 66, 67, and 72. See also, *Political Liberalism*, pp. 109–10, n. 15.

[37] See Hart, *The Concept of Law*, pp. 116–17.

[38] Ibid., pp. 159–60.

[39] Ibid., pp. 193–200.

[40] See Rawls, *Political Liberalism*, pp. 143–4.

[41] Hart himself remained troubled by this apparent feature of his view. See Nicola Lacey, *A Life of H.L.A. Hart*, Oxford: Oxford University Press, 2004, pp. 228–34.

[42] See *LoP*, p. 66, n. 5.

[43] Similarly, South Africa had no moral right to nonintervention prior to the abolition of apartheid.

[44] Rawls develops these points, albeit in a cursory way, in *LoP*, pp. 65–72.

[45] After completing this essay, I learned that Alyssa Bernstein reaches a similar conclusion by similar reasoning in her very instructive dissertation, "Human Rights Reconceived: A Defense of Rawls's Law of Peoples," PhD dissertation, Department of Philosophy, Harvard University, 2000.

[46] Treaty making is not the only path open to expanding the range of human rights enforceable under international law. Custom (not rooted in mere force) may be integrated into and enforced as international law. There is, therefore, much to be gained simply by drawing not yet liberal and not yet democratic peoples into an international conversation and practice within which liberal democratic peoples play a substantial and visible and perhaps leading role. The power of example ought not be underestimated.

Part IV

On Global Economic Justice

11

Collective Responsibility and International Inequality in *The Law of Peoples*

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When John Rawls published his last book, *The Law of Peoples* (*LoP*), in 1999, it drew critical responses of greater or lesser degrees of vehemence from a range of political philosophers who were sympathetic to Rawls's work in general, and to the theory of justice laid out in the book of that name in particular.[1] The most vehement responses spoke of betrayal, retraction and so forth; others were more nuanced.[2] It was agreed, however, that in attempting to extend his theory of justice from the domestic to the international realm, Rawls had lost his bearings. Of course, in *A Theory of Justice* (*TJ*), he had made some comments about just principles of international law that anticipated the position he would take in *LoP*.[3] But these were intended only to introduce a discussion of just war and conscientious objection, and so writers influenced by Rawls, such as Charles Beitz and Thomas Pogge, had felt free to develop theories of global justice that applied Rawlsian principles such as the difference principle at global level.[4] In *LoP*, however, Rawls explicitly repudiates such theories, and argues that the principles of international relations – principles of justice that apply to what he calls the Society of Peoples – are of a quite different kind from the principles of social justice that apply within liberal societies. The famous Rawlsian principles of basic justice – equal liberty, equality of opportunity and the difference principle – do not apply at global level. Instead we have a list of eight principles, most of which are familiar from the conventional literature of international law – observing treaties, non-intervention and so forth. The only principle that bears directly on economic redistribution between peoples is the last, which posits a duty of assistance towards peoples whose material conditions are such that they cannot sustain what Rawls calls 'a just or decent political and social regime'.[5]

What, according to the critics, has gone wrong as Rawls directs his attention away from social justice and towards global justice? A claim often made is that

Rawls has, so to speak, 'gone communitarian' when thinking about justice at global level. Instead of thinking in terms of individuals and what they can rightfully claim from each other, he thinks in terms of politically organised communities, and how they should conduct their relationships. One symptom of this shift is that when imagining an original position from which the principles of international relations are to be derived, Rawls fills it not with individual persons but with representatives of different peoples, who are charged with advancing the interests of the societies they represent.[6] To the critics, this is starting in precisely the wrong place: it gives communities an unwarranted moral priority over their individual members.

Besides this general charge, (at least) three more specific criticisms have been made of Rawls's position in *LoP*. The first concerns the principled toleration that he wants to extend to those non-liberal societies that he calls 'decent hierarchical societies'. I don't want to enter the debate here about how Rawls characterises these societies, and why he believes that liberal societies should refrain from trying to transform them – this would take another paper. The critics argue that Rawls should not be as complacent as he apparently is about societies that are undemocratic, discriminate against women, etc.

The second criticism is that although 'honouring human rights' is one of the eight principles Rawls lays down to govern the society of peoples, he then proceeds to pare down human rights in an unacceptable way, so that, for instance, rights to democratic participation or to unrestricted freedom of conscience do not belong on the list. Here, the critics claim, he neglects the growing international consensus, embodied not just in official declarations like the *Universal Declaration of Human Rights* and its successor documents but also in political practice, on a longer and richer list of rights which can serve to challenge not only various authoritarian regimes but also liberal societies themselves, who often fail to practise what they preach.

The third criticism – and this is the one that I shall focus on in this paper – is that Rawls has given us no good reason to abandon a broadly egalitarian conception of global justice. He has not explained why the arguments that support equality of opportunity and the difference principle at the domestic level do not also apply internationally. The duty to assist burdened societies, which is a limited duty that ceases to apply as soon as a society crosses the threshold where it is able to attain well-orderedness and decency, is no substitute for this. Even if this duty were to be fulfilled by the richer societies, we might well still have a grossly unequal world where people's life chances were arbitrarily determined by the society into which they happened to be born.

So how does Rawls justify his rejection of global principles of distributive justice, and especially the global difference principle? One reason that he gives – in fact the only reason that he presents in the lecture on 'The Law of Peoples' that prefigured the book – is that we should not expect cross-national agreement on liberal principles of justice.[7] Given that the law of peoples is meant to apply to

societies of different types, and in particular to decent hierarchical societies as well as to liberal societies, we cannot expect people to comply at a global level with principles that they would reject when applied to domestic society: for instance, if a society's internal conception of justice mandates treating men and women unequally in certain respects, then it would be unreasonable to require it to comply with egalitarian principles in its international relations.

However, this argument seems less than decisive. Recall that when developing his theory of social justice, Rawls has no hesitation in requiring groups inside the political community to comply with liberal principles of justice, even though, within their own associations, they may follow a different conception. For instance, a church may refuse to ordain women on theological grounds, but in other respects it must comply with the principle of equal opportunity – it couldn't, say, discriminate against women when it came to hiring a caretaker to look after the church building. Rawls makes it clear that non-liberal conceptions of justice can be followed only within limits set by the need to preserve a basic structure that fulfils his two principles, and this is something that can reasonably be demanded of the groups in question.[8] So why not make a parallel demand at global level, requiring all societies to interact on terms established by reference to liberal principles of distributive justice?

Perhaps sensing the gap in his argument, Rawls in *LoP* advances a rather strong claim about the causes of international inequality. Indeed he makes two connected claims. The first is that:

> I believe that the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues.

And the second, which follows immediately in the text, is that:

> I would further conjecture that there is no society anywhere in the world – except for marginal cases – with resources so scarce that it could not, were it reasonably and rationally organized and governed, become well-ordered.[9]

He draws two normative conclusions from these claims. The first is that there is no reason of justice to be concerned about arbitrary inequalities in the distribution of natural resources. Because virtually every society could reach the threshold of well-orderedness and decency if it organized itself properly, we should not be concerned by the fact that some societies start off with more natural resources per capita than others. The second conclusion is that, since a society's wealth depends upon factors internal to that society, it would be wrong to transfer resources from societies that have become wealthy to societies that have remained poor, as the difference principle for instance might require. To drive the point home, he

invites us to imagine two societies starting out with the same initial resource endowment. For cultural reasons, one decides to industrialize while the other remains pastoral.[10] The first becomes twice as wealthy as the second. Rawls asks, rhetorically:

> Assuming, as we do, that both societies are liberal or decent, and their peoples free and responsible, and able to make their own decisions, should the industrializing country be taxed to give funds to the second?[11]

He assumes that the answer to this question is 'No', and that we therefore have reason to reject any broadly egalitarian principle (such as the difference principle) that could require such a transfer to be made.

As we can now see, Rawls has a very different picture of international society from the picture of domestic society that he assumes in developing his theory of social justice.[12] In the domestic case, individuals' life chances are largely determined by a basic structure of institutions over which they as individuals have no control. For that reason the basic structure must be regulated by principles of justice that allow citizens to live together on terms that all can accept – principles that involve, for example, compensating for the economic effects of inequality in natural talent. In the international case, by contrast, peoples are regarded for the most part as relatively autonomous, in the sense of being able to determine, through their cultural values and the institutions that embody these, how materially wealthy they will become, so here distributive principles are out of place, and inter-societal transfers are required only in the case of 'burdened' societies, insofar as such transfers can help these societies to become well-ordered.

I want to focus attention on Rawls's reason for thinking that – at least among liberal and decent peoples – inequalities between peoples can be just, and therefore do not stand in need of correction. His argument to this effect can be broken down into three separate claims:

1. *The empirical claim.* The causes of wealth and poverty are largely internal to each society. Whether a society becomes wealthy or remains poor depends primarily on its political culture and institutions, its religious and moral traditions, the industriousness of its members, etc.
2. *The justice claim.* If inequalities between agents arise as a result of factors for which the agents in question can be held responsible, these inequalities are not unjust.
3. *The responsibility claim.* Liberal and decent peoples are each collectively responsible for the cultural and other features that give rise to inequalities between them.

Each of these claims has to be defended if Rawls's argument is to go through. If societies become rich and poor mainly for external reasons – their positioning

in the global economy, for instance – then for their members to claim responsibility for such outcomes would clearly be wrong, and the argument immediately collapses. If justice sometimes requires us to correct for inequalities for which agents are responsible, then even if the empirical claim is true, there is nothing to prevent us from proposing redistributive principles of global justice such as the global difference principle. And finally, even if the factors that cause wealth and poverty are primarily internal, it still has to be shown that we can hold peoples collectively responsible for these factors – that, for example, a people can genuinely be held responsible for the religious and moral traditions that it adheres to. But Rawls himself makes little attempt to justify any of the three claims.

The empirical claim is the most intractable of the three, for political philosophers at least. One might well despair of finding a valid general answer to the question: why do some societies become rich, while others remain poor, or become poorer still? The possible explanatory factors can roughly be divided into three groups: *physical factors*, such as the availability of resources like coal and oil, the prevailing climate, and the society's geographical location (is it landlocked, for instance?); *domestic factors*, for instance the prevailing religious or political culture, and the practices and institutions which both reflect and shape it; and *external factors*, such as the pattern of global trade and investment, the impact of foreign states through colonialism or neo-colonialism etc.[13] *A priori*, it seems likely that any adequate answer to the question will invoke factors of all three kinds. Rawls himself cites David Landes's book, *The Wealth and Poverty of Nations*, in support of his claim about the primary importance of culture, but Landes's wide-ranging and somewhat unanalytical historical study does not suggest any mono-causal theory; indeed the book starts with a chapter about the importance of climate in explaining the relative success of Europe *vis-à-vis* countries closer to the Equator. Landes clearly thinks that culture matters in explaining economic success, but he supports this claim largely anecdotally.[14]

Other economic historians, however, provide support for Rawls's claim, interpreted as saying that domestic factors are the main, rather than the sole, cause of economic success or failure. Geography matters to some extent – nearly all developed economies are to be found in temperate rather than tropical zones – but examples such as Singapore and Mauritius show that geographical disadvantage can be overcome by domestic factors. Natural resources can be either a blessing or a curse depending on the cultural and institutional context in which they are appropriated – coal was a major factor propelling the industrial revolution in Britain, whereas the discovery of oil in the Middle East is widely judged to have distorted economic development in those societies and propped up authoritarian regimes. Conversely, both culture and institutions can be shown to correlate significantly with economic success, the main problem being to disentangle their effects, since there is obviously strong interaction between them. The independent effect of culture can be seen most easily by studying the varying success rates of different ethnic groups in a single society – for instance by comparing the

performance of Asian immigrants to the USA with that of blacks and Hispanics.[15] Institutional effects have been studied by looking at ex-colonial societies, starting out with contrasting legal systems, sets of property rights, and so forth and comparing their economic performance over time.[16]

Rawls has been criticized by, among others, Thomas Pogge, for failing to see that the economic effects of a society's culture and institutions depend on the global environment in which the society is placed. According to Pogge, 'it is quite possible that, in a different global environment, national factors that tend to generate poverty, or tend to undermine the fulfilment of human rights more generally, would occur much less frequently or not at all'.[17] In a formal sense, this is certainly true: for almost any set of national factors, we could imagine a global environment in which those factors would lead the society that possessed them to do reasonably well. But is it illuminating? Suppose someone lives in poverty because, although he has been offered a variety of paid work on reasonable terms, he steadfastly refuses to take it. It is true that, in a different environment – one in which the link between income and work has been severed, so that everyone receives the same income unconditionally – this person would not be poor. Nevertheless it is reasonable to hold him responsible for being poor in the society in which he actually lives. Behind this judgement lies the assumption that making the receipt of income depend on willingness to work isn't unfair. In a similar way, Pogge is on strong ground when he points to practices such as the 'international resource privilege' – the legal convention whereby governments, no matter what their complexion, are recognized as having the right to sell natural resources found on their territory to outsiders – which positively encourage authoritarian rulers to oppress and exploit their subjects.[18] Such practices do indeed make the governments of rich countries responsible for contributing to world poverty. But he is wrong to turn this into a wholesale indictment of the current international order as harmful to people in poor countries, because much of that order is neutral, in the sense that it gives adequate opportunities for societies with suitable domestic institutions and cultures to grow economically – as indeed many have done in recent decades.

There remains much work to do in specifying what a 'fair' international order would look like, but I hope to have said enough to render Rawls's empirical claim – that the primary causes of a society's wealth or poverty are its political culture and institutions, etc. – at least plausible. To defend his thesis about global justice, however, there are two further hurdles to cross, so let me turn now to the justice claim: if inequalities between agents arise as a result of factors for which the agents in question can be held responsible, these inequalities are not unjust.

This claim might seem to be the least problematic of the three, because it expresses an intuition about distributive justice that many have found plausible. But it may prove to be somewhat problematic for Rawls himself, given his support for the difference principle in domestic contexts. For that principle is often thought to license redistribution in favour of the worst-off group in society regardless of

whether the members of that group are responsible for being worst off. Indeed, as a matter of intellectual history, the justice claim seems to have emerged as a *corrective* to Rawls, in the work of Dworkin and others: Rawls's theory of justice was seen as defective because it did not take personal responsibility sufficiently into account. So how can Rawls now rely on it to defeat the difference principle at the global level?

It is important to note that Rawls's theory of social justice does incorporate one important claim about responsibility. Rawls holds people responsible for forming and revising their conceptions of the good, and therefore for the amount of welfare that they can derive from any given allocation of primary goods. You are not held responsible, at least at first glance, for the amount of income you receive, but you *are* responsible for what you do with that income – with how effectively you use it to pursue a conception of the good. You must cut your coat to suit your cloth. So it is not the case that the idea of responsibility is absent in *TJ* and present with a vengeance in *LoP*. But it may still seem that an important difference remains: in *LoP* but not in *TJ*, people are being held responsible for having a larger or smaller share of primary goods, especially income and wealth.

But here we need to look a little more closely at how the difference principle is used in *TJ*. It is applied to the basic structure of society, not to individual members. Along with the other two principles, it establishes a structure of rights, opportunities and rewards – for instance, it might be used to set a minimum wage for unskilled workers. However, it is still left to each individual to determine what use she will make of the opportunity set that confronts her. This is clear in the case of the equal opportunity principle, for example, which specifies that there should be equal life prospects for people who are similarly endowed and motivated. Motivation matters, therefore: it is not an injustice if ambitious or hard-working people end up with more resources than those who lack these qualities. Indeed in a notorious comment added in a later paper, Rawls remarked that 'those who surf all day off Malibu must find a way to support themselves and would not be entitled to public funds'.[19] The difference principle does not justify paying people who choose not to work an unconditional income. Thus the position taken in *TJ* might be described as a mitigated responsibility view: individuals are held responsible for gaining a greater or lesser share of primary goods like income, but the structure within which they exercise that responsibility is tilted in favour of those who have less talent and weaker motivation, partly in recognition of the fact that 'the effort a person is willing to make is influenced by his natural abilities and skills and the alternatives open to him' and that a person's character 'depends in large part upon fortunate family and social circumstances for which he can claim no credit'.[20]

The position, then, is not that Rawls dismisses responsibility for outcomes in *TJ* only to endorse it in *LoP*. Although the conception of social justice elaborated in the earlier work is not based on the justice claim in the form laid out above – Rawls should not be understood as a 'luck-egalitarian', as other commentators

have pointed out[21] – the two principles, when properly understood, are not starkly at odds with it. As I have indicated, they give individual responsibility considerable scope, and aim to offset the effects of certain kinds of luck, most notably the luck of being born talented or untalented. But if *TJ* develops a mitigated responsibility view, does the mitigation disappear in *LoP*? Does Rawls hold peoples entirely responsible for their economic success or failure in a way that leaves no scope for compensating them for unfavourable circumstances?

The answer, clearly, is that Rawls does mitigate responsibility in the case of those who belong to burdened societies. He holds that well-ordered societies have a duty of assistance towards societies 'whose historical, social, and economic circumstances make their achieving a well-ordered regime, whether liberal or decent, difficult if not impossible'.[22] Although burdened societies are economically poor, Rawls attributes their difficulties chiefly to cultural and political factors, and argues that the main aim of the duty of assistance should be to help engineer change in these dimensions rather than to send material assistance in the form of foreign aid. So although in one sense members of burdened societies are responsible for their condition, Rawls thinks that they are unlikely to bootstrap themselves out of that condition, and so responsibility is mitigated by the duty of assistance. That duty, however, has a clear target: once a society has crossed the threshold and is able to become liberal or decent, it is then regarded as fully responsible for its future progress, and no further transfers are required. In this respect mitigation goes less far than in the domestic case: the difference principle has no cut-off point beyond which redistribution automatically ceases.

We may speculate about why Rawls gives the justice claim greater scope in the international arena than he does in the domestic case. One plausible explanation is that he sees relations between peoples as being governed primarily by a principle of equal respect, which manifests itself practically in mutual toleration. Among well-ordered societies, at least, each is to leave the others free to develop politically and economically as they choose, and to refrain from acting on judgements of cultural superiority and inferiority. Relations among individuals within a political community, by contrast, are in addition governed by the principle of fraternity, which requires that each should be able to justify to the others his relative share of primary goods. Once the difference principle is in place, those who are better off can justifiably claim that the basic structure has been arranged in such a way that those who are worse off are nonetheless as well off as they can be. This interpretation is controversial, of course, but the main point for our discussion is that Rawls does not see the fraternity principle as applying at international level. Indeed he is concerned that there is not enough affinity between peoples even to support the weaker duty of assistance. His hope for the international realm is that over time it can come to embody mutually advantageous co-operation, and eventually what he calls 'mutual caring'. But this is qualitatively different from the kind of solidarity that Rawls envisages as being essential to the working of a just society.

So far I have been deliberately glossing over the difference between individual responsibility and collective responsibility in order to assess whether the place that Rawls gives to responsibility in international justice is inconsistent with the place he assigns it in domestic justice. But now I want to turn to Rawls's third claim, which I have labelled the responsibility claim: liberal and decent peoples are each collectively responsible for the cultural and other features that give rise to inequalities between them. This claim involves at least three further assumptions that critics have found problematic: that responsibility can inhere in collectives as well as in individuals; that responsibility can pass down between generations in such a way that members of a later generation can justifiably benefit or suffer from decisions or policies adopted by an earlier generation; and that the cultural and political features that form the basis of the empirical claim are also features for which peoples can properly be held responsible. Each of these assumptions raises big questions, and Rawls makes little attempt in *LoP* to deal with them adequately. So what follows is a sympathetic reconstruction of arguments that are only hinted at in the text but seem to be necessary to justify the responsibility claim.

It is important to note, first of all, that the responsibility claim is only invoked in the case of peoples who are either liberal or decent. When Rawls tells his two societies story to illustrate why the difference principle should not be applied globally, it is a crucial part of the story that the societies in question are 'liberal or decent, and their peoples free and responsible, and able to make their own decisions'.[23] What is being signalled here, I think, is that the peoples in question are not being subjected to generalised coercion, but are living under regimes to which they give their support, either because, in the case of the liberal societies, people are free and equal citizens, and there is an overlapping consensus on principles of social justice, or, in the case of decent societies, there is a consultation hierarchy and convergence on what Rawls calls 'a common good idea of justice'. In neither case does this imply, of course, that every member of the society agrees with every decision that is taken; but insofar as decisions are informed by principles on which there is agreement, and taken according to procedures that citizens accept, they are reasonably implicated in collective responsibility.

It is sometimes argued that responsibility only ever applies to individuals, never to collectives, but this position is unsustainable, as I have argued elsewhere.[24] Just to illustrate the point with a simple example, suppose the University of Oxford were to decide to revert to its practice of previous centuries and exclude women from taking degrees, and that I had not bothered to attend the meeting of Congregation which voted on the matter; then I would rightly be included in collective responsibility for the decision, even though, had I gone along to the meeting, I would have voted against it. I believe also, though this is less intuitively obvious and requires further argument, that I can sometimes be implicated in collective responsibility even for decisions that I do vote against.[25] So although Rawls can be faulted for not spelling out explicitly the conditions under which

collective responsibility applies, he characterises liberal and decent peoples in a way that makes assigning collective responsibility to them plausible. Of course, it can also be argued that his characterisations are unrealistic: that the portraits he presents are of imagined societies with their faults airbrushed out – for instance, he overstates the extent to which the inhabitants of liberal societies agree over matters of justice, and he is naïve to think that 'consultation hierarchies' which don't treat citizens as equals can properly embody a shared view of the common good. But Rawls says explicitly that he is trying to describe a 'realistic utopia' – a world different from ours but one that nevertheless stays within the realms of the possible.[26] Given that aim, his general assumption about the collective responsibility of liberal and decent peoples is reasonable.

What next about responsibility across the generations? When Rawls tells his story about the industrializing and pastoral societies, he describes inequalities that emerge 'some decades later' without raising the question whether the gainers and losers are the same people as those who made the original decisions to industrialize and remain pastoral respectively. This might seem to be a crucial ambiguity. Why should the children of pastoralists be disadvantaged by their parents' decision?[27] But, on the other hand, what precisely is their complaint? As Rawls tells the story, the pastoralists' original decision was motivated by their values: they preferred a more leisurely life, and one that was presumably more in tune with nature. If their descendants share these values – a plausible assumption – then they have no reason to feel aggrieved about their lower material standard of living; they would have made the same decision in their parents' place. What, though, if their values are different? So long as the earlier generation have not diminished the resources available to their descendants, and so long as these resources are sufficient to support a well-ordered society, it is again not clear what complaint their children have. They may wish that their parents had acted differently, but that is another matter. As Rawls makes clear in his original discussion of justice in savings, 'justice does not require that early generations save so that later ones are simply more wealthy. Saving is demanded as a condition of bringing about the full realization of just institutions and the fair value of liberty'.[28] The fact that another people have chosen a higher rate of saving and investment, made possible by their decision to industrialize, cannot ground a claim of injustice on the part of the pastoralists' children.

There is a further point worth making here in support of Rawls's position. Collective responsibility of the kind discussed above is a two-way street. We appeal to it to show why the current generation may be justified in claiming economic and other advantages that stem from the actions of their predecessors. But this same understanding of responsibility across generations can be used to support claims for redress in cases where the actions of earlier generations can be shown to have inflicted continuing injustice on other peoples, or on minorities within the nations in question. Claims of this kind are often now advanced on behalf of those who suffer from the after-effects of slavery, colonial exploitation,

the wartime internment of aliens, and so forth. There are many problems with such claims, mainly having to do with establishing the identity of the present-day victims, the appropriate level of compensation and so forth,[29] but their basic logic is sound: people should not be disadvantaged today by acts of injustice committed against their ancestors. However, even if these problems can be addressed, there is a further stumbling block, which is to show why the present-day descendants of the perpetrators should be held responsible for what their ancestors did. They, after all, are in no way causally implicated in the injustice, and may not even benefit directly from it. This problem can be overcome only by embracing an intergenerational account of collective responsibility – an account, in other words, that shows that a people today is *both* entitled to inherit the legitimate gains of its predecessors *and* liable to make redress for the injustices they perpetrated, in cases where these injustices can be shown to have had a lasting effect. Rawls himself does not discuss historical redress as an aspect of justice between peoples in *LoP*, and this is certainly an omission. But if we correct that omission, we can see that collective responsibility, while not an egalitarian view, may in some circumstances require compensatory transfers to be made to peoples who are now badly off – in other words, it supplements the general duty of assistance by imposing specific obligations on peoples whose ancestors exploited or oppressed their vulnerable contemporaries.

This leaves the third assumption behind Rawls's responsibility claim: that collective responsibility can extend to the features Rawls cites in his empirical claim about the causes of wealth and poverty, namely 'political culture', 'the religious, philosophical, and moral traditions that support the basic structure of [a people's] political and social institutions', and their 'industriousness and cooperative talents'. To explain: when Rawls introduces his examples of twinned societies to justify the intuition that international inequality may be just when it stems from collective responsibility, he stresses collective decisions: to industrialize or to remain pastoral, and, in the second example, to reduce population growth or allow it to continue. It is easy to see how collective responsibility applies to political decisions, given appropriate circumstances and procedures. But can it also apply to background factors such as political culture or religious and moral tradition, which are more plausibly invoked as explaining economic success, or lack of it? It might seem more reasonable to regard peoples as the captives of their culture and traditions, rather than as being responsible for them.

Here we might wish to draw a line between liberal and decent peoples. For the institutions of liberal societies are such as to encourage their members to take responsibility for their own conceptions of the good, and by extension to reflect upon and debate their political arrangements, their religious and moral traditions, and so forth. Cultural matters are discussed openly, and cultural shifts occur more or less rapidly – consider, for instance, changing attitudes towards women, gays and ethnic minorities over the course of the last generation, and the way in which these attitudes have been incorporated into public policy, work practices and so

forth. The conditions for collective responsibility seem to apply here. In contrast, in societies whose culture is dominated by one conception of the good – presumably in practice a religious conception – and in which freedom of expression is somewhat restricted, it is less easy to justify holding the members responsible for the results of their culture and institutions: they may endorse the culture and institutions wholeheartedly, but they are less well placed to reflect critically on those same features.

When Rawls sets out the criteria for a decent hierarchical society, he is mainly concerned to show that such a society may treat its members sufficiently well to deserve the respect of liberals. He is not trying to tackle the issue of collective responsibility. Nevertheless his description includes features that may prove to be helpful in this task. For instance, he makes it clear that decent societies are pluralistic: they contain a number of corporate groups, each of which is consulted via its representatives before decisions are made. As a result 'a decent consultative hierarchy allows an opportunity for different voices to be heard'.[30] It must also allow for the possibility of dissent from existing policy, and dissent must be taken seriously and responded to with reasons. Admittedly all this takes place within 'the basic framework of the common good idea of justice', but Rawls assumes that the framework will allow for real debate – for instance, he thinks that within an Islamic framework it will be possible to mount arguments in support of the equal treatment of women. So decent societies are not totalitarian: no single doctrine is enforced, and there is space for different interpretations of the common culture to be advanced. Under these circumstances we may judge that collective responsibility applies, albeit with less confidence than in the case of liberal peoples.

I have been attempting in this essay to defend Rawls's position in *LoP* against critics of a more cosmopolitan bent who wished him to extend the principles of justice laid down in *TJ* to the world as a whole. Rawls argues, correctly in my view, that we should not assume that justice is a matter of applying the same principles regardless of the subject matter to which they are applied.[31] Just as justice within the family or within a church may have a different content from justice in a society, so principles of global justice may differ from principles of social justice. I have defended Rawls's general claim that the collective responsibility of peoples may legitimate international inequality, although I have also indicated where I think that claim needs more defence than Rawls himself provides. There is, however, one last issue that needs a brief comment. Even if international inequality can be shown to meet relevant criteria of justice, based on responsibility, may it not still have consequences that we find objectionable? Rawls tackles this question in a short section of *LoP*, where he asks whether the reasons we have for objecting to inequality in domestic society also apply at the international level – for instance the idea that inequalities may wound the self-respect of those who are worse off, even if they are otherwise just.[32] The answers he gives are generally satisfactory, except (in my view) when he turns to consider the impact of inequality on international political processes.[33] That is, he

underestimates the extent to which economic inequalities between peoples may also constitute inequalities of power, which will have a distorting effect on future terms of international co-operation. It may be hard in these circumstances for poor nations to enjoy an adequate measure of self-determination. And given that there are a number of areas in which nation-states need to co-operate with one another to their mutual advantage – environmental policy is perhaps the most obvious – the distribution of costs and benefits in the agreement that emerges is likely to be determined largely by the relative bargaining power of the various parties. Agreement in such areas of policy cannot be forced. Rawls explicitly rules out the creation of any form of world state, and implicitly rules out international institutions able to wield coercive power over liberal and decent peoples. If rich countries dislike the terms of co-operation that are being proposed, they can simply refuse to sign the relevant treaty or agreement (as the USA has notoriously done in the case of the Kyoto Agreement), and poor countries have few sanctions that they can deploy to bring them back to the negotiating table. Rawls addresses this problem of unequal power by considering an international original position with a veil of ignorance, behind which, as he says, 'the representatives of peoples will want to preserve the independence of their own society and its equality in relation to others'.[34] But if so, and if they understand the likely political consequences of global economic inequality, will they not want to go beyond formal measures to protect independence and fairness and support policies that aim to control and counteract such inequality?

In short, even if international inequalities can be shown to be just when grounded in collective responsibility, they may still trouble us because of their likely effects on justice in the future. But how, in practice, inequality-limiting measures could be implemented at global level is one of the several questions that Rawls's slim volume leaves unanswered.

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Notes

[1] J. Rawls, *The Law of Peoples* (hereafter *LoP*), Cambridge, MA: Harvard University Press, 1999.

[2] See, for instance, C. Beitz, 'Rawls's Law of Peoples', *Ethics*, 110 (1999–2000): 669–96; A. Buchanan, 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World', *Ethics*, 110 (1999–2000): 697–721; S. Caney, 'Cosmopolitanism and the Law of Peoples', *Journal of Political Philosophy*, 10 (2002): 95–123; M. Nussbaum, 'Women and the

Law of Peoples', *Politics, Philosophy and Economics*, 1 (2002): 283–306; K.-C. Tan, *Toleration, Diversity and Global Justice*, University Park, PA: Pennsylvania State University Press, 2000.

[3] J. Rawls, *A Theory of Justice* (hereafter *TJ*), Cambridge, MA: Harvard University Press, 1971, sect. 58.

[4] C. Beitz, *Political Theory and International Relations*, Princeton, NJ: Princeton University Press, 1979, Part III; T. Pogge, *Realising Rawls*, Ithaca, NY: Cornell University Press, 1989, Part III.

[5] Rawls, *Law of Peoples*, p. 37.

[6] Rawls in fact describes two original positions for formulating the principles of the Law of Peoples, one containing representatives of liberal peoples and the other containing representatives of 'decent' peoples – see the following paragraph.

[7] J. Rawls, 'The Law of Peoples', in *John Rawls: Collected Papers*, ed. S. Freeman, Cambridge, MA: Harvard University Press, 1999.

[8] See J. Rawls, 'The Idea of Public Reason Revisited', sect. 5, in Freeman, ed., *John Rawls: Collected Papers*; J. Rawls, *Justice as Fairness: A Restatement*, Cambridge, MA: Harvard University Press, 2001, sect. 50.

[9] Rawls, *Law of Peoples*, p. 108.

[10] In a second example offered by Rawls, one society gradually reduces its rate of population growth to zero, while the other allows it to remain high. Here too the first society becomes wealthier (per capita, Rawls presumably means) than the second. See Rawls, *Law of Peoples*, pp. 117–18.

[11] Rawls, *Law of Peoples*, p. 117.

[12] The differences are well brought out in D. Reidy, 'Rawls on International Justice: A Defense', *Political Theory*, 32 (2004): 291–319.

[13] This division follows the one suggested by Rodrik in D. Rodrik, ed., *In Search of Prosperity: Analytical Narratives of Economic Growth*, Princeton, NJ: Princeton University Press, 2003, ch. 1, although I have used different labels. See also M. Risse, 'What We Owe to the Global Poor', *Journal of Ethics*, 9 (2005): 81–117.

[14] D. Landes, *The Wealth and Poverty of Nations*, London: Little, Brown and Co., 1998, esp. ch. 29.

[15] See the papers collected in L. E. Harrison and S. P. Huntington (eds), *Culture Matters*, New York, NY: Basic Books, 2000.

[16] D. Acemoglu, S. Johnson and J. Robinson, 'The Colonial Origins of Economic Development: An Empirical Investigation', *American Economic Review*, 91 (2001): 1369–1401. See also D. Rodrik, A. Subramanian and F. Trebbi, 'Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development', *Journal of Economic Growth*, 9 (2004): 131–65. For a somewhat more sceptical appraisal, which focuses in particular on the instruments used to measure institutional quality in the two papers above, see E. C. Glaeser, R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'Do Institutions Cause Growth?', *Journal of Economic Growth*, 9 (2004): 271–303.

[17] T. Pogge, 'The Bounds of Nationalism', in *World Poverty and Human Rights*, Cambridge: Polity Press, 2002, p. 141.

[18] Pogge, *World Poverty and Human Rights*, *passim*.

[19] J. Rawls, 'The Priority of Right and Ideas of the Good', in Freeman, ed., *John Rawls: Collected Papers*, p. 455.

[20] Rawls, *A Theory of Justice*, pp. 312, 104.
[21] See, for instance, S. Scheffler, 'What is Egalitarianism?', *Philosophy and Public Affairs*, 31 (2003): 5–39.
[22] Rawls, *Law of Peoples*, p. 90.
[23] Rawls, *Law of Peoples*, p. 117.
[24] D. Miller, 'Holding Nations Responsible', *Ethics*, 114 (2003–4): 240–68.
[25] Miller, 'Holding Nations Responsible', sect. II.
[26] Rawls, *Law of Peoples*, sects. 1, 18.
[27] This question is pressed in Beitz, 'Rawls's Law of Peoples'.
[28] Rawls, *A Theory of Justice*, p. 290. This plainly refers to the savings principle as it applies to liberal societies.
[29] See, for instance, J. Waldron, 'Superseding Historic Injustice', *Ethics*, 103 (1992): 4–28; G. Sher, 'Ancient Wrongs and Modern Rights', in Sher, *Approximate Justice: Studies in Non-Ideal Theory*, Lanham, MD: Rowman and Littlefield, 1997; A. J. Simmons, 'Historical Rights and Fair Shares', in Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge: Cambridge University Press, 2001.
[30] Rawls, *Law of Peoples*, p. 72.
[31] For a general argument to this effect, see D. Miller, 'Two Ways to Think about Justice', *Politics, Philosophy and Economics*, 1 (2002): 5–28.
[32] Rawls, *Law of Peoples*, sect. 16.1.
[33] For a fuller discussion, see my article, 'Against Global Egalitarianism', *Journal of Ethics*, 9 (2005): 55–79, sect. V.
[34] Rawls, *Law of Peoples*, p. 115.

12

Do Rawls's Two Theories of Justice Fit Together?

Thomas Pogge

In *A Theory of Justice*, John Rawls offered his account of domestic justice, meant to provide moral guidance for the assessment, design, and reform of the institutional order ("basic structure") of one society.[1] Twenty-eight years later, he published a work on international justice: *The Law of Peoples*, presenting it as an extension of his domestic theory.

Central to both texts are thought experiments involving a fictional deliberative forum, the *original position*, composed of rational deliberators, or *parties*. In the domestic case, the parties represent individual persons. As there is one representative for each prospective citizen, this original position is said to model the freedom and fundamental equality of all persons. The parties have the task, in behalf of their respective clients and protecting their interests, to agree on a public criterion of justice for assessing alternative feasible basic structures for a society. A *veil of ignorance* conceals all distinguishing features of these prospective citizens from the parties, who must choose a public criterion of social justice without knowing their clients' particular creeds, values, tastes, desires, and endowments or even the natural and historical context of their clients' society. On the basis of a highly complex array of rigorous arguments, Rawls tries to demonstrate that the parties would select his liberal public criterion: the two principles of justice with the two priority rules (*TJ*: 266–7).

In the international case, the thought experiment of the original position is deployed rather differently. Four divergences spring to mind. The rational deliberators are conceived as representing *peoples* rather than persons, and the international original position is thus said to model the freedom and equality of *peoples*. Representation is granted *selectively*: it is granted only to peoples who are well-ordered by having either a liberal or a decent domestic institutional order, while the remainder are not accepted as equals and are thus denied equal respect and tolerance. The veil of ignorance is *thinner*, allowing the parties to know whether they are representing a liberal or a decent people; and Rawls therefore

conducts his international thought experiment twice to show separately that representatives of liberal peoples and representatives of decent peoples would independently join the same agreement. And the task assigned to the parties in the international original position is, importantly, disanalogous; they are *not*, as one might have expected, charged with agreeing on a public criterion for the assessment, design, and reform of the global institutional order, but charged with agreeing on a set of rules of good conduct that cooperating peoples should (expect one another to) obey.

Why Two Theories at All?

Developing his domestic theory, Rawls writes, "at some level there must exist a closed background system, and it is this subject for which we want a theory" (*PL*: 272 n.9). And so he assumes throughout, if only for purposes of "a first approximation" (ibid.), that the society whose institutional order he discusses is "self-contained" (*TJ*: 401), "more or less self-sufficient" (*TJ*: 4), and "a closed system isolated from other societies" (*TJ*: 7). The citizens of such a society ought to structure it, he concludes, according to his public criterion of justice (the two principles with the two priority rules).

Since the world at large is self-contained, more or less self-sufficient, and a closed system isolated from other societies, it seems to fit Rawls's stipulations – certainly better than any national society does. So how about structuring all of humankind in accordance with the public criterion of social justice proposed in his domestic theory? Rawls not merely denies that we ought to do this, but even insists that we ought not. What reasons can he offer?

As a first reason, Rawls can adduce his skepticism about the feasibility of a well-ordered world state: "Here I follow Kant's lead in *Perpetual Peace* (1795) in thinking that a world government . . . would either be a global despotism or else would rule over a fragile empire torn by frequent civil strife as various regions and peoples tried to gain their political freedom and autonomy" (*LoP*: 36).

But this appeal to Kant is questionable. Kant writes in *Perpetual Peace* that a plurality of independent states, "is still to be preferred to their amalgamation under a single power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy."[2] This passage expresses strong reservations about a universal monarchy achieved by conquest. Kant does not, here or elsewhere, express such reservations about a liberal world republic achieved through a peaceful merger of republics – though he realized, of course, that such a transition might well be opposed by existing rulers.[3]

Even granting, without textual support, that Kant believed that any world state would invariably lead to despotism or civil strife, it is quite doubtful that his

opinion is the best evidence one can have about whether such a just world government is feasible in the twenty-first century and beyond. This is doubtful because the last two hundred years have greatly expanded our historical experience relevant to this question and have vastly improved our social theorizing, especially in economics and political science. In particular we have learned from the federalist systems of the United States and the European Union that – Kant's contrary view notwithstanding – a genuine division of powers, even in the vertical dimension, is workable and no obstacle to stability and justice.

Moreover, had Rawls really been convinced that limits on the range of just and effective government render a global liberal society infeasible, then we should expect these limits to appear within his domestic theory – as the requirement, perhaps, that the society it discusses must not grow beyond a certain population or area, or beyond a certain percentage of the global population or land surface area. But he never considers such limitations.

Finally, even if a justly structured world government were infeasible, this would not invalidate the global application of Rawls's public criterion of social justice. This criterion does not prescribe a specific institutional design, but governs the comparative assessment of alternative feasible institutional designs. Applied globally, it would instruct us to design global political institutions that would secure the basic liberties of human beings as far as possible and to design the global economic order so that fair equality of opportunity is realized worldwide as far as possible and so that it engenders socioeconomic inequalities among persons only insofar as this raises the socioeconomic floor. The applicability of this criterion is not refuted, but rather *confirmed* by Rawls's empirical speculation: If world government would lead to despotism or civil strife, then the public criterion would correctly reject this institutional option for its failure to secure the basic liberties of human beings worldwide. This criterion would then favor another global institutional design – perhaps a global federation on the model of the European Union, or a loose league of nations as Kant had described, or Rawls's similar Society of Peoples, or a states system like that existing now.

As a second reason against the applicability of his public criterion of social justice to the world at large, Rawls could point out that it would be wrong to impose a global order designed according to a liberal criterion of social justice upon decent peoples who may reject the normative individualism of this criterion as well as its emphasis on basic liberties.[4] His international theory is needed, then, to accommodate decent peoples whom liberals are to tolerate and welcome as equal "members in good standing of the Society of Peoples" (*LoP*: 59).

This argument, too, is problematic in three respects. First, why must we "express liberalism's own principle of toleration for other reasonable ways of ordering society"[5] by accommodating the opponents of liberalism in Rawls's international theory and the interactions among societies, but not in his domestic theory and the design of our national institutional order?

Second, why should the accommodation Rawls suggests be so one-sided? As far as I can see, Rawls's theory of international justice requires no concessions at all from decent hierarchical societies, which get exactly the rules that best accord with their values and interests. But it greatly compromises liberal values by rejecting normative individualism, by disregarding the basic liberties of persons outside well-ordered societies, by truncating the basic liberties of persons in decent societies,[6] and by tolerating poverty and huge inequalities worldwide. (While greatly compromising liberal values, Rawls does accommodate those who profess such values quite well by sanctioning the 22:1 income advantage and the much greater wealth advantage that the citizens of today's liberal countries enjoy over the rest of humankind.)

Third, why does Rawls, by not envisioning more liberal global arrangements, assume that the accommodation of decent hierarchical societies is needed forever? Is this a stipulation based on principle or an empirical prediction? Rawls describes a fictional such society, Kazanistan, in which normative individualism is rejected (*LoP*: 75–8). But is the mere possibility of such societies reason enough to accommodate them in the design of the international original position and of the envisioned Society of Peoples – even if such accommodation accommodates no living persons or peoples?

It is unclear how Rawls would answer this question. Either answer would reveal a gap in his reasoning. To motivate an affirmative answer, one would need to explain why an equal place should be indefinitely preserved for such societies when Rawls himself deems them morally flawed – "a decent hierarchical society does not treat its own members reasonably or justly as free and equal citizens" (*LoP*: 83) – and defends accommodation by claiming that it encourages decent societies to reform themselves in a liberal direction (*LoP*: 61–2).

A negative answer would leave a different gap, as Rawls gives no evidence that there really are – let alone always will be – nonliberal societies that qualify as decent and also reject normative individualism. Contemporary defenses of nonliberal societies often stress how happy and secure individuals feel under their more authoritarian, communal, or moralizing social institutions and how disorienting and alienating they find liberal ones. Thus, justifications of decent regimes might well take the interests of persons as morally fundamental. If actual decent regimes were so justified by their supporters, or if no such regimes existed, then a liberal commitment to accommodate actual decent peoples would *not* support an international original position that represents peoples rather than persons.

The dilemma for Rawls arises more broadly. His proposed accommodation presupposes humanity's division into mutually distinct and culturally cohesive peoples. Is this presupposition meant to reflect a moral valuation or entrenched empirical facts? Again, either possibility leads into difficulty. The former answer is problematic, because *A Theory of Justice* provides no reason for valuing political boundaries (not even federalist ones, surprisingly). The latter answer is

problematic as well, because Rawls makes no effort to show that his concept of a people reflects general and entrenched facts in the contemporary world. Many borders in Africa, Latin America, and Asia are colonial constructs that lump diverse communities together (Indonesia) while splitting others over two or more states (Kurds). In Europe, borders are rapidly losing practical significance, so that the notion of a people seems increasingly ill-fitted to the old groups (the Dutch and the Danes) and ill-fitted also to the new and still expanding population of the European Union. In the midst of globalization, we can easily imagine a broadening of this trend, leading to a world in which most borders have little political or practical significance and do not correlate with "separate languages, religions, and cultures" (*LoP*: 112).

The status of Rawls's account remains then unclear. Calling his Society of Peoples a "realistic utopia," does he propose it as the highest ideal for the indefinite future? Or is it a stopgap model meant to accommodate, so long as they are still around, some slightly backward but still basically passable societies that are best handled with tolerance and equal respect – a stopgap model to be superseded, in a hoped-for future era when nearly all societies will have become liberal, by a genuinely liberal conception of global justice? Perhaps *The Law of Peoples* is not meant to be clear on this point. The accommodation of actual decent societies – whichever ones Rawls may have in mind under this label – can have its desired effects only if it is genuine and unconditional, only if decent societies feel assured that their equal place is secure indefinitely irrespective of their number or power (cf. *LoP*: 122–3).

This parallels the liberal domestic accommodation of diverse comprehensive (e.g., religious) doctrines. But there are two crucial differences: Rawls expresses no preferences within the range of reasonable comprehensive doctrines and he predicts that, barring state oppression, citizens will continue to hold and to respect doctrines throughout this range (the "fact of reasonable pluralism" – *PL*: 36). In the international case, by contrast, Rawls holds that decent societies are morally inferior and hopes that all human beings will eventually live under liberal institutions. Ought the humanity of such a happy future age share his concern to maintain a global order fully acceptable and hospitable to decent regimes? Would it be wrong (unjust) if, with universal approval, they adopted Rawls's two principles of justice to guide the design of their global institutional arrangements? It may seem wise to leave this issue unexplored for now. But what could possibly justify an affirmative answer?

Why Exclude the Interests of Persons?

Insisting that two theories of justice are needed, Rawls praises the divergences between them as demonstrating the "versatility" and "flexibility" of his original position (*LoP*: 40, 86). He fails to note that such flexibility can greatly undermine

the justificatory power of reflective equilibrium (*TJ*: 42–5, 507–8). If the thought experiment of the original position can be bent in a variety of ways to deliver desired conclusions, then it becomes rather less remarkable that Rawls's diverse considered judgments about social justice can be "derived" through one or other variant of this thought experiment. The fact that all these considered judgments fit into one contractualist account can confirm those judgments only insofar as this account exerts some discipline of fit. Failing this, the fact has no significance. As in geometry, the fact that given data points in a plane precisely fit some algebraically expressible graph shows nothing significant about these data points, because such a graph can be constructed for *any* set of points whatsoever.

The present section and the next seek to show that Rawls indeed loses much of the justificatory point of his contractualist theorizing by failing to provide a convincing rationale for the divergences between his theories. Remaining unexplained, the asymmetries between his two theories damage the credibility of both and of his far less rigorously developed international theory in particular.

Much attention has already been paid to the fact that Rawls puts so much moral weight on the notion of a people. This notion is marred by a double vagueness. First, it is unclear what groups are to count as peoples. Does Rawls want to count any group of persons residing together within the territorial boundaries of a state? What about the Kurds, the Jews, the Chechens, the Maori, the Sami, and hundreds of other traditional and aboriginal nations, which often transcend state borders or are nested within one another? Secondly, it is unclear how each of the recognized peoples is delimited. Is this decided by passport, culture, descent, choice, or any combination of these and perhaps other criteria? Can persons belong to several peoples or to one at most? All these questions would assume great importance in any attempt to realize the Society of Peoples Rawls envisions. And yet, he disregards them completely.

It has also been frequently noted that Rawls endorses normative individualism domestically but rejects it internationally. This is an asymmetry insofar as, in Rawls's domestic theory, the interests of collectives (associations) are given *no* independent weight – are considered only insofar as persons choose and identify with them. In his international theory, by contrast, peoples *are* recognized as ultimate units of moral concern and, more remarkably still, individuals are *not* so recognized. In selecting and justifying particular rules governing state conduct, Rawls disregards the interests of persons by focusing exclusively on the interest, attributed to each well-ordered people, "to preserve [its] equality and independence" (*LoP*: 41, cf. 70) as a stable liberal or decent society (*LoP*: 33, 69).

This decision has important implications for the content of the agreement that rational representatives of well-ordered peoples would reach in the international original position. Serving that stipulated interest, such representatives might well agree to "provisions for ensuring that *in all reasonable liberal (and decent) societies* people's basic needs are met" (*LoP*: 38, my emphasis). But, in Rawls's international theory, ensuring that persons can meet their basic needs has no

moral importance as such. It has only instrumental moral importance insofar as it contributes to preserving the internal stability or the external equality or independence of liberal or decent societies. So what about the basic needs of members of other societies, here pointedly excluded?[7] Adding an eighth law to his Law of Peoples, Rawls suggests that representatives of well-ordered peoples would agree to extend their concern to other peoples that, but for unfavorable conditions, would be organized as liberal or decent societies[8] – though he does not explain why they would so agree. But, as the italicized qualification confirms, his international theory still ignores the basic needs of human beings in benevolent absolutisms and outlaw states (*LoP*: 4, 63) which, even when they encounter unfavorable conditions, remain in these categories. Assistance to such societies is not mandatory because it would not help them be either liberal or decent. Assistance is required only to *burdened societies* – ones that, if not prevented by unfavorable conditions that assistance would overcome, would be liberal or decent of their own accord. This limitation is entailed by the way Rawls constructs his international original position: Animated solely by the stipulated interest of well-ordered peoples, their rational representatives have no reason to commit themselves to a duty to show concern for individuals living in benevolent absolutisms or outlaw states – not even for their basic liberties, personal security, and basic needs for food, water, clothing, shelter, health care, and education.

Well-ordered peoples are required to help one another stay above the economic minimum necessary to make a well-ordered society possible. But beyond this threshold, Rawls's international theory permits indefinite economic inequalities within the Society of Peoples. This is so, because he disregards the interests of individuals within well-ordered societies. Had Rawls stipulated that the deliberators in the international original position give even just a little weight to the interest of such individuals in the absolute and/or relative socioeconomic position they have an opportunity to attain, then those deliberators would have favored global economic rules that tend to moderate rather than aggravate international economic inequality.[9]

Rawls avoids this conclusion by means of an undefended and dramatic asymmetry: While the interests of individuals are the only ones that count in his domestic theory, such interests do not count at all in his international theory. He acknowledges this point when he characterizes his international original position as one "that is fair to peoples and not to individual persons" (*LoP*: 17 n.9). But his attempt to defend the exclusion of individual interests as necessary to accommodate decent hierarchical societies (*LoP*: 82–5) fails: Just as liberal societies are said to be concerned for "the well-being of their citizens" (*LoP*: 34), so decent hierarchical societies are, by definition, committed to a common good idea of justice that involves a concern for "the human rights and the good of the people they represent" (*LoP*: 69; here "people" can only be read as "persons"). Accommodating decent societies is thus necessarily compatible with incorporating into the international original position a concern for at least the jointly recognized

interests of individuals, alongside the interest of each people in maintaining a stable well-ordered domestic regime.

Why Cut Out the Middle Tier?

Let me turn to the most important structural asymmetries, which have received little scholarly attention thus far. While the domestic theory is *three-tiered* and *institutional*, the international theory is *two-tiered* and *interactional*, as illustrated in Table 12.1. What are these asymmetries, and what impact do they have on the conclusions Rawls claims the parties would reach in the two cases?

In the domestic case, the parties are to adopt a public criterion of justice which is to guide the design, reform, and adjustment of the domestic institutional order within variable natural, historical, cultural, and economic-technological circumstances. In the international case, the parties are asked to endorse particular international rules directly.

The former, three-tier construction provides more flexibility for adapting to diverse circumstances. It leaves important features of the basic structure open while prescribing only the objective that should guide their design in any concrete context. Whether and to what extent there should be private ownership in means of production, for example, is to be settled pursuant to the difference principle by examining which solution (satisfying the first and opportunity principles) would engender the best socioeconomic floor. Circumstances may change, of course, and citizens may then have reason to reorganize the basic rules of their legal and political system so as to maintain the security of the basic liberties or to reorganize the basic rules of their economic order so as to keep the difference principle satisfied.

The latter, two-tier construction provides no such flexibility. The members of Rawls's Society of Peoples are locked into a particular set of rules that could

Table 12.1

Domestic Theory	**International Theory**
Parties in the original position *who select*	Parties in the original position *who select*
A public criterion of social justice (Rawls's two principles and two priority rules) *which selects*	A scheme of international rules (Rawls's eight laws of peoples)
A basic-structure design for any specific empirical context	

prove too rigid to fulfill their interests as peoples under changing global circumstances. Perhaps there are reasons favoring a two-tier construction. It could be said, for instance, that the probability of errors and corrupt judgments is reduced when political actors are constrained by firm rules rather than by rules they are supposed to adjust, under the guidance of a public criterion of social justice, to changing natural, historical, cultural, and economic-technological circumstances. But one would like to know what these reasons are and, especially, why they should be decisive in the international but not in the domestic case.

The structural disanalogy leads to important substantive differences. Consider to what extent members of one generation should be saddled with the economic costs of decisions made by their predecessors. Rawls's domestic theory rules out some such costs completely, through the first and opportunity principles: All members of society, no matter how irresponsibly their parents may have behaved, have an equal claim to a fully adequate scheme of equal basic liberties and to fair equality of opportunity. Beyond this, Rawls's domestic theory gives a flexible response: Social institutions may allow persons to be penalized for their parents' high fertility or failure to save only if and insofar as such selective penalization – mainly through the greater incentives it gives parents to behave responsibly – tends to raise the socioeconomic floor. The degree of such selective penalization embodied in social rules may then need to be adjusted over time so as to track changes in parental dispositions. Social rules or institutions are viewed as mere means, to be designed and redesigned so as optimally to serve the ends specified in Rawls's criterion.

Internationally, the same issue arises with regard to societies that have a low rate of savings or high birth rate. In this case, however, Rawls asks *directly* what the rules should be and asserts that the costs of decisions made by former members of a society should be borne entirely by its present members. To impose any of these costs on other societies "seems unacceptable" (*LoP*: 117–18). But, again, Rawls gives no reason why a different response should be appropriate in the international case. The difference in moral content is a byproduct of an unexplained variation in the parties' task description, which prevents them from adopting a flexible solution that would be sensitive to empirical information about how much loss through moral hazard would actually occur under global economic institutions designed to have a moderating effect on international inequality.

In pressing this point, I am neither dismissing Rawls's concern for the moral significance of collective self-governance, nor denying that this plausibly requires the self-governing collective to receive a disproportionate share of the benefits and burdens deriving from its decisions. Rather, I am adding two thoughts.

First, even in Rawls's ideal world of exclusively well-ordered and self-governing peoples, there may still be reasons to favor *some* burden sharing so that especially poorer societies bear not the full consequences of their unfortunate decisions but only a disproportionate share thereof. One such reason comes into play when the

consequences of crucial decisions made for a society would be borne by persons who had no role in this decision – by children or later generations, for instance, or by persons barred from meaningful political participation in their decent hierarchical society.[10] Another reason comes into play when the consequences of crucial decisions made for a society are heavily influenced by luck or other unforeseeable intervening causes. The force of these reasons is widely recognized with regard to the decisions of autonomous families, so why should they not be applicable to societal decisions as well? And even where neither of these reasons applies, our domestic institutions often mitigate even self-caused hardships and disadvantages, for example through the tax system or the personal bankruptcy law. (A person who is seriously hurt through his own reckless conduct, for example, can claim some of his medical expenses as an itemized deduction and, if he was blinded by the accident, he can also claim a somewhat higher standard deduction in future years.) As we have seen, Rawls's domestic theory gives general support to such mitigation of costs that poor households must bear as a result of their decisions and provides guidance for how such mitigation should be structured in light of empirical knowledge about the actual impact of moral hazards. Why should the international analogue to such mitigation be incompatible with self-governance or otherwise unacceptable?

The second thought deepens and corrects the first. How great the costs of an unfortunate decision are, and what sorts of burdens it might entail, depend importantly on the larger institutional context in which this decision is made. Society can be organized to recognize and enforce slavery or debt bondage. If it is, then unfortunate decisions by parents can result in their children growing up as slaves or virtual slaves, chained to looms or laboring in underground mines. Or society can be so organized that no parental decisions can deprive children of equal access to the national health and education systems and hence of the opportunity to compete for employment on nearly equal terms later in life. This contrast shows that the burdens typically arising from unfortunate decisions are much larger under some designs of the institutional order than under others, even when the latter involve no quantifiable burden sharing or regrettable loss in family autonomy.

The same holds also for the international realm, where collective self-governance is not seen as diminished, for instance, by the fact that international lending rules do not enable states to put up their children as loan collateral. Here is a more relevant contrast: The international order can be so structured that the rules of the world economy reflect the bargaining power of the various states, effectively preventing poorer societies from achieving rates of economic growth that are easily available to richer ones – or this order can be structured so that, regardless of the distribution of power, it maintains fair and open markets that actually make it easier for poorer than for richer societies to achieve high rates of economic growth. Even if (the first thought notwithstanding) we accept the principle that each national population ought to bear the "full consequences" of

decisions its society had made, we can still opt for either of these two contrasting institutional designs. The way we design the global order thus co-determines what the full consequences of national decisions are. The latter design, when combined with the principle of full consequences, would clearly engender much less deprivation and inequality than the former would.

The structural difference between the tasks Rawls assigns to the parties in his domestic and international original positions is associated with two distinct conceptions of economic justice. When we reflect upon social rules directly, as Rawls does in the international case, it may seem plausible to let participants themselves negotiate the terms of their economic interactions: "2. Peoples are to observe treaties and undertakings. 3. Peoples are equal and are parties to the agreements that bind them." To block the danger of excessive poverty arising from such libertarian rule making, Rawls adds the rule that "8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime" (*LoP*: 37).

However, Rawls himself finds strong reason to reject such a mildly constrained libertarianism in the domestic case. When a society's economic order arises from free bargaining among its members, the rich can use their greater bargaining power to shape and reshape this order in their own favor and can thus expand their advantage by capturing a disproportionate share of the social product. As Rawls writes eloquently:

> suppose we begin with the initially attractive idea that social circumstances and people's relationships to one another should develop over time in accordance with free agreements fairly arrived at and fully honored. Straightaway we need an account of when agreements are free and the social circumstances under which they are reached are fair. In addition, while these conditions may be fair at an earlier time, the accumulated results of many separate and ostensibly fair agreements, together with social trends and historical contingencies, are likely in the course of time to alter citizens' relationships and opportunities so that the conditions for free and fair agreements no longer hold. (*PL*: 265–6)

He warns of "the tendency . . . for background justice to be eroded even when individuals act fairly: the overall result of separate and independent transactions is away from and not toward background justice. We might say: in this case the invisible hand guides things in the wrong direction and favors an oligopolistic configuration of accumulations that succeeds in maintaining unjustified inequalities and restrictions on fair opportunity" (*PL*: 267). In the domestic case, Rawls demands that the rules of economic interaction must not be shaped by free bargaining, but must rather be designed and adjusted (pursuant to the second principle of justice) to preserve background justice and to minimize economic hardship.

At times Rawls seems to recognize that allowing the terms of economic interaction to be shaped by free bargaining poses a threat to background justice also in

the international case. Thus he writes that any "unjustified distributive effects" of cooperative organizations need to be corrected (*LoP*: 43, 115) and suggests that the international parties, going beyond his official eight laws of peoples, "would agree to fair standards of trade to keep the market free and competitive" (*LoP*: 43).

But how are we to judge whether distributive effects are unjustified or trading arrangements unfair? To answer this question, Rawls would need a principle for assessing and adjusting the global economic order in light of its distributive effects in the way his difference principle assesses and adjusts the domestic economic order. But Rawls specifically rejects any such principle without "a target and a cutoff point" in the international case, countenancing only the duty of assistance which secures the poorest well-ordered societies no more than an economic floor defined in absolute terms (*LoP*: 115–19). He also rejects any international analogue to a democratic process, which allows a majority of citizens in a liberal society to restructure its economic order if it favors the rich too much. The global economic order of Rawls's utopia is thus shaped by free bargaining among societies, unconstrained by any principle that would check the ability of the stronger societies to use their greater bargaining power to shape the terms of international interaction in their favor in ways that further enhance their advantage.

Is Each Society Master of its Own Fate?

Rawls decides against any principle for preserving international background justice, I believe, because he falls for what may be the most harmful dogma ever conceived: explanatory nationalism, the idea that the causes of severe poverty and of other human deprivations are domestic to the societies in which they occur.[11] This idea is of crucial importance for enabling the citizens of today's affluent countries to live comfortably in the face of the horrendous poverty and hardships suffered in the poorer societies. If the suffering of the poor abroad is due to local causes, then our only moral question is the one Rawls asks: whether and how much we ought to "assist" them. Thinking further along these lines, we may admit that we should help the poor abroad more than we do. But explanatory nationalism spares us the question whether and how our rich countries, especially through the global institutional arrangements we design and impose, are contributing to their deprivations. And explanatory nationalism preempts the need for a principle of global distributive justice, which would guide the design of the rules of the world economy in light of their distributive effects, by assuring us that these rules do not have significant distributive effects.

If it were explicitly formulated as an empirical assertion, explanatory nationalism would be incredible on its face. In our world (and in Rawls's utopia), conventions and treaties are negotiated about trade, investments, loans, patents, copyrights, trademarks, double taxation, labor standards, environmental protection, use of

seabed resources, and much else. How could it possibly be true that *no* feasible modifications of *any or all* of these elements of the global institutional order would appreciably affect what life is like in the poorer societies?

But then explanatory nationalism isn't explicitly formulated as an empirical assertion. It is spread by suggestion, by highlighting and debating domestic causes while disregarding external factors. Thus, the debates in development economics are mostly about the merits and demerits of various ways in which poor countries can design their economic institutions and policies, with Hong Kong and Kerala held up as competing exemplars. And other academic disciplines also sport smart debates about which domestic factors – climate, natural environment, resources, food habits, diseases, history, culture, social institutions, economic policies, leadership personalities, or whatever – are decisive for national success.[12] There are no careful investigations of the causal impact of global institutional factors. It is hard to find even a flat denial of such causal impact. In discussions of the causes of human misery, these factors are simply left aside, like the moons of Jupiter, as if it were obvious that they could not possibly be playing a role.

Rawls is typical in this disregard:

> the causes of the wealth of a people and the forms it takes lie in their political culture and in the religious, philosophical, and moral traditions that support the basic structure of their political and social institutions, as well as in the industriousness and cooperative talents of its members, all supported by their political virtues. . . . The crucial elements that make the difference are the political culture, the political virtues and civic society of the country, its members' probity and industriousness, their capacity for innovation, and much else. Crucial also is the country's population policy. (*LoP*: 108)

If a society does not want to be poor, it can curb its population growth or industrialize (*LoP*: 117–18); and anyway, "if it is not satisfied, it can continue to increase savings, or, if this is not feasible, borrow from other members of the Society of Peoples" (*LoP*: 114).

The causal factors Rawls highlights are surely important. This is evident from the diversity in the economic and political development of societies that were in equally poor shape a few decades ago. This great diversity of trajectories seems to support explanatory nationalism, because the success of some formerly miserable societies vividly illustrates that the global institutional context cannot be what condemns their unsuccessful peers to failure.

But reconsider the argument in a less ideologically charged context. Suppose there is great diversity in the performance of the students in a class. This certainly shows that local (student-specific) factors play an important role in explaining student performance. But it does not show that "global" factors are unimportant to effective learning. It is quite possible that the class would have performed much better in a less noisy classroom or that its women students would have

learned much more if they had not been so exasperated by the teacher's sexist attitudes.

Analogous possibilities obtain with respect to divergent national development trajectories. And there is a further important point. Poor societies seeking to raise their standard of living had to compete over access to the same heavily protected markets of the affluent countries. These protections – including tariffs, quotas, anti-dumping duties, export credits and huge subsidies to domestic producers, all grandfathered into the World Trade Organization treaty – are so blatantly hypocritical and unfair that they have come to be criticized even by establishment figures and are beginning to weaken the hold of explanatory nationalism.[13] China's success in the last 25 years shows then at most that other poor countries could have had such success, *instead of* China – not that all of them could have had such success together. To mirror the point within my analogy, one might add to the story that teaching materials are artificially kept in short supply with students forced to compete over books, computer terminals, consultations, and classroom seats in a way that ensures that no more than a few of them can possibly attain full mastery of the subject matter.

Often overly impressed by the great diversity of national development trajectories, explanatory nationalists are also prone to another illusion: that the relevant country-specific factors are homegrown. Rawls is once more typical. When societies fail to thrive, he writes, "the problem is commonly the nature of the public political culture and the religious and philosophical traditions that underlie its institutions. The great social evils in poorer societies are likely to be oppressive government and corrupt elites."[14] Yes, corruption and oppression are indeed great evils that importantly contribute to the persistent misery of many national populations. But here we must ask further how a political culture of corruption or oppression is formed and sustained. Perhaps Rawls means to suggest that such a culture is to be blamed on the local "religious and philosophical traditions."[15] But there is the distinct possibility that the domestic factors he cites are themselves significantly shaped and sustained by external factors.

I have debunked two fallacies that enhance the seductive appeal of explanatory nationalism and may have helped attract Rawls to this dogma: Great diversity of national development trajectories notwithstanding, it is quite possible that global institutional factors play a crucial causal role in sustaining severe poverty and other deprivations. And corruption and oppression, inflicting horrendous harms in so many poor countries, need not be homegrown, but may themselves be importantly fuelled and sustained by external forces, and by global institutional factors in particular. These possibilities do not defeat explanatory nationalism, but they indicate how it can be defeated: by showing that these possibilities actually obtain.

To show this concisely, for both possibilities simultaneously, let us concentrate on global institutional factors that sustain severe deprivations in the poor countries by promoting oppressive and corrupt government within them. The most

important such factors are the international resource, borrowing, treaty, and arms privileges.[16] Those who exercise effective power in a country – regardless of how they acquired or exercise it – are internationally recognized as entitled to sell the country's resources and to dispose of the proceeds of such sales, to borrow in the country's name and thereby to impose debt service obligations upon it, to sign treaties on the country's behalf and thus to bind its present and future population, and to use state revenues to buy the means of internal repression. These privileges, enshrined in the present global institutional order, do enormous harm in the poor countries, especially in those with a large natural resource sector. They permit even the most hated, brutal, oppressive, corrupt, undemocratic, and unconstitutional regime to entrench itself. Such a regime can violently repress the people's efforts toward good governance with weapons it buys from our firms and pays for by selling us the people's resources and by mortgaging their future to our banks.

Greatly enhancing the rewards of effective power, the same privileges also encourage coup attempts and civil wars that often provoke opportunistic outside military interventions. And in many (especially resource-rich) countries, these privileges make it all but impossible, even for democratically elected and well-meaning leaders, to rein in the embezzlement of state revenues: Any attempt to hold military officers to the law is fraught with danger, because these officers know well that a coup can restore and enhance their access to state funds, which will continue to be replenished through loans and resource sale revenues which will continue to be exchangeable for military equipment.

The overly generous privileges just discussed are not innocent errors of institutional design, but hugely important to the wealth and convenience of the corporations, citizens, and governments of the rich countries. Our lifestyle absolutely depends on our appropriation of natural resources from the poor countries. And we would pay vastly more for such resources if we were not entitled to buy them from clearly illegitimate rulers or if these countries had governments that acted in the best interests of the populations they rule.

At the beginning of this section I wrote that explanatory nationalism may be the most harmful dogma ever conceived. This must have seemed hyperbolic. But consider what would happen if explanatory nationalism were explicitly repudiated in the affluent countries; if we investigated and understood the full causal impact of our decisions about the design of the global institutional order. We would then need to think about this global order in moral terms, asking ourselves whether it is permissible for the affluent states (in collaboration with the ruling "elites" of many poor countries) to impose a global institutional order designed so that it foreseeably reproduces avoidable human rights deficits on a truly horrendous scale.

We would conclude that this global order is gravely unjust and that those who cooperate in its imposition are harming those whose human rights avoidably remain unfulfilled. This would lead us to accept the minor opportunity costs

involved in the modest global institutional reforms needed to achieve a global order that would avoid human rights deficits insofar as this is reasonably possible. And this in turn would dramatically reduce the avoidable misery in the poorer half of humankind – now confined to well under 2 percent of the global product – where 831 million are chronically undernourished, 1197 million lack access to safe water, and 2747 million lack access to basic sanitation, and 2000 million lack access to essential drugs.[17] Insofar as explanatory nationalism blocks such reforms, it is a very harmful dogma. Today, nearly one-third of all human deaths are from poverty-related causes, some 50,000 daily or 18 million each year, including 10.6 million children under five.[18] This continuous death toll matches that of the December 2004 tsunami every few days, and it matches, every three years, the entire death toll of World War II, concentration camps and gulags included.

To be sure, these human right deficits would also be avoided in Rawls's Society of Peoples (though they might persist outside of it in benevolent absolutisms and outlaw states). This commonality has spawned the claim that my view differs from his in only minor ways.[19] But this claim overlooks the fact that we differ greatly in our moral assessment of the present world. Rawls might criticize some of the rich liberal societies today for falling short in discharging their positive duties of assistance to burdened societies, which, with more assistance, would be liberal or decent. I criticize the rich liberal societies (and the ruling elites of many poor countries) for massively violating their negative duties not to harm by imposing a global institutional order that foreseeably causes avoidable human suffering of unimaginable proportions. I see our imposition of this order as the largest, though not the gravest, crime against humanity ever committed.

Do the Asymmetries Get Rawls the Result He Wants?

We have seen that Rawls greatly helps his case against egalitarian and cosmopolitan critics of his eight rules (*LoP*: 37) through three important and unexplained departures from his domestic theory. By conceiving his international theory *interactionally*, as seeking rules of good conduct, he sidelines what he correctly identifies, within the domestic context, as the most important moral topic: the design of the institutional order, which crucially shapes the character of the relevant actors as well as the options and incentives they face. It is undeniable that, today and in the foreseeable future, there is a global institutional order that importantly affects the options and incentives societies and their rulers face in their relations with one another and even affects profoundly the domestic institutions and cultures of especially the smaller and weaker societies. By allowing this global order to be shaped and adjusted through free bargaining among states, Rawls puts it almost entirely beyond moral assessment.

While Rawls's domestic theory gives weight *only* to individuals and their interests, his international theory gives *no* weight to individuals and their interests. To be sure, the recognized interest of each well-ordered people – to preserve its equality and independence as a stable liberal or decent society – may accord with the interest of its members to live in a well-ordered society whose equality and independence are preserved. But individuals have other interests that are relevant to formulating rules for the good conduct of states. For example, individuals have an interest in avoiding severe poverty, which they may well suffer even if their people as a whole has a sufficient economic base for maintaining itself as a liberal or decent society. And the citizens of a society also have an interest in being able to avoid very large discrepancies between their own socioeconomic level and that prevailing in more affluent societies.

Rawls's domestic theory is three-tiered and, through the middle tier, systematically incorporates sensitivity to empirical information about the distributional effects of alternative feasible institutional arrangements. His criterion of social justice specifies the objective of domestic social institutions and guides systematic reflection about which basic structure design is, in the given circumstances, best suited to this objective. His international theory, by contrast, is two-tiered and so does not systematically incorporate information about the empirical (statistical) effects of alternative formulations of the "Law of Peoples."

Can these three unexplained departures from his domestic theory help Rawls support his eight laws as the formulation that representatives of liberal and decent peoples would agree upon behind their veil of ignorance? Perhaps so. Yet all he actually offers in the text is the bald assurance that "the representatives of well-ordered peoples simply reflect on the advantages of these principles of equality among peoples and see no reason to depart from them or to propose alternatives" (*LoP*: 41, cf. 69).

In fact, such representatives *do* have reasons to consider alternatives. They must consider the possibility that explanatory nationalism is false. And if decisions about how to design the rules of the world economy do have distributive effects, then it is to be expected that each society will try to shape these rules to its own advantage. Given that wealthier societies enjoy advantages in bargaining power and expertise, they are likely to be able to achieve agreements that (even without blatant unfairness as manifested in the current rules) secure for themselves the lion's share of the benefits of international economic interaction. This could lead to a self-reinforcing trend toward ever-increasing international inequalities in per capita incomes.[20]

Despite Rawls's emphatic rejection of any principle of international distributive justice without "a target and a cutoff point" (*LoP*: 115–19), rational representatives of well-ordered peoples would agree on a duty not to shape global institutional arrangements that exert such a centrifugal force. With this constraint, each well-ordered people has better prospects of being comfortably *above* the minimal economic threshold that allows it to maintain itself as a liberal or decent society.

With this constraint, each well-ordered people is more likely to avoid becoming dependent on other societies' compliance with their duty of assistance. And this constraint also makes it less likely for a well-ordered people to be exposed to corruption from abroad that could destabilize its domestic order. When a people is much poorer than others, its politicians and officials are likely to find that they have more to gain from catering to the interests of rich foreign governments and corporations than from advancing the interests of their own much poorer compatriots. Such corruption of politicians and officials may lead a people to fall short of its own conception of justice or decency – or even to cease being liberal or decent altogether. For these three reasons, the parties in Rawls's international original position would agree to constrain the treaty making of well-ordered societies to rule out a global economic order that would tend to aggravate and reinforce international economic inequalities.[21]

It may be objected that, in Rawls's ideal world, rich and powerful societies would never seek to shape the rules of international economic interaction for their disproportionate advantage or fail to comply with their duties of assistance, and no one would try to corrupt politicians and bureaucrats in poor societies. Rawls would not have made this objection. He meant his Society of Peoples to be one that could actually endure on this earth – a *realistic* utopia.

Conclusion

My disagreements with Rawls's views on international justice are deep and long-standing. Still, I am most grateful to him for having worked so hard, under most adverse conditions, to give us a final and full articulation of these views. I am also very glad that he formally incorporated the duty of assistance into his Law of Peoples. This duty, suitably specified, supports a critique of most of the more affluent societies today for doing far too little toward enabling poorer societies to be well ordered. Given the magnitude of their failure and indifference, this critique might well qualify those wealthier societies as "outlaw states" in Rawls's sense.

Still, this important insight should not obscure the even more important point, which Rawls would deny. We are not merely helping too little, but also harming too much: by imposing a global institutional order under which, foreseeably and avoidably, nearly half of humankind continue to live in abject poverty and some 300 million have died from poverty-related causes since the end of the Cold War.

Notes

[1] Citing Rawls's works in the text, I use *TJ* for his *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1999 (1971); *PL* for his *Political Liberalism*, New York, NY:

Columbia University Press, 1996 (1993); and *LoP* for his *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999.

[2] Immanuel Kant, "Perpetual Peace," in *Kant's Political Writings*, ed. Hans Reiss, Cambridge: Cambridge University Press, 1995, p. 113.

[3] "For states in their relation to one another, there cannot be any reasonable way out of their lawless condition which entails only war except that they, like individual human beings, should give up their savage (lawless) freedom, adjust themselves to public coercive laws, and thus establish a continuously growing international state (civitas gentium), which will ultimately include all the nations of the world. But under their idea of the law of nations they absolutely do not wish to do this, and so reject in practice what is correct in theory. If all is not to be lost, there can be, then, in place of the positive idea of a world republic, only the negative surrogate of an alliance which averts war, endures, spreads, and checks the force of that hostile inclination away from law, though such an alliance is in constant peril of its breaking loose again" (ibid., p. 105).

[4] Normative individualism is the view that, in settling moral questions, only the interests of individual human beings should count.

[5] John Rawls, "The Law of Peoples" (1993 essay version, reprinted), in his *Collected Papers*, Cambridge, MA: Harvard University Press, 1999, p. 530.

[6] Decent hierarchical societies, though they solicit the views of social groups through a "decent consultation hierarchy," lack democratic procedures (*LoP*: 71–3) and may also, perhaps pursuant to a state religion, impose substantial and unequal restrictions on freedom of expression and liberty of conscience (*LoP*: 74).

[7] This pointed exclusion is fully deliberate. It was stated in Rawls, "The Law of Peoples," *Collected Papers*, p. 541, n. 5 ("provisions for ensuring that in all reasonably developed liberal societies people's basic needs are met"), and I had questioned it in "An Egalitarian Law of Peoples," *Philosophy and Public Affairs*, 23 (1994): 195–224, at 209.

[8] See *LoP*, p. 37. The eighth law, postulating this *duty of assistance*, was not listed in the earlier essay, "The Law of Peoples," *Collected Papers*, p. 540, n. 5.

[9] I have raised this point in Section III of "An Egalitarian Law of Peoples," and so have other commentators since. But we are still missing a plausible defense of Rawls on this point.

[10] Such societies are said to reach out to all their members through a "*consultation hierarchy* or its equivalent" (*LoP*: 61); members can articulate their views within their respective "associations, corporations, and estates" (*LoP*: 68), which may then pass them on to higher levels. Dissent is permitted and "government and judicial officials are required to give a respectful reply" (*LoP*: 61). Still, such a reply may be indigestible for dissenters who do not share the "state religion [which], on some questions, [is] the ultimate authority within society and may control government policy on certain important matters" (*LoP*: 74). In any case, receiving a reply, however respectful, goes no way toward a meaningful role in political decision making.

[11] For the introduction of this term and further discussion, see my *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Cambridge: Polity Press, 2002, sect. 5.3.

[12] Some notable recent contributions are David Landes, *The Wealth and Poverty of Nations: Why Some Are So Rich and Some So Poor*, New York, NY: Norton, 1998; Jared

Diamond, *Guns, Germs, and Steel: The Fates of Human Societies*, New York, NY: Norton, 1999; Lawrence E. Harrison and Samuel P. Huntington, eds., *Culture Matters: How Values Shape Human Progress*, New York, NY: Basic Books, 2001.

[13] For example, World Bank chief economist Nick Stern stated in a recent speech, "Cutting Agricultural Subsidies" (globalenvision.org/library/6/309), that in 2002 the rich countries spent about $300 billion on export subsidies for agricultural products alone, roughly six times their total development aid that year. He said that cows receive annual subsidies of about $2,700 in Japan and $900 in Europe – far above the annual income of most human beings. He also cited protectionist anti-dumping actions, bureaucratic applications of safety and sanitation standards, and textile tariffs and quotas as barriers to developing country exports: "Every textile job in an industrialized country saved by these barriers costs about 35 jobs in these industries in low-income countries."

[14] Rawls, "The Law of Peoples," *Collected Papers*, p. 559.

[15] Thereby echoing Michael Walzer, who says: "it is not the sign for some collective derangement or radical incapacity for a political community to produce an authoritarian regime. Indeed, the history, culture, and religion of the community may be such that authoritarian regimes come, as it were, naturally, reflecting a widely shared world view or way of life" (Michael Walzer, "The Moral Standing of States," *Philosophy and Public Affairs*, 9 [1980]: 209–29, at 224–5).

[16] I have discussed the resource and borrowing privileges, documented their effects, and sketched plausible avenues of institutional reform in *World Poverty and Human Rights* (sections V, 4.9, 6.2–4, 8.2.1). I also discuss there (section 5.3) how the culture of corruption, now deeply entrenched in many poor countries, has been decisively promoted during their formative years by extensive bribery of their officials. The industrialized countries allowed their multinational corporations to deduct such bribes from their taxable revenues, thereby providing financial incentives and moral approval for such bribery. For an insider's account of how the global rules facilitate and encourage corruption, see Raymond Baker, *Capitalism's Achilles Heel*, New York, NY: John Wiley and Sons, 2005.

[17] See UNDP, *Human Development Report 2004*, New York, NY: UNDP, 2004, pp. 129–30, and for the last figure www.fic.nih.gov/about/summary.html. I lack the space here to substantiate my belief that most of these deficits are reasonably avoidable through relatively minor modifications of the global institutional order. See *World Poverty and Human Rights*, chs. 6 and 8, and "Severe Poverty as a Human Rights Violation," in Thomas Pogge, ed., *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?*, Oxford: Oxford University Press, 2005.

[18] See WHO, *World Health Report 2004*, Geneva: WHO, 2004, pp. 120–5, and UNICEF, *The State of the World's Children 2005*, New York, NY: UNICEF, 2005, inside front cover.

[19] See, for example, Alan Patten, "Should We Stop Thinking About Poverty in Terms of Helping the Poor?," *Ethics and International Affairs*, 19 (2005): 19–28, at 24.

[20] It is hard to deny that global rules shaped by and for the industrialized countries exerted such a centrifugal influence in the post-colonial period when "the income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, up from 60 to 1 in 1990 and 30 to 1 in 1960" (UNDP, *Human Development Report 1999*, New York, NY: Oxford University Press, 1999, p. 3).

[21] See "An Egalitarian Law of Peoples," Section IV.

13

Rawls on International Distributive Economic Justice: Taking a Closer Look

Rex Martin

1 Background

1. John Rawls's classic book *A Theory of Justice* (*TJ*, 1971/1972)[1] emphasized two main criteria for fairness in the way a society is set up: the first criterion is equal basic rights and liberties; the second is economic justice, involving (a) equality of opportunity and (b) the difference principle: that is, the mutual economic benefit of all groups, subject to certain egalitarian restraints. A consistent following of the pattern laid out in this notion of economic justice should lead, ideally, to the greatest well-being of the least well-off group.[2]

In time, Rawls became dissatisfied with many aspects of his approach in *Theory of Justice*, and he began to reconfigure his basic theory in new and interesting directions. His second book, *Political Liberalism* (*PL*, 1993/1996), represents his best statement of this new theory. In this second book Rawls appeared to many either to give up or to downplay the difference principle in favor of the less demanding notion of a social minimum. I would suggest a quite different interpretation: that Rawls should be taken as advocating, for affluent liberal and democratic states, a new dual-level standard for domestic justice (with the social minimum setting the lower-level standard and the difference principle a higher, more demanding one).

2. In his third book, *The Law of Peoples* (*LoP*, 1999), Rawls draws upon the account of a liberal and democratic society that he had developed in *Political Liberalism* in order to situate his theory within the international arena.[3] Rawls,

while accepting that a large number of societies in the world today are neither liberal nor democratic, argues that, nonetheless, some of them are or could be "decent" societies. That is, they are or can be societies in which the values accepted by the majority – and often these are shared religious values – afford grounds for certain protections and securities for *all* the inhabitants in the country. Such societies can be conceived as subscribing to a "common good" standard of justice for all inhabitants, based on values shared by most of them.[4]

This is not to say that they conform to anything like democratic norms (on a one person/one vote basis), but Rawls does regard the decent societies in question as all of them well ordered. In the example used in *The Law of Peoples*, each one operates as a "consultation hierarchy." Here the basic decision procedure, though not democratic, is such that the governing person or governing council nonetheless makes a genuine effort to consult various *constituencies* as to their interests and their view of the public interest, and to keep them informed (see *LoP*: 68, 72, 78, 88, 92).

And these societies are nonaggressive toward their neighbors. Accordingly Rawls argues that decent societies (both liberal and nonliberal ones) would be able to agree to the same eight articles of what Rawls calls the law of peoples (see *LoP*, p. 37 for a short list of the eight articles of Rawls's "basic charter of the Law of Peoples"). Thus, decent societies can accept the same short list of fundamental human rights (see *LoP*, p. 65 for the list), can accept a policy of nonaggression toward neighbors, and can accept a duty to aid certain deeply impoverished societies ("burdened societies," Rawls calls them).

3. This last duty (of aid and assistance to burdened societies), interestingly, was not included in Rawls's original article version of "The Law of Peoples" (1993).[5] Burdened societies are societies that live under "unfavorable conditions" (typically engendered, in Rawls's view, by bad social policies and retrograde beliefs, sometimes accompanied by inhospitable environments and shortage of resources, all of which is magnified by the characteristic corruption, inefficiency, heavy-handedness, and sometimes brutality of their governments). As a result, the people there are condemned to extreme and life-threatening poverty.[6]

Societies such as these are not well ordered and are simply unable to be decent liberal societies or decent nonliberal ones and to have just or tolerable political regimes. Burdened societies are the main object of the law of people's duty to aid.

There are, in fact, two main dimensions to this duty of aid in Rawls's account. First, there is the duty that liberal and decent peoples have to fulfill the human right to subsistence in such societies. Second, there is the duty to assist these societies to themselves become self-supporting decent societies.

Rawls argues that the duty to assist, the second and more demanding of the duties to aid, is fully satisfied once the political and economic institutional structure and human capital (literacy, skills) sufficient to achieve a decent society are in place. The basic goal or "target" has been met; the "cutoff point" at which no

further aid is required, as a duty of justice, has been reached (*LoP*, pp. 106, 111–12, 114, 119). There's nothing further that affluent decent societies *need* to do to assist these formerly burdened societies, unless things change dramatically and unexpectedly.

A host of critics have argued that Rawls and his supporters are quite wrong here, about *the* target of international economic justice and any cutoff point associated with it. We turn now to the points they make.

2 A Global Difference Principle?

1. Many of these critics claim, in fact, that the difference principle ideal that Rawls had originally developed for the case of a domestic society should be extended globally. Thus, the affluent decent societies would continue to have a duty to aid the peoples of poorer societies (and certainly the peoples of the formerly "burdened societies") by seeing to it that the material well-being of the poorest folk among these peoples was *continually* bettered. There'd really be no cutoff point at all, until (or unless) the greatest well-being of the least well off among them (the worldwide bottom 20 percent, in standard of living, say) had been achieved.

The argument they make can be modeled in five simple claims. (i) The locus of the concern of justice is ultimately the lives of *individual* persons. (ii) There is right now a global or international *basic structure*, a structure of *interdependence* in place. Talk of its design or redesign is, thus, appropriate. (iii) Accordingly, a *global original position* could be set up, representing all individual persons alive at present, to formulate principles for its fair design. (iv) Relying on the same constraints and using the same arguments Rawls had used in his account of the principles of domestic justice (e.g., in *A Theory of Justice*), the parties would select a *global difference principle*. (v) Rawls and his supporters could not deny any of these points and thus are committed to a global application of the difference principle.[7]

2. Rawls responded with arguments designed to show that the arguments of his critics were not compelling.[8] In particular, Rawls contended that principles of distributive economic justice on the order of the difference principle had no place in the international or global arena.[9] I would endorse Rawls's claim here but not his supporting arguments.

3 Two Main Cases

Rawls wants to argue, in this regard, that inequalities in wealth are not per se unjust (see *LoP*, pp. 107, 113). The main form Rawls's argument takes is to present us with two distinct sample cases, in each of which a comparison is drawn.

1. In the first of the sample cases Rawls asks us to consider "two liberal or decent societies [that] are at the same level of wealth [with] the same size population." The first decides to industrialize. The second society, content with its "pastoral" way of life, does not. Over a period of several decades the first society becomes twice as wealthy overall. Rawls says that these are choices the two societies have made, and the people of the wealthier society should not be taxed, as would be required by a "global egalitarian principle," to transfer some of their funds to people in the second.[10]

We can assume, I think, that the only thing of any importance that changes in the industrialization case is *overall* or total wealth. And since, over the decades, population size does not change in the *second* society (the relatively poorer one over the period involved), and neither does the relative distribution of income among the various groups, we can assume that the real purchasing power of representative individuals in none of the "income" groups there, including that of the least well off, *worsens* in that period.

Rawls says, I would add, nothing specific about the relations of trade or investment between the two societies. For simplicity, we can assume that there has been and continues to be some such cooperative relationship between them. But the point is, even so, the societies are largely independent of one another in the case imagined. They are independent in the following way: the decision of the first society to industrialize has little net impact (and certainly no negative impact) on the second society; by the same token, the decision of the second society to remain pastoral has little net impact (and certainly no negative impact) on the first society.

2. Now we go to Rawls's second main case. Here the big issue is population policy. At the beginning, both the societies to be compared have a "rather high" rate of "population growth." But the first society in this case, as it comes to stress the value of equal citizenship for women, ends up shooting for zero population growth. The second society, largely for religious reasons "freely held by women" there, does not; its rate of population growth is not significantly reduced and remains "rather high."[11]

It turns out, again, after several decades of changes in the relative rates of population growth, that the first society is "twice as wealthy as the second." And again, Rawls says that these are choices the two societies have made (choices this time respecting population policy and not industrialization). And, again, the assumption of relative independence which we noted in the first case seems to hold for the second as well.

Since both societies are again described as "liberal or decent" we can assume the income distributions within each to be, vaguely, suitable. The inequalities met with are *not* unjust. Over the decades, only population size has changed in the second society (the relatively poorer one) during the period involved; we can assume, then, that *overall* wealth and its relative distribution have not *worsened*, within that society, in that period.

3. The two cases examined, one involving industrialization and the other population growth, seem to Rawls to be fundamentally similar and, as such, to be wholly satisfactory from the perspective of justice.[12] We need to locate this shared ground for satisfaction and make it a bit clearer. We need, then, a closer look at the two cases.

4 A Closer Look

1. The industrialization case looks fairly straightforward. Here the people in the pastoral society, the one that didn't industrialize, stay more or less where they were as regards both wealth and population size. Let's just say, arbitrarily, that the top 20 percent there continue to command 30 percent of the relevant income and wealth (that is, insofar as relevant to their standard of living) and the bottom 20 percent continue to command 10 percent of the relevant income and wealth. This shows that inequality has not increased between those groups (or between the representative persons from each group). And since the population size over the period in question presumably remains static, we can assume that the share-out to persons within each group has not changed there either. So three things are true here: (i) the relative distribution among the main income groups has not changed, (ii) the basic well-being of none of the groups has worsened, and (iii) representative persons from each group are no worse off in this regard when compared with their counterparts in earlier generations.

But the second case, the one involving population growth, appears to have a problematic feature. Here the people in the prolific society, the society that didn't bring down their rate of population growth, stay more or less where they were as regards overall wealth and its relative distribution but *not* as regards population size.

Rawls describes the result, after several decades, between the zero growth society and the prolific one by saying that "the first society is twice as wealthy as the second." One possible explanation here is that population size over the period in question has virtually doubled in the prolific society; another possible explanation is that population size has stayed almost constant in that society but has been cut by virtually one half in the zero growth one.

Neither aspect of the second explanation seems particularly likely. Of course, the possibility remains open that population size over the period in question has virtually doubled in the prolific society. But an equally likely – perhaps a more likely – explanation is that some combination of one society's decreasing its overall population size and the other society's increasing its overall size is what led to the result Rawls described. Both the decrease and increase would have to be substantial ones, relative to where the two societies had started. Let us say, for illustration, that the zero growth society has reduced its population by roughly 25 percent, going from a base of 1 to 0.75; and the prolific society, putting no brake on its high population growth rate, has grown by 50 percent, going from

a base of 1 to 1.5. Here the net difference between population sizes in the two societies gives us a ratio of 1 to 2 in just a few decades. And the zero growth society has now become, on a per capita basis, "twice as wealthy" as the other.

2. Here is where the problem would arise, in my view. In the prolific society the share-out to individual persons within each income grouping has changed – it has gotten worse over time (since there are now a lot more individuals sharing the same-sized overall packet of wealth and income available to each income group). Here, then, the representative person from *all* of the relevant groups is considerably worse off now (in terms of real standard of living) when compared with the standard of living of the representative person in their own counterpart group from a few decades ago – that is, when the top 20 percent now is compared with the top 20 percent back then, etc.

Even so, we can assume, as one would expect in any decent society, that the standard of living now is still quite adequate for all the income groupings (even for the worst-off one). It is well above bare subsistence and sufficient to provide persons in each grouping with the goods of life and the things necessary to be full and participating citizens in their society.[13] And the relative distribution among the main income groups has not changed (during the period of time in question).

Nonetheless, given the fact that the two main cases are substantially different – the industrialization case and the population size case – one wonders why Rawls passed over these fairly obvious differences so rapidly and pronounced himself equally satisfied with both. Let me suggest why this might be so.

5 Rawls's Background Thinking

There are, it seems to me, three main points to Rawls's basic analysis, to his background thinking in the examination of these two cases.

1. First, we are concerned with the standing of various income groups toward one another as regards their respective economic well-being. The rule to follow here is that if one or two groups benefit, then all should. Every group is to improve their well-being in such a case; or at least none is to become worse off. A society that followed this rule would be thoroughly just.

The inequalities one encounters here are inequalities in a situation of mutual (of efficient) benefit that is "just throughout." Reducing inequality between groups is not part of this particular picture.

But for a society to be "perfectly just" (in Rawls's terminology) egalitarian considerations would need to enter the picture. Thus, for example, when more than one mutually beneficial set of options was available (as is often the case), that option which most reduced the difference (the inequality) between the top-most and the bottom-most group should be chosen.[14]

2. The account just developed concerns the relations of well-being and of relative distribution among contemporary income groups within the same society. Now, we come to a second main point in Rawls's basic analysis. For it is also possible to compare the well-being between a given group *now* (say the bottom 20 percent) and its counterpart group in the past (conceivably even the distant past, when no one now alive was then alive). Where we have an *increasing* level of overall wealth (and we assume that injustice is not a factor), a group *now* should not be worse off (in real income terms) than its counterpart group was in the past. This is a second consideration that Rawls's analysis raises. But he does not emphasize it; his emphasis, rather, is typically on the relationship of contemporary groupings to one another, given where they started and where they are now.

3. We come now to a third point in Rawls's basic analysis. Suppose we had, as we did in the industrialization example or in the population growth example, contemporary groups in society A, for example, which were better off than were contemporary groups in society B. Thus, the top 20 percent in A might be on average appreciably better off than the top 20 percent in B, and so on down the line. And let us suppose, further, that the relatively greater well-being of the groups in society A had not come at the expense of the lesser well-being of the groups in society B. Here I think Rawls's *first* main concern would come back into play: the inequalities between the two societies would not be the primary concern; rather, if the groups (in society B) were not appreciably worse off than they had been in recent years, then no falling below the mark, as set by the standard of mutual benefit, can be alleged in this matter. The situation within society B would be thoroughly, though not perfectly, just; that situation would be subject to improvement, but it would not be unjust, in itself or in relation to society A.

4. There initially appeared to be a significant difference between Rawls's two cases – the industrialization one and the population growth one – a difference involving counterpart groups widely separated in time. Even so, a look at the background analysis indicates that one of the conditions for taking a comparison here to be a significant one, the condition that there was an *increasing* level of overall wealth in the period of comparison, was not present in the population increase example. And since Rawls tended to put significantly more emphasis on evaluating the relative distribution among contemporaneous income groupings than he did on the relative standing over time of counterpart groups, we can see how he came to judge the two main cases as fundamentally similar and how he might regard both cases as satisfactory. There was, given his background thinking, no injustice in what happened in either the industrialization case or the one involving population growth. Even Rawls's prolific society is not acting in a way that goes against this background account.

6 Puzzlement

However, there is something deeply puzzling about Rawls's overall resolution to these two cases, even when the background thinking to it has been elaborated. I want to turn to that puzzlement now.

Rawls intended his argument, as developed in the two cases, to be a way of countering or rebutting the idea of a global application of the difference principle. He was primarily intent, in short, to deny the claim that justice required the difference principle, or something very like it, as *the* standard for the international or transnational distribution of income and wealth, to deny in fact that it should even be regarded as one of the appropriate standards.[15]

1. And here is where my puzzlement arises. I don't think Rawls shows that these cases, both of them said to be fully acceptable, lie outside the normative scope of the difference principle; he hasn't shown, in short, that the difference principle is inapplicable in the cases he has examined (though it clearly was his intention to show this).

Consider. In the first case, the people in the pastoral society, the one that didn't industrialize, stayed more or less where they were as regards both wealth and population size over time. In that society no income group (including those in the bottom 20 percent) became worse off in any of the relevant comparisons (not in their standing with regard to contemporary groups in their own society, in the relative distribution among the main income groups; not in their basic well-being; and not with where the bottom 20 percent is now when compared with its counterpart group, the bottom 20 percent, in the past).

But such an arrangement (where the bottom group is no worse off) is, interestingly enough, compatible with one formulation Rawls himself gives of the difference principle. I mean here his account of the so-called lexical difference principle.[16]

Of course, there is one quite unusual feature to the lexical difference principle. It involves the case where one of the income groups (initially, it's the least well-off one in Rawls's analysis) does not become either worse off or better off, over time. Rawls regards this "flatness" in the slope of income curves, even for a single grouping, over a longish period of time as "unlikely" (*TJ*, p. 72; also *JasF*, pp. 66–8); I think such flatness for *all* income groups would be highly unlikely.

Yet this is exactly what Rawls contemplates for the income groupings within the pastoral or poorer of the societies in his industrialization comparison. They retain the same relative standing throughout, both with respect to contemporary groups and with respect to counterpart groupings in earlier generations of their own society. Rawls endorses such overall "flatness" for one case *only*, where the least well-off group has attained its greatest level of well-being, having done so in a way consistent with other groups becoming better off or at least no worse off

(see *JasF*, pp. 64, 159–60; *LoP*, p. 107 and n. 33 on pp. 107–8). All the passages just cited here affirm Mill's idea of a just stationary state. It is possible, then, that the pastoral society might be, given its options and choices and assuming no injustice in the intention or outcome, such a just stationary state.

In short, the industrialization case does not exhibit anything other than what the difference principle requires (under conditions of full conformity). Neither of the societies surveyed in Rawls's industrialization case provides a clear-cut instance of a society in which the difference principle was normatively inoperable. Nor does the comparison of the two societies in that case provide a clear-cut example of a *relationship* between two different societies that violates the difference principle.

2. But what about the second, the population growth case, where one society preferred to have more children than to have a higher per capita standard of living? As before, this is the problematic case. Here *all* the income groups (including the bottom group) became worse off in one of the relevant comparisons (e.g., with where that group – say, the bottom 20 percent group – was as regards per capita income when compared with where the counterpart of that same group was in the past, several decades ago). But on *another* relevant comparison (that is, the relative standing among the various contemporary income groupings within their own society), the league tables have not changed at all. The relative distribution among such groups is unchanged; no group has either worsened or bettered its situation appreciably with respect to economic well-being. Thus, in the second case, the prolific society splits the results in the relevant assessments, satisfying the "no worse off" standard in the one case but not in the other.

3. Now, Rawls did emphasize one relationship in particular that should hold for past/present or intergenerational justice. He referred to it as the principle of just investment (or "just savings"). The idea here is that a just society is concerned with the economic infrastructure that it leaves in place for subsequent generations. The maxim that should be followed here, Rawls thinks, is that the people involved are "to agree to a savings principle subject to the further condition that they would want all *previous* generations to have followed it."

But there's no reason to think that this principle had not been satisfied in the cases we've been examining. Indeed, we can assume that the people now alive in the prolific society, like those in the pastoral one, would affirm the way of life and its governing norms (including the savings principle, whatever it was) that they had in fact inherited. Rawls does not bring the issue of just savings up in his discussion of the case of the prolific society. We can set that issue aside; it does not offer a line of solution to the case we're interested in.[17]

4. Indeed, the case of the prolific society is a very odd one. It involves *all* groups becoming worse off over time, in past/present comparisons, in their "general

all-purpose economic means" (see *LoP*, p. 65n for the phrase). Such a situation, of long-term deterioration, is not one that Rawls ever contemplated or at least ever *explicitly* discussed in all his writings. Moreover, it is one that doesn't fit comfortably into the parameters of his fully developed theory.

There's little textual support for thinking that Rawls had broad-ranging past/present comparisons in mind when he invoked the difference principle as a ground for making comparative evaluations (see, for example, *TJ*, pp. 253–4; *JasF*, p. 159). So I'm reluctant to make a definitive judgment here.

In the population growth example (if we stick with the case introduced at the end of §4.1), the representative person from *each* of the relevant groups is, roughly, 33 percent worse off now (in terms of real standard of living) when compared with the standard of living of the representative person in their own counterpart group from several generations ago. Even so, there is still a sense in which the *relative distribution* of income among representative contemporary individuals within their own respective domestic societies (and during the same given period of time) has not worsened. Perhaps one could say, odd as this case might be, that so long as a basic parity in the relative distribution among the main contemporary income groups is preserved, the members of the society have not acted unjustly.

Rawls's take on this is somewhat different; his emphasis is on the contention that the members of the society did what they did by choice.[18] But I leave this contention aside. It doesn't alter the main lines already laid down. Indeed, any such emphasis on voluntary choice presupposes that the relevant background conditions in the society and in the relations between societies are not unjust and that the choice so made is *not* itself unjust, either in intention or in outcome.

5. The idea that all income groupings in society might go down together, in terms of past/present comparisons, is an unsettling one. But in fact, some societies might actually have to act in an analogous way. They might, for example, if they were responding to long-term ecological degradation. Clearly, we cannot regard such a situation (of progressive long-term deterioration, either in overall or in group aggregate wealth) as a possible candidate for a Millian "just stationary society"; this would distinguish the pastoral society in Rawls's first example from the prolific one in his second. But one could still maintain that Rawls's philoprogenitive society (or a society in the throes of environmental crisis), insofar as it substantially maintains an acceptable parity in relative distributions among groups (or at least an acceptable ordinal ranking among them), may not provide a clear-cut case of a society that is acting unjustly, or even of a society acting inappropriately with respect to difference principle standards.

6. Rawls intended his argument, as developed in the two main cases – industrialization and population growth – to be a way of countering or rebutting what

he called a "global egalitarian principle"; he intended it to counter or rebut the idea of a global application of the difference principle. Indeed, I'd say the latter aim was the more central one in his thinking. He was primarily intent, in short, to deny the claim that justice required the difference principle, or something very like it, as *the* standard for the international or transnational distribution of income and wealth, to deny in fact that it should even be regarded as one of the appropriate standards.

7. However, as we have seen, the poorer societies in each of his two sample cases (the industrialization and the population growth one) do fit in with what I called Rawls's background thinking. Accordingly, they are compatible with one or even several of the things the difference principle requires. They in fact conform to one version of the difference principle, albeit a highly peculiar one (the lexical difference principle). So, neither one is an example of an ostensibly just or tolerable society which is acting in a way other than what the difference principle, in one of its versions, would tolerate or allow for. Nor do they provide examples of a society which is doing something that simply violates or infringes the difference principle.

In making this point, I'm not saying that either of these societies yields an example of a society that is following or complying with the difference principle. Indeed, if we go beyond the highly peculiar situation of conformity to the *lexical* difference principle, neither society is an example of a society that conforms to the more robust versions of the difference principle that Rawls advocates for liberal societies in *A Theory of Justice* or *Political Liberalism* or, by extension, in *The Law of Peoples*.[19] No goal of continual mutual benefit is being set or followed. No attempt is being made to reduce inequalities between the top-most and bottom-most income groups. No attempt is underway to achieve a minimizing of this inequality or, to say the same thing in another way, to maximize the well-being of the least well-off group. These goals are not being followed; it's not clear that the aims of any such version of the difference principle are even regarded as goal-worthy in these societies.

This might well be Rawls's point. These societies are not unjust, but they don't conform to anything like a robust version of the difference principle.

7 Rawls's Arguments: an Appraisal

I think that Rawls's arguments, against those who advocate a global difference principle, are poor. For one thing, the examples he uses of acceptable arrangements do not provide a clear contrast or challenge to any and all transnational or global normative applications of the difference principle (or of some particular formulation of it, such as the so-called lexical difference principle). The arguments here are poor for other reasons as well.

1. They do not address the case of formerly burdened societies but, instead, the relation of liberal and democratic (or of liberal and decent) societies to one another. They certainly do not address the case where liberal and democratic (or liberal and decent) societies are attempting to help raise burdened societies, helping them become decent societies. But the relation of *these* states to burdened societies (or formerly burdened societies) was exactly what Rawls claimed to be addressing in *The Law of Peoples*, and what he should have been addressing here.[20]

2. There is a further point. Rawls assumes no significant net impact in the relationship of trade or investment between the societies in his two sample cases. And he assumes no history of such impacts in the relationships between them in the past. Perhaps more important, he assumes no significant relationship of trade or investment and, in particular, no unequal or deleterious impact in the relationship between richer decent societies (be they liberal or nonliberal) and the much poorer "burdened societies." This assumption is a logically possible one, but it seems unrealistic and unduly restrictive to make it the model case, as Rawls does.

3. Though Rawls's arguments in *The Law of Peoples* are poor ones, it does not follow that he must therefore concede to his critics and endorse a global or international application of the difference principle in the stronger, more robust, version of the principle that he (and they) had in view. There are arguments against any such application which Rawls could have made. They are arguments that could be developed from elements embedded in Rawls's thinking. I think such arguments would be highly effective ones, given that these arguments draw on the very resources in *A Theory of Justice* that Rawls's critics draw on in advocating a *global* difference principle and that Rawls himself had drawn on in his advocacy, in *A Theory of Justice*, of a difference principle that applies to the basic structure of a *domestic* society.

But Rawls did not make these arguments. They need to be made.[21] But I will not try to make them or add to them here (reasons of length do not permit this in the present paper). Let me conclude instead by returning to the point from which my chapter began.

4. One main point of the present paper is to argue that the Rawlsian duties of aid to burdened societies are, in fact, robust. They should not be downplayed or ignored (by those who say that we should instead turn to a globalized difference principle). And this, I think, was primarily what Rawls intended to say.

Satisfaction of the human right to subsistence, achieved by carrying out the human rights duty to provide "unpolluted air, unpolluted water, adequate food, adequate shelter, minimal preventive public health care"[22] to people in burdened societies would make a tremendous difference, freeing vast numbers of persons in those societies from extreme poverty and chronic malnutrition, endemic disease, and often early death.

The duty decent societies have to assist burdened societies to become well ordered and self-supporting decent societies would also have great impact. In carrying out this duty decent societies would help provide burdened societies with education to achieve general literacy and, beyond that, job skills. They would help build up the beginnings of a culture of common citizenship supporting a "spirit of mutual concern" and the rule of law (as embodied in such institutions as effective courts, legislative bodies, and property regimes).[23] They would help build up the economic infrastructure in burdened societies. And they would help burdened societies increase the level and quality of their social services in such matters as sanitation, disease control and eradication, improvement in health services and information, availability of life-saving medicines, and so on.

I would argue that the duty to assist burdened societies to become self-supporting decent societies also requires that the assisting countries (and their citizens and corporations) work to effect structural changes in the financial and economic environment in which formerly burdened societies interact with wealthier and more technologically advanced societies. And I would suggest that Rawls and his defenders might be open to endorsing some such suitably expanded form of the duty of assistance.[24]

5. In sum, carrying out these two duties of aid would involve a high level of commitment. The delivery of such aid would be expensive, costing far more than the wealthier states are currently laying out; and the delivery would be extensive and long-term. Dramatic and fundamental changes could be expected not merely in the civic and social culture of burdened societies themselves but also in the financial and economic environment in which formerly burdened societies interact with wealthier and more technologically advanced societies. It would amount to a new Marshall Plan for the world order.[25]

The defenders of a global difference principle have not attended to the character or the importance of the alternative Rawls has advocated in his account of these two main duties of aid. If decent societies, both liberal and nonliberal, were to enact in conscientious fashion the Rawlsian duties of aid, it would have a measurable and significant impact. The case for a global difference principle, then, would have to be made, not on grounds of urgency[26] but on grounds of its merit and practicability when measured against a viable alternative. And it is not clear that the case for a global difference principle, even if it could survive a more cogent line of argument than any Rawls had used against it, could sustain this altered challenge.

Notes

[1] *A Theory of Justice* (hereafter *TJ*), Cambridge, MA: Harvard University Press, 1971. (Oxford University Press published *TJ* in Britain in 1972. A revised edition of *TJ* was

published by Harvard University Press in 1999.) All subsequent citations to *TJ*, by page, will be to the revised edition of 1999.

[2] For Rawls's original statement of the two principles of justice see *TJ*, p. 266. For the latest version see pp. 5–6 of his book *Political Liberalism* (hereafter *PL*), New York, NY: Columbia University Press, 1996. (This paperback version is unchanged in content from the hardback version of 1993, except that it has a second [paperback] introduction, pp. xxxvii–lxii, and adds Rawls, "Reply to Habermas," *Journal of Philosophy*, 92 [1995]: 132–80, as Lecture IX.) Columbia University Press recently issued (in 2005) an "expanded edition" of *PL*, which includes a 1997 paper by Rawls as well, but I will stay with the version that Rawls himself saw through to publication. Thus, all subsequent citations to *PL*, by page, will be to the paperback version of 1996.

The goal point of Rawls's difference principle can be stated in either of two distinctive ways: (i) as minimizing the difference (measured in terms of income or wealth) between the topmost and bottom-most group, consistent with the realization of everyone's continual betterment, or (ii) as achieving "the greatest benefit of the least advantaged" (*TJ*, pp. 72, 266), that is, the greatest benefit for the least well-off group. Here we have a distinction without a difference; the two goal point formulations, (i) and (ii), say the same thing. (For a proof of this last contention, see the Appendix, by Prakash Shenoy and myself, in my book *Rawls and Rights* (hereafter *R&R*), Lawrence, KS: University Press of Kansas, 1985, pp. 197–201.)

[3] Bibliographical details on all the other writings by John Rawls (1921–2002) that I cite are as follows:

(a) *The Law of Peoples with "The Idea of Public Reason Revisited"* (hereafter *LoP*), Cambridge, MA: Harvard University Press, 1999.

(b) *Justice as Fairness: A Restatement* (hereafter *JasF*), ed. Erin Kelly, Cambridge, MA: Harvard University Press, 2001.

(c) *John Rawls: Collected Papers* (hereafter *CP*), ed. Samuel Freeman, Cambridge, MA: Harvard University Press, 1999.

[4] For Rawls's account of these "decent" nonliberal societies see *LoP*, sects. 8 and 9 (esp. p. 77) and p. 88. For the crucial idea of a "common good" conception of justice see *LoP*, pp. 61, 64–7, 69, 83, and sect. 9.

[5] Reprinted in *CP*, pp. 529–64. See *CP*, p. 540 for Rawls's short list of the "principles" of the law of peoples in his *article* (comprising in this case only seven short points, not the eight found in the *book*, at *LoP*, p. 37). There are other changes – changes in the order of the points or in the verbal content – of the seven points that the article and the book (*LoP*) have in common, but the addition of the duty to assist is the only substantive change that the book makes on the list in the article.

[6] For Rawls's discussion of burdened societies, see *LoP*, sect. 15; for his discussion of the main contributory causes of the "unfavorable conditions" under which most people in those societies live or are forced to live, see *LoP*, pp. 106, 108–10, 112, 117. Rawls draws heavily on A. K. Sen's account of these main contributory causes (as found, e.g., in Sen's *Poverty and Famine*, Oxford: Clarendon Press, 1981; in Sen's book, co-authored with Jean Drèze, *Hunger and Public Action*, Oxford: Clarendon Press, 1989; and in Sen's article, "Population: Delusion and Reality," *The New York Review of Books*, [Sept. 22, 1994]: 62–71.)

Rawls emphasizes that a country does not have to be rich in natural resources to be well ordered (*LoP*, pp. 106, 108) and that it doesn't have to be wealthy either; indeed,

a society that was rather poor could be well ordered (*LoP*, pp. 106–7). But it is, of course, true that burdened societies are typically desperately poor, or at least a vast part of their population is.

Rawls does *not* mention either the legacy of colonialism or the exploitation – as some would call it – and unfavorable trading and financial conditions imposed on burdened societies by the wealthier nations (and their private corporations and other economic interests) as being among the main contributory causes of the "unfavorable conditions" under which people in burdened societies live.

[7] Among the earliest advocates of this idea are Thomas Pogge and Charles Beitz; see Thomas Pogge, *Realizing Rawls*, Ithaca, NY: Cornell University Press, 1989, part 3, chs. 5–6, and Pogge, "An Egalitarian Law of Peoples," *Philosophy and Public Affairs*, 23.3 (1994): 195–224; and Charles Beitz, *Political Theory and International Relations*, 2nd edition, Princeton, NJ: Princeton University Press, 1999, 1st edition 1979, part 3, sects. 3–4. (See also Beitz's "Afterword" to the 2nd edition, pp. 185–216, at 198–214.) The term "interdependence" that I used in point (ii), of the points just sketched, I took from Beitz.

Even Brian Barry, who is no friend of Rawls's original position construct, developed his own version of a cosmopolitan difference principle, relying on the notion of impartiality, out of a careful critique of Rawls's *TJ* analysis; see Brian Barry, *Theories of Justice*, Berkeley, CA: University of California Press, 1989, chs. 5 and 6, esp. 6).

[8] In particular, Rawls denies the analogy between the circumstances and setting of (a) domestic principles and institutions of justice and (b) international or global ones (see *LoP*, pp. 82–3, 114–16).

[9] See *LoP*, sect. 16, for his main argument; also *LoP*, p. 106.

[10] For the first comparison, and for the passages quoted, see *LoP*, p. 117.

[11] See *LoP*, pp. 117–18 for the second case and for the passages quoted. Rawls says in another context (as regards the family as an institution in the basic structure of a liberal and well-ordered society): "[A] liberal conception of justice may have to allow for some traditional gendered division of labor within families – assume, say, that this division is based on religion – provided it is fully voluntary and does not result from or lead to injustice" ("The Idea of Public Reason Revisited" [1997] in *CP*, pp. 573–615, at 599 and see the important note [n. 68] there on "voluntary"; this essay is also reprinted in *LoP*, pp. 131–80, see here pp. 161–2). What Rawls says about "voluntary" in the quote above is very like his remark just cited about religious reasons "freely held by women" (in a very traditional, presumably decent, society).

[12] There is a third very brief comparison, by Rawls, between "two societies [that satisfy] internally the two principles of justice found in *A Theory of Justice*." In this third case it transpires that the "worst-off representative person in one [society] is worse off than the worst-off representative person in the other."

For this third comparison see *LoP*, p. 120. It provides nothing significantly different from Rawls's first comparison (the industrialization one); so I'll not discuss it further in the present paper.

[13] These are the considerations that Rawls himself advances. See *LoP*, pp. 118–19.

[14] Rawls clearly regards comparisons of relative degrees of inequality as relevant to any discussion of mutual benefit, itself regarded as one feature of ascertaining justice in distributions. The egalitarian motif – the motif of reducing, ideally of minimizing,

differences in income between the top-most and the bottom-most group – is expressed most clearly in *TJ* in sect. 17 (see esp. pp. 89–90). See also Rawls, "Reply to Alexander and Musgrave" (1974) in *CP* at pp. 246–7, including n. 7; and Rawls, "Social Unity and Primary Goods" (1982) in *CP*, at p. 374, n. 12. Indeed, a line of argument, stressing (as a consideration first arising in the original position) the *continuing* importance of the benchmark of equality, can be found in Rawls's writings at several points: for example in "Kantian Conception of Equality" (1975) in *CP*, at pp. 262–4; in "Basic Structure as Subject" (1978), reprinted in Rawls, *PL*, as lecture VII: at *PL*, pp. 281–2; and in his discussion of reciprocity (as distinct from mere "mutual advantage") in *PL* at pp. 16–18, esp. n. 18, also pp. 50, 54.

Policies of mutual economic benefit (constrained by egalitarianism) would conform to Rawls's difference principle under either of its two main rubrics: by seeing to it that, as some groups benefit, all benefit or at least none are made worse off (this Rawls calls being "just throughout"); and by taking egalitarian considerations on board and achieving or trying to achieve the greatest well-being of the least well-off group of workers (this achievement Rawls calls being "perfectly just"). For the distinction thoroughly just/perfectly just, see Rawls, *TJ*, pp. 68–9, 280–1, and for the background argument see *TJ*, sects. 13, 17.

Rawls sums up the main considerations nicely in *TJ*, sect. 13, at pp. 68–9: "[T]here is a significant distinction between the cases that fall short of the best arrangement. A society should try to avoid situations where the marginal contributions of those better off are negative, since, other things equal, this seems a greater fault than falling short of the best scheme when these contributions are positive. The even larger difference between classes violates the principle of mutual advantage as well as democratic equality . . ." (See also *TJ*, pp. 89–90, 154–6.)

[15] See *LoP*, pp. 106, 117, 118–20.

[16] See *TJ*, p. 72 for this version of the difference principle. For discussion of various versions of Rawls's difference principle that include but go well beyond the lexical version, see my *R&R*, ch. 5.

[17] For the passage quoted in the previous paragraph, see "Basic Structure as Subject" (1978), reprinted unchanged in *PL*, at p. 274. For discussion of just savings, see *TJ*, sects. 44, 45; *JasF*, pp. 159–60; and *LoP*, pp. 106–7.

[18] Rawls does allow for trade-offs between income and leisure, allowing the choice of more leisure time at the cost of less income for given individuals. (See Rawls, "Reply to Alexander and Musgrave," *CP*, pp. 252–3; see also "The Priority of Right and Ideas of the Good" [1988] in *CP*, p. 455, see esp. n. 7, and also *JasF*, p. 179.)

[19] I suggested in §1.1 that Rawls does not desert or downplay the difference principle in *Political Liberalism*; the difference principle comes into play there as a second higher-order focal point for distributive justice, situated above the social minimum. Rawls is willing to assert that "justice as fairness – its two principles, which of course include the difference principle" is, among all presently feasible reasonable alternatives, "the most reasonable conception" (*PL*, p. xlviii, in the preface to the 2nd, the 1996, edition). Justice as fairness is the version, within the "family of liberal principles," that Rawls continues to prefer as the standard for domestic justice in liberal societies. See also *PL*, pp. 164–8; "The Idea of Public Reason Revisited" (1997) in *CP*, at pp. 581–3, esp. n. 27 on p. 582; and *LoP*, p. 128.

[20] In *LoP*, sects. 15 and 16.

[21] For some examples of such arguments, see the article by Samuel Freeman in this volume.

[22] For the quoted phrase see Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd edition, Princeton, NJ: Princeton University Press, 1996, p. 23. For further detail and argument, see Shue, *Basic Rights*, chs. 1, 2, 5, pp. 150–2, and the Afterword (pp. 153–80, added in the 2nd edition). Shue's book was originally published in 1980 (1st edition); the text and pagination are identical, in the two editions, in the first six chapters (up through p. 152).

Rawls cites with approval (at *LoP*, p. 65n) what Shue says here. Rawls also cites the book by R. J. Vincent, *Human Rights and International Relations*, Cambridge: Cambridge University Press, 1986, but (unlike the citation to Shue) he mentions no specific page.

[23] The passage quoted is from *LoP*, p. 113. The examples of rule of law institutions were suggested to me by David Reidy.

[24] For Rawls's possible willingness to accommodate this point, see *LoP*, pp. 42–3, 115. Thomas Pogge complains that Rawls does not make clear in these passages how we are to judge whether "distributive effects are 'unjustified' or trading arrangements 'unfair'" (see Thomas Pogge, "The Incoherence Between Rawls's Theories of Justice," in Symposium: "Rawls and the Law," *Fordham Law Review*, 62/5 (2004): 1381–2285, at p. 1751 [Pogge's article is found at pp. 1739–59]). But this isn't a wholly fair criticism. Rawls is not making a philosophical argument in these passages; rather, he's laying out considerations that would be widely understood and widely thought to be reasonable. He does, of course, discuss (albeit briefly) what he regards an "unjust" distribution to be. Rawls says, "A scheme is unjust when the higher expectations, one or more of them, are excessive. If these expectations were decreased, the situation of the least favored would be improved" (*TJ*, p. 68). Rawls's criterion here is clear enough; it provides a benchmark for a discussion of the considerations he has raised.

[25] The percentage of Gross National Income (GNI) devoted by the most developed nations (in North America, Western Europe, the Pacific Rim) to official development assistance (ODA) stood at roughly 0.33 percent (well less than 1 percent) in 1990, at the very end of the Cold War. In the year 2000 it had dropped to 0.22 percent. Of this aid only about 7 percent went (in 2001) to meeting basic needs (well below the 20 percent target figure that the most developed nations had set for themselves). Thomas Pogge and others estimate that to bring *everybody* up above the $2 per day income line (set by the World Bank as the *higher* of two target lines) would cost about $300 billion annually. In percentage terms this comes to about 1.2 percent of the combined GNI of the most affluent countries.

These figures are cited from Thomas Pogge, "Severe Poverty as a Human Rights Violation," in a volume edited by him, under UNESCO sponsorship, Oxford: Oxford University Press, 2005. (See the Pogge article in this volume, n. 17.)

Marshall Plan aid, extended by the USA to the devastated economies of Western Europe after World War II, came to about 3 percent per year of the US GDP (Gross Domestic Product), for the years it was in place.

[26] See *LoP*, p. 117.

14

Distributive Justice and *The Law of Peoples*

Samuel Freeman

1 Introduction

A Theory of Justice says that the distribution of income and wealth within a society is just when laws and economic institutions are designed so as to maximally benefit the least advantaged members of that same society. This standard for domestic distributive justice is to apply worldwide, to determine just distributions in every society in the world. In this regard Rawls has an account of global distributive justice. But he does not have, and he does not endorse, a global distribution principle. The difference principle applies within each society, but it is not otherwise global in reach.

Neither *Political Liberalism* nor *The Law of Peoples* retracts or alters this position. The primary focus of political liberalism is not ideal justice, but liberal legitimacy. It asserts that laws regulating distributions in a democratic society can be legitimate, hence worthy of respect, even if they are not wholly just.[1] Unlike the basic liberties and their priority, the difference principle is not required by liberal legitimacy; for legitimacy it suffices that a liberal society provide an adequate social minimum (adequate to enable free and equal persons to realize the moral powers and effectively exercise equal basic liberties). The difference principle is one among several standards that satisfy the legitimacy test, all of which meet the criterion of reciprocity and the requirements of public reason. A society that protects the basic liberties and their priority, and affords equal opportunities and an adequate social minimum is "reasonably just." It is not "fully just" since liberal justice for Rawls still requires guaranteeing the fair value of the political liberties, fair equal opportunities, and distributions according to the difference principle. But the argument for this strongly democratic position is a matter of reasonable disagreement, and (Rawls thought) it would not be generally accepted by all reasonable citizens in a well-ordered liberal society on grounds of public reason.

The Law of Peoples does not retract Rawls's earlier position that the principles of justice are required in every society in the world. It is not the purpose of the Law of Peoples to say what social justice requires. Instead, *The Law of Peoples* is an extension of political liberalism. It too has a limited aim: Given the justification of a liberal conception of social justice, such as justice as fairness, what principles are to govern the relations among different societies in the world? "The Law of Peoples proceeds from the international political world as we see it, and concerns what the foreign policy of a reasonably just liberal people should be" (*LoP*: 83).

The foreign policy of a liberal people includes a duty of assistance, to meet the basic needs of "burdened peoples" (*LoP*: 38, 105–13), but it does not include a duty of distributive justice that applies to the world at large (*LoP*: 113–20). Distributive justice for Rawls is socially, hence domestically, established. It exists globally when every society designs its institutions so as to maximally benefit its least advantaged members.

Here cosmopolitans criticize Rawls's starting position, his beginning with principles of *social* justice, among members of the same society, instead of justice among all individuals in the world. For principles of social justice seem to preempt much of the territory that would be covered by a theory of global justice, including a global distribution principle. Cosmopolitans say: "But how can we decide distributive shares within a society until we first decide such global distribution questions as whether societies have exclusive rights to control the resources within their territory?" This question (purportedly) requires principles of global distributive justice.

To understand Rawls's account of distributive justice, it is essential to keep in mind that Rawls's Law of Peoples is (like his principles of social justice) specified to apply in the first instance for the ideal case, among "well-ordered societies." How the Law of Peoples is to be applied in our world, "with all its injustices," is a separate issue. All reasonable members of a well-ordered society generally accept the public conception of justice that regulates society, and have a willingness to comply with it. In well-ordered liberal societies all citizens conceive of themselves as free and equal and they publicly endorse one or another liberal conception (all of which guarantee basic liberties and their priority, equal opportunities, and a social minimum). In decent hierarchical societies, all endorse the nonliberal, common good conception of justice that regulates their society. Common good conceptions, by definition, promote a conception of the good of each member of society. This does not mean that the common good promoted is the same liberal and democratic conception that we accept; nor does it mean that everybody in a well-ordered decent society accepts all laws designed to promote their common good. But still all do accept the common good conception used to justify those laws, even if they do not agree with all its interpretations and applications.

Liberal societies are obligated to tolerate decent hierarchical societies under Rawls's Law of Peoples; still there is nothing in Rawls's account of human nature and social institutions that rules out the real possibility of a world of well-ordered

liberal societies. But even under the most-ideal case of a world of well-ordered liberal societies that all domestically enforce the difference principle, individuals similarly situated in different societies will have markedly different economic powers and entitlements to income and wealth.

Critics say: Why should the least advantaged people born into poorer societies have different life prospects than the least advantaged in wealthier societies? For if, as Rawls contends, the social class and natural talents one is born with are arbitrary from a moral point of view (*TJ*: sect. 12), so too must be the country where a person happens to be born. Even if we accept Rawls's argument that liberal rights and entitlements should be domestically, not globally, enforced, this does not establish Rawls's claim that the scope of the difference principle is domestic rather than global. Why shouldn't a people have the duty to structure their economic relations to maximize the position of the least advantaged people, not in their own society, but in the world at large?

Some of Rawls's most sympathetic critics have argued that the difference principle should apply globally rather than domestically (Beitz, Pogge, Tan, Barry, Scanlon, etc.), and indeed that it would be chosen in a global original position. I argue that, in the absence of a world state, a global legal system, and global property, the suggestion makes little sense. Critics' immediate response here may be that, if not the difference principle, then some other global distribution principle should apply to fairly distribute natural resources and the products of industry. I address this more general objection first, before turning to the difference principle in section 3.

2 A Global Distribution Principle?

A. Rawls's stance assumes that while we have duties of humanitarian assistance to burdened peoples, distributive justice is different and presupposes social cooperation. This is partly because social cooperation involves political cooperation and the capacity of a people to politically determine their social and economic fates. The basic ideas are as follows:

1. For Rawls, distributive justice is not an allocation problem, to divide up and redistribute for consumption a product that is produced by some unrelated external process. Distribution of product, though important, is a secondary issue, dependent upon the social process of production. Distributive justice in the first instance poses the general problem of fairly designing the system of basic legal institutions and social norms that make production, exchange, distribution, and consumption possible among free and equal persons.[2]
2. The system of property and economic norms (of social and legal institutions) can be designed in many ways. How property and the economy should be designed is the first subject of distributive justice. Distributive justice is then,

in the first instance, a feature of *basic social institutions*, including the legal system of property, contract, and other legal conditions for economic production, transfers and exchanges, and use and consumption.

3. Basic social institutions and legal norms that make production, exchange, and use and consumption possible are *political products*, one of the primary subjects of political governance. It is not just fiscal policies, taxation, public goods, and welfare policies that are involved here; more basically it is political decisions about the many property rules and economic institutions that make these policies – and economic and social cooperation as well – possible. A primary role for a principle of distributive justice is to provide standards for designing, assessing, and publicly justifying the many legal and economic institutions that structure daily life.
4. Since these basic institutions are social and political it should follow that distributive justice is itself social and political. If so, then in the absence of a world state, there can be no global basic structure on a par with the basic structure of society. Indeed, there is nothing in global relations anywhere near to being comparable to a society's basic structure of political, legal, property, and other economic institutions. Of course there is global cooperation and there are some global institutions, but these are not *basic* institutions.[3] Rather, global political, legal, and economic arrangements are *secondary* institutions and practices: they are largely the product of agreements among peoples and are supervenient upon the multiplicity of basic social institutions constituting the basic structures of many different societies.
5. Consequently the only feasible global basic structure that can exist is also secondary and supervenient: It is nothing more than "the basic structure of the Society of Peoples," and its governing principles are the Law of Peoples.

The crucial point then is that Rawls transforms the problem of distributive justice from an allocation question into a question of the political design of basic social (economic and legal) institutions. Modern property systems, and contractual and commercial norms, consist of innumerable laws (in the USA literally millions of legislative acts, judicial rulings, administrative regulations, etc.) that provide basic structure and content to property and economic activity; this includes norms regarding the productive control, the use and consumption, and transfer and disposal of economic goods and other possessions. It is not just that global norms pale by comparison, but that they are secondary and supervenient on these and other basic social institutions. An example of what I mean by the "secondary" nature of global norms and institutions is when firms contract for goods and labor on the international market, but their contracts, property rights, powers, duties and liabilities are specified and enforced according to the laws of one or another society. It is the national legislative specification of property systems, contact law, commercial instruments, corporate and securities law, etc. – the myriad rights, powers, duties, liabilities, and so on that make them up – that is

crucial here, not simply their legal enforcement.[4] Also even in the few cases where international norms do exist independent of any nation's particular laws, these norms do not issue from any global political body with non-derivative original political and legal jurisdiction, for there are none. Whatever jurisdiction global regulators and courts have is not original, but they have been granted and continue to enjoy it only by virtue of the political acts of different peoples.

For Rawls then distributive justice presupposes social and political cooperation, since distributive principles apply to structure basic institutions and these are socially and politically specified, sustained, and enforced. Social and political cooperation, not global cooperation, provide the myriad laws and norms that define people's expectations and structure and govern their everyday life. This is not to deny that production and consumption in one country affects people's lives and prospects in another or that countries are economically dependent upon each other's trade or consumption patterns. Rawls's argument for social rather than global distributive justice does not rely upon a false assumption of autarky. But trade alone or causal influences of consumption patterns on other peoples do not amount to social cooperation.

B. Rawls's critics confidently refer to "global economic institutions" and a "global basic structure," as if Rawls had simply ignored the fact, clear to all, that basic global institutions and all-pervasive global norms exist. I contend that the economic and political relations they mention (few and far between) are secondary, not basic institutions. They are secondary in that they are based upon the property, contract, and commercial laws of one or another people's political society, and arise as a result of treaties and agreements between nations. There is no global basic structure because there are no *basic* global institutions – no world state, no independent global legal order, no global property system, no independent global contract law, negotiable instruments law, securities law, and so on. The rules and institutions that make global economic cooperation possible are national, and they apply internationally only due to agreements among peoples.

The one significant practice or norm Rawls's critics allude to which might at first appearance be regarded as a basic global institution is peoples' recognition that nations have "ownership" or control of the land and natural resources in the territories they occupy. Pogge, K. C. Tan, and others see this example as justifying a need for a global distribution principle to regulate this practice, and decide how global resources are to be distributed. But it is a mistake to regard this norm as a basic institution, on a par with the institution of property. For control and jurisdiction over a territory by a people is *sui generis*: it is the condition of the possibility of the existence of a people and their exercising political jurisdiction. As such it is not a kind of property; for among other reasons, it does not have the incidences of property: it is not legally specified and enforced, nor is it alienable or exchangeable, but is held in trust in perpetuity for the benefit of a people. But more importantly, rather than being a kind of property, a people's control of a

territory provides the necessary framework for the legal institution of property and other basic social institutions. Finally, peoples can and have controlled territories without norms of cooperation or even recognition by other peoples at all. Indeed this has been true of many countries for most of history; they have existed in a Hobbesian state of war. The point is not that there is anything just about this situation – on the contrary, it has been sustained by aggression and injustice for most of history – but that, unlike property and other basic social institutions, a people's control of a territory is not necessarily cooperative or in any way institutional. It is then misleading to call a people's control of a territory and recognition of others' boundaries "property," a "basic institution," or part of a "global basic structure," simply in hopes of showing an inconsistency in Rawls and smuggling in a global principle of distributive justice. There are surely global norms of respect for another people's territory – indeed this is part of the Law of Peoples. But there are no global basic institutions, because there is no global polity. And in so far as there is a "global basic structure," it can be nothing more than the basic structure of the Society of Peoples, which is to be regulated by the Law of Peoples.

C. Rawls's critics often rely upon the fact of gross inequality and world poverty to argue for a global distribution principle.[5] World poverty is certainly a problem of justice, for it is largely due to the great injustice that currently exists in many people's governments and in world economic relations. But on Rawls's account it is an injustice that is to be addressed by the duty of assistance, by preventing the unfair exploitation of a people's resources by other nations and international business, and by requiring corrupt governments to respect human rights and satisfy the basic needs and promote the good of their members. A global distribution principle is not needed to address the problem of severe global poverty, and indeed is an inappropriate remedy. For distributive justice applies among peoples whether or not they are poor. If some day all the peoples of the world had adequate income and wealth to enable their members to pursue their chosen way of life, global principles of distributive justice would still apply. This suggests that there must be some other foundation than poverty for global principles of distributive justice.

Contrary to some critics, Rawls's duty of assistance is not a charitable duty. Rather it is a duty of justice that well-ordered peoples owe to burdened peoples existing under unfavorable circumstances. The duty of assistance is as much a duty of justice as is the domestic duty to save for future generations. Rawls discusses "the similarity" between these two duties: "[they] express the same underlying idea" (*LoP*: 106–7). The duty of assistance also resembles another natural duty of justice, mutual aid.[6] Apparently, for Rawls, the duty of assistance to burdened peoples, to meet their basic needs, is to be satisfied, like the just savings principle, before determining the distributive shares of the least advantaged in one's own society under the difference principle.[7] Rawls then seems to

afford a kind of importance to meeting basic human needs worldwide that moderates claims of distributive justice within society.

D. Many assertions of a global distribution principle appear to be based in a kind of egalitarianism that Rawls simply rejects. This is the kind of egalitarianism which says that equality (of resources, or of welfare, or perhaps of capabilities) is good for its own sake. Taken strictly, the idea that equality of resources is good for its own sake implies that, even if people equally endowed voluntarily decide to use their resources in ways that create great inequalities – suppose you save your earnings and I spend mine drinking expensive wines – there are considerations that speak in favor of restoring equal distribution, hence of transferring part of your savings to me so I can buy still more expensive wine. Most egalitarians, understandably, do not endorse this position. They claim, not that equal distributions per se are intrinsically good, but that what is desirable are equal distributions in so far as they are not the product of people's free and informed choices (under appropriate conditions). The egalitarian position here is then one that seeks to equalize the products of fortune – "luck egalitarianism," so called. So long as the relevant products of fortune have been equalized or neutralized (e.g., people have been compensated for misfortune), then inequalities in resources, welfare, capabilities – whatever the relevant good – are warranted, assuming they are based in people's free and informed choices.

I suspect that luck egalitarianism drives many cosmopolitan calls for a global distribution principle. Whether or not this is so, luck egalitarianism is not Rawls's position. Justice does not require that we equalize or even neutralize the products of brute fortune (whether the products of social or natural endowments or just brute bad luck). Instead, social justice requires that society use these inevitable inequalities of chance so as to maximally benefit the least advantaged members of society.

Rawls also rejects the position that equal income and wealth are good for their own sake (*LoP*: cf. pp. 114–15). Equal respect for persons, equal basic liberties, equality of fair opportunities, equal worth of political rights and liberties – these equalities are good for their own sake, but not the equal distribution of income and wealth, or of welfare or opportunities for welfare, or of capabilities for functioning. For equality of these things for their own sake would require, other things being equal, making some worse off in these regards without improving anyone else's situation. There seems no point in that, unless needed to protect fundamental interests.

E. Thomas Pogge contends that Rawls's Law of Peoples is subject to "libertarian rule-making" and "free bargaining" among peoples, where economic distributions among peoples are determined by negotiated treaties and trade agreements.[8] The references to "libertarian rule-making" and so on can be misleading. Trade agreements between peoples are not "free bargains" between self-interested economic agents, but political agreements among peoples' representatives, each

of whom has "due respect" for one another as an equal people. One has to be careful not to confuse agreements between well-ordered peoples or societies with bargains between individual economic agents, and draw the conclusion that, because economic relations between individuals in separate societies are regulated by trade agreements between their governments, final distributions to these and other individuals are also (therefore) determined by "free bargaining" and "libertarian rule-making." In "Rawls's utopia" final distributions to individuals are not determined by libertarian free bargaining, but should in all cases be determined by the difference principle. This is not altered by the fact that trade relations between peoples are decided by trade agreements among their governments. For whatever individuals gain via international commerce is always subject to regulation/redistribution according to the difference principle applied within their own society.

If so, then what must be bothersome to Pogge is that the collective wealth controlled by some peoples enables them to impose on less wealthy peoples terms of trade that unfairly take advantage of their bargaining power. Of course this happens all the time in the world as we know it, where corporations exercise undue influence over governments. But why should we expect the same political corruption to be the rule in Rawls's well-ordered Society of Peoples? Pogge and others just assume that, because Rawls does not have a global distribution principle, then it must be the case that relations between more and less advantaged peoples will be exploitive of the less affluent.[9] This assumption is simply unwarranted in Rawls's ideal case of well-ordered societies that are members of the Society of Peoples, who have a moral nature and "due respect" for one another as an independent people. Indeed, Rawls takes for granted that non-exploitive principles of fair trade would be agreed to among such peoples, determined behind a veil of ignorance regarding wealth and the size of one's economy (*LoP*: 42–3).

F. Again, Pogge says: "Like the existing global economic order, that of Rawls's Society of Peoples is then shaped by free bargaining." Consequently, "Rawls's account of international justice renders all but invisible the question of whether the global economic order we currently impose is harming the poor by creating a headwind against economic development in the poorest areas and is therefore unjust." Underlying this is the idea that nothing in Rawls's Law of Peoples prevents the current practice by "affluent and powerful societies" in imposing "a skewed global economic order that hampers the economic growth of poor societies and further weakens their bargaining power."[10] Among the unjust exploitive practices, Pogge says, that cause global poverty are: (1) corporations' bribery payments to corrupt officials in undeveloped nations, which are tolerated by those corporations' home governments; (2) the "international resource privilege" allowing corrupt officials to sell off a poor nation's resources to corporations in rich nations, thereby ransacking poor countries' wealth; and

(3) international borrowing by corrupt governments to support their regimes, which saddle poor nations with debts that endure long after corrupt governments have been replaced.[11]

Pogge's accounts of the extent of severe world poverty, the huge discrepancies in wealth between nations, and the very modest sacrifices that richer nations would need – but refuse – to make to help alleviate the worst global poverty, are sobering. But his arguments against Rawls are misguided. To begin with, as Pogge recognizes, Rawls's duty of assistance, requiring that richer peoples contribute to meet impoverished people's basic needs, imposes stringent duties upon nations to alleviate the miseries of the status quo. But more to the point, Rawls recognizes the many injustices of the current global situation that Pogge points to, and he clearly rejects them. He says: "If a global principle of distributive justice for the Law of Peoples is meant to apply to our world as it is with its extreme injustices, crippling poverty, and inequalities, its appeal is understandable" (*LoP*: 117). This can be understood to imply that, as a transitional principle to establishing a well-ordered Society of Peoples, Rawls would support some sort of global distribution principle – if not the difference principle, then some other redistributive principle.

The corrupt governments Pogge cites are outlaw regimes; even if they do respect human rights of their members (which is doubtful since they do not provide means of subsistence, as *LoP*: 65, requires), they still exploit their people and do not pursue anything resembling a common good conception of justice. As outlaws, they have no claim to be tolerated under the Law of Peoples, much less bargained with, and it would be wrong for well-ordered peoples to do anything to perpetuate them. On Rawls's account, developed countries are not simply authorized, but would have a duty to prohibit their corporations from participation in exploitation of a burdened people. For surely if a government can set up sanctions against outlaw governments for abuse of their people and even intervene, it can also prevent its own domestic corporations from aiding and abetting outlaw governments' exploitation of their people.

The problem with Pogge's contention that the Law of Peoples does nothing to alleviate current global injustice is that, like so many criticisms of Rawls, it ignores the fact that the Law of Peoples is drawn up for the ideal case of well-ordered societies and peoples. As Rawls maintains in the case of social justice, the transition principles that apply to the non-ideal case to bring about a well-ordered society often must go beyond the principles of justice, and by implication beyond the Law of Peoples, to establish remedial conditions that would not be appropriate in a well-ordered society. So just as Rawls might have supported as a provisional measure preferential treatment of minorities, though it infringes fair equality of opportunity, in order to remedy generations of pernicious discrimination, so too he could have supported as a temporary measure a global distribution principle, to rectify the history of exploitation, expropriation, and gross violation of human rights endured by burdened peoples around the world.

But the important point is that such a global principle would be remedial, not permanent, for the reasons Rawls suggests. What are these reasons?

G. Even in a well-ordered Society of Peoples, among peoples each of whom are themselves internally well ordered, either as liberal societies or as decent ones (who pursue a common good conception that all of their members accept), there would still be no cut-off point for transfers from more advantaged to less advantaged nations, even when the least advantaged are well-to-do. Rawls objects to this. He gives two examples (*LoP*: 117–18). One is where a people in Society B freely chooses to remain "pastoral and leisurely" rather than industrialize; the other where Society B "because of its prevailing religious and social values, freely held by its women, does not reduce the rate of population growth and it remains rather high." In both cases he says it would be "inappropriate" to redistribute wealth to B from a wealthier Society A that had deliberately undertaken industrial development or controlled its population in order to increase its wealth.

If it is held that, even though each person in Society B freely endorses the population policies leading to a lesser standard of living, nonetheless there still should be a redistribution of wealth from Society A to B, then we go well beyond luck egalitarianism to a position that says that, in matters of distributive justice, not only are people not to be held responsible for the luck affecting their future prospects, but they are not even to be held responsible for the consequences of their preferences when in line with their society's decisions. For in Rawls's example, all members of Society B prefer to live in their society with its increasing population and the cultural advantages this provides for them, to living in Society A with its restrained population policies and the greater wealth it enjoys. It is under these conditions, Rawls says, that it would be "inappropriate" to transfer wealth from A to B. To insist on the contrary that it is nonetheless fair seems to be a difficult if not untenable position.

3 Problems with Globalizing the Difference Principle

A. I cannot in the confines of this paper fully vindicate Rawls's position against a global distribution principle, or reply to the many criticisms by his cosmopolitan critics. For example, it is not easy to respond in short order to Thomas Pogge's argument that the parties to Rawls's original position representing Peoples would choose a global resources tax to benefit less advantaged peoples. To respond that Rawls sets up the original positions among liberal Peoples and among decent Peoples respectively so that this question does not arise seems an unsatisfactory answer – though I believe this is true and is the beginning of the right answer. I think the main reason Pogge's global resource tax seems intuitively attractive is due both to the severe poverty that so many people suffer, and to the many

injustices that developed nations have imposed and continue to impose upon poorer peoples. Perhaps a better test of Pogge's proposal is to ask whether a global resource tax would be appropriate under ideal conditions, in a well-ordered Society of Peoples, where all reparations have been paid, and all Peoples domestically enforced the difference principle and were at least moderately prosperous. I believe not, but no doubt many will think otherwise.

Even if a full case against a global distribution principle or resource tax cannot be made here, I do think suggestions of a global difference principle can be dispatched. Once we consider the kind of principle the difference principle is and what would be needed to globalize it, the proposal is not feasible, if it makes sense at all.

B. What is usually envisioned by proponents of a global difference principle is a reallocation of wealth from wealthier to poorer societies, periodically and in lump-sum payments. The problem with this reallocation model is that it is not Rawls's difference principle. We've seen that the difference principle does not apply simply to allocate existing sums of wealth without regard to how or by whom they are produced and their expectations (cf. *TJ*: 56, 77.) This is not its proper role. Rather it applies in the first instance to structure basic legal and economic institutions that enable individuals to exercise control over economic resources. The crucial point is that the difference principle is a *political* principle: it requires legislative, judicial, and executive agency and judgment for its application, interpretation, and enforcement. There is no invisible hand that gives rise to the myriad complexities of the basic institutions of property, contract law, commercial instruments, and so on. If *political* design of these and other basic economic and legal institutions is primarily what the difference principle is all about, and if distributions to particular individuals are to be left up to pure procedural justice once this design of the basic economic structure is in place, then there must exist political authority with legal jurisdiction, and political agents to fill these functions and positions. So in addition to complex economic practices and a legal system of property, commercial instruments, securities, etc., the difference principle requires for its application political authority with the normal powers of governments.

There is no global political authority to apply the difference principle; nor is there a global legal system or global system of property to apply it to. So a global difference principle would be without both agency and object – *no legal person* to implement it, and *no legal system* to which it is applicable. In this regard, one can see why advocates of a global difference principle might want to regard it as an allocation principle. But their global allocation principle is not a political principle that political agents can apply to any basic institutions or basic structure. Such a principle is not the difference principle, but is something quite different.

C. There may be other ways to apply the difference principle globally and still preserve its role as a political principle that applies to a basic structure. Consider

"global difference principle #2" – the proposal that the governments of many different peoples severally should apply the difference principle to their own basic institutions, with an eye towards advancing the position of the least advantaged, not in their own society, but in the world at large. This is a peculiar proposal, given the inevitable lack of coordination among the world's governments in severally applying the difference principle in this way, and given also each society's inability to directly influence the practices and laws of peoples where the world's least advantaged reside. To apply the difference principle in this way is very unlikely to make the world's poorest better off than if governments were to follow some other policy.

The cosmopolitan proponent of the global difference principle may say: "What is important is not what principle governments directly apply, but the end result of making the least advantaged as well off as they can be. So governments should not directly appeal to a global difference principle, since obviously its direct application severally by many peoples will not have the intended effect. They should observe a method of indirection, applying policies that make their own economy prosperous. Whatever principles or combination of principles they severally follow that maximally benefit the world's least advantaged is the best." Call this indirect position "global difference principle #3." It is compatible with a global economy where each nation applies Rawls's domestic difference principle, just as he advocates, to maximally benefit the least advantaged in their own society. (Then too, it is potentially compatible with any number and combination of economic principles and policies observed by nations.)

It may well be that the domestic application of the difference principle in every society would maximally benefit both the least advantaged in each society and also simultaneously the least advantaged in the world. The best way to maximally benefit the world's poorest would then be for each people to focus on its own members and maximize the position of the poorest among them. This would be an interesting coincidence, ironical perhaps from both cosmopolitans' and Rawls's perspectives. But why would we call this eventuality the "application" of a "*global* difference principle" when no such global principle is directly applied by anyone? What we have instead is the application of Rawls's domestic difference principle in every society worldwide, with the coincidental effect of maximally benefiting the world's least advantaged. But since this effect is coincidental, and "global difference principle #3" is not publicly known or applied in any legislative or other public deliberations, it is not a *public political principle* of justice. Since it does not effectively guide anyone's reasoning or deliberations, it is not clear why we should call it a "principle" at all. What if (contrary to evidence) the best way to maximally benefit the world's poorest now just happened to be that each nation observe the classical liberal *laissez-faire* policies advocated by the IMF and current US policy? Would we then say that each nation was applying the global difference principle? Whatever the case, not being a public political principle, global difference principle #3 has little to do with Rawls's difference principle.

Finally, "global difference principle #4": It has been suggested (by Pogge in conversation) that the difference principle should apply, not to all economic institutions worldwide, or to the total product of all world economies, but to global institutions (lending policies, trade agreements, etc.) and the marginal product that results from economic cooperation among peoples. (One example: assuming that annually 15–17 percent of the US wealth stems from global trade, this percentage of our GNP should be applied to maximally benefit the world's least advantaged.) But this is not the difference principle either, for it does not apply broadly to structure all economic institutions and property relations, but either applies simply to allocate the marginal product of global economic cooperation ("to each so as to maximize the welfare or share of the least advantaged"); or it applies the difference principle narrowly to structure certain specific procedures (e.g. loan policies should be arranged to maximally benefit the poorest nations). It is questionable whether or how much this piecemeal application of the difference principle will actually improve the situation of the worst off in the world all things considered, not to mention make them as well off as they can be. (Granted, this would be an empirical issue. But, for example, it would impose an enormous deterrent on global trade for goods and labor if resulting wealth had to be subjected first to a global, and then to a domestic, difference principle.) In any case, this piecemeal difference principle, since it applies to but a marginal portion of the world's wealth, seems little more than an afterthought to Rawls's position. It abandons the basic cosmopolitan position that distributive justice should be globally, not domestically, determined.

D. I have argued that, in the absence of basic global institutions – a world state, a world legal system with comprehensive jurisdiction, a unified global property system, and so on – a "global difference principle" is not even a shadow of its domestic self. But there are even more formidable dissimilarities between Rawls's domestic difference principle and a global difference principle. To begin with, Rawls's arguments for the difference principle rely upon a robust idea of social cooperation and of reciprocity among the members of a *democratic* society. "Democratic Equality" and a "property-owning democracy"[12] are the terms he uses for the economic system structured by the difference principle and fair equality of opportunity. Democratic social and political cooperation does not exist at the global level, and never will. The natural question then is: Even if we agree that there is some kind of global distribution principle, why should it be the difference principle? Outside the confines of a democratic society, Rawls's arguments for the difference principle do not travel well when considered from the perspective of a global original position. But if the argument from democratic reciprocity cannot be relied on, what then could be the argument for a global difference principle?

More to the point, Rawls envisions the difference principle to structure property institutions so as to encourage (when conjoined with fair equality of

opportunities) widespread ownership and control of the means of production, either in a "property-owning democracy" or a liberal socialist economy:

> The intent is not simply to assist those who lose out through accident or misfortune (although that must be done), but rather to put all citizens in a position to manage their own affairs on a footing of a suitable degree of social and political cooperation . . . The least advantaged are not, if all goes well, the unfortunate and unlucky – objects of our charity and compassion, much less our pity – but those to whom reciprocity is owed as a matter of political justice among those who are free and equal citizens along with everyone else.[13]

Like J. S. Mill, Rawls believed that for workers to have as their only real option a wage relationship with capitalist employers undermines individuals' freedom and independence, blunts their characters and imaginations, diminishes mutual respect among income classes, and leads to the eventual loss of self-respect among working people. For this and other reasons Rawls was attracted to such ideas as a "share economy" (where workers have part ownership of private capital), workers' cooperatives, public provision of capital to encourage workers in becoming independent economic agents or to start up their own businesses, and other measures for the widespread distribution of control of the means of production.[14]

Since it does not apply to any substantial basic structure to shape property and other economic relations, and is not conjoined with a principle of fair equal opportunities, the cosmopolitans' allocation model of the global difference principle can do little to further these aims. This is not to deny that the difference principle, when applied domestically, does have an allocative role (primarily in the form of supplementary income payments for workers who earn too little for economic independence: *TJ*: 252). But the difference principle (1) is not an instrument for alleviating poverty or misfortune (though it incidentally does that); nor (2) is its purpose to assist those with special needs or handicaps, or (3) to compensate the unfortunate for bad luck, natural inequalities, and other accidents of fortune. Regarding (1) poverty, any number of principles, domestic and global, can provide a decent social or global minimum and serve the role of poverty alleviation. There is no need to appeal to a dysfunctional "global difference principle" for that purpose. Rawls's duty of assistance to meet basic needs is already sufficient to serve that role.

As for (2) assisting those with handicaps or special needs, in the domestic case Rawls envisions other principles to be decided at the legislative stage to serve this role, based in considerations of assistance and mutual aid similar to those behind the global duty of assistance (cf. the natural duties of mutual aid and of mutual respect in *TJ*: sects. 19, 51). Here objections by Sen, Nussbaum, and others – that Rawls misdefines the least advantaged and does not take into account the needs of the handicapped in his account of distributive justice – misconceive the

role of the difference principle in structuring production relations and property systems among free and equal democratic citizens. To oversimplify perhaps, the difference principle focuses initially on the side of production, not consumption. It is because of Rawls's focus on social cooperation in the production of wealth among members of a democratic society that he is able to insist upon reciprocity in its final distribution, as specified by the difference principle. As a principle of reciprocity the difference principle is not suited to deal with problems of meeting people's special needs. We could always spend more upon those who are especially handicapped, and to apply the difference principle to their circumstances would severely limit if not eliminate the share that goes to the economically least advantaged (unskilled workers at the minimum wage), who make a contribution to production.

Finally, regarding (3), Rawls says, "the difference principle is not of course the principle of redress. It does not require society to try to even out handicaps as if all were expected to compete on a fair basis in the same race" (*TJ*: 86). Rawls suggests that "luck egalitarianism" by itself, taken as a conception of distributive justice, is implausible, for it does not take into account production relations, measures needed to advance the common good, or to improve standards of living on average or for the less advantaged. "It is plausible as most such principles are as a prima facie principle" (ibid.).

The general point then is that Rawls does not regard distributive justice in an alleviatory manner; rather he transforms the issue from a narrow question of allocation of a fixed product of wealth for alleviatory or other purposes, in order to address a larger set of issues. "We reject the idea of allocative justice as incompatible with the fundamental idea by which justice as fairness is organized: the idea of society as a fair system of social cooperation over time. *Citizens are seen as cooperating to produce the social resources on which their claims are made*" (*JasF*: 50; italics added). Distributive justice is then made part of the larger question about how to fairly structure economic and property relations among socially cooperative productive agents, who regard themselves as free and equal, and each of whom does his or her fair share in creating the social product. Rawls therewith incorporates the question of distributive justice into the tradition of Mill and Marx, where the primary focus is on how to fairly structure production relations in a way that affirms the freedom, equality, dignity, and self-respect of socially productive agents. "What men want is meaningful work in free association with others, these associations regulating their relations to one another within a framework of just basic institutions" (*TJ*: 257). The robust conception of reciprocity implicit in the difference principle responds to this more general issue. The difference principle is not a proper response to the problem of global poverty or to other alleviatory issues mentioned (meeting handicaps and special needs, redressing misfortune, etc.). These are specific problems to address in non-ideal theory, by reference to moral duties of assistance, mutual aid, and so on, and are to be determined by citizens' democratic deliberations,

on the basis of their knowledge of available resources. These alleviatory problems of non-ideal theory raise issues separate from the question of ideal theory of determining appropriate standards for just distributions among socially productive democratic citizens who are cooperative members of a well-ordered society.

4 Conclusion

There may be other reasons why Rawls provides distributive justice with a social rather than a global reference point. I have not sought to connect the social bases of distributive justice with Rawls's all-too-brief remarks regarding the good of participation in the civic and public life of one's culture (*PL*: 61). My view is that this argument from the good of community, however significant such values might otherwise be, is not of much importance to Rawls's social grounding of distributive justice. Instead I have argued that the main reasons for Rawls's social grounding of distributive justice are political and institutional – they concern the social conditions needed for the creation, distribution, and enjoyment of income and wealth under conditions of democratic society and compatible with its fundamental values.

It is a serious failing of cosmopolitan accounts of distributive justice that they discount the significance of social cooperation and regard distributive justice as asocial and apolitical. Like Nozick's libertarianism, they regard distributive justice as determined pre-cooperatively, and see social and political cooperation themselves as simply arbitrary facts, irrelevant to the central questions of distributive justice. But social cooperation is not just one way, rather it is the only possible way that economic value is created and goods and services are produced. In this and other regards, global cooperation is secondary; it may be conducive to but it is not necessary for production, use, and enjoyment of income and wealth. These facts should be of fundamental significance to distributive justice.

Finally, I think that what bothers many cosmopolitans is that global capitalism has created ways to elude political control by the world's governments. Wal-Mart employs entire villages in developing countries, which make only one product. There is a problem here, and part of the problem is that there is no global basic structure to deal with it. Perhaps some additions need to be made to Rawls's Law of Peoples to deal with this and other problems; for example, making room for international institutions that regulate global business practices to insure fair business and labor practices and guard against exploitation. Rawls clearly leaves room for that in his Law of Peoples. But cosmopolitans seek the wrong solution to this problem. It is not a problem that can be addressed, much less resolved by a global distribution principle that simply reallocates wealth from richer nations to poorer people in developing nations.[15]

Notes

[1] Rawls's first two books are *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971 (a revised edition was published in 1999) and *Political Liberalism*, New York, NY: Columbia University Press, 1993 (with a revised paperback edition in 1996). These books will be cited as '*TJ*' and '*PL*' respectively in the text; all citations to *TJ* will be the revised edition of 1999. For Rawls's distinction between the aims of *TJ* and *PL*, see "The Idea of Public Reason Revisited," sect. 7, in *The Law of Peoples*, Cambridge MA: Harvard University Press, 1999, pp. 179–80, referred to as '*LoP*' in the text.

[2] The focus on basic institutions is needed to make distribution a matter of pure procedural justice. Why this is important ultimately goes to Rawls's reasons for focusing on the basic structure in the first place. This is a complicated topic, but basically it is to guarantee conditions for moral pluralism and the free pursuit of a plurality of objective goods.

[3] The extent and powers of global institutions are greatly exaggerated in my view by Rawls's cosmopolitan critics.

[4] Thomas Nagel also grounds distributive justice socially but on somewhat different grounds, namely in the need to associate socially under the auspices of a coercive state. Nagel contends that, unlike global cooperation, adherence to political institutions is not voluntary, and it is in that coercive context that special obligations of justice arise towards members of our own societies. See Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs*, 33/2 (Spring 2005): 113–47, at 132–3. My position here (and Rawls's, I believe) differs from Nagel's in that it does not hinge on coercive legal enforcement, but rather on the need for cooperative political institutions that legislate and sustain (whether coercively or not) the cooperative institutions of distributive justice.

[5] See for example K. C. Tan, *Justice Without Borders*, Cambridge: Cambridge University Press, 2004, pp. 34–5. Much of Thomas Pogge's case for global distribution depends also on abject world poverty. See his *World Poverty and Human Rights*, Cambridge: Polity Press, 2002.

[6] "One aim of the law of nations is to assure the recognition of these [natural] duties in the conduct of states" (*TJ*: 99).

[7] "Thus the complete statement of the difference principle includes the savings principle as a constraint" (*TJ*: 258).

[8] Thomas Pogge, "Rawls on International Justice," *The Philosophical Quarterly*, 51/4 (April 2001): 246–53, at pp. 250, 252, and 251; see also Pogge, "An Egalitarian Law of Peoples," *Philosophy and Public Affairs*, 23/3 (summer 1994): 195–224, at p. 212; Pogge, "Priorities of Global Justice," *Metaphilosophy*, 32/1–2 (January 2001): 6–24, at p. 16.

[9] See for example, Pogge, "Rawls on International Justice," p. 251.

[10] Pogge, "Priorities of Global Justice," pp. 16–17.

[11] Ibid., pp. 17–22.

[12] See *TJ*, sects. 13 and 42; *Justice as Fairness: A Restatement*, Cambridge, MA: Harvard University Press, 2001, sect. 41 (cited as *JasF* in the text).

[13] *JasF*, p. 139.

[14] See for example, *JasF*, p. 176, where Rawls endorses Mill's idea of worker-owned cooperatives as part of a property-owning democracy. See also *LoP*: 107–8n, on Mill on the "stationary state" and the "labouring class."

[15] I am indebted to Samuel Scheffler for the remarks in these two concluding paragraphs. I am also grateful for helpful comments from Samuel Scheffler, Eric Rakowski, Chris Kutz, and other members of the Kadish Center workshop at the School of Law, UC-Berkeley; and to Pavlos Eleftheriadis, Neil MacCormick, Jon Tasioulas, and other participants at the 2005 Legal Philosophy Conference, Balliol College, Oxford. Thanks also to David Reidy and Rex Martin for their suggestions.

Part V

On Liberal Democratic Foreign Policy

15

Are Human Rights Mainly Implemented by Intervention?

James W. Nickel

In *The Law of Peoples*[1] Rawls prescribed a normative vision of human rights and other principles of international justice; he was not offering a descriptive account of international human rights law.[2] Accordingly, Rawls sketched his international theory without much reference to contemporary international human rights law and practice.[3] Still, given his views on how political philosophy should proceed, Rawls could not avoid consideration of the role that human rights have come to play in world politics. *The Law of Peoples* avowedly treats international justice in the way that *Political Liberalism*[4] prescribes – by working up a "political" conception of international justice from ideas already implicit in the practices and cultures of liberal and decent countries.[5] Further, today's popular meaning of "human rights" comes to us from the *Universal Declaration of Human Rights* (*UDHR*)[6] and the contemporary human rights movement, not from the writings of philosophers. If we are even partly looking to law and current international practice to understand what human rights are, it would be good to do so explicitly. This article examines Rawls's view of human rights from the perspective of contemporary human rights law and practice.

Rawls suggested that a central role of human rights is to govern how countries deal with the problems and injustices they perceive in the internal practices of other countries by setting out the boundaries of international toleration and permissible intervention. This view ties human rights very tightly to foreign policy and to the permissible use of coercion and force in international relations. In this essay I advocate a more multifunctional view of human rights and criticize Rawls's theory of human rights for relying excessively on grand dichotomies and thus being stylized and oversimplified. I also emphasize the important role that "jawboning" plays in the international promotion of human rights.

1 Intervention and Human Rights

Rawls agrees with most theorists in taking human rights to be norms that are: (1) international and universal in the sense of applying to all people everywhere whether or not their governments recognize them;[7] (2) norms of very high priority – "a special class of urgent rights";[8] (3) minimal standards that protect people against the most severe injustices; and (4) primarily addressed to governments.

There are two areas, however, where Rawls holds a nonstandard view of human rights. First, he links human rights closely to a particular political role, namely specifying when outside intervention in a country is permissible. Rawls says that human rights "specify limits to a regime's internal autonomy" and that their fulfillment "is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or . . . by military force."[9] A country that "fulfills" human rights, along with the other principles of international justice, is entitled to tolerance, which Rawls takes to include recognition as "equal participating members in good standing of the Society of Peoples."[10]

Second, Rawls advocates a list of human rights that is nonstandard by being much more minimal than the one found in the Universal Declaration. The Declaration and the human rights treaties that followed[11] attempted to give determinate meaning to the idea of human rights and gain widespread international acceptance for their list. Amazingly, this attempt was largely successful. By 2000 the main human rights treaties had been ratified by a large majority of the world's countries. As Ann Bayefsky writes, "Every UN member state is a party to one or more of the six major human rights treaties. 80% of states have ratified four or more."[12] This is not to say, of course, that all or most states largely comply with these treaties. Nevertheless, within international law and politics, the selection and enactment of an authoritative list of human rights has been substantially completed. The Universal Declaration's content is no longer a subject of significant international controversy.

The Declaration sets out a list of over two dozen specific human rights that countries should respect and protect. These specific rights comprise at least seven families: (1) *security rights* that protect people against crimes such as murder, massacre, torture, and rape; (2) *due process rights* that protect against abuses of the legal system such as imprisonment without trial, secret trials, and excessive punishments; (3) *liberty rights* that protect personal freedoms in areas such as belief, expression, association, assembly, and movement; (4) *political rights* that require regular and genuine elections in which people can participate through actions such as voting, serving in public office, communicating, and peacefully assembling; (5) *equality rights* that guarantee equal citizenship, equality before the law, and nondiscrimination; and (6) *economic and social rights* that require

provision of education to all children and protections against severe poverty and starvation. Another family of rights that should be mentioned here is (7) *minority and group rights*. The *UDHR* does not include group rights, but several human rights treaties do, beginning with the Genocide Convention.

Rawls offers a shorter list of international human rights containing the following elements: (1) "the right to life (to the means of subsistence and security)"; (2) "liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought)." Rawls also mentions the "right of emigration";[13] (3) "property (personal property)"; and (4) "formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)."[14] Rawls's view eliminates most rights in the Universal Declaration that have strong liberal, democratic, or egalitarian dimensions. Within liberal constitutional democracies Rawls's view of social justice supports a list of rights of citizens that is similar to the Universal Declaration's. But international human rights are a different matter. Rawls distinguishes "rights that citizens have in a reasonable constitutional democratic regime" from international human rights. He says that, "Human rights are distinct from constitutional rights, or from the rights of liberal democratic citizenship."[15]

The biggest differences between Rawls's view and the list in the Universal Declaration are in the areas of:

Liberty rights. Rawls proposes a much more restricted conception of fundamental freedoms than the one found in the Universal Declaration. In particular, Rawls denies the status of human rights to freedom of expression and to peaceful assembly and association.

Political rights. Rawls does not endorse the view of political rights found in Articles 20–21 of the Universal Declaration. Those articles declare rights to protest peacefully, to participate in one's country's governance, to equal access to public service, and to periodic and genuine elections with universal suffrage. Rawls replaces these commitments to democracy with a requirement that political leaders receive petitions from and consult with the leaders of the country's constituent groups. Rawls says that countries must at least have a "decent consultation hierarchy" with "a family of representative bodies whose role in the hierarchy is to take part in an established procedure of consultation . . ."[16]

Equality rights. Rawls believes that human rights require that rulers govern rationally and with concern for the common good, but that international human rights should not exclude social and political hierarchies or the political subordination of women and minority religious groups. A legal system that fulfills human rights must display "formal equality as expressed by the rules of natural justice,"[17] but this does not exclude hierarchical and group-based differences. Rawls allows that one religious group may be favored, that there may be "inequality of religious freedom," and that there may be religious (and presumably therefore gender) discrimination in access to higher political and judicial appointments.[18] Women's

place in society need not be equal, but he imagines that "dissent has led to important reforms in the rights and role of women."[19] Rawls recognizes that apartheid and genocide violate human rights.[20]

Economic and social rights. Rawls restricts these rights to "subsistence," while the Universal Declaration asserted rights to an adequate standard of living, health services, education, support during disability and old age, employment and protection against unemployment, and limited working hours.

There seem to be two related lines of thought that Rawls uses to arrive at his list of human rights. One involves throwing out rights that do not seem important enough to be able to justify international coercion and intervention.[21] Let's call this "role-related importance testing." If a right, such as the liberty to organize and belong to independent trade unions, is not important enough to justify international intervention, then it is not an international human right. The other line of thought involves throwing out rights that are unlikely to be acceptable to decent nonliberal peoples.[22] Let's call this "wide acceptability." If a right, such as the liberty to proselytize on behalf of foreign religions, is not acceptable to decent hierarchical peoples, it is not an international human right. Since it is often permissible to use coercion and force in promoting human rights, cultural imperialism by liberal countries can be avoided only if human rights are restricted to those that have broad international appeal.[23] Rawls thinks that the rights on his minimal list do better on these two tests than the wide range of rights in the Universal Declaration.

Rawls believes that "decent" peoples (or countries) are worthy of full respect and toleration even though they are deficient in their very limited commitment to the liberty and equality of citizens. "If all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways (if such there are, as I assume) of ordering society."[24] To accommodate such peoples, Rawls limits human rights to norms that he thinks they would be willing to accept. To exclude decent but nonliberal peoples from the community of peoples would unjustifiably go against their fundamental interest in self-respect. "This interest is a people's proper self-respect of themselves as a people, resting on their common awareness of their trials during their history and of their culture with its accomplishments."[25] Rawls believes that his minimal account of human rights has the advantage that it cannot reasonably be rejected as "politically parochial," "peculiarly liberal," or "special to the Western tradition."[26]

2 Aligned Dichotomies

Rawls's conception of human rights is "political" because it is not advanced as a "comprehensive" doctrine of international justice that claims to be the philosophical truth. Instead, Rawls follows the agenda for political philosophy

prescribed in *Political Liberalism* by offering a modest doctrine of international justice grounded in the outlooks and practices of liberal and decent peoples. And Rawls's conception is also "political" in the sense that human rights are demarcated from other rights and norms by their special political roles within a just international system.

There are three such roles. First, the "fulfillment" of human rights serves as a necessary and defining condition of when a country is "decent" and hence entitled to full membership and status in the international community. Second, by setting a necessary condition for being a decent country, human rights limit tolerable diversity or pluralism among peoples. And third, their fulfillment is "sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force."[27]

It is the third of these that will be my concern. Instead of merely saying, as many would, that large-scale violations of the most important human rights can justify intervention by other countries, Rawls says that it is a key function of human rights to define the point at which diplomatic, economic, or military intervention by other countries becomes morally and politically permissible.

In a country (C) where grave human rights violations (GV) occur, intolerance of C in respect of GV is permissible. As Rawls says, "liberal and decent peoples have the right . . . not to tolerate outlaw states."[28] Because C engages in GV it is an outlaw state and therefore should not be a full member in good standing of the community of peoples. Liberal states have the right to refuse "to admit outlaw regimes as members in good standing in mutually beneficial cooperative practices."[29] Intervention by other countries in C to stop GV is also permissible (although it may, of course, be unwise). Rawls says that, "An outlaw state that violates these rights is to be condemned and in grave cases may be subjected to forceful sanctions and even to intervention."[30] Later he says: "Is there ever a time when forceful intervention [on behalf of human rights] might be called for? If the offenses against human rights are egregious and the society does not respond to the imposition of sanctions, such intervention in the defense of human rights would be acceptable and would be called for."[31] Further, sanctions or intervention by other countries in respect of GV would not violate C's sovereignty because human rights define the outer limits of a country's sovereignty. Rawls says that, "Human rights . . . specify limits to a regime's internal autonomy."[32] He also says that:

> no people has the right to self-determination, or a right to secession, at the expense of subjugating another people. Nor may a people protest their condemnation by the world society when their domestic institutions violate human rights, or limit the rights of minorities living among them. A people's right to independence and self-determination is no shield from that condemnation, nor even from coercive intervention by other peoples in grave cases.[33]

Table 15.1

Country C fulfills human rights (and other principles of the law of peoples)	Grave human rights violations (GV) occur in C
C should be tolerated by liberal peoples; intolerance of disapproved practices in C is impermissible	Intolerance of C by liberal peoples in respect of GV is permissible
C enjoys full membership in good standing in the international community	C is an outlaw state; it is not a full member in good standing
Using diplomatic, economic, or military sanctions on C is impermissible	Using diplomatic, economic, or military sanctions on C to stop GV is permissible

On the other side, if a country does not engage in grave human rights violations (and respects the other principles of the law of peoples), then it should be tolerated by liberal peoples, it should enjoy full membership in good standing in the international community, it is immune to intervention using military, economic, and diplomatic sanctions, and its sovereignty should be fully respected. "Peoples are to observe a duty of non-intervention."[34]

Rawls's views are summarized in Table 15.1, which has two columns of aligned dichotomies. No intermediate space between the columns is envisioned or taken to be theoretically interesting.

The four concepts that Rawls is concerned with (grave violation of human rights, toleration, full membership, and nonintervention) all seem to admit of differences in degree and kind in the things they cover. Rawls recognizes this in regard to intervention by distinguishing between interventions using military, economic, and diplomatic sanctions. But he treats the other concepts as polar. If we transform Rawls's aligned dichotomies into aligned trichotomies, it turns out that the middle column is just as interesting and significant a theoretical type as the other two, as Table 15.2 illustrates.

The human rights movement as we know it directs as much attention to countries in the middle column as to countries in the right one. In many ways the countries I have described as "delinquents" (in contrast to "outlaws"[35]) are more promising candidates for progress. The human rights movement has developed characteristic means of dealing with such countries that use low levels of intervention and lots of encouragement and nagging (see the section on jawboning below).

International human rights law does much more than deal with gross violations. This is not, of course, to deny the importance of such violations. In a course on international human rights law the professor usually teaches about gross violations by covering the UN Commission on Human Rights – whose mission centrally includes dealing with large and severe violations;[36] the UN

Table 15.2

Country C largely fulfills human rights (and other principles of the law of peoples). Its human rights violations are small in scale, repudiated by the government, and subject to sincere efforts at improvement.	C has a mixed record on human rights. It is not overall a repressive or tyrannical country. But it has areas of serious human rights violations (SV) that the government has not repudiated and attempted to improve.	Grave human rights violations occur in C. They are large in scale, recent, intentional, malicious, and unrepudiated.
C is entitled to toleration by liberal peoples	C experiences a mixture of acceptance, tolerance, and criticism. Other countries and international human rights organizations criticize SV.	C is permissibly not tolerated by liberal peoples in respect of GV
C enjoys full membership in good standing	C is a delinquent country because of SV; it is a full member but is subject to disapproval and dissociation	C is an outlaw state because of GV
It would be impermissible to use military, economic, or diplomatic sanctions on C	Military and economic intervention in C to stop SV would not be permissible but lots of scrutiny and criticism is rightly directed at C by other governments and by international governmental organizations	Using diplomatic, economic, or military sanctions on C to stop GV is permissible

Security Council with its power to authorize economic sanctions and military interventions;[37] and the role of states as protectors and enforcers of human rights.[38] The International Criminal Court[39] also needs to be covered. Rawls's view suggests that this is all there is to human rights law. But an adequate course still needs to cover institutions that deal with human rights problems and violations that are not "grave" or "gross." Here one teaches about human rights treaties and the courts and quasi-judicial bodies that administer them. One teaches about the European Convention on Human Rights and the European Human Rights Court.[40] Courts typically deal with individual cases, not massive violations. One teaches about the UN human rights treaties, including ones dealing with minorities, women, and children,[41] which mainly use reporting and mediation systems to promote compliance with the treaty norms.[42] And one teaches about human rights NGOs (nongovernmental organizations) that use publicity and shaming to nudge countries in the direction of greater compliance.

It would be a big mistake to follow Rawls in treating human rights as if their main political role is to specify when it is permissible for countries to use intervention to deal with grave violations. Rawls takes one important role that human rights serve and makes it central without examining other roles that individually or jointly might be used to define the political role of human rights. If we look at how human rights work within the Council of Europe, the Organization of American States, the African Union, and the United Nations, we see that they serve many political roles that include providing:

1. Standards for education about good government. The preamble to the Universal Declaration emphasizes that human rights are to be promoted by "teaching and education."
2. Guides to suitable content for bills of rights at the national level.
3. Guides to domestic aspirations, reform, and criticism.
4. Guides to when rebellion against a government is permissible.
5. Guides to when a country's leaders and generals should be prosecuted domestically for human rights crimes.
6. Standards to be used as reference points in making periodic reports to the committees established by human rights treaties about progress in respecting and implementing human rights.
7. Standards for considering complaints and adjudicating cases (the European, Inter-American, and United Nations human rights systems have international courts).
8. Standards for criticisms of governments by their citizens, by people in other countries, and by national and international NGOs. Many NGOs define their missions by reference to human rights.
9. Standards for actions to promote human rights by the UN High Commissioner for Human Rights, the UN General Assembly, and other international organizations.
10. Standards for evaluating the suitability of countries for financial aid.
11. Standards for deciding whether to prosecute or convict the leaders or former leaders of a country within the International Criminal Court.
12. Standards for international criticism and diplomatic action by governments or international organizations.
13. Standards for recommending economic sanctions by international organizations and for imposing them by governments.
14. Standards for military intervention by international organizations or governments.

Of all these political roles that human rights serve, Rawls mentions only the last three and makes them central. This privileging of roles related to intervention is arbitrary and undefended. Indeed, as human rights function today within international organizations, it is just untrue to say that they are mainly about

intervention. A better description of their main role is that they *encourage and pressure* governments to treat their citizens humanely with respect for their lives, liberties, and equal citizenship. They use social pressure and acculturation to promote acceptance and compliance with human rights norms.[43]

One reason why the international human rights system puts this emphasis on encouragement and mild pressure concerns the high costs and dangers of using coercion and intervention to enforce international norms. Because enforcement efforts are costly, dangerous, and often fail to work it is reasonable to restrict their use to the most severe human rights crises. These tend to be situations in which large numbers of people are being killed. To avoid narrowing the human rights agenda to such crises, means for promoting human rights have been devised that do not require intervention or the imposition of sanctions. These weaker means include educating governments and publics about international human rights standards, treaties that commit countries to human rights norms and require governments to make reports on their progress in realizing them, and nagging and shaming governments by NGOs, other governments, and international officials (e.g., the UN High Commissioner for Human Rights).

3 Jawboning: Does Tolerance Require Refraining from Public Criticism?

Let's call criticism and condemnation of other countries that is not accompanied by significant threats "jawboning." This term was first used, I believe, as a name for attempts by US officials to use speeches and publicity to limit inflation-producing price hikes by private firms. As I have suggested, jawboning is the most common means of promoting human rights across international borders. It is used by governments, international governmental organizations, nongovernmental organizations, and private citizens.

Rawls is not clear as to whether his restrictions on attempts to influence the human rights policies of other countries preclude jawboning by government officials and by officials in international governmental organizations. He defines tolerance as requiring a country to (1) refrain "from exercising political sanctions – military, economic, or diplomatic – to make a people change its ways" and (2) recognize the tolerated country "as a *bona fide* member of a politically reasonable Society of Peoples . . ."[44]

Public criticism of one government by another could count as a "diplomatic sanction," and hence this passage leaves it unclear whether a country that publicly criticizes another is being intolerant. Elsewhere Rawls says that violations (of his minimal list) of human rights "are equally condemned by both reasonable liberal peoples and decent hierarchical peoples,"[45] thereby suggesting that condemnation counts as a form of intolerance.

Some indirect evidence about Rawls's views comes from Michael Walzer, who says: "The enforcement of a partial embargo against South African apartheid is a useful if unusual example. Collective condemnation, breaks in cultural exchange, and active propaganda can serve the purposes of humanitarian intolerance, though sanctions of this sort are rarely effective."[46] In a footnote to this passage, Walzer says: "These examples of intolerance short of armed intervention were suggested to me by John Rawls." If Rawls takes "collective condemnation" and "propaganda" to be forms of intolerance, then public criticism by one government of another is at least sometimes restricted by the limits on intervention that Rawls proposes.

In thinking about the relation between public criticism and intolerance it will be helpful to have a more detailed list of the ways in which governments express their disapproval of each other's actions. These include:

- expression of a country's political position where its content or tone allows knowledgeable people to infer that it disagrees with and disapproves of the actions or policies of another country, even though that country is not mentioned;
- dissociation from or rudeness to a country's diplomats and representatives, where that is intended as and can reasonably be understood as an expression of disapproval;
- reports of the government's disapproval leaked to the press without attribution;
- private criticism of an explicit sort ("quiet diplomacy");
- public criticism or condemnation delivered in official statements (stronger if delivered by a high official than by a subordinate);
- cancellation of cultural exchanges;
- calling home the ambassador for "consultation";
- calling home the ambassador for an extended period;
- making official contacts difficult or impossible;
- closing the embassy (demotion of relations to a consular level);
- breaking off formal diplomatic relations and closure of missions.

Perhaps the last three of these are "diplomatic sanctions" since they clearly impose a significant penalty. Obviously, these actions can be taken both unilaterally and in concert with other countries. If done collectively by most nations they may make the condemned country a pariah.

Coercion admits of degrees, and most criticism is either noncoercive or only slightly coercive. If the Canadian government criticizes – publicly or privately – US policies on global warming, the USA remains free to adhere to its policies. This is true even if the criticizing country is large and the criticized country is small. If France criticizes Israel for its occupation of Palestinian territories, Israel can continue its occupation.

It is not plausible to treat all the diplomatic measures listed above as if they had the same status in relation to toleration. Liberal peoples, in negotiating the terms

of the society of peoples, have strong reasons to insist upon the right of their governments and politicians to freedom of expression about the domestic and international policies of other countries. Rawls allows that the fundamental interests of liberal peoples derive from their "liberal conception of justice" and include preserving "their free political institutions . . ."[47] They must insist on the right of their politicians and governments to express their views about the folly or wrongfulness of the practices of other countries in the areas of foreign relations, human rights, economic policy, international law, trade, the environment, and the preservation of historic sites and artifacts. Tolerance does not require liberal peoples, and their governments, to refrain from public criticism of other countries in these varied areas.

Further, official protests by governments play a critical role in the evolution of customary international law.[48] A state's normal practice, if other states do not protest, can create a customary liberty right in regard to that practice. The purpose of a protest is to give notice of nonacquiescence in a practice so as to prevent or make more difficult the development of a customary norm. If states did not have the liberty to lodge protests over all manner of international law matters they would be deprived of an important means of protecting and defining international legal rights. Expressions of criticism and disagreement are not always incompatible with tolerance.

Rawls presents us with a false dilemma when he suggests that liberal peoples must either be intolerant and disrespectful of decent peoples as they impose their principles by pressure and force, or extend full equality and tolerance. As suggested earlier, a middle path is present (recall the middle column in Table 15.2). Serious criticism may cast doubt on whether a country really deserves equal respect and full membership, but it falls far short of expelling the country from the society of peoples. One can perfectly well say to a person or country, "We respect and admire you in most areas, but in this matter we think that your behavior is unacceptable." One can respect (and even admire) people and countries for many things while being fiercely critical of other things they do.

Not all of the interesting action within international human rights law focuses on coercion and intervention. In fact, many human rights treaties deal with human rights violators through gentler means, such as consciousness-raising, persuasion, norm-promotion, criticism, shaming, defining conditions for full acceptance, mediation, and negotiation. Far from being inert, jawboning has done a great deal to advance human rights around the world. It may not help with the most entrenched and intransigent violators, but it does help with others.

The possibility of using jawboning as a noncoercive means of promoting human rights is also relevant to Rawls's concern with avoiding cultural imperialism. The fact – if it is a fact – that decent nonliberal countries do not find all the human rights in the Universal Declaration attractive is very important if all of those rights are to be promoted using coercion and force. But if jawboning is the main means of promoting many rights, then cultural imperialism is not quite so imperialistic.

Countries that sincerely believe in the full range of Universal Declaration rights can use them as standards for criticizing other countries without the target countries finding the criticisms particularly wounding to their self-respect. Officials in target countries can dismiss those criticisms as being wrong, misinformed, and culturally insensitive. They can say: "We disagree. But you're entitled to express your views as long as you don't try to force them on us."

4 Do We Need a Two-Tiered View of Human Rights?

Someone who finds my criticisms of Rawls's conception of human rights persuasive might propose the following strategy for a compromise. "Let's keep something like the broad *UDHR* list for domestic purposes and for international jawboning, but let's have a more minimal list of 'basic human rights'[49] like Rawls's that can justify international actions involving serious coercion and force." The second would be a proper subset of the first. Further, basic human rights would have the kind of normative backing that Rawls envisions while nonbasic human rights have something weaker. At the extreme they might be "human rights" only in the sense that they are found in human rights treaties.

The two-tiered view postulates two sets of human rights. One set, the upper tier, is of higher priority, enjoys near-universal acceptance, and can justify international action using coercion and force. The other set, the lower tier, consists of full-fledged human rights, but ones that are of slightly lower priority, are perhaps more controversial in some parts of the world, and that cannot justify international interventions involving coercion and force. Between the two sets there is a fairly sharp boundary rather than a continuous slope. Rawlsian minimalism denies the lower tier the status of human rights; but the compromise view now under discussion grants them that status while recognizing their lower priority.

This two-tiered view allows for the fact that once what is a "human right" can be decided by international treaties and judicial decisions, the list of human rights is likely to grow. For example, the right to freedom from discrimination can be extended to cover homosexuals, and the right to a safe environment can be added. Growth will be normal in the area of nonbasic human rights, but will rarely occur among basic human rights. Since human rights treaties including nonbasic rights often provide for adjudication and enforcement, some nonbasic human rights would be enforced through intervention and coercion.

This two-tiered view deserves serious consideration, but I have some worries about it. First, I would not want to define "basic human rights" using Rawls's narrow list. I doubt that respect for decent peoples or the avoidance of cultural imperialism requires us to cut so many liberty rights, democratic rights, and equality rights.

Second, I would resist the suggestion that the severity of a human rights violation depends entirely or even largely on whether the rights involved are "basic." Besides the priority of a right there are a number of other important factors as well. Rawls recognizes that another factor is the *scale of the violations.* Also important are: (1) the time of the violation (distant past, recent past, present); (2) whether the violations are intentional and malicious or negligent and systemic; and (3) whether the country has sincerely repudiated the violations and attempted to stop and remedy them.

Third, I doubt that the boundary between basic and nonbasic human rights can be sharp. It is possible that a very large, intentional, malicious, unrepudiated, and unremedied violation of a nonbasic right could justify coercive or forceful international action to end that violation. For example, the rights to freedom of association and to form independent political parties are on the Universal Declaration list but not on Rawls's list of "basic" human rights. Suppose that a country violates these rights severely and massively without using much violence. It suppresses political association by harassment, short jail terms, and getting dissenters fired from their jobs. If this policy is current, deliberate, malicious, unrepudiated, and large in scale, it would be justifiable to use diplomatic and perhaps even economic sanctions.

Finally, I lack confidence that we really can sort human rights into the higher and lower tiers. Human rights are very interconnected; they support each other in numerous ways. Respecting and protecting one right often makes others more secure, and large violations of one make others insecure. For example, due process rights not only protect individuals against unfair procedures, imprisonment, and execution; they also protect the integrity of the criminal justice system, prevent those in power from using phony trials to imprison their political opponents, and generally make individuals and groups more secure in the enjoyment of their liberties. While some rights, such as those against murder, torture, and starvation are more closely and obviously connected to having a minimally good life than rights such as freedom of speech and voting in periodic elections, the interconnectedness of rights means that rights against murder, torture, and starvation share at least some of their priority or weight with other rights, more institutional in character, that support them.

Notes

[1] John Rawls, *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999.

[2] "This monograph . . . is neither a treatise nor a textbook on international law" (*The Law of Peoples*, p. 5).

[3] Rawls did compare his list to that of the *Universal Declaration of Human Rights* in *The Law of Peoples*, fn 23, p. 80.

[4] John Rawls, *Political Liberalism*, New York, NY: Columbia University Press, 1993 (paperback edition 1996).

[5] *The Law of Peoples*, pp. 9–10.
[6] United Nations, 1948.
[7] *The Law of Peoples*, p. 80.
[8] Ibid., p. 79.
[9] Ibid., pp. 79–80.
[10] Ibid., p. 59.
[11] These treaties include the Genocide Convention (1948); the European Convention of Human Rights (1950); the International Covenant on Civil and Political Rights (1966); and the International Covenant on Economic, Social, and Cultural Rights (1966); the American Convention on Human Rights (1978); and the African Charter on Human and People's Rights (1981).
[12] A. Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads*, Ardsley, NY: Transnational, 2001.
[13] *The Law of Peoples*, p. 74.
[14] Ibid., p. 65. Rawls endorses articles 3–18 of the Universal Declaration in fn 23, p. 80.
[15] *The Law of Peoples*, p. 79.
[16] Ibid., p. 71f.
[17] Ibid., p. 65.
[18] Ibid., p. 75.
[19] Ibid., p. 78.
[20] Ibid., p. 80, fn 23.
[21] Ibid., p. 79.
[22] Ibid., p. 81.
[23] Ibid., pp. 121–2.
[24] Ibid., p. 59.
[25] Ibid., p. 34.
[26] Ibid., p. 65.
[27] Ibid., p. 80. See also pp. 27, 42, 65, and 79.
[28] Ibid., p. 81.
[29] Ibid., p. 93.
[30] Ibid., p. 81.
[31] Ibid., p. 94fn.
[32] Ibid., p. 79.
[33] Ibid., p. 38.
[34] Ibid., pp. 37, 42.
[35] Rawls distinguishes five different kinds of peoples: (1) "reasonable liberal peoples"; (2) "decent peoples"; (3) "outlaw states"; (4) "societies burdened by unfavorable conditions"; and (5) "benevolent absolutisms" (*The Law of Peoples*, p. 4).
[36] See, for example, H. Steiner and P. Alston, eds., *International Human Rights in Context*, Oxford: Oxford University Press, 2000, pp. 562–648.
[37] *International Human Rights in Context*, pp. 648–704.
[38] Ibid., pp. 987–1130.
[39] Ibid., pp. 1192–98.
[40] Ibid., pp. 786–867.
[41] International Convention on the Elimination of All Forms of Racial Discrimination (1966); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention on the Rights of the Child (1989).

[42] *International Human Rights in Context*, pp. 705–88.

[43] Ryan Goodman and Derek Jinks, "How to Influence States: Socialization and International Human Rights Law," *Duke Law Journal*, 54/3 (2004): 621–704.

[44] *The Law of Peoples*, p. 63.

[45] Ibid., p. 79.

[46] M. Walzer, *On Tolerance*, New Haven, CT: Yale University Press, 1999, p. 115. I am indebted to Rex Martin for this reference.

[47] *The Law of Peoples*, p. 29.

[48] T. Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law," *Harvard International Law Journal*, 26 (1985). I recognize that some human rights are not subject to the persistent objector rule because they are *jus cogens*. See John Tasioulas, "In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case," *Oxford Journal of Legal Studies*, 16 (1996): 85–128.

[49] This sense of "basic right" is not the same as Henry Shue's. See his *Basic Rights*, Princeton, NJ: Princeton University Press, 1996.

16

A Human Right to Democracy? Legitimacy and Intervention

Alyssa R. Bernstein

The philosophical question of whether there is a human right to democracy has gained practical relevance and urgency in recent years. Since the end of the Cold War, the USA and other states have undertaken a number of international military interventions which they have characterized as wholly or partly motivated by humanitarian concerns, and in more than one of these cases a declared aim was to protect or establish democratic governance.[1] According to some legal scholars, an enforceable right to democratic governance has emerged in international law.[2] And according to some philosophers of international law, not only does justice require recognition of such a right, but the international community should not recognize as legitimate any non-democratic state or government.[3] Such legal and philosophical arguments, together with political science research regarded by many as confirming the hypothesis of "the democratic peace," may seem to establish that there is a basic human right to democracy, and that, therefore, non-defensive international military action aiming to establish democratic political systems may be morally justifiable as humanitarian intervention.[4]

I will argue, to the contrary, that although the political rights of procedural democracy (e.g., voting rights) are among the basic rights of citizens of liberal democracies, and there is a strong case for regarding them as *derivative* human rights, they are not *basic* human rights; and that the aim of establishing procedurally democratic regimes, as distinct from the aim of stopping grave violations of basic human rights, is not by itself an adequate justification for non-defensive international military action. The arguments I will develop are philosophical and moral, as distinct from legal. To support my position I will draw upon Rawls's political liberalism, in particular his work *The Law of Peoples* (*LoP*),[5] which I interpret differently from most of its critics.

As I understand it, *The Law of Peoples* outlines the moral basis of a just system of international law. It proposes a set of principles to constitute the foundation charter of a Society of Peoples (the nucleus of a law-governed international community that can develop into a fully just global order), as well as a list of basic human rights by reference to which these principles are to be interpreted. It also presents arguments (or essential elements of arguments) to justify this list and those principles, and to support the following theses:

(1) All human individuals have basic human rights that the international community may legitimately enforce and should enforce worldwide (via appropriate procedures and measures), regardless of whether all states have legally committed themselves to respect and secure these rights.[6]
(2) The aim of establishing procedurally democratic political institutions, as distinct from the aim of securing the basic human rights referred to in thesis (1), is not a morally acceptable justifying reason for using military force internationally.
(3) The peoples of all states have obligations to provide each other with assistance, including but not limited to financial or material aid, in order that all states under governments willing but unable to secure their people's basic human rights be enabled to do so; and these obligations have a moral basis that is independent of the character of any current or past international political or economic relationships.

Since all three theses refer to basic human rights, in order to assess *LoP* we need to consider what rights are to be so classified, and why.

1 Basic Human Rights

According to one plausible, familiar, simple, and widely appealing way of using the term, human rights are rights all human beings have just in virtue of being humans sharing the same vital needs and interests. However, rights must be grounded in principles of justice (of one kind or another, depending on the kind of social cooperation in question). If by using the term "human rights" we intend to speak not only about needs and interests but indeed about rights, i.e., valid claims justifiable with reference to relevant principles of justice, we need to determine the relevant principles and show how they ground valid claims.

Some principles of justice apply to political practices and relationships, others to non-political ones. Some political principles of justice are fully general and fundamental, others are less so (e.g., those pertaining to political practices such as the making of laws and the rendering of judicial verdicts). In *A Theory of Justice*[7] and *Political Liberalism*[8] Rawls argued for two fully general, fundamental principles of societal justice, understood as fair social cooperation among individual

human beings who are members of the same society under the same state government, all free citizens of equal political status. These principles are to guide and constrain the citizens of a democratic society in using the coercive powers of their government domestically. In *The Law of Peoples* Rawls argued for certain fully general, fundamental principles of fair social cooperation among legitimately governed states, which are to guide and constrain the international uses of their coercive powers.

The principles of *LoP* are fully general and fundamental in the following respects. They use no proper names or any descriptions of particulars, but instead spell out logical implications of the abstract idea of voluntary social cooperation among states aiming to establish the foundation of a just international legal order. These implications include the freedom and equality of the participating states, understood as follows.

A legal system consists of individuals and/or groups cooperating according to rules. The ability to cooperate presupposes the ability to act, i.e., to guide one's behavior by practical reasoning. States can act insofar as the policy decisions made by their political leaders constitute state actions (e.g., declaring war, signing treaties). Moreover, the ability to cooperate according to rules regarded as justifiable in terms of fairness and justice presupposes the ability to act not only on prudential but also on moral reasons. If states are to engage in voluntary cooperation together on terms they all accept as fair and just, they must ascribe these abilities to each other as well as to themselves, and must think of all of the participating states as equals insofar as all are capable of such cooperation and entitled to acceptable terms of cooperation.

If we suppose that the main reasons for establishing an international legal order include reducing international violence and instability and facilitating mutually beneficial cooperation, then the first five principles of *LoP* can be understood as specifying the basic rights that states undertaking to establish such a legal order among themselves must ascribe to each other, simply as implications of so conceiving their cooperative activity. The remaining three principles require states also to acknowledge moral duties applying to conduct in war and to domestic government, as well as duties to help enable all states to secure their people's basic human rights and to become entitled to all of the rights of states enjoyed by members in good standing of the Society of Peoples.

The principles of *LoP* constitute significant modifications of certain long-standing principles of international conduct, including the following: "States are to observe a duty of non-intervention" and "States have the right of self-defense but no right to instigate war for reasons other than self-defense." Rawls argues that these principles must be revised to allow for intervention in cases of "grave violations of human rights."[9] He further modifies these principles by substituting the term "peoples" for the term "states"; thus, in place of the traditional idea of a state as a rational, self-interested collective agent that mainly aims to acquire and retain military, economic, and diplomatic power over other states, he puts

the normative idea of a society under a legitimate government. He argues that only such societies are entitled to the rights traditionally ascribed to all states. Furthermore, he adds a principle stating: "Peoples are to honor human rights." But it will not be clear how these principles are to be interpreted until the criteria of legitimate government and of human rights are determined.

Rawls formulates two criteria of decency, such that states satisfying them count as well-ordered peoples entitled to membership in good standing in the Society of Peoples. The first criterion of decency states an international non-aggression condition; the second states three conditions of governmental legitimacy. These conditions are the criteria states are to use in deciding whether to regard the government of another state as legitimate, i.e., whether to recognize the state as entitled to the right of non-intervention and to respect for its sovereignty.

According to liberalism, societal justice requires that all members of a political society equally have all the rights of free citizens, and that the basis of equal citizenship be mere possession of the two moral powers (the capacity for a conception of one's good and the capacity for a sense of justice)[10] to the minimum degree necessary to enable them to understand and exercise their rights and fulfill their obligations. All who are held obligated to obey the law are presumed to possess these two powers. Normally all human beings do come to possess them as they become adults (as long as they don't suffer too much deprivation, etc.). Liberals hold also that provisions should be made, in law and policy, to prevent or rectify the effects of such deprivation. Thus liberalism may seem to entail that all of the basic rights of free and equal citizens are basic human rights. But whether it does or not depends on how the term "basic human rights" is being used – in particular, whether the rights are regarded as grounded in a liberal conception of a just society or in the criteria of governmental legitimacy appropriate to a Law of Peoples.

In both versions of his Law of Peoples (1993 and 1999), Rawls sometimes uses the term "basic human rights" but most often uses the term "human rights." Given the roles these terms play in Rawls's argument, it seems clear that he uses them interchangeably to refer to a set of rights that satisfy all three of the following criteria (although these criteria do not constitute a definition): (a) urgent or especially important rights; (b) rights that are fundamental in the sense of being non-derivative or logically more basic than other rights (which are justified on the basis of the more fundamental rights, e.g., as means of securing them); and (c) rights that both can and should be enforced internationally regardless of whether countries have legally (or otherwise explicitly) committed themselves to secure those rights. For the sake of clarity I will henceforth use the cumbersome term "internationally enforceable basic human rights" to refer to these rights.

Rawls presents his list of internationally enforceable basic human rights as incomplete, a mere sketch. Its function is mainly to indicate that the list of basic human rights appropriate for a Law of Peoples would largely agree with classic

bills of rights, but would diverge from the *Universal Declaration of Human Rights* (*UDHR*) at certain points, for example, regarding the political rights of procedural democracy. A complete defense of Rawls's proposed list of internationally enforceable basic human rights would not only justify including the included rights but also justify excluding the excluded rights. As I reconstruct it, *LoP* provides both elements: a justification of the inclusions, which is directed mainly to nonliberals, and a justification of the exclusions, which is directed mainly to liberals. Here I will present the argument for excluding the political rights of procedural democracy from the list of internationally enforceable basic human rights. I address this argument to liberals.

All liberals hold that every individual human being is morally important and that the equality of everyone's basic moral status must, as a matter of justice, determine the structure of the main institutions of political society. In *A Theory of Justice* Rawls said that the two principles of societal justice for which he argued were "the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association," and that by accepting such principles people decide "what is to be the foundation charter of their society."[11] In *The Law of Peoples* Rawls proposes principles to constitute the foundation charter of a Society of Peoples. He argues that the basic structure of the system of global public law to be developed must recognize the basic moral equality of every individual human person by securing for everyone all of the basic human rights that can be adequately justified as such rights by public reason. His conception of public reason, and the role he assigns to states in developing the system of global public law, distinguish his interpretation of liberalism from those advanced by utilitarian or "cosmopolitan" liberals.[12]

Governments, i.e., political leaders and policymakers, are to employ the concept of internationally enforceable basic human rights in practical reasoning about using coercive force internationally. This being so, the conception they employ, i.e., the specification of which rights are to count as belonging to the category of internationally enforceable basic human rights, should meet the requirements of public reason. If no justification for including in that category the political rights of procedural democracy meets these requirements, then these rights must be excluded. It appears that none can meet them, and that therefore Rawls was right to exclude them from that category.

2 Public Reason

According to Rawls, arguments purporting to justify an internationally enforceable basic human right to democracy must identify universal human needs and interests such that justice requires governments to secure or provide for them and doing so requires democratic political institutions. Also, these needs and interests

must be sufficiently important and urgent so as to provide grounds for international enforcement. Furthermore, the justification for the contention that those needs and interests provide grounds for international enforcement must meet the relevant requirements of public reason.

I will now briefly explain Rawls's idea of public reason in relation to his ideas of justice, reciprocity, reasonableness, and overlapping consensus. From the 1950s through the 1970s Rawls worked out in his writings the idea that a just society is such that its basic institutions can be justified by reference to a public conception of justice which all of the society's participants can find acceptable. In such a society, none of the participants has reason to feel merely coerced to obey the laws, and everyone can willingly take part in the social system they structure. During the 1980s Rawls came to recognize that the people of any free society, including the just liberal society he envisioned, would over time naturally and reasonably come to hold a variety of different comprehensive doctrines, that is, they would come to believe various religious and secular views about what is valuable and why. In his second book, *Political Liberalism*, he asserted: "a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power."[13] In this book he asked: Under what conditions will someone properly accept her society's laws as legitimate, even if she thinks them unjust or otherwise faulty? For the rest of his career he focused on questions about political legitimacy and their relations to questions about societal justice.[14]

This led Rawls to develop the idea of an "overlapping consensus" on a conception of justice, endorsed by diverse comprehensive doctrines, each of which could therefore be regarded as "politically reasonable." A conception of societal justice can be the focus of an overlapping consensus if it is a "free-standing" political conception, i.e., if it can be presented and justified independently of any particular comprehensive doctrine. Such a conception can be justified either in terms of one of these politically reasonable doctrines, or independently of all of them and simply in terms of the political ideas of which the conception of justice consists. When an overlapping consensus obtains, the members of the society can use what Rawls calls "public reason" when offering justifications to one another for "laws and policies that invoke the coercive powers of government concerning fundamental political questions,"[15] and for the basic structure of their shared social and political world. Such justifications can be offered to and freely accepted by all participants.[16]

2.1 Reasonableness and reciprocity

Rawls uses the term "reasonable" in a precise, technical way. A conception of justice applicable to the basic structure of a system of social cooperation is reasonable only if its principles satisfy the criterion of reciprocity. According to this

criterion, terms of cooperation may be regarded as fair only if those proposing them have good reason to regard them as acceptable to all of the participants, who are thought of as equals acting freely and not subject to domination, manipulation, or the pressures generated by an inferior social, economic, or political position. If the system of social cooperation to which a conception of justice is to apply is a single society, then a reasonable conception of justice for it is one that meets the criterion of reciprocity for equal citizens acting freely. If the system of social cooperation to which a conception of justice is to apply is a Society of Peoples, then a reasonable conception of justice for it is one that meets the criterion of reciprocity for equal peoples acting freely, not subject to domination, manipulation, or the pressures generated by an inferior social, economic, or political position.

Some of the differing moral doctrines, and their associated conceptions of justice and governmental legitimacy, that may arise over time in conditions of freedom, can coexist within a single constitutional democracy (whether as part of the overlapping consensus supporting a political liberal conception of justice, or as among the views that do not threaten it, e.g. because they have few adherents), while others cannot. Among those that cannot are non-liberal ones. Among nonliberal conceptions of justice, some cannot but others can govern societies that can be members in good standing of a Society of Peoples. Nonliberal societies of this latter kind are reasonable as regards relations between peoples, although they are less than reasonable as regards their domestic structure of political and economic institutions.

2.2 Reasonable societies

A liberal society has a constitutional democratic government that answers to and protects the people's fundamental interests as specified in the constitution (whether written or unwritten) and its interpretation.[17] A well-ordered liberal society is a fully reasonable society, in that its basic structure is ordered in accord with a conception of justice that meets the liberal criterion of reciprocity, which applies to social cooperation in which the participants regard themselves and each other as equal citizens acting freely. A nonliberal society is not a fully reasonable society in this technical sense. A nonliberal society may be a well-ordered society, i.e., its basic structure may be ordered according to the requirements of a conception of justice; however, this conception of justice does not meet the liberal criterion of reciprocity; if it did, the society should be classified as a liberal rather than a nonliberal society. Thus a nonliberal society is not a fully reasonable society in the above sense. Therefore every nonliberal society, whether well ordered or not, is to some degree unjust, according to Rawls.

However, there is a significant moral difference between those nonliberal societies that are well ordered in accord with some conception of justice, and those

that are not. There is also a significant moral difference between those non-liberal societies that are well ordered in accord with a conception of justice that requires that the society's basic structure of political and legal institutions provide for the good of all members by recognizing and securing their basic human rights, and those that are well ordered in accord with a conception of justice that does not require this. And liberal political philosophers need to take due account of these moral differences when developing the principles to guide states in using force internationally.

2.3 Kazanistan

If there were a society well ordered in accord with a conception of justice that required recognizing and securing the basic human rights of all its members, yet did not require a procedurally democratic political system; and if this society were able and willing to be a member of a Society of Peoples, then (from a liberal point of view) it would be reasonable as regards relations between peoples, although less than fully reasonable domestically. Should its government be regarded as legitimate, and should it be admitted as a member in good standing of the Society of Peoples?

According to Rawls, when shaping a conception of legitimate government that is to guide interpretation of the charter of a Society of Peoples, liberals should assign priority to whatever political rights and liberties are essential institutional means to secure the basic human rights. If diverse kinds of political structure may be able to secure them, liberals should acknowledge this. Rawls neither asserts nor denies the general empirical claim that only states with procedurally democratic regimes can secure the basic human rights and satisfy the other two conditions of governmental legitimacy, but he offers both intuitive and conceptual arguments against it.[18] As he shows, a single actual instance of a state like his imaginary Kazanistan (a state that satisfies his second criterion of decency despite not having a procedurally democratic regime) would falsify that claim of empirical necessity. If such an instance is empirically possible, then the claim that only procedurally democratic regimes can satisfy the second criterion of decency is false. Rawls's arguments appear to show that it cannot be proven that no such instance is empirically possible.

3 Sovereignty and Self-determination

Liberals have reason to be cautious about classifying any right as an internationally enforceable basic human right. For the more inclusive the category, the more numerous are the available justifications for states to take action, and to require each other to take action, to compel other states to make changes in their

domestic political institutions or practices. And if states constantly interfere in each other's internal affairs then the world cannot be at peace. So some caution is in order, since the goal is a world both just and stably peaceful.

Furthermore, liberals distinguish between, on the one hand, a citizen's having sufficient justification for civil disobedience or conscientious refusal to serve in the military, and, on the other hand, there being sufficient justification for another state to intervene in order to support or oppose that citizen's protest. And they have good reason to do so: if it were the case that foreign states took sides and intervened every time the citizens of a liberal society engaged in a public dispute regarding the justice of some aspect of their government's domestic or foreign policy, then those citizens would not be free to express and work out their disagreements among themselves; yet such freedom is of central importance from a liberal point of view. And if the citizens are indeed to be self-governing, i.e., if their government is to be democratic in the sense of expressing and giving effect to popular sovereignty, then their state must be both independent of the political authority of any other state and free of interventions by other states. Therefore liberal states clearly have some reason to take the position that states must respect each other's sovereignty and recognize a strong presumption against intervention in each other's affairs. But how strong must this presumption be? That is, how high must the threshold of justification be set, and what are the requirements of an acceptable justification for intervention?

Coercive intervention for the purpose of changing a country's form of government is liable to escalate into full-scale war, and in general it is difficult to justify the kinds of destruction, harms, and violations of rights that occur in wars. If there is a presumption in favor of respect for states' rights of self-determination and sovereignty, then the burden of justification is on the state(s) that undertake(s) intervention. Such a presumption, together with the general prohibition of non-defensive war (understood as allowing for humanitarian intervention only in cases of grave violations of human rights) and the possibility that the intervention would escalate into war, make the burden of justification quite heavy.

4 The DNSL Argument and the Minimum Respect-for-Justice Condition

Some argue that only states with legitimate governments are entitled to the right of non-intervention, and that all and only democratic regimes are legitimate.[19] But is the fact that a state is democratic either necessary or sufficient to ensure the legitimacy of its government? I will argue that it is neither, if we distinguish between procedural and substantive democracy and understand governmental legitimacy in a way suited to the public reason of a Society of Peoples.

A proponent of an internationally enforceable basic human right to democracy might argue as follows. Democratic states are entitled to claim the right of

non-intervention because they have (domestically) legitimate governments. Such states not only secure all human rights but also meet *the minimum respect-for-justice condition*: they have the kind of political structure as well as the kind of civil society that are necessary if the citizens are to be free to express publicly their disagreements with the government on matters of justice and to claim what they take to be their rights, and if these conflicts are to be settled peacefully and fairly. Only if a state meets this condition should its government be regarded as legitimate and its sovereignty respected. And all and only democratic regimes meet this condition.

This argument (which I will call the "democracy is necessary and sufficient for legitimacy" argument, abbreviated DNSL) rests on the following premises, the justifications for which I will examine: (1) a state has a legitimate government only if the state meets *the minimum respect-for-justice condition* (this is a necessary but not sufficient condition; also necessary is that it secure human rights); (2) the sovereignty of a state should be respected only if its government is legitimate; (3) democratic governments necessarily meet *the minimum respect-for-justice condition*; and (4) only democratic governments meet this condition.

Whether the first and second premises of the DNSL argument should be granted depends on how *the minimum respect-for-justice condition* is to be interpreted. I will argue that premises (1) and (2) of the DNSL argument should be granted only if *the minimum respect-for-justice condition* is given a weak interpretation, and that premises (3) and (4) cannot be adequately justified.

4.1 How to avoid begging the question

If securing all human rights is a condition of governmental legitimacy, and if the set of human rights includes democratic political rights, then only states with democratic regimes can have legitimate governments. But at this stage of the inquiry, the question of whether the set of human rights should include democratic political rights has not yet been answered. I will take it up below. Until that question is answered, we must make sure to interpret the requirement of securing human rights in a way that avoids committing the fallacy of begging the question. One way to do so is to distinguish between the disputed human right to democracy and the human rights that are not in dispute, and to designate the undisputed human rights "basic human rights." But this is not enough; one must also make sure, if possible, not to interpret the idea of basic human rights in a way that logically presupposes or requires democratic governmental institutions (nor, conversely, in a way that logically implies that they cannot require them); otherwise, the question gets begged.

According to the DNSL argument, a state has a legitimate government only if the *minimum respect-for-justice condition* is met. It seems reasonable to regard this as a necessary condition of a government's legitimacy; therefore, it seems, one should grant premise (1) of the argument. If a government does not allow

the people to protest publicly when they believe the government is treating them unjustly, but instead violently suppresses all such protest, then the people have reason to regard their government as illegitimate. The same holds if the government allows protest but does not pay attention to it and makes no evident good-faith attempt to settle the conflict in a way that the people can see as giving due weight to their claims. These points are quite weak or uncontroversial.[20]

If this is all there is to the claim (that a state has a legitimate government only if the state meets *the minimum respect-for-justice condition*), then this proposed condition is plausible and avoids begging the question. But if the idea that the conflicts are to get settled "fairly" presupposes a liberal conception of justice, and if the idea that the members of the society must be "free" means that they must be fully free in all of the ways that equal participants in a fair system of liberal-democratic self-government are free, then the proposed condition is too strong and begs the question. The strong interpretation states liberal criteria of a just society. However, the question of whether a liberal state ought to regard the government of another state as legitimate, i.e., whether it ought to respect the other state's sovereignty and recognize it as entitled to the right of non-intervention, is not the same as the question of whether a society is just from a liberal point of view.

4.2 Legitimacy: internal versus external perspectives

The idea of "a legitimate government" is clearly not the same as the idea of "a just society": to judge that a society has a legitimate government is not to judge that it is a just society, since the former is a necessary but not sufficient condition of the latter. For example, the United States of America is arguably a society, which, although not fully just, has a legitimate government. Furthermore, even if a citizen of the USA were to judge that its injustices were so great, or that its political processes were so corrupt, as to call into question the legitimacy of its government, she would not therefore be committed to the view that its sovereignty need not be respected by foreign governments or that it had lost its right of non-intervention. A judgment of legitimacy as made about a government by another state (an "external" judgment of its legitimacy) is not logically the same as a judgment of legitimacy as made by the people under that government (an "internal" judgment of its legitimacy). The judgments are different in that they answer different practical questions. They are posed by different agents who stand in different relations to the government in question and who are deliberating among different sets of alternative courses of action.

4.3 The value of procedural democracy

I have argued that the first two premises of the DNSL argument should be granted only if the *minimum respect-for-justice condition* is given a weak interpretation.

Now recall that the DNSL argument claims (3) that all democratic governments are necessarily legitimate. Here we must distinguish procedural from substantive conceptions of democracy.

An example of a procedural conception of democracy is the view that a society is democratic if its political offices are filled through periodic public elections and legislative decisions are made by majority rule. An example of a substantive conception of democracy is the view that a society is democratic if its basic structure of institutions (political and economic) serves the fundamental interests of the people and functions so as to distribute liberties, opportunities, and economic goods among them on an egalitarian basis. A society with a procedurally democratic political system may have a government that violates its people's basic human rights. So liberals should not hold that procedural democracy is sufficient for legitimacy (whether judged internally or externally).[21]

Premise (3) of the argument must be rejected. If it is understood to mean that all procedurally democratic governments are necessarily legitimate, it is false. And if it is understood to mean that all substantively democratic governments are necessarily legitimate, it may be true, but then we must interpret premise (4) as stating that only substantively democratic governments meet the *minimum respect-for-justice condition*, which is false on the weak interpretation of that condition required for premises (1) and (2).

But can any non-democratic governmental structures secure the basic human rights? Are procedurally democratic political institutions necessary, even if not sufficient, for legitimacy? Arguments purporting to show that procedurally democratic political institutions are necessary (even if not sufficient) to secure the basic human rights may claim either that such institutions are *instrumentally* valuable as necessary means of securing people's basic needs and interests, or else that living under democratic government and being able to participate in it has great value in itself, *non-instrumentally*, e.g., in the sense that a life of active participation in a self-governing political society is an especially valuable kind of life and that it develops especially valuable character traits and capacities.

But is it true that procedurally democratic political institutions are necessary means of securing the basic human rights? As noted above,[22] Rawls neither asserts nor denies the general empirical claim that only states with procedurally democratic regimes can secure the basic human rights and satisfy the other two conditions of governmental legitimacy; but he offers both conceptual and intuitive arguments against it. I find these arguments persuasive.

The foundation charter of a Society of Peoples must be suited to serve as a lasting foundation for its evolving legal and political system. The charter, including its list of basic human rights, is to become enforceable law. It is to provide a stable background for the actions of its participants: their particular decisions and agreements must take into consideration the empirical information that is specifically relevant to each situation or case at the time it occurs, but the charter must not use such specific information. Its fundamental principles of right

and its list of basic human rights should be developed mainly by analysis of the relevant concepts and should use only the most firmly established empirical facts and generalizations, i.e., those least likely to be invalidated by future events or research. Since it is in principle possible for a government that is not procedurally democratic to be legitimate, the political rights specific to procedural democracy (e.g., voting rights) do not belong on the list of internationally enforceable basic human rights that is to be included in the foundation charter of a system of international law.

It remains to ask whether participating in democratic self-government has sufficiently great value in itself that it should rank among the basic needs and interests grounding internationally enforceable basic human rights; and whether any answer to this question can satisfy the requirements of public reason.

5 Adequate Justification

As Rawls said in 1958, persons engaged in a just or fair practice must be able to "face one another openly and support their respective positions, should they appear questionable, by reference to principles which it is reasonable to expect each to accept . . . otherwise their relations will appear to them as founded to some extent on force."[23] When laws and policies invoke the coercive powers of government concerning fundamental political questions, they must be justifiable by public reason. This requires that the justification be a sound argument proceeding by clearly valid inferences from premises which, whether empirical or non-empirical, are clearly relevant and minimally controversial.

5.1 Rawls's empirical premises

"The absence of war between major established democracies is as close as anything we know to a simple empirical regularity in relations among societies," says Rawls.[24] He notes that actual, allegedly constitutional democratic regimes (characterized by various failures in their supporting institutions and practices) have often intervened in weaker countries, including those exhibiting some aspects of democracy; and that there are historical examples of interventions by democratic governments motivated by economic interests but publicly claiming that their motivation was defense of their people's security. But still, he argues, if Kant's hypothesis of a *foedus pacificum* is correct, as Rawls believes it is, armed conflict between democratic peoples will tend to disappear as they approach the ideal of constitutional regimes.[25]

Moreover, Rawls argues, following the Law of Peoples is the best way to bring into being a stably peaceful international society of decent peoples, thus securing

everyone's basic human rights. And doing this is the best morally permissible way to increase the likelihood that nonliberal societies will become liberal democracies. All societies change over time, at least gradually, and since decent societies allow a right of dissent and require that governmental officials reply to criticism respectfully, by addressing the merits of the question,[26] such societies may well evolve in a liberal-democratic direction, unless impeded by liberal states' ill-justified coercive interventions.

By treating decent non-democratic societies as entitled to the same rights of non-intervention and self-determination as liberal-democratic ones, and by allowing them to follow their own paths of development (with appropriate forms of assistance), liberal-democratic societies could confidently expect that public political discussion in decent nonliberal societies would lead to their liberalization. Also, and more importantly, liberal societies' properly respectful conduct would contribute to realizing a Society of Peoples by building its constitutive relationships of civility. In Rawls's words: mutual respect among peoples constitutes "an essential part of the basic structure and political climate" of a Society of Peoples.[27]

5.2 Controversial non-empirical premises

Claims about the non-instrumental value of participation in democratic self-governance are to some extent controversial even among liberals (some of whom favor the "liberties of the moderns" over the "liberties of the ancients"). They are disputed also by many who contend that the basic human rights to life and to access to the goods and services necessary for a decent standard of living must be given higher ranking than democratic voting rights. And they are disputed by believers in various religions that conceive very differently the greatest human virtues and the best human lives.[28]

Disagreements of these kinds can be among the most profound and hard to resolve. It is not merely the fact of disagreement that is significant to a Rawlsian liberal; it is the particular character of such disagreements: they are, or may be, rooted in people's most deeply held values and convictions, religious or secular, which are the very types of values and convictions that laws guaranteeing liberties of conscience, speech, assembly, and worship are designed to respect. Moreover, the classic liberal arguments for such liberties (by Locke, Kant, and Thomas Jefferson, among others) emphasize that force is an entirely inappropriate means of changing people's beliefs and values. Given the presumption against the justifiability of any non-defensive international military action, and the stringent requirements to be met by any justification for using coercive force internationally, controversial conceptions of human needs and interests based on comprehensive doctrines (whether religious or secular) should not be made the basis of a conception of internationally enforceable basic human rights.

5.3 LoP's most vulnerable points

The most vulnerable points of *LoP* are its empirical or contingent premises, including in particular: those underlying Rawls's view that decent nonliberal societies might evolve in a liberal-democratic direction if allowed to follow their own path of development; that coercive interventions would tend on balance to impede such liberalization; that externally imposed democratic political structures are liable to lead to violations of human rights unless the society's culture is sufficiently liberal (in which case the democratic structures need not have been externally, coercively imposed); and that if liberal societies tolerate decent nonliberal ones, treating them with due respect, it is likely that the decent nonliberal societies will reciprocate, thus creating mutually respectful, civil international relationships. These empirical premises are the most vulnerable points, but they seem defensible. I leave it to others to judge whether they are sufficiently uncontroversial.

6 Rights of Political Participation

Rawls formulates conditions of governmental legitimacy which, while satisfiable in principle by some non-democratic regimes, ground broadly described rights of political participation. Any decent society's political and legal system will have the following features: its members have "a substantial political role in making decisions," in that they have a "right to be consulted" and "a right of dissent," and "government and judicial officials are required to give a respectful reply, one that addresses the merits of the question according to the rule of law as interpreted by the judiciary."[29] They may not persecute or suppress dissenters, nor dismiss them as merely ignorant or incompetent; if they do, then they fail to demonstrate "their good faith and willingness to defend publicly society's injunctions as justified by law."[30]

Should such political rights be called human rights? After all, no government can qualify as legitimate unless it ascribes them. Yet they are not logically fundamental but derived. Nor are they internationally enforceable, according to Rawls; he holds that even a benevolent autocracy is immune from forceful intervention as long as it secures the rights on *LoP*'s list of basic human rights. However, even accepting this point one may reasonably hold that the broadly described rights of political participation grounded in *LoP*'s conditions of governmental legitimacy, although not internationally enforceable basic human rights, should be regarded as (derivative) human rights.

7 Post-war Nation Building

It is important to distinguish clearly the question of whether forceful intervention can be justified on the ground that its primary aim is to transform a decent society into a democratic society, from the related question of whether in

rebuilding an invaded country it is permissible or even mandatory to establish a democratic political system. Suppose, for example, that a country's government has been violating basic human rights to such an extent that there is sufficient moral reason to depose it, and that the international community has decided, by appropriate procedures, to do this. Foreseeably there will be a power vacuum after the government is deposed. It will be necessary for appropriate agents to set up a new government of some form. Clearly the goal must be to set up a legitimate legal and political system, so that the society can meet the criteria of decency. But it will be necessary to decide upon a particular form of legitimate government. Would it be permissible in such a case to set up a democratic political system?

Before this question can be answered, it is necessary to ask: Who is to set up the government? What is the character of the society's culture? What are the alternative available courses of action? Suppose the society's culture and history make its people favor a system which is neither procedurally democratic nor very liberal, and does not fully satisfy the criteria of decency, whereas the international community of liberal states wants to ensure that the installed regime satisfies the criteria of decency. In such a case, if discussion and negotiation can yield a mutually acceptable modification of the traditional form, this might provide a solution; if it also leads to a further modification in the direction of democracy, then as long as this is sufficiently widely supported (as determined perhaps by polling), or seems highly likely to be, it may be permissible. But if democratic political structures would be too new or unfamiliar to be quickly understood and embraced by the people, and would be unlikely to work properly, then arguably they should not be imposed.[31] Here the considerations are not only pragmatic and prudential but also moral; they include reasons deriving from the liberal moral and political ideal of self-government, the meaning of which is not entirely reducible to the idea of living under the legal and political structures of a liberal democracy.[32]

Moreover, it is important to ensure that the resulting system would be workable, not unstable, and not liable to deteriorate. One way to ensure stability is to facilitate establishment of a government that not only meets the criteria of decency but also is perceived as legitimate by the people under it, for reasons deriving from the society's prevailing understanding(s) of justice. In certain cases, among the feasible alternative forms of government that would satisfy the criteria of decency, a procedurally democratic system with liberal guarantees of rights might be the one most likely to work successfully, or one of those equally likely, given the facts of the particular situation. But in other cases, imposing a democratic system might be neither feasible nor justifiable.

8 Promoting Political Reform

Note that the argument of this paper does not prohibit promoting the spread of liberal democracy by non-violent means, nor does it rule out all ways of pressuring governments that secure the basic human rights yet do not meet the other

two conditions of legitimate government constituting the second criterion of decency (e.g., benevolent autocracies). Such governments secure the basic human rights for the people they govern; therefore forceful intervention would not be justified. Yet such states are not entitled to full membership in good standing in the Society of Peoples. What exactly did Rawls mean by this? What should he have meant? I suggest we should take it to mean that such states are not entitled to full respectful toleration and cooperation from other states. When does non-cooperation amount to coercion? And are all forms of coercion ruled out, or only forceful intervention? These important questions require further exploration.[33]

9 Conclusion

The Law of Peoples does not alone fully determine what presently existing states are morally obligated or permitted to do as regards employing coercive force in order to secure basic human rights worldwide. A full consideration of the question of what the rights and duties of presently existing states are, with regard to humanitarian intervention, would require taking into account a variety of historical and legal facts, including the UN Charter and the *UDHR*, as well as treaties, customary law, and prevailing practices. Of course, the fact that a practice has become customary or prevalent does not alone make it morally justified, and there may be laws which ought not be obeyed. In order to assess existing practices and laws we must determine what moral principles apply to them; this is an aim of Rawls's political liberalism.

The Law of Peoples provides grounds for arguing that the basic human rights are so strongly justified that nonliberal societies cannot reasonably deny that they are indeed universal basic human rights, nor that enforcement of them by a Society of Peoples (via appropriate decision-making procedures and suitable penalties and other measures) would in principle be morally permissible. However, in this paper I have focused narrowly on the question of whether there is a basic human right to democracy that is permissibly enforceable whether or not states have specifically committed themselves to secure it. I have answered this question in the negative. The purported basic human right to democracy does not have as strong a philosophical or moral justification as do the basic human rights.

I support taking all morally permissible measures that are effective and feasible – including provision of financial, material, and other forms of assistance – in order to secure the basic human rights for everyone and bring about a just and stably peaceful world. What I oppose is unjustifiable use of coercive force in the name of democracy, specifically, non-defensive international military action with the aim of establishing procedurally democratic political institutions, as distinct from the aim of stopping grave violations of basic human rights.

If the Rawlsian arguments I have presented are sound, they answer an important question left unaddressed by other theorists about justice in relation to war.

Moreover, unlike just war theories based either on the Catholic religion or on some other comprehensive moral doctrine (religious or secular), these moral arguments are developed to satisfy the requirements of public reason. Furthermore, by showing that non-democratic societies meeting the criteria of decency would deserve membership in a Society of Peoples, the Law of Peoples transforms the idea of the democratic peace into the ideal of the Society of (decent) Peoples: an international order that is stably peaceful because its constituent societies are committed to building and maintaining, both at home and abroad, civil political relationships based on practices of offering mutually acceptable justificatory reasons for state conduct.

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Notes

[1] During the 1990s the Security Council several times approved the use of force for humanitarian reasons (in Iraq, Bosnia-Herzegovina, Somalia, Rwanda, and Albania), and in 1994 it authorized the use of force to return Haiti's elected but deposed president to power. In 2003 the G. W. Bush Administration declared that one of its principal aims in invading Iraq was to turn it into a democracy; this was presented as (at least partly) a humanitarian justification for the war.

[2] See, for example, Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law*, 86 (1992), and "Legitimacy and the Democratic Entitlement," in *Democratic Governance and International Law*, ed. Gregory H. Fox and Brad R. Roth, Cambridge: Cambridge University Press, 2000; also Reginald Ezetah, "The Right to Democracy: A Qualitative Inquiry," *Brooklyn Journal of International Law*, 22 (1997).

[3] See, for example, Fernando Teson, *A Philosophy of International Law*, Boulder, CO: Westview Press, 1998, and Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004.

[4] A number of American neo-conservatives have argued that using force to spread democracy can be justified partly on humanitarian grounds. See, e.g., David Frum and Richard

Perle, *An End to Evil: How to Win the War on Terror*, New York: Random House, 2003, and Stefan Halper and Jonathan Clarke, *America Alone: The Neo-Conservatives and the Global Order*, Cambridge: Cambridge University Press, 2004.

[5] John Rawls, *The Law of Peoples*, Cambridge, MA: Harvard University Press, 1999 (henceforth I will use the abbreviation *LoP* to refer both to this book and to the view it presents).

[6] Rawls does not state these theses; I have formulated them. I contend that *LoP* makes sense and is defensible if interpreted as supporting these theses. Defenses of thesis (1) are developed in the following three works, which interpret and supplement Rawls's Law of Peoples: Alyssa R. Bernstein, "Human Rights Reconceived: A Defense of Rawls's Law of Peoples," Ph.D. dissertation, Harvard University, 2000; Joshua Cohen, "A Human Right to Democracy?," forthcoming in a festschrift for G. A. Cohen; and David Reidy, "Political Authority and Human Rights," in this volume. I acknowledge that the brief formulation of thesis (1) in the present paper is problematic, in that it appears to hold that states may legitimately act to enforce rights merely because the rights are justifiable via sound moral and philosophical arguments, even though they are not recognized in positive law. If so understood, thesis (1) takes a controversial position and raises difficult philosophical questions, which go beyond the narrow scope of this paper. However, I do not intend thesis (1) to be so understood; instead, it should be understood as: (a) rejecting a positivistic legal understanding of human rights; and (b) asserting that the duty-imposing normativity of human rights does not derive from acts of commitment, consent, or legislation but instead from (political) morality; and (c) that a distinctive feature of these morality-based rights is that the international community should enforce them worldwide, via appropriate procedures and measures. What kinds of procedures and measures would be appropriate? Although this question is highly important, I do not attempt to address it in this paper. (I thank Alessandro Ferrara and Faviola Rivera Castro for helpful discussion about these points at the 2005 conference of IVR, the International Society for Philosophy of Law and Social Philosophy.)

[7] John Rawls, *A Theory of Justice* (hereafter *TJ*), 2nd edition, Cambridge, MA: Harvard University Press, 1999.

[8] John Rawls, *Political Liberalism* (hereafter *PL*), New York, NY: Columbia University Press, 1996, p. 37.

[9] *LoP*, p. 37.

[10] *TJ*, p. 442.

[11] *TJ*, p. 10.

[12] Among the critics of Rawls's Law of Peoples who designate themselves "cosmopolitan" liberals are Thomas Pogge, Charles Beitz, Brian Barry, and Kok-Chor Tan.

[13] *PL*, p. 37.

[14] See the essay by Burton Dreben in *The Cambridge Companion to Rawls* (hereafter *CCR*), Cambridge: Cambridge University Press, 2003.

[15] By doing so, the citizens fulfill their duty of civility toward each other; *LoP*, pp. 165–6.

[16] *John Rawls: Collected Papers* (hereafter *CP*), ed. Samuel Freeman, Cambridge, MA: Harvard University Press, 1999, p. 607.

[17] *LoP*, p. 24.

[18] See *LoP*, p. 75, n. 16.

[19] See, for example, Teson, *A Philosophy of International Law* and Buchanan, *Justice, Legitimacy, and Self-Determination*.

[20] This conception of governmental legitimacy is formulated so as to resemble that used by Charles Beitz in his *Political Theory and International Relations*, Princeton, NJ: Princeton University Press, 1979, p. 78, n. 26; as well as that used by T. M. Scanlon in his "Human Rights as a Neutral Concern," in *Human Rights and United States Foreign Policy*, ed. P. Brown and D. MacLean, Lexington, MA: Lexington Books, 1979, p. 83.

[21] Some definitions of "democracy" combine substantive features with procedural ones, or blur the distinction between liberalism and democracy. Regarding the practical as well as theoretical importance of these distinctions, see Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd edition, Ithaca, NY: Cornell University Press, 2003, ch. 11; Amy Gutmann, "Rawls on the Relationship between Liberalism and Democracy," in *CCR*; and Shadia Drury, *Leo Strauss and the American Right*, New York, NY: St. Martin's Press, 1999, especially pp. 154–8.

[22] See section 2.3.

[23] *CP*, p. 59.

[24] *LoP*, pp. 52–3.

[25] *LoP*, pp. 44–54. Support for Rawls's view is provided by John M. Owen, IV in his article, "International Law and the Liberal Peace," in *Democratic Governance and International Law*, Cambridge: Cambridge University Press, 2000. Owen argues that liberal states, which "limit governmental power via civil rights and competitive elections," do not fight wars against one another, and that it is not democracy alone but liberalism that causes the peace, via ideology and institutions working in tandem. See also the large-scale study conducted by the Political Instability Task Force convened by the US Central Intelligence Agency, described in "How to Construct Stable Democracies," by Jack A. Goldstone and Jay Ulfelder (*The Washington Quarterly*, [Winter 2004–5]), who state: ". . . the key to maintaining stability appears to lie in the development of democratic institutions that promote fair and open competition, avoid political polarization and factionalism, and impose substantial constraints on executive authority" (p. 10).

[26] *LoP*, p. 61.

[27] *LoP*, p. 62.

[28] For example, many of the Amish people of Pennsylvania and Ohio choose not to take part in the American political system and do not vote in elections, believing that they should instead trust in God; so I have been informed by several with whom I spoke in 2004 in southeast Ohio.

[29] *LoP*, p. 61.

[30] *LoP*, pp. 61, 67.

[31] "The first disturbing lesson of the post-Cold War period . . . is that while in the long run democracy may be a very good thing – democracies do not go to war with democratic neighbors, they prove more efficient economically, and they allow the peaceful expression of internal conflict – in the short term the coming of democracy to a closed society with suppressed ethnic tensions can have explosive consequences. . . . The 1990s were a decade of unprecedented democratization – there are more functioning democracies in the world than at any time in history – but they also brought with them ethnic war and ethnic cleansing." Michael Ignatieff, "State Failure and Nation-Building," in

Humanitarian Intervention: Ethical, Legal, and Political Dilemmas, ed. J. L. Holzgrefe and R. O. Keohane, Cambridge: Cambridge University Press, 2003, pp. 300–1.

[32] See Michael Byers and Simon Chesterman, "'You, the People': Pro-democratic Intervention in International Law," in *Democratic Governance and International Law*.

[33] On these topics, see, e.g., the papers in this volume by Nickel and Hinsch/Stepanians.

17

Justice, Stability, and Toleration in a Federation of Well-Ordered Peoples

Andreas Follesdal

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.
>
> Treaty establishing a Constitution for Europe (2004), Article I-2: The Union's values

> [I]t makes sense to think of liberal and decent peoples together in an original position when joining together into regional associations or federations of some kind, such as the European Community, or the commonwealth of the republics in the former Soviet Union. It is natural to envisage future world society as in good part composed of such federations together with certain institutions, such as the United Nations, capable of speaking for all the societies of the world.
>
> John Rawls, *The Law of Peoples*, p. 70

Introduction: the European Union and the Law of Peoples

Scholars of international relations debate the withering of the Westphalian world of states, in Europe and elsewhere.[1] Normative political theorists follow suit and seek to assess the transformed global order. They ask how norms of internal and external state sovereignty should change with regard to international immunity and intervention. New normative standards are needed for federations and regional and global regimes.

Europeans have discussed these issues intensely in the process of drafting and now ratifying a Constitutional Treaty for Europe. How should the European Union (EU) express and promote human rights and solidarity?[2] What is the scope of toleration towards states that violate human rights, within and beyond its borders? And what is the scope of permissible economic inequality across states in such a federation of democracies committed to domestic solidarity?

The reactions against Austria illustrate some of the Union's human rights challenges. The 2000 Austrian elections put the allegedly xenophobic Freedom Party in government. Other EU Member States – though not the EU itself – responded swiftly. They sent diplomatic protests, ended bilateral political contacts, and rejected Austrian candidates for international posts. The reactions had two distinct effects. In the short run they were counterproductive since they mobilized Austrians in defense of their democratically elected government – a government many of them despised. The longer-term response by the EU was to develop procedures for when a Member State is suspected of systematic violations of human rights.[3]

The fundamental issue is how to best respond to alleged human rights violations, within a federation and abroad. The objective must be to promote long-term compliance by means of a consistent and unified policy toward states within and beyond EU borders.

Another major challenge concerns international responsibilities for social and economic human rights. The Constitutional Treaty recognizes obligations of federal solidarity:

> the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.[4]

The recent inclusion of poor Central and Eastern European states into the EU increases the challenge. Distributive justice seems to require redistributive common institutions that burden richer Member States. Such obligations meet opposition, especially when European economic integration already seems to challenge domestic structures of solidarity in the Western states.[5] Yet to deny federal solidarity seems contrary to the egalitarian norms expressed precisely in the domestic welfare arrangements of Member States. A central normative issue is clearly whether sound theories of global or federal distributive justice allow greater material inequality across borders.

John Rawls contributed to these topics in *The Law of Peoples* (*LoP*), which stresses the intertwined issues of toleration, stability, and legitimacy that face these political relations across political borders.[6] Can this Law of Peoples shed light on the legitimacy of emerging regional political orders such as the African Union, The Association of Southeast Asian Nations (ASEAN) or the European Union?

As with John Rawls's pathbreaking *A Theory of Justice*, *LoP* frames the issues in a fruitful institutional perspective.[7] Institutions are of crucial normative

importance and pose particular normative challenges, not least because the basic institutional structures profoundly shape our life plans and preferences and fundamentally affect our resources and opportunities to fulfill them.

When defending standards for assessing the domestic basic structure of liberal states, Rawls famously sought principles and their immediate justification that were acceptable to a broad range of duly modified philosophical and religious world views. The theory of Justice as Fairness itself alleviates assurance problems among individuals who would otherwise likely mistrust each other to not comply. The theory promotes stability by offering a public justification for just social institutions that all can endorse.

The normative assessment of global and federal institutions must likewise consider issues of stability, and Rawls underscores how public knowledge of the theory itself may help stabilize the international order. The allegedly universal values of equality and human rights challenge other established norms of political autonomy and stability. The tension prompts careful reflection about the grounds and limits of toleration and intervention. In particular, should nonliberal states continually fear intervention by liberal states eager to promote democracy, human rights, and economic distributive justice – and contested conceptions of liberalism? *LoP* explicitly seeks to prevent this source of global instability. Liberal peoples have good reason to tolerate and even respect the political autonomy of some non-liberal "decent" hierarchical peoples. These peoples can live free from fear of liberal humanitarian intervention.

The present reflections agree with the objective of the Law of Peoples, to provide a plausible "extension of a liberal conception of justice for a *domestic* regime to a *Society of Peoples*." The Liberal Contractualist account below agrees with some of the conclusions of the Law of Peoples, on at least two counts: the respect owed states that deny their citizenry certain human rights, and the standards for distributive justice.[8] The account offered here seeks to respect state sovereignty even in the face of some human rights violations, and it accepts a degree of material inequality among individuals in different subunits of a federation. In particular, the European Union may have a differentiated human rights policy, and solidarity does not require a European-wide difference principle. The difference principle, even if appropriate for domestic justice, need not apply to a federal order.

The conception of human rights for federations sketched below must be more complex than Rawls's account focused on human rights in a "non-federated" international order. That difference in domain of application is not a criticism of the Law of Peoples. However, a central weakness of Rawls's account is that it offers inadequate arguments within its own intended domain of application. International stability for the right reasons requires more than a statement of the limits of toleration about "how far nonliberal peoples are to be tolerated" (*LoP*, p. 10). The limits must be based on convincing public reasons, namely "the ideals and principles of the *foreign policy* of a reasonably just *liberal* people."[9] The

mixed reception of *The Law of Peoples* suggests that better justifications are required. The comments below develop aspects of a theory of federal justice to offer further – and perhaps better – Liberal Contractualist arguments regarding these two issues.

Let me conclude this introduction with an overview of what follows. Section 1 sketches why *LoP* grants moral standing in the form of political immunity to "hierarchical peoples" that fail to secure political rights, freedom of religion, and gender equality. Criticisms motivate an alternative account of the grounds and limits of intervention for human rights in section 2. Section 3 presents *LoP*'s arguments for permitting economic inequalities in a federal or global setting. Section 4 provides an alternative account of why claims to equal shares are not as decisive for federal distributive justice as in unitary states. Section 5 returns to check whether the account secures toleration and stability.

1 The Argument of *Law of Peoples*: Standards and Grounds for International Stability

The Law of Peoples seeks to remove "hierarchical" nonliberal peoples' fears of intervention. The claim is that both liberal and nonliberal peoples endorse principles of non-intervention against each other.[10] In response, we must question why liberal peoples should respect the nonliberal "hierarchical" peoples as "equal participating members in good standing of the Society of Peoples" (*LoP*, pp. 59, 5).

The hypothetical "hierarchical" peoples have a system of laws that is guided by a "common good" conception of justice, defended publicly by judges and other officials, and their system of laws respects certain Proper Human Rights that are said to secure the common good. These include the right to life with subsistence, freedom from slavery, and sufficient liberty of conscience to ensure some freedom of religion and thought, to personal property and to formal equality – but not gender equality or equality of religious freedom (*LoP*, p. 65). *LoP* also recognizes "implied human rights" against genocide and apartheid (*LoP*, p. 80). The system of laws satisfying these human rights "specifies a decent scheme of political and social cooperation" which imposes *bona fide* moral duties and obligations (*LoP*, pp. 66–7).[11] Note that the citizenry is thus bound even though individuals have no political rights, but only opportunities for dissent through a consultation hierarchy. Freedom of religion for some is "freely" curtailed for the sake of the dominant religion. The Law of Peoples argues that these peoples are safe from interventions of any kind. They are only permitted against violations of Proper Human Rights or Implied Human Rights (*LoP*, pp. 80, 83). In the Law of Peoples only human rights play this trigger function, and that is their sole function.[12]

The upshot is that neither military, economic nor diplomatic intervention or other forceful influence is permitted as a means to foster or establish liberal

political structures such as equal freedom of association, democratic political rights, freedom of expression, equal pay for equal work, or right to education, or any of the other rights listed in the *Universal Declaration of Human Rights* beyond Article 18 (cf. *LoP*, p. 65). Indeed, single countries or organizations of reasonable and decent peoples, such as a revised United Nations (UN) or International Monetary Fund (IMF), should not even use economic incentives to make hierarchical peoples comply with these human rights (*LoP*, p. 84).

Critics may argue that *LoP* fails to show why hierarchical peoples are decent. There are empirical reasons for including political rights and freedom of the press as what we may think of as *Instrumental Human Rights.*[13] Plausible empirical cases can be made for these rights as necessary but insufficient institutional safeguards to reliably prevent hunger and to secure other human rights over time. Indeed, in their absence the society is likely to deteriorate into an absolutist state, a burdened society or even an outlaw state. Rawls acknowledges this empirically plausible instrumental argument for these rights.[14] And his institutional perspective recognizes the need for mechanisms to ensure that governments remain effectively responsive over time. One such imperfect mechanism would be competitive democratic elections under conditions of freedom of the media.[15] In contrast, the long-term effectiveness of the consultations of hierarchical peoples remains unclear. Rawls provides no reason to expect such a society to remain consultative and respectful of Proper Human Rights over time without Instrumental Political Human Rights.

Why does *LoP* not require that all decent peoples enjoy such instrumental rights? The main defense is presumably not to deny the importance of such instrumental rights, but rather to deny that they are human rights in the relevant sense. The claim may be that international intervention to promote these rights is ill guided. In further support of this view, *LoP* argues that respect, rather than intervention, best promotes domestic reforms (*LoP*, p. 61).

In response, we might agree that the success rate of military intervention to promote democracy or gender equality is very poor. But Rawls fails to show that success is noticeably more likely when invading for violations of Proper or Implied Human Rights such as subsistence, or that such success rates are irrelevant. *LoP* does not provide arguments for its claim that "respect" is effective, nor for the claim that that non-military forms of interference and human rights conditionalities by the IMF or the UN are generally futile to promote Instrumental Human Rights. Surely there may be good reasons to consider economic pressure aimed at promoting political rights and freedom of speech, as much as to prevent practices of torture.

The upshot is that *LoP* as it stands does not provide a reasoned basis for stability. The arguments do not give liberal peoples sufficient reason to respect hierarchical societies and refrain from intervention. Public knowledge of this lacuna undermines hierarchical peoples' trust; they continue to be concerned that they are at risk and liable to significant interventions by liberal peoples.

2 Human Rights in Federations

LoP is right to be concerned for the stability of a just world order. But we need another justification for, and other limits on, interventions and interferences for the sake of human rights.

Consider first that legally codified human rights serve many different roles within a federation of liberal peoples, exemplified by the European Union. Superficially conflicting accounts of human rights may turn out to address quite different actions of various agents. Critics sometimes miss this point when they accuse the EU and many states of double standards with regard to human rights violations.

A typical challenge concerns alleged inconsistencies between the "internal" and "external" aspects of the EU. The human rights protections for EU residents are stronger than the role of human rights for EU foreign policies.

Professors Alston and Weiler have recently argued that "only a unified approach embracing both dimensions of the Union's approach to human rights is viable."[16] I submit that the Charter of Fundamental Rights, now Part II of the Constitutional Treaty, is necessary but not sufficient to alleviate the apparent inconsistencies. We must also consider the multiple roles of human rights within federal political orders that give rise to different standards for various actions.

Harking back at least to John Locke's discussion of human rights, we note that compliance by government has been required for citizens' political obedience.[17] In comparison, *LoP* is concerned with human rights as conditions for immunity from intervention by the international community of states.[18] Since these two functions are different, it should come as no surprise that the standards are likely to differ as well.[19]

The list of human rights that regulate intervention of various kinds must be specified not only in light of the importance of the substance of these rights for individuals, but also in light of the dangers of intentional and unintentional abuse by intervention-prone states, and the likely effects of such intervention. These considerations lead to a more limited list of human rights whose violation may trigger international intervention of various kinds.

Human rights can also serve at least three other functions in federal political orders. Firstly, human rights may specify the scope of immunity and discretion for subunits and their citizens, to protect them from central authorities. For instance, citizens may be granted some scope of cultural and institutional variation to allow for expressions of national identity and subunit preferences. Violations may merit reactions by subunits against central authorities, or even secession.

Secondly, human rights may protect minorities living within a subunit. Violations may warrant rescue by other subunits against the local tyrant, as Montesquieu hoped.[20] This seems to be the role of the new regulation in the EU Constitutional Treaty for human rights-based intervention into a Member State. A third task is to promote trustworthiness among subunits cooperating within common

schemes. Europeans of different Member States agree to be jointly governed by bodies consisting of representatives of all subunits who sometimes decide by majority rule. These representatives must be trusted to not only serve their own electorate, but also be guided by common European values and an "overarching loyalty" to Union citizens. If one government in the EU violates human rights, this may serve as a sign for other governments and Union citizens that it can no longer be trusted to exercise Union political authority responsibly on their behalf.

In each of these five functions, the substantive human rights requirements should presumably be quite different. The lists of human rights should reflect the risks and benefits of various actions, including the likelihood of mistaken assessment of violations and the relative prospects for success compared to alternative policies and mechanisms. The institutional perspective is important to bear in mind: the question is not only the likelihood of an individual case of intervention, but whether such public intervention practice fosters compliance with legitimate institutions in the long run. These assessments will vary depending on the kinds of actions regulated by these five different roles. They range from compliance with law by individuals to humanitarian armed intervention. In federations the subunits are mutually interdependent to such an extent that milder forms of interventions may suffice. Human rights interventions may also backfire, causing hostility and suspicion rather than transformation, as *LoP* notes. *The Law of Peoples* rightly raises concerns about stability. Indeed, fear of abuse and instability has restrained institutions and humanitarian intervention policies even by the United Nations, at least until the 1990s. The last ten years have witnessed an increased readiness by the Security Council to allow interventions, in Somalia, Rwanda, and Haiti.[21] Unfortunately these interventions have not achieved enough in the way of protecting basic human rights.[22]

This brief sketch suggests that the set of human rights serving each function must be argued with great care in light of the objectives and forms of intervention. We may agree that the EU needs a consistent set of human rights policies regarding interventions of different kinds. Such a unified account does not mean a *unitary* approach that requires intervention whenever the rights in the Constitutional Treaty are violated. Different – possibly higher – standards may apply within Member States than when EU members are reacting against Union institutions, or when the EU is considering international intervention. A satisfactory account must also differentiate much more than *LoP* does among the forms of intervention, ranging from military to economic reactions.

The upshot is that much more must be said to make a convincing argument that peoples should be protected from *all sorts of intervention* if they fail to secure what we may think of as "Liberal Human Rights": democratic political rights, freedom of the press, and gender equality. *LoP*'s conclusion seems sound regarding military intervention in defense of freedom of the press or gender equality. Such interventions might seem particularly unlikely to achieve their objectives and to do so better than alternative responses, and they are prone to abuse. Such a

practice therefore seems illegitimate. Still, other modes of intervention and sanctions may be more effective. One important objective may be to strengthen domestic mechanisms for improving the situation by means of economic or diplomatic measures, which carry lower risks. These actions may entice – or sometimes coerce – a government to grant universal voting rights, or promote women's right to education, or freedom of the press. It would seem feasible and more legitimate than military intervention to offer international loans conditional on such changes, and to refuse to nominate officials from these countries to public offices (contrary to *LoP*, pp. 84–5).

Rawls's concern for stability and compliance for the right reasons led him to warn that "the reasons for not imposing sanctions do not boil down solely to the prevention of possible error and miscalculation in dealing with a foreign people" (*LoP*, p. 83). Reticence is also appropriate out of respect for political autonomy, in the sense that those who live under a regime are often better at improving it, if given the real opportunity to do so. Against this view, I submit that it is difficult to accept this as an argument against intervening in hierarchical societies to protect instrumental human rights.[23] These citizens are hardly free to make their own political decisions, their consultation hierarchies notwithstanding. Non-military intervention in such societies may indeed foster the ability of citizens to take control over their governors in the absence of political rights. The reactions against Austria support *LoP*'s claim that intervention and the withholding of respect for governments *sometimes* discourage internal change and mobilize counterproductive popular support (*LoP*, p. 61). But on other occasions non-military interference and international expressions of contempt for non-elected governments may well foster and support popular dissatisfaction and protest.

I conclude that there are reasons not to prohibit all forms of international intervention to promote democratic rights, freedom of the press, and gender equality. Military intervention is unlikely to further this objective, and hence this practice should not be permitted. In decent hierarchical or liberal states the domestic population may often effect changes in safer, more effective ways. Other forms of intervention may still be accepted, especially when they aim to foster domestic accountability and hence legitimate political autonomy.

3 The Argument of *Law of Peoples* for Inter-people Inequality

The second normative issue addressed both by the Law of Peoples and by the European Union concerns standards of just economic distribution in a world with several somewhat independent states.[24] The egalitarian commitment of *domestic* Liberal Contractualism would seem to require massive transfers to poorer states in accordance with a global difference principle, though possibly at a cost to political autonomy. Alternatively, poorer states and their poorest citizens in

particular may be left with less than what, say, a global difference principle would allow. *LoP* argues the latter. There are limited duties of assistance to *burdened societies*, but only to establish and then preserve their just or decent institutions. This objective does limit inequalities among societies (*LoP*, p. 106f.), but it is not the only such limit. Other obligations hold among peoples who set up cooperative organizations for mutual advantage in the longer run, such as in the European Union (*LoP*, p. 42f.). In his exchange with Rawls, van Parijs rightly claims that political philosophy should point out under what conditions more strict principles should apply, and how one might go about deciding where the borders between peoples should be drawn. Presence of a common culture or shared political institutions may seem insufficient, given mobility, contact, and interdependence. *LoP* sheds some light on these issues, though more needs to be argued with regards to distributive justice within federations.

LoP seems to provide two main sorts of reasons for limited trans-border egalitarianism. Firstly, differences in economic development among non-burdened societies are largely regarded as a result of domestic political culture. This in turn seems to render the consequences solely the responsibility of the domestic populations in both liberal and hierarchical peoples, rather than a responsibility of the international community to be borne by taxes. Rawls finds the latter allocation of responsibility unacceptable, since the free and responsible peoples of these poorer societies are able to make their own decisions, and presumably should be able to take responsibility for their decisions (*LoP*, p. 117).

His implicit argument makes several problematic assumptions. It is difficult to see what reasons liberal societies have for regarding decent peoples as "free and responsible." I take it that the responsibility at issue here is "political" not "metaphysical." That is: is it reasonable that the people of hierarchical societies can make no further claims on the international community, but must bear all burdens of the political culture and the resultant outcomes of government policies? Applying Rawls's earlier discussion of domestic justice to this topic, *LoP* seems to hold that hierarchical peoples can make no further normative claims on the *global* "system of common public law which defines and regulates political authority and applies to everyone as citizen" – as Rawls put it when discussing domestic justice.[25] Critics may object that the populations of decent societies have good reasons to object to the "division of labour" imposed by this allocation of resources and authority among individuals and their institutions.[26] By definition, they lack popular political control over "their" government.

It is true that their system of law is guided by a common good ideal of justice that secures *LoP*'s limited set of human rights (*LoP*, pp. 65, 71). The public officials must have set up a consultation procedure with representative bodies. The officials are thus "accountable" and responsive in the sense that they have a moral obligation to listen to citizens' concerns, and address and answer them. It seems correct that such societies can self-reform. But if citizens are unsatisfied with the answers given, their recourse is only to renew their protest – they cannot replace

the officials.[27] Is this sufficient self-government to hold that citizens in these societies can make no further distributive claims on the global basic structure? It would seem more plausible that democracies make it markedly easier for individuals to shape their lives and obligations in light of available resources and options. Scanlon puts the point thus:

> One thing which people may reasonably demand, however, is the ability to shape their lives and obligations through the exercise of choice under reasonably favorable conditions. Moral principles of social institutions which deny such opportunities when they could easily be provided, or which force one to accept the consequences of choice under extremely unfavorable conditions which could be improved without great cost to others, are likely to be reasonably rejectable for that reason.[28]

It would seem that hierarchical peoples may plausibly claim more from the global basic structure: either that the global rules deny their rulers recognition as equals, and/or that the peoples retain claims on a share of material benefits resulting from the global schemes of production.

Secondly, *LoP* sees the causes of economic development as endogenous to each society (*LoP*, p. 108). An alternative view is that the global basic structure *also* plays crucial roles, directly and indirectly.[29] It affects the legal and hence what counts as material resources available to each society. Non-democratic governments are granted international legal recognition. This serves to bolster their international and domestic position. They may get access to international loans, which can be used to further economic growth, but may also damage economic development. And the increased power may diminish domestic opposition forces seeking to replace the economic policies with better ones. If the global basic structure does contribute to economic development in these indirect ways, it further weakens *LoP*'s case that each people should bear the responsibility for their own economic development.

These considerations do not entail a global difference principle. There are other reasons for denying so egalitarian a requirement among foreigners across borders, even in a system of somewhat independent, liberal states. *LoP* dismisses three reasons in support of equal shares to citizens across borders: to relieve suffering, to prevent stigmatization, and to ensure that political processes work fairly. None of these require equalization (*LoP*, p. 114). Such claims to equality seem stronger in federal arrangements. Still, there are other reasons to reject a global difference principle for federations.

4 Distributive Justice in Federations

Federal arrangements are often introduced to solve perceived problems suffered by independent states or by unitary governments: to secure peace, promote

institutional innovation, efficiency or liberty.[30] Yet egalitarian cosmopolitans may not permit federal arrangements in practice.

The federations of concern are non-unitary political orders where the central and multiple regional loci of government enjoy final legislative or executive authority with regards to some functions, often by way of constitutionally enumerated powers.[31] Federations challenge strict egalitarian requirements that would restrict the distributive impact of local autonomy.

The federal contractualist normative theory sketched below pursues a middle ground. It is "cosmopolitan" in being concerned with the well-being of individuals (*LoP*, p. 120), yet allows that the well-being of the globally worst off not be maximized. This account thus defends the somewhat startling claim in *LoP* that the difference principle would not necessarily emerge as the "most reasonable" political conception even for a federal union of liberal democratic societies (*LoP*, p. 43, n 53). Limited inequality may be acceptable because the same interests that ground claims to equality support subunit autonomy rather than a unitary political order. Further, it seems that gains in political influence provided by local autonomy and immunity can sometimes be advantageous even for those who are left economically worse off.[32]

On reasons for equality

Some liberal theories appear to take for granted that equal respect for all entails equal shares – be it of goods, opportunities, resources, or initially un-owned objects.[33] Rawls's Justice as Fairness gives a similar impression since it famously requires a baseline of equal shares of economic and social goods (see *A Theory of Justice*).

However, contractualism allows substantive inequalities if they withstand reasonable objections.[34] At least four grounds for lamenting inequalities merit discussion.

Equality is sometimes necessary to prevent misery. Acceptable institutions must engender and distribute benefits so as to meet the basic vital needs and secure the survival of all when possible. Human rights can be regarded as identifying some such conditions on domestic and international regimes.[35] This argument from basic needs and human rights may limit permissible inequalities as a necessary means, for instance in the market place for food. But misery prevention does not require equality of condition.

Equality may also be required for fair procedures that require a roughly equal distribution of procedural input levers, such as education, income, and wealth. The relative share of certain goods matter for the real value of formal political power, and for acceptable food markets.[36] Inequalities of wealth or knowledge may also foster domination, leaving some subject to the arbitrary will of others.[37] Those inequalities that threaten fair procedures or foster domination are therefore objectionable.

Finally, individuals may claim equal shares of certain goods when they have contributed equally to their production, and when no one can be said to have prior claims to the benefits. This may occur when there is no prior agreement regarding distribution and each party's contribution cannot be determined. When several individuals jointly labor to produce such goods, they have equal claims to them. I submit that this "constitutive" argument strengthens Rawls's argument for equal claims to *social primary goods*. We may think of social institutions as social practices that are maintained by the use of legal powers such as sanctions and authoritative interpretations. Political power, property rights and even income are such legal rights. They are products of cooperation in a significant sense. A person's claim to own something is true – and can be made sense of – only when and because the rules of ownership are generally complied with by those participating in that practice. Her entitlements are of course hers, but the entitlements exist as entitlements only insofar as others regulate their actions according to public rules. The constitutive argument for equal shares of products applies to such legal rights. Citizens therefore have equal moral claims on how social institutions should regulate the legal distribution of political power, income, and other legal rights, when they all contribute to upholding these practices and where there are no prior claims. This is appropriate when discussing which institutional rules of acquisition and transfer should exist. Since these legal rights exist only through the cooperation of all, all participants in social institutions have a *prima facie* equal moral claim to the legal rights that arise within such institutions.

I submit that this account provides an argument in favor of Rawls's egalitarian principles for Social Primary Goods – that is, political and civil rights, and equality of opportunity and income and wealth. These goods are clusters of legal rights, existing as aspects of public practices maintained by citizens.

These various arguments for equality only apply to a limited range of objects, and often only put limits on permissible inequalities.

5 Federal and Global Implications

These reasons against inequality do not hold across solid state borders where external sovereignty effectively prevents cross-border causes of misery, domination, and unfair procedures. The "constitutive" argument for equal shares of products of cooperation also fails, if citizens of different states do not participate in common institutions. But states in an interdependent world have restricted real autonomy due to such factors as global market competition, oligarchic transnational corporations, structural adjustment policies, and international human rights norms. The present world order is clearly of this kind. The *LoP* discussions about the best relations among fully independent states must therefore be supplemented to consider standards for cooperative arrangements (*LoP*, pp. 114–15).[38]

Reflections on federal distributive justice shed some light on the significance of claims to equality under interdependence.

Member States of the European Union have pooled sovereignty to a large extent. They share institutions and maintain freedom of movement for capital, workers, goods, and services. Many also have a common currency that renders their citizens more vulnerable to trans-border economic shocks. Many decisions are made by majority vote among government representatives in combination with a common directly elected European Parliament. Normatively, it is difficult to distinguish sharply between the effects of domestic social institutions and those of neighboring states and of the Union as a whole. The same arguments for equal shares and against certain forms of inequality therefore seem to apply as within a unitary state.[39] However, there may be a further reason for permitting inequality.

In a democratic order, local autonomy and immunity can provide political influence that is advantageous even for those economically worst off. To show this we consider arguments for splitting legal authority between a central and subunit levels of a federal political order, sometimes addressed in the forms of arguments for "subsidiarity."[40] The legitimacy of such split authority may be assessed by a hypothetical contract between representatives of joining nations or states, deciding on the terms of their federation without knowing which nation or people they represent.[41] Why and when would individuals reasonably seek to protect and further their interests by means of federal arrangements? Note that the arguments here hold for democratically ordered peoples, but not necessarily for hierarchical peoples.

One classical argument is to protect against unjust domination. In a federal system "the parts are so distant and remote that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest."[42] Majority coalitions in larger polities are presumably less likely to harm local minorities. But this argument favors centralization without explaining why subunits should have any powers at all.

Subunit autonomy allows room for institutional experimentation and innovation, "compass and room enough to refine the democracy." These "experiments in living" allow citizens to learn from the experiences of other subunits.[43] Local autonomy is also valuable when individuals' interests and preferences vary according to geographical parameters such as physical environment, resources, or cultural tastes and values. Several reasons can be discerned. Immunity can protect such groups from majorities.[44] Local powers are sometimes more likely to address the "local circumstances and lesser interests" without neglect.[45] Subunits may also be more competent at this task, and they may be able to create "club goods" or "internalities" for the affected individuals.[46] If the only effects occur locally, there is little reason to burden outsiders with information gathering, reflection, and decisions. Subunit autonomy also allows pre-existing political units some control over institutional changes, which promotes individuals' interest in maintaining legitimate expectations.

On the other hand, local government has its own risks and must be curbed to prevent oligarchies and tyranny against local minorities.[47]

To sum up, subunit autonomy on certain issues can yield identifiable benefits for citizens in the form of more political influence than in a unitary political order. But is it advantageous for the "subunit poor"? Their income share is fair compared to others in their subunit, for instance according to a difference principle. But they are economically worse off than the worst off in a unitary political order regulated by a difference principle. I submit that they would have reason to prefer a federal arrangement at some economic cost for at least three reasons:

1. The division of political agendas reduces their vulnerability to the larger majority, preventing domination due to ill will, incompetence, or insufficient attention.
2. Subunit autonomy over certain issues makes these political bodies more responsive to the subunit poor and others in that subunit. Immunity and more political power over these issues can therefore be of more value to the individual than somewhat more economic resources within a unitary political order. The subunit authority to shape institutions to fit local circumstances may confer a greater benefit than would having marginally more in the way of material resources (but from institutions that fit those circumstances less well).[48]
3. Finally, subunit autonomy reduces each person's burden to reflect on the political issues largely affecting other subunits. The economic inequality that follows from such local autonomy may thus be unobjectionable, at least when kept within certain limits. There must be no or few externalities, and local knowledge is required. Furthermore, the subunits must have fair working democratic processes in place. Under such conditions, subunit autonomy may be preferable even at some economic cost to the subunit poor – within limits set by their interest in avoiding misery and domination.

6 Toleration and Stability Reconsidered

The arguments presented allow non-military intervention in some cases to promote democratic rights, freedom of the press, and gender equality. Economic inequalities across subunits of a federal political order are justifiable within limits, defending *LoP*'s view that a global difference principle is not required. Do these aspects of a federal theory of justice address the issues of toleration and stability acceptably well?

Firstly, is this theory indefensibly based on liberalism? Of course, democratic political rights, freedom of the press, and gender equality may well be Western in origin. But genesis is not an objection: if so, claims to external sovereignty should also be dismissed, since state sovereignty is also largely a Western concept. The

defense of intervention for Instrumental Human Rights is not based on a particularly "liberal" conception of the person, but on empirical findings that universal suffrage is central to secure basic needs and Proper Human Rights. Among the central mechanisms are, firstly, the articulation of demands provided by freedom of the media and competing political parties, and, secondly, electoral accountability with opposition parties that ensure a degree of responsiveness.[49] One might object that, conceivably, a non-democratic hierarchical people with transparent government, freedom of the press, and consultation processes may secure subsistence equally well as a democratic regime. In response, we note firstly that the issue is not one of conceivability but rather of empirical matters, and, secondly, the issue is not whether there happen to be such cases, but the tendencies of regimes of this kind.

A second objection is that stability is at risk when compared to the criteria of intervention laid out in *LoP*. In response, note firstly that we agree with many of *LoP*'s conclusions, but for other reasons. There are good *empirical* grounds against a practice of *military intervention aimed at establishing democratic governments*. Such interventions are seldom successful, and such authority is easily abused.[50] It might be objected that these are merely empirical grounds, and that they are less trustworthy than the more philosophical argument of *LoP*. However, these empirical generalizations are acceptable in public reason. *LoP* indeed appeals to such generalizations when it claims that withholding respect will stifle change in hierarchical peoples who have no Instrumental Human Rights (*LoP*, p. 64). Moreover, and most important: if the argument in *LoP* fails, it does not bolster international trust. Rawls underscored that the theory itself may serve to stabilize the international order. It would do so because international stability requires more than a statement of the limits of toleration about "how far nonliberal peoples are to be tolerated" (*LoP*, p. 10). These limits must be based on convincing public reasons for respecting such political autonomy. The Law of Peoples would promote stability if it offered a public justification for just social institutions that all can endorse. It is a central weakness of Rawls's account that it fails to provide adequate arguments for its conclusions.

Unlike *LoP*, this account is prepared to allow non-military interventions in hierarchical peoples to protect against violations of Instrumental Human Rights. This does not render a legitimate global order less stable. The empirical premises for Instrumental Human Rights hold that in their absence the population faces a higher risk to their Human Rights Proper. So such violations will often warrant intervention anyway. Successful interventions for Instrumental Human Rights will also foster the citizenry's political autonomy to protect themselves against future human rights violations, and promote longer-term just stability.

Another source of instability may be that citizens of rich countries may not be prepared to participate in redistributive arrangements beyond a duty of assistance: "with a global egalitarian principle without target, there would always be a flow of taxes as long as the wealth of one people was less than that of the other. This

seems unacceptable" (*LoP*, p. 117). A first response is that this worry seems inappropriate for our subject matter, the distributive effects of institutions. The principles do not regulate single acts of transfers. I have also argued that principles of distributive justice may be less egalitarian in federal arrangements, and by extension in the global political order. This result would seem to reduce the "burdens of compliance." Finally, this source of instability from lack of motivation does not seem different in kind from the instability wrought by the risk that rich citizens will not comply with institutions required by the difference principle. A response faithful to Justice as Fairness would be that such compliance should be fostered by reflective socialization by the just institutions themselves (*LoP*, p. 13, n 2). It is in part a matter of providing sound public arguments against certain kinds of inequality.

The concern for stability thus seems secured as much by this theory of federal justice as by the Law of Peoples. Rawls wrote regarding the Law of Peoples that:

> The social contract conception of that law, more than any other conception known to us, should tie together, into one coherent view, our considered political convictions and political (moral) judgments at all levels of generality. (*LoP*, p. 58)

The social contract conception Rawls single-handedly did so much to revive and develop may avoid some of the criticisms raised against his own arguments in *The Law of Peoples*. His objective remains paramount: to provide a public, reasoned basis for an overlapping consensus that may contribute to a just and stable political order.

Acknowledgments

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Notes

[1] See Robert O. Keohane, "Hobbes's Dilemma and Institutional Change in World Politics," in *Whose World Order?* ed. Hans-Henrik Holm and Georg Sorensen, Boulder, CO: Westview Press, 1995; Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton, NJ: Princeton University Press, 1999; Neil MacCormick, *Questioning Sovereignty*, Oxford: Oxford University Press, 1999.

[2] http://ue.eu.int/igcpdf/en/04/cg00/cg00087.en04.pdf

[3] Article I-59 of the Constitutional Treaty.

[4] Article III-220.

[5] Paul Pierson, ed., *The New Politics of the Welfare State*, Oxford: Oxford University Press, 2001.

[6] John Rawls, *The Law of Peoples* (hereafter *LoP*), Cambridge, MA: Harvard University Press, 1999.

[7] John Rawls, *A Theory of Justice*, Cambridge, MA: Harvard University Press, 1971; *Political Liberalism*, New York, NY: Columbia University Press, 1993.

[8] See Charles R. Beitz, "Rawls' Law of Peoples," *Ethics*, 110 (2000): 669–96; Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," *Ethics*, 110 (2000): 697–721; John Rawls and Philippe van Parijs, "Three Letters on The Law of Peoples and the European Union," *Revue de philosophie économique*, 7 (2003): 7–20; Stephen Macedo, "What Self-governing Peoples Owe to One Another: Universalism, Diversity, and The Law of Peoples," Symposium: Rawls and the Law, *Fordham Law Review*, 72 (2004): 1721–38; Thomas W. Pogge, "The Incoherence between Rawls's Theories of Justice," Symposium: Rawls and the Law, *Fordham Law Review*, 72 (2004): 1739–59.

[9] We leave aside broader issues such as the normative legitimacy of the global order in general.

[10] The reflection on these principles (at *LoP*, pp. 41–2) provides a quite different form of defense than the contractualist ranking alternative principles familiar from Rawls's *A Theory of Justice*.

[11] Whether liberal peoples must agree with this assessment is unclear.

[12] A point that is sometimes overlooked by critics, as Alyssa Bernstein argues in "Human Rights Reconceived: A Defense of a Rawlsian Law of Peoples," Ph.D. Dissertation, Harvard University, 2000.

[13] Bernstein calls them "derivative" (Bernstein, "Human Rights Reconceived").

[14] *LoP*, p.75, fn 16. Rawls notes Amartya Sen's arguments to this effect (pp. 9, 75, 109, 110); and cf. Robert A. Dahl, *On Democracy*, New Haven, CT: Yale University Press, 1998, ch. 5; Joseph T. Siegle, Michael M. Weinstein, and Morton H. Halperin, "Why Democracies Excel," *Foreign Affairs*, 53/4 (2004): 57–71; Mancur Olson, "Dictatorship, Democracy, and Development," *American Political Science Review*, 87 (1993): 567–76.

[15] Adam Przeworski, Susan Stokes, and Bernard Manin, eds., *Democracy, Accountability, Representation*, Cambridge: Cambridge University Press, 1999.

[16] Philip Alston and J. H. H. Weiler, "An 'Ever closer Union' in Need of a Human Rights Policy: the European Union and Human Rights," *Harvard Jean Monnet Working Paper*, 1 (1999).

[17] John Locke [1690], *Two Treatises of Government*, ed., and introd. Peter Laslett, New York: New American Library, Mentor, 1963, para 6, 16.

[18] *LoP*, pp. 49, 51, 70, 71, 79. Alyssa Bernstein defends a Rawlsian theory of human rights partly on the basis of this distinction in "Human Rights Reconceived" and in this volume.

[19] *LoP* appears to waver, since even hierarchical peoples have *bona fide* political obligations (p. 66). This may indicate that *LoP* draws on a non-consensual conception of political obligation even in the domestic case. I owe this suggestion to Helga Varden.

[20] Montesquieu [1748], *Spirit of Laws*, New York: Prometheus, 2002, book 9.

[21] UN Doc. S/RES/794 (1992), S/RES/729 (1992), and S/RES/940 (1994), respectively. Cf. Anne Julie Semb, "The New Practice of UN Authorized Interventions: A Slippery Slope of Forcible Interference?" *Journal of Peace Research*, 37/4 (2000): 469–88.

[22] Lakhdar Brahimi, *Brahimi Report of the Panel on United Nations Peace Operations, A/55/305 – S/2000/809*. http://www.un.org/peace/reports/peace_operations/: UN, 2000.

[23] Contrary to *LoP*, p. 117 and Macedo, "What Self-governing Peoples Owe to One Another."

[24] Philippe van Parijs and John Rawls had an illuminating exchange on what *LoP* requires with regards to distributive justice across "peoples," in the EU in particular, in Rawls and van Parijs, "Three Letters on The Law of Peoples and the European Union."

[25] John Rawls, "The Basic Structure as Subject," in *Values and Morals*, ed. Alvin I. Goldman and Kim Jaegwon, Dordrecht: D. Reidel, 1978, pp. 47–71, at p. 52.

[26] Cf. Rawls, "The Basic Structure as Subject," pp. 55, 63.

[27] Cf. Macedo, "What Self-governing Peoples Owe to One Another," p. 1734, referring to Rawls, *LoP*, p. 72.

[28] Thomas M. Scanlon, "The Significance of Choice," *The Tanner Lectures on Human Values*, 8: 150–216, Cambridge: Cambridge University Press, 1987, at pp. 184–5.

[29] Macedo, "What Self-governing Peoples Owe to One Another," p. 1726, refers to Jeffrey Sachs who argues that geographic factors are an independent cause of poverty; that is compatible with this point.

[30] Cf. Andreas Follesdal, "Federalism," *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2003, http://plato.stanford.edu/entries/federalism/.

[31] William H. Riker, "Federalism," *A Companion to Contemporary Political Philosophy*, ed. Robert E. Goodin and Philip Pettit, Oxford: Blackwell, 1993, pp. 508–14, at p. 509.

[32] Andreas Follesdal, "Federal Inequality among Equals: A Contractualist Defense," *Metaphilosophy*, 32/1–2 (2001): 236–55.

[33] G. A. Cohen, "On the Currency of Egalitarian Justice," *Ethics*, 99 (1989): 906–44.

[34] I draw on Thomas M. Scanlon, *The Diversity of Objections to Inequality*, Lawrence, KS: University of Kansas, Zinoley Lecture, 1997; Andreas Follesdal, "The Significance of State Borders for International Distributive Justice," Ph.D. Dissertation, Harvard University, 1991 (UMI No. 9211679); cf. *LoP*, pp. 113ff.

[35] Follesdal, "The Significance of State Borders for International Distributive Justice."

[36] Robert A. Dahl, *A Preface to Economic Democracy*, Cambridge: Polity Press, 1985, p. 55.

[37] Philip Pettit, *Republicanism*, Oxford: Clarendon Press, 1997; Quintin Skinner, *Liberty Before Liberalism*, Cambridge: Cambridge University Press, 1998.

[38] Contributions include Charles Beitz, *Political Theory and International Relations*, Princeton, NJ: Princeton University Press, 1979; Judith Lichtenberg, "National Boundaries and Moral Boundaries," in *Boundaries*, ed. Peter Brown and Henry Shue, Totowa, NJ: Rowman and Allanhead, 1981, pp. 79–100; Onora O'Neill, *Towards Justice and Virtue*, Cambridge: Cambridge University Press, 1996; Thomas Pogge, *World Poverty and Human Rights*, Cambridge: Polity Press, 2002.

[39] Andreas Follesdal, "Global Justice as Impartiality: Whither Claims to Equal Shares?" in *International Justice*, ed. Tony Coates, Aldershot: Ashgate, 2000, pp. 150–66.

[40] Andreas Follesdal, "Subsidiarity," *Journal of Political Philosophy*, 6/2 (1998): 231–59.

[41] Wayne Norman, "Towards a Philosophy of Federalism," in *Group Rights*, ed. Judith Baker, Toronto: University of Toronto Press, 1994, pp. 79–100.

[42] David Hume, *Essays and Treatises on Several Subjects*, Edinburgh, 1793, pp. 514–15.

[43] John Stuart Mill [1859], *On Liberty*, Glasgow: Collins, 1962.

[44] Johannes Althusius, *Politica Methodice Digesta*, ed. F. S. Carney and D. J. Elazar, Indianapolis, IN: Liberty Press, 1995.

[45] Adam Smith [1776], *An Inquiry into the Nature and Causes of the Wealth of Nations*, London: Dent, 1954, p. 680.

[46] Robert Musgrave, *The Theory of Public Finance*, New York, NY: McGraw-Hill, 1959.

[47] James Madison, *The Federalist Papers*, no. 10, New York, NY: Mentor, 1961; John Stuart Mill, *Autobiography*, Boston, MA: Houghton Mifflin, 1969, p. 116.

[48] Andreas Follesdal, "Minority Rights: A Liberal Contractualist Case," in *Do We Need Minority Rights?* ed. Juha Raikka, The Hague: Kluwer, 1996, pp. 59–83.

[49] See, for example, Amartya Sen, *Development as Freedom*, Oxford: Oxford University Press, 1999. For further references regarding these mechanisms, see Andreas Follesdal and Simon Hix, "Why There Is a Democratic Deficit in the EU," *European Governance Papers* 1 (2005). http://www.connex-network.org/eurogov/pdf/egp-connex-C-05-02.pdf

[50] David A. Welch, *Justice and the Genesis of War*, Cambridge: Cambridge University Press, 1993.

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